17 APRIL 2013

ORDER

CERTAIN ACTIVITIES CARRIED OUT BY NICARAGUA IN THE BORDER AREA

(COSTA RICA v. NICARAGUA)

JOINDER OF PROCEEDINGS

CERTAINES ACTIVITÉS MENÉES PAR LE NICARAGUA DANS LA RÉGION FRONTALIÈRE

(COSTA RICA c. NICARAGUA)

JONCTION D'INSTANCES

17 AVRIL 2013

ORDONNANCE

INTERNATIONAL COURT OF JUSTICE

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CERTAIN ACTIVITIES CARRIED OUT BY NICARAGUA IN THE BORDER AREA

(COSTA RICA *v.* NICARAGUA)

JOINDER OF PROCEEDINGS

ORDER

Present: *President* TOMKA; *Vice-President* SEPÚLVEDA-AMOR; *Judges* OWADA, ABRAHAM, KEITH, BENNOUNA, SKOTNIKOV, CANÇADO TRINDADE, YUSUF, GREENWOOD, XUE, DONOGHUE, GAJA, SEBUTINDE, BHANDARI; *Judges* ad hoc GUILLAUME, DUGARD; *Registrar* COUVREUR.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Article 48 of the Statute of the Court and to Article 47 of the Rules of Court,

Makes the following Order:

Whereas:

1. By an Application filed in the Registry of the Court on 18 November 2010, the Government of the Republic of Costa Rica (hereinafter "Costa Rica") instituted proceedings against the Government of the Republic of Nicaragua (hereinafter "Nicaragua") in the case concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* (hereinafter referred to as the *Costa Rica* v. *Nicaragua* case) for "the incursion into, occupation of and use by Nicaragua's army of Costa Rican territory", contending, in particular, that Nicaragua had "in two separate incidents, occupied the territory of Costa Rica in connection with the construction of a canal across Costa Rican territory . . . and certain related works of dredging on the San Juan River". Costa Rica alleged breaches by Nicaragua of its obligations towards Costa Rica under a number of treaty instruments and other applicable rules of international law, as well as under certain arbitral and judicial decisions. In this regard, Costa Rica refers to the Charter of the United Nations and the Charter of the Organization of American States; the Treaty of Territorial Limits between Costa Rica and Nicaragua of 15 April 1858 (hereinafter the "1858 Treaty of Limits"), namely, Articles I, II, V and IX; the arbitral award issued by the President of the United States of America, Grover Cleveland, on 22 March 1888 (hereinafter the "Cleveland Award"); the first and second arbitral awards rendered by Edward Porter Alexander dated respectively 30 September 1897 and 20 December 1897 (hereinafter the "Alexander Awards"); the 1971 Convention on Wetlands of International Importance (hereinafter the "Ramsar Convention"); and the Judgment of the Court of 13 July 2009 in the case concerning the *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua)*.

2. In its Application, Costa Rica invokes, as a basis for the jurisdiction of the Court, Article XXXI of the American Treaty on Pacific Settlement signed at Bogotá on 30 April 1948 (hereinafter the "Pact of Bogotá"). In addition, Costa Rica seeks to found the jurisdiction of the Court on the declaration it made on 20 February 1973 under Article 36, paragraph 2, of the Statute, as well as on the declaration which Nicaragua made on 24 September 1929 (and amended on 23 October 2001) under Article 36 of the Statute of the Permanent Court of International Justice and which is deemed, pursuant to Article 36, paragraph 5, of the Statute of the present Court, for the period which it still has to run, to be acceptance of the compulsory jurisdiction of this Court.

3. On 18 November 2010, having filed its Application, Costa Rica also submitted a Request for the indication of provisional measures, pursuant to Article 41 of the Statute of the Court and Articles 73 to 75 of the Rules of Court.

4. In accordance with Article 40, paragraph 2, of the Statute, the Registrar communicated a signed copy of the Application forthwith to the Government of Nicaragua; and, under paragraph 3 of that Article, all States entitled to appear before the Court were notified of the filing of the Application.

5. Pursuant to the instructions of the Court under Article 43 of the Rules of Court, the Registrar addressed to States parties to the Pact of Bogotá and to the Ramsar Convention the notifications provided for in Article 63, paragraph 1, of the Statute. In accordance with the provisions of Article 69, paragraph 3, of the Rules of Court, the Registrar moreover addressed to the Organization of American States the notification provided for in Article 34, paragraph 3, of the Statute. The Organization of American States indicated that it did not intend to submit any observations in writing under Article 69, paragraph 3, of the Rules of Court.

6. Since the Court includes no judge of the nationality of the Parties upon the Bench, each of them, in exercise of the right conferred by Article 31, paragraph 3, of the Statute, chose a judge *ad hoc* in the case. Costa Rica chose Mr. John Dugard, and Nicaragua chose Mr. Gilbert Guillaume.

7. By an Order of 8 March 2011, the Court indicated certain provisional measures to both Parties.

8. By an Order of 5 April 2011 the Court fixed 5 December 2011 and 6 August 2012 as the respective time-limits for the filing of a Memorial by Costa Rica and a Counter-Memorial by Nicaragua. Costa Rica's Memorial was duly filed within the time-limit so prescribed.

9. On 22 December 2011, Nicaragua instituted proceedings against Costa Rica in the case concerning *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)* (hereinafter referred to as the *Nicaragua* v. *Costa Rica* case). In its Application, Nicaragua stated that the case relates to "violations of Nicaraguan sovereignty and major environmental damages on its territory", contending, in particular, that Costa Rica was carrying out major works along most of the border area between the two countries along the San Juan River, namely the construction of a road, with grave environmental consequences. Nicaragua also reserved the right to request that the proceedings in the *Nicaragua* v. *Costa Rica* case and the *Costa Rica* v. *Nicaragua* case be joined.

10. Nicaragua filed its Counter-Memorial in the present case on 6 August 2012, within the time-limit fixed for that purpose in the Court's Order of 5 April 2011. That pleading included four counter-claims. Nicaragua stated in the Counter-Memorial that, "with the filing of its Counter-Claims . . . including its claim based on the harm caused to the San Juan de Nicaragua River caused by the construction of this road and particularly, on its navigability, a discussion of the joinder of the cases [became] more opportune".

11. At a meeting held by the President with representatives of the Parties on 19 September 2012, the Parties agreed not to request the Court's authorization to file a reply and a rejoinder in the present case. At the same meeting the Co-Agent of Costa Rica raised certain objections to the admissibility of the first three counter-claims contained in the Counter-Memorial of Nicaragua. These objections were confirmed in a letter from the Co-Agent of Costa Rica dated 19 September 2012.

12. By letters dated 28 September 2012, the Registrar informed the Parties that the Court had decided that the Government of Costa Rica should specify in writing, by 30 November 2012 at the latest, the legal grounds on which it relied in maintaining that the Respondent's first three counter-claims were inadmissible, and that the Government of Nicaragua should then present its own views on the question in writing, by 30 January 2013 at the latest.

13. The Written Observations of the Republic of Costa Rica were duly filed within the time-limit so prescribed. In these Written Observations, Costa Rica argued that Nicaragua was "effectively seeking the joinder of the two different cases" pending between both Parties before the Court and that such joinder would be neither timely nor equitable. In particular, Costa Rica contended that the present case concerned the exercise of territorial sovereignty and that, in the absence of the Court's ruling thereon, "Costa Rica [was] prevented from exercising sovereignty over part of its territory", while the *Nicaragua* v. *Costa Rica* case had a different subject-matter. Costa Rica underlined that, as each of the two cases has its own procedural timetable, the joinder of proceedings would lead to a delay in the resolution of the dispute over territorial sovereignty and would thus constitute a serious prejudice to Costa Rica. Finally, Costa Rica noted that the composition of the Court is different in the two cases.

14. In a letter dated 19 December 2012, accompanying its Memorial in the *Nicaragua* v. *Costa Rica* case, Nicaragua again asked the Court to consider the need to join the proceedings in the above-mentioned case and the present case, and requested the Court to decide on this matter in the interests of the administration of justice.

15. By a letter dated 15 January 2013, the Registrar, on the instructions of the President, asked the Government of Costa Rica to inform the Court, by 18 February 2013, of its views on Nicaragua's position regarding the proposed joinder of the proceedings in the *Nicaragua* v. *Costa Rica* case and the *Costa Rica* v. *Nicaragua* case.

16. The Written Observations of the Republic of Nicaragua containing its views on the admissibility of the first three counter-claims made in its Counter-Memorial in the present case were duly filed on 30 January 2013, within the time-limit prescribed in the Registrar's letter dated 28 September 2012. Nicaragua stated that the *Nicaragua* v. *Costa Rica* case and the present case "involve the same Parties and are tightly connected both in law and in fact" and that there was "therefore no reason why they could not be joined". It requested the Court to "decide the joinder of the proceedings" in the two cases in accordance with Article 47 of the Rules of Court.

17. By a letter dated 7 February 2013, Costa Rica, with regard to the question of the proposed joinder, stated that the proceedings in the two cases should not be joined for the reasons previously indicated in its Written Observations on the Admissibility of Nicaragua's Counter-Claims, filed in the *Costa Rica* v. *Nicaragua* case on 30 November 2012. In the same letter, Costa Rica reiterated its position that it would be neither timely nor equitable to join the proceedings in the two cases. Costa Rica contended that there was no close connection between the two cases such as might justify a joinder. In particular, according to Costa Rica, the *Costa Rica* v. *Nicaragua* case concerns an area which is geographically distant from the road the construction of which is the subject of the *Nicaragua* v. *Costa Rica* case. Costa Rica argued that "[i]t [was] not sufficient that both cases [were] related — although in very different respects — to the San Juan River, which is more than 205 km in length".

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18. Under Article 47 of its Rules, "[t]he Court may at any time direct that the proceedings in two or more cases be joined". That provision leaves the Court a broad margin of discretion. Where the Court, or its predecessor, has exercised its power to join proceedings, it has done so in circumstances where joinder was consonant not only with the principle of the sound administration of justice but also with the need for judicial economy (see, e.g., *Legal Status of the South-Eastern Territory of Greenland, Order of 2 August 1932, P.C.I.J., Series A/B, No. 48*, p. 268; *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Order of 26 April 1968, I.C.J. Reports 1968*, p. 9). Any decision to that effect will have to be taken in the light of the specific circumstances of each case.

19. The two cases here concerned involve the same Parties and relate to the area where the common border between them runs along the right bank of the San Juan River.

20. Both cases are based on facts relating to works being carried out in, along, or in close proximity to the San Juan River, namely the dredging of the river by Nicaragua and the construction of a road along its right bank by Costa Rica. Both sets of proceedings are about the effect of the aforementioned works on the local environment and on the free navigation on, and access to, the San Juan River. In this regard, both Parties refer to the risk of sedimentation of the San Juan River.

21. In the present case and in the *Nicaragua* v. *Costa Rica* case, the Parties make reference, in addition, to the harmful environmental effect of the works in and along the San Juan River on the fragile fluvial ecosystem (including protected nature preserves in and along the river).

22. In both cases, the Parties refer to violations of the 1858 Treaty of Limits, the Cleveland Award, the Alexander Awards and the Ramsar Convention.

23. A decision to join the proceedings will allow the Court to address simultaneously the totality of the various interrelated and contested issues raised by the Parties, including any questions of fact or law that are common to the disputes presented. In the view of the Court, hearing and deciding the two cases together will have significant advantages. The Court does not expect any undue delay in rendering its Judgment in the two cases.

24. In view of the above, the Court, in conformity with the principle of the sound administration of justice and with the need for judicial economy, considers it appropriate to join the proceedings in the present case and in the *Nicaragua* v. *Costa Rica* case.

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25. For these reasons,

THE COURT,

Unanimously,

Decides to join the proceedings in the present case with those in the case concerning *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)*;

Reserves the subsequent procedure for further decision.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this seventeenth day of April, two thousand and thirteen, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Costa Rica and the Government of the Republic of Nicaragua, respectively.

(Signed) Peter TOMKA,
President.

(Signed) Philippe COUVREUR,
Registrar.

Judge CANÇADO TRINDADE appends a separate opinion to the Order.

(Initialled) P. T.

(Initialled) Ph. C.

SEPARATE OPINION OF JUDGE CANÇADO TRINDADE

I. INTRODUCTION

1. I have concurred with my vote to the adoption by the International Court of Justice (ICJ) of its Order of today, 17 April 2013, whereby it decides to join the proceedings in the present case concerning *Certain Activities Carried out by Nicaragua in the Border Area* (Costa Rica *versus* Nicaragua) with the proceedings in the case concerning *Construction of a Road in Costa Rica along the San Juan River* (Nicaragua *versus* Costa Rica). The *ratio decidendi* in the present decision of the Court (paragraphs 19-23) is clear; yet, it touches on foundations which have not been examined or developed by the Court in the present Order, and to which I attach great importance. I feel thus obliged to leave on the records my reflections thereon, in support of my personal position on the matter.

2. I shall, first, address the issue of "implied" and "inherent powers", so as to provide some precisions in respect of the exercise of the international judicial function. Secondly, I shall dwell upon the issue of the *Kompetenz Kompetenz* / *la compétence de la compétence*, inherent to the exercise of the international judicial function. Thirdly, I shall review the sound administration of justice, and focus attention on joinders effected by the Hague Court (PCIJ and ICJ) *avant la lettre*. Fourthly, I shall consider what I perceive as the idea of justice guiding the sound administration of justice (*la bonne administration de la justice*). And fifthly, I shall examine the sound administration of justice (*la bonne administration de la justice*) and the procedural equality of the parties. The way will then be paved for the presentation, in the epilogue, of my brief final considerations.

3. It is not my intention, in the following consideration of these issues, to be exhaustive; I could hardly be so, writing this Separate Opinion, as I have been, under the merciless and unnecessary pressure of time. I do so, struggling stubbornly against time, moved by a sense of duty, and endeavouring to provide the reasoning which I can hardly find in the present Order in support of the decision taken. The *ratio decidendi*, yes, it is in the Order, but I cannot behold therein the *obiter dicta* supporting it. As I have concurred with the Court's decision in the present

Order, I feel bound to take the care to elaborate on the foundations of the matter dealt with, the way I perceive and conceive them.

II. "IMPLIED" AND "INHERENT POWERS" REVISITED: SOME PRECISIONS

4. May I begin by making a brief incursion, for a specific purpose, into the law of international organisations, which — may I observe *in passim* —- marks its discreet presence in the present Order (paras. 1-2 and 5). With the rise of international organisations, the conceptions of "inherent powers" as well as "implied powers" took shape in that context, with the contribution of the case-law of the ICJ. One year after the Advisory Opinion of the ICJ in respect of *Certain Expenses of the United Nations* (of 20.07.1962), the doctrinal formulation of F. Seyersted (1963) found the light of the day[1], invoking the "inherent powers" of the U.N., and seeking to demonstrate them, by means of an arguable analogy — which promptly attracted criticisms — with the legal position of States.

5. After all, the ICJ itself had clarified, in its celebrated *obiter dictum* in the Advisory Opinion on *Reparations for Injuries Suffered in the Service of the United Nations* (of 11.04.1949), that while the State is endowed with the totality of rights and duties recognized by international law, the rights and duties of an entity such as the U.N. ought to depend on the purposes and functions, specified or implicit in their constitutive documents and developed in practice[2]. The ICJ thus espoused to the doctrine of "implied powers"[3], surely distinct from that of "inherent powers", inspired in an analogy with comparative constitutional law.

6. While the doctrinal construction of "implied powers" was intended to set up limits to powers transcending the letter of constitutive charters, — limits found in the purposes and functions of the international organization at issue[4], — the doctrinal construction of "inherent powers", quite distinctly, was intended to assert the powers of the juridical person at issue for the accomplishment of its goals, as provided for in its constitutive charter. The point I wish here to make is that the same expression — "inherent powers" — has at times been invoked in respect of the operation of international judicial entities; yet, though the expression is the same, its *rationale* and connotation are different, when it comes to be employed by reference to international tribunals. Another precision is here called for, for a proper understanding of the operation of these latter. Understanding and operation go hand in hand: "*ad intelligendum et ad agendum*".

III. *KOMPETENZ KOMPETENZ* / *LA COMPÉTENCE DE LA COMPÉTENCE*, INHERENT TO THE EXERCISE OF THE INTERNATIONAL JUDICIAL FUNCTION

7. International tribunals, to start with, are endowed with competence to resolve any controversy raised with regard to their own jurisdictions: this amounts to a basic principle of international procedural law[5]. As master of its own jurisdiction, the international tribunal concerned has the *compétence de la compétence* (*Kompetenz Kompetenz*). Such power of determination is inherent to every contemporary international tribunal, responding to an imperative

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[1] F. Seyersted, *Objective International Personality of Intergovernmental Organizations*, Copenhagen, 1963, pp. 28-29, 35-36, 40, 45-46.

[2] *ICJ Reports* (1949) p. 180.

[3] Cf. also, subsequently, its Advisory Opinion of 13.07.1954, on the *Effect of Awards of Compensation Made by the U.N. Administrative Tribunal*, wherein the ICJ again dwelt on the doctrine of "implied powers".

[4] Thereby not attributing *carte blanche* to this latter; cf. Rahmatullah Khan, *Implied Powers of the United Nations*, Delhi/Bombay/Bangalore, Vikas Publushing, 1970, pp. 1-222.

[5] IACtHR, case of *Hilaire, Benjamin and Constantine and Others versus Trinidad and Tobago* (Preliminary Objections, Judgment of 01.09.2001), Separate Opinion of Judge A.A. Cançado Trindade, paras. 2 and 15.

of juridical security: it goes without saying that the determination of the scope of its own jurisdiction belongs to the international tribunal concerned, as it cannot be left in the hands, and at the mercy, of the contending parties. In any circumstances, the international tribunal concerned is master of its own jurisdiction[6].

8. International tribunals, as courts of law, judicial entities, stand on a firmer ground than arbitral tribunals, in so far as the determination of their competence is concerned. They are the guardians and masters of their own respective jurisdiction (*jurisdiction, jus dicere*, the prerogative or power to declare the Law). In this way, they discard permissive practices (remnant of international arbitrations of the past), and preserve the integrity of their own jurisdiction. Contending parties, on their turn, are bound to comply with their conventional obligations (of a substantive as well as of a procedural nature), so as to secure to the conventional provisions at issue their proper effects in their respective domestic legal orders. This also corresponds to a general principle of law, that of *ut res magis valeat quam pereat*, widely known as the principle of effectiveness (of *effet utile*)[7].

9. The *compétence de la compétence* (*Kompetenz Kompetenz*) of international tribunals extends to the interpretation of the provisions of their respective jurisdictional instruments, as well as to the determination of the nature of the controversy at issue and the characterization of its factual context; moreover, the prerogative of international tribunals to determine their own jurisdiction (*compétence de la compétence*) starts at the time they are seized of the disputes at issue[8]. The ICJ itself stated, six decades ago, in its Judgment (of 18.11.1953, preliminary objection) in the *Nottebohm* case, that the *compétence de la compétence*

> "assumes particular force when the international tribunal is no longer an arbitral tribunal constituted by a special agreement between the parties for the purpose of adjudicating on a particular dispute, but is an institution which has been pre-established by an international instrument defining its jurisdiction and regulating its operation and is (...) the principal judicial organ of the United Nations" (p. 119).

IV. The Sound Administration of Justice, and Joinders *avant la lettre*

10. Thus, keeping these precisions in mind, may I briefly recall that the ICJ developed its practice on joinder of proceedings well before the institute of *joinder* was enshrined, in 1978, into the Rules of Court (Article 47)[9]. By then, the Court counted only on a very general provision of its Statute, on its prerogative to deliver Orders for the conduct of the case at issue (Article 48). References can be made to its decisions on joinders in the *South West African* cases (1961), and the *North Sea Continental Shelf* cases (1968)[10]. The joinders effected by the ICJ on those occasions

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[6] IACtHR, case of *Barrios Altos versus Peru* (Judgment of 14.03.2001), Concurring Opinion of Judge A.A. Cançado Trindade, para. 2.

[7] For examples of the preservation, by contemporary international tribunals, of the integrity of their own jurisdiction, cf. A.A. Cançado Trindade, *El Ejercicio de la Función Judicial Internacional - Memorias de la Corte Interamericana de Derechos Humanos*, 2nd. ed., Belo Horizonte/Brazil, Edit. Del Rey, 2013, pp. 5-10, 29-52, 145-149 and 215.

[8] I.F.I. Shihata, *The Power of the International Court to Determine Its Own Jurisdiction*, The Hague, Nijhoff, 1965, pp. 1-304.

[9] Article 47 of the Rules of Court provides that: "The Court may at any time direct that the proceedings in two or more cases be joined. It may also direct that the written or oral proceedings, including the calling of witnesses, be in common; or the Court may, without effecting any formal joinder, direct common action in any of these respects".

[10] Yet, in the *Fisheries Jurisdiction* cases (1972) and the *Nuclear Test* cases (1973), however, the ICJ decided not to join the proceedings.

transcended the letter of its *interna corporis*. The Court was guided by its awareness of the sound administration of justice.

11. These two decisions of the ICJ were preceded by three other decisions of its predecessor, the PCIJ, in the cases of *Certain German Interests in Polish Upper Siberia* (1926), the *Legal Status of the South-Eastern Territory of Greenland* (1932), and the *Appeals from Certain Judgments of the Hungaro-Czechoslovak Mixed Arbitral Tribunal* (1932). Thus, both the PCIJ and the ICJ ordered the joinder of proceedings *avant la lettre*, despite the absence of an express provision on it in their *interna corporis*. They ordered the joinder as a measure of judicial administration, so as to secure *the sound administration of justice (la bonne administration de la justice)*, well before the institute of joinder was at last inserted, and found its place, in the 1978 ICJ's Rules of Court.

12. In the course of the proceedings, the Court may be faced with a situation which requires from it a decision (at procedural level), even if it does not squarely fit into its *interna corporis*. This has often happened in practice, — and the aforementioned decisions are not exhaustive. As early as in 1937, G. Morelli perspicaciously pondered that "[r]ésoudre un différend juridique signifie substituer la certitude à l'incertitude sur la situation juridique existante"[11]. And he added, in his sharp criticism of State voluntarism, that the generation of legal effects cannot be subsumed under the "will" of States, or under what they agree upon *inter se*; legal effects of the international *corpus juris* stand "above the will of States" ("*au-dessus de la volonté des États*")[12].

V. The Idea of Justice Guiding the Sound Administration of Justice (*la bonne administration de la justice*)

13. In recent times, much discussion has taken place as to whether the sound administration of justice (*la bonne administration de la justice*) is a maxim or a principle, or whether such a distinction is immaterial[13]. Be that as it may, if it flourished as a maxim, this latter clearly gave expression to a principle. The proper exercise of the international judicial function requires the blend of logic and experience (*la sagesse et l'expérience*), deeply-rooted in legal thinking (of comparative domestic law and of international law). Such blend of logic and experience seeks to secure the sound administration of justice. Positivists try in vain to subsume this latter under the *interna corporis* of the international tribunal at issue, in their well-known incapacity to explain anything that transcends the regulatory texts.

14. I have already referred to joinders effected by the ICJ *avant la lettre*, despite the absence of an express provision regulating the matter, and before the institute of joinder was inserted into the Rules of Court (cf. *supra*). In my understanding, the Court did not do so pursuant to an "implied power" ensuing from the regulatory texts, but rather, and more precisely, pursuant to an "inherent power", proper to the exercise of the international judicial function. It is an "inherent power" of the international tribunal concerned to see to it that the procedure functions properly, so that justice is done and is seen to be done. It is an "inherent power" of an international tribunal such as the ICJ to see to it that the procedure operates in a balanced way, ensuring procedural equality and the guarantees of due process, so as to preserve the integrity of its judicial function.

15. The sound administration of justice enables the international tribunal at issue to tackle questions of procedure even if these latter have "escaped" the regulations of its *interna corporis*. It

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[11] G. Morelli, "La théorie générale du procès international", 61 *Recueil des Cours de l´Académie de Droit International de La Haye* (1937) p. 260.

[12] *Ibid*., p. 263.

[13] Cf., *inter alia*, e.g., R. Kolb, "Les maximes juridiques en droit international public: questions historiques et théoriques", 32 *Revue belge de droit international* (1999) pp. 407-434; A. Lelarge, "L'émergence d'un principe de bonne administration de la justice internationale dans la jurisprudence internationale antérieure à 1945", 27 *L'Observateur des Nations Unies* (2009) pp. 23-51.

is, in my perception, the idea of an objective justice that, ultimately, guides the sound administration of justice (*la bonne administration de la justice*), in the line of jusnaturalist thinking. The proper pursuit of justice is in conformity with the general principles of law. With the reassuring evolution and expansion of judicial settlement in recent decades, there has been, not surprisingly, an increasing recourse to the maxim *la bonne administration de la justice*, — which gives expression to a general principle of law, captured by human conscience[14].

16. Writing at the time of the emergence and consolidation of judicial settlement of international disputes, M. Bourquin pondered that many international controversies pertained to a disagreement, not as to the interpretation or application of positive law (*jus positum*), but rather as to the value of that law. Accordingly, the exercise of the international judicial function is not — cannot be — limited to a simple application of positive law in the *cas d'espèce*; there is a certain element of creativity inherent to it, and there are always "superior principles of justice" to be kept in mind[15].

17. The proper handling of international procedure is thus endowed with particular relevance. After all, we are here confronted with common sense, which often appears to be the least common of all senses. As to such proper handling of international procedure, for the sake of the realization of justice, M. Bourquin deemed it fit to warn that

> "La qualité des procédures constitue certainement un facteur dont il faut tenir compte. Une bonne procédure facilite la solution des difficultés. Une mauvaise procédure fait, en revanche, plus de mal que de bien. Mais ce n'est pas un mécanisme, même admirablement agencé, qui pourrait régler à lui seul une pareille matière. Ce qu'il faut ici, par-dessus tout, c'est un certain état d'esprit, dont nous paraissons malheureusement assez éloignés. Ce qu'il faut, c'est le calme de la raison; c'est cette chose si simple et pourtant si rare qu'on appelle le bon sens[16].

18. An international tribunal such as the ICJ has the "inherent power" to take *motu propio* the measures necessary to secure the sound administration of justice. In doing so, *ex officio*, the Court is exercising its *compétence de la compétence*, a prerogative which is "essentially inherent in its judicial function"[17]. International legal procedure has a specificity and a dynamics of its own, and general principles of law applicable therein are not to be assumed to be identical, in operation, to those sedimented in national legal systems[18]. Positivists, anyway, do not feel at ease with general principles of law; they thus keep on trying, repetitiously and in vain, to minimize their presence and relevance.

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[14]On human conscience — the universal juridical conscience — as the ultimate material source of international law, cf. A.A. Cançado Trindade, *International Law for Humankind — Towards a New Jus Gentium*, 1st. ed., Leiden/The Hague, Nijhoff/The Hague Academy of International Law, 2010, ch. VI, pp. 139-161.

[15]M. Bourquin, "Stabilité et mouvement dans l'ordre juridique international", 64 *Recueil des Cours de l'Académie de Droit International de La Haye* (1938) pp. 371, 408 and 422.

[16]*Ibid.*, p. 472.

[17]M. Kawano, "The Administration of Justice by the International Court of Justice and the Parties", *in Multiculturalism and International Law — Essays in Honour of E. McWhinney* (eds. Sienho Yee and J.-Y. Morin), Leiden, Nijhoff, 2009, pp. 298-299, and cf. pp. 286 and 293-294.

[18]A word of caution has been uttered as to such an analogy; cf., e.g., H. von Mangoldt, "La comparaison des systèmes de droit comme moyen d'élaboration de la procédure des tribunaux internationaux", 40 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1980) pp. 554-572.

VI. The Sound Administration of Justice (*la bonne administration de la justice*) and the Procedural Equality of the Parties

19. The sound administration of justice (*la bonne administration de la justice*) is not an isolated illustration of the kind, — of the incidence and relevance of a general principle. Other such examples could be recalled, such as, *inter alia*, that of the maxim *audiatur et altera pars* (or *audi alteram partem*), which gave expression to the general principle of law providing for *procedural equality* between the contending parties in the course of judicial proceedings[19]. Another principle, of international procedural law, is that of *jura novit curia*: originated in Roman law (civil procedure, as from the XIIth century), it acknowledges the freedom and autonomy of the judge in searching for and determining the law applicable to a given dispute, without being restrained by the arguments of the parties. The examples abound.

20. In my perception, the presence of the idea of justice, guiding the sound administration of justice, is ineluctable. Not seldom the text of the Court's *interna corporis* does not suffice; in order to impart justice, in circumstances of this kind, an international tribunal such as the ICJ is guided by the *prima principia*. To attempt to offer a definition of the sound administration of justice that would encompass all possible situations that could arise would be far too pretentious, and fruitless. An endless diversity of situations may be faced by the ICJ, leading it — in its pursuit of the realization of justice — to deem it fit to have recourse to the principle of the sound administration of justice (*la bonne administration de la justice*); this general principle, in sum, finds application in the most diverse circumstances.

21. Moving from the general to the particular, the incidence or application of this general principle has enabled international tribunals to secure the *procedural equality* of the contending parties. The ICJ has, on successive occasions, expressed its concern as to the need to secure such procedural equality. Thus, in its most recent Advisory Opinion, of 01.02.2012, on a *Judgment of the ILO Administrative Tribunal upon a Complaint Filed against IFAD*, the ICJ insisted on "the right to equality in the proceedings" (para. 30), on "the principle of equality before the Court" as "a central aspect of the good administration of justice" (paras. 35 and 44), on "equality of access" to justice (paras. 37, 39, 43 and 48), on "the concept of equality before courts and tribunals" (paras. 38 and 40), on the guarantee of "equal access and equality of arms" (para. 39), on "the principle of equality in the proceedings before the Court, required by its inherent judicial character and by the good administration of justice" (para. 47).

22. In my Separate Opinion (paras. 82-118) appended to this recent Advisory Opinion of the ICJ of 2012, I have dwelt in depth upon the imperative of securing the equality of the parties in the international legal process. Earlier on, the Court itself related the "principle of procedural fairness" to the "sound administration of justice" (case concerning the *Use of Force*, Serbia and Montenegro *versus* Belgium, preliminary objections, Judgment of 15.12.2004, para. 116). Almost two decades earlier, the ICJ stated that "the equality of the parties to the dispute must remain the basic principle for the Court" (case *Nicaragua versus United States*, merits, Judgment of 27.06.1986, para. 31). The ICJ again stressed the relevance of "the principle of equality of the parties" in its Advisory Opinion of 20.07.1982, regarding an *Application for Review of a Judgment of the U.N. Administrative Tribunal* (paras. 29-32 and 79).

23. Three decades earlier, the ICJ had again relied upon that principle in its Advisory Opinion of 23.10.1956 on *Judgments of the ILO Administrative Tribunal upon Complaints Made against UNESCO* (pp. 85-86); on that occasion, the Court stated, in a rather clumsy way, that the "principle of equality of the parties follows from the requirements of good administration of justice" (p. 86). The Court, in my understanding, would have been more precise had it stated that

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[19] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, London, Stevens, 1953, p. 291.

the principle of equality of the parties *orients* or *guides* the requirements of good administration of justice. Principles (*prima principia*) stand higher than rules or requirements, and orient them.

VII. EPILOGUE: FINAL CONSIDERATIONS

24. In its Order of joinder of the proceedings in the present case concerning *Certain Activities Carried out by Nicaragua in the Border Area* (Costa Rica *versus* Nicaragua) with those in the case concerning *Construction of a Road in Costa Rica along the San Juan River* (Nicaragua *versus* Costa Rica), the ICJ has taken into due account that

> "The two cases here concerned involve the same Parties and relate to the area where the common border between them runs along the right bank of the San Juan River.
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> Both cases are based on facts relating to works being carried out in, along, or in close proximity to the San Juan River, namely the dredging of the river by Nicaragua and the construction of a road along its right bank by Costa Rica. Both sets of proceedings are about the effect of the aforementioned works on the local environment and on the free navigation on, and access to, the San Juan River. In this regard, both Parties refer to the risk of sedimentation of the San Juan River.
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> In the present case and in the *Nicaragua versus Costa Rica* case, the Parties make reference, in addition, to the harmful environmental effect of the works in and along the San Juan River on the fragile fluvial ecosystem (including protected nature preserves in and along the river).
>
> In both cases, the Parties refer to violations of the 1858 Treaty of Limits, the Cleveland Award, the Alexander Awards and the Ramsar Convention.
>
> A decision to join the proceedings will allow the Court to address simultaneously the totality of the various interrelated and contested issues raised by the Parties (...)" (paras. 19-23).

25. Such is the *ratio decidendi* of the present decision of the Court. Its foundations lie in the realm of principles, as I have endeavoured to demonstrate in the present Separate Opinion. The *Kompetenz Kompetenz* / *la compétence de la compétence* of an international tribunal such as the ICJ is inherent to its exercise of the international judicial function. The ICJ and its predecessor, the PCIJ, have both effected joinders *avant la lettre*, even in the absence (before 1978) of a provision to that effect in their *interna corporis*. The idea of justice guides the sound administration of justice (*la bonne administration de la justice*), as manifested, e.g., in decisions aiming at securing the *procedural equality* of the contending parties.

26. General principles of law have always marked presence in the pursuit of the realization of justice. In my understanding, they comprise not only those principles acknowledged in national legal systems[20], but likewise the general principles of international law. They have been repeatedly reaffirmed, time and time again, and, — even if regrettably neglected by segments of contemporary legal doctrine, — they retain their full validity in our days. An international tribunal like the ICJ has consistently had recourse to them in its *jurisprudence constante*. Despite the characteristic attitude of legal positivism to attempt, in vain, to minimize their role, the truth remains that, without principles, there is no legal system at all, at either national or international level.

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[20] Cf. H. Mosler, "To What Extent Does the Variety of Legal Systems of the World Influence the Application of the General Principles of Law within the Meaning of Article 38(1)(c) of the Statute of the International Court of Justice", *in International Law and the Grotian Heritage* (Hague Colloquium of 1983), The Hague, T.M.C. Asser Instituut, 1985, pp. 173-185.

27. General principles of law inform and conform the norms and rules of legal systems. In my understanding, sedimented along the years, general principles of law form the *substratum* of the national and international legal orders, they are indispensable (forming the *jus necessarium*, going well beyond the mere *jus voluntarium*), and they give expression to the idea of an *objective* justice (proper of jusnaturalist thinking), of universal scope. Last but not least, it is the general principles of law that inspire the interpretation and application of legal norms, and also the law-making process itself[21]. In the present case concerning *Certain Activities Carried out by Nicaragua in the Border Area* (Costa Rica *versus* Nicaragua), the ICJ has relied on the provision on joinder of Article 47 of the Rules of Court, and has significantly acknowledged that the joinder it has effected was in accordance with the principle of the sound administration of justice (*la bonne administration de la justice*)[22].

(Signed) Antônio Augusto CANÇADO TRINDADE
Judge

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[21] A.A. Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium, op. cit. supra* n. (14), ch. III, pp. 85-121, esp. pp. 90-92.

[22] Paragraphs 18 and 24.

SEPARATE OPINION OF JUDGE CANÇADO TRINDADE

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*

I. Introduction

1. I have concurred with my vote to the adoption by the International Court of Justice (ICJ) of its Order of today, 17 April 2013, whereby it decides to join the proceedings in the present case concerning *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* with the proceedings in the case concerning *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)*. The *ratio decidendi* in the present decision of the Court (paras. 19-23) is clear; yet, it touches on foundations which have not been examined or developed by the Court in the present Order, and to which I attach great importance. I feel thus obliged to leave on the records my reflections thereon, in support of my personal position on the matter.

2. I shall, first, address the issue of "implied" and "inherent powers", so as to provide some precisions in respect of the exercise of the international judicial function. Secondly, I shall dwell upon the issue of the

Kompetenz Kompetenz/la compétence de la compétence, inherent to the exercise of the international judicial function. Thirdly, I shall review the sound administration of justice, and focus attention on joinders effected by the Hague Court (PCIJ and ICJ) *avant la lettre*. Fourthly, I shall consider what I perceive as the idea of justice guiding the sound administration of justice *(la bonne administration de la justice)*. And fifthly, I shall examine the sound administration of justice *(la bonne administration de la justice)* and the procedural equality of the parties. The way will then be paved for the presentation, in the epilogue, of my brief final considerations.

3. It is not my intention, in the following consideration of these issues, to be exhaustive; I could hardly be so, writing this separate opinion, as I have been, under the merciless and unnecessary pressure of time. I do so, struggling stubbornly against time, moved by a sense of duty, and endeavouring to provide the reasoning which I can hardly find in the present Order in support of the decision taken. The *ratio decidendi*, yes, it is in the Order, but I cannot behold therein the *obiter dicta* supporting it. As I have concurred with the Court's decision in the present Order, I feel bound to take the care to elaborate on the foundations of the matter dealt with, the way I perceive and conceive them.

II. "Implied" and "Inherent Powers" Revisited: Some Precisions

4. May I begin by making a brief incursion, for a specific purpose, into the law of international organizations, which — may I observe *in passim* — marks its discreet presence in the present Order (paras. 1-2 and 5). With the rise of international organizations, the conceptions of "inherent powers" as well as "implied powers" took shape in that context, with the contribution of the case law of the ICJ. One year after the Advisory Opinion of the ICJ in respect of *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* (of 20 July 1962), the doctrinal formulation of F. Seyersted (1963) found the light of the day[1], invoking the "inherent powers" of the UN, and seeking to demonstrate them, by means of an arguable analogy — which promptly attracted criticisms — with the legal position of States.

5. After all, the ICJ itself had clarified, in its celebrated *obiter dictum* in the Advisory Opinion on *Reparations for Injuries Suffered in the Service of the United Nations* (of 11 April 1949), that while the State is endowed with the totality of rights and duties recognized by international law, the rights and duties of an entity such as the UN ought to depend on the purposes and functions, specified or implicit in their constitutive docu-

[1] F. Seyersted, *Objective International Personality of Intergovernmental Organizations*, Copenhagen, 1963, pp. 28-29, 35-36, 40, 45-46.

ments and developed in practice[2]. The ICJ thus espoused to the doctrine of "implied powers"[3], surely distinct from that of "inherent powers", inspired in an analogy with comparative constitutional law.

6. While the doctrinal construction of "implied powers" was intended to set up limits to powers transcending the letter of constitutive charters — limits found in the purposes and functions of the international organization at issue[4] — the doctrinal construction of "inherent powers", quite distinctly, was intended to assert the powers of the juridical person at issue for the accomplishment of its goals, as provided for in its constitutive charter. The point I wish here to make is that the same expression — "inherent powers" — has at times been invoked in respect of the operation of international judicial entities; yet, though the expression is the same, its rationale and connotation are different, when it comes to be employed by reference to international tribunals. Another precision is here called for, for a proper understanding of the operation of these latter. Understanding and operation go hand in hand: *ad intelligendum et ad agendum*.

III. *Kompetenz Kompetenz/La Compétence de la Compétence*, Inherent to the Exercise of the International Judicial Function

7. International tribunals, to start with, are endowed with competence to resolve any controversy raised with regard to their own jurisdictions: this amounts to a basic principle of international procedural law[5]. As master of its own jurisdiction, the international tribunal concerned has the *compétence de la compétence (Kompetenz Kompetenz)*. Such power of determination is inherent to every contemporary international tribunal, responding to an imperative of juridical security: it goes without saying that the determination of the scope of its own jurisdiction belongs to the international tribunal concerned, as it cannot be left in the hands, and at the mercy, of the contending parties. In any circumstances, the international tribunal concerned is master of its own jurisdiction[6].

8. International tribunals, as courts of law, judicial entities, stand on a firmer ground than arbitral tribunals, in so far as the determination of

[2] *I.C.J. Reports 1949*, p. 180.

[3] Cf. also, subsequently, its Advisory Opinion of 13 July 1954, on the *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, wherein the ICJ again dwelt on the doctrine of "implied powers".

[4] Thereby not attributing *carte blanche* to this latter; cf. Rahmatullah Khan, *Implied Powers of the United Nations*, Delhi/Bombay/Bangalore, Vikas Publishing, 1970, pp. 1-222.

[5] IACtHR, case of *Hilaire, Benjamin and Constantine and Others* v. *Trinidad and Tobago* (preliminary objections, judgment of 1 September 2001), separate opinion of Judge A. A. Cançado Trindade, paras. 2 and 15.

[6] IACtHR, case of *Barrios Altos* v. *Peru* (judgment of 14 March 2001), concurring opinion of Judge A. A. Cançado Trindade, para. 2.

their competence is concerned. They are the guardians and masters of their own respective jurisdiction (*jurisdiction, jus dicere*, the prerogative or power to declare the law). In this way, they discard permissive practices (remnant of international arbitrations of the past), and preserve the integrity of their own jurisdiction. Contending parties, on their turn, are bound to comply with their conventional obligations (of a substantive as well as of a procedural nature), so as to secure to the conventional provisions at issue their proper effects in their respective domestic legal orders. This also corresponds to a general principle of law — *ut res magis valeat quam pereat* —, widely known as the principle of effectiveness (of *effet utile*)[7].

9. The *compétence de la compétence (Kompetenz Kompetenz)* of international tribunals extends to the interpretation of the provisions of their respective jurisdictional instruments, as well as to the determination of the nature of the controversy at issue and the characterization of its factual context; moreover, the prerogative of international tribunals to determine their own jurisdiction starts at the time they are seized of the disputes at issue[8]. The ICJ itself stated, six decades ago, in its Judgment (of 18 November 1953), in the *Nottebohm* case, that the *compétence de la compétence*

> "assumes particular force when the international tribunal is no longer an arbitral tribunal constituted by virtue of a special agreement between the parties for the purpose of adjudicating on a particular dispute, but is an institution which has been pre-established by an international instrument defining its jurisdiction and regulating its operation and is (. . .) the principal judicial organ of the United Nations" (*Nottebohm (Liechtenstein* v. *Guatemala), Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 119).

IV. The Sound Administration of Justice, and Joinders *avant la lettre*

10. Thus, keeping these precisions in mind, may I briefly recall that the ICJ developed its practice on joinder of proceedings well before the institute of *joinder* was enshrined, in 1978, into the Rules of Court (Article 47)[9].

[7] For examples of the preservation, by contemporary international tribunals, of the integrity of their own jurisdiction, cf. A. A. Cançado Trindade, *El Ejercicio de la Función Judicial Internacional — Memorias de la Corte Interamericana de Derechos Humanos*, 2nd ed., Belo Horizonte/Brazil, Edit. Del Rey, 2013, pp. 5-10, 29-52, 145-149 and 215.

[8] I. F. I. Shihata, *The Power of the International Court to Determine Its Own Jurisdiction*, The Hague, Martinus Nijhoff, 1965, pp. 1-304.

[9] Article 47 of the Rules of Court provides that:

> "The Court may at any time direct that the proceedings in two or more cases be joined. It may also direct that the written or oral proceedings, including the calling of witnesses, be in common; or the Court may, without effecting any formal joinder, direct common action in any of these respects."

By then, the Court counted only on a very general provision of its Statute, on its prerogative to deliver Orders for the conduct of the case at issue (Article 48). References can be made to its decisions on joinders in the *South West African* cases (1961), and the *North Sea Continental Shelf* cases (1968)[10]. The joinders effected by the ICJ on those occasions transcended the letter of its *interna corporis*. The Court was guided by its awareness of the sound administration of justice.

11. These two decisions of the ICJ were preceded by three other decisions of its predecessor, the PCIJ, in the cases of *Certain German Interests in Polish Upper Silesia* (1926), the *Legal Status of the South-Eastern Territory of Greenland* (1932), and the *Appeals from Certain Judgments of the Hungaro-Czechoslovak Mixed Arbitral Tribunal* (1932). Thus, both the PCIJ and the ICJ ordered the joinder of proceedings *avant la lettre*, despite the absence of an express provision on it in their *interna corporis*. They ordered the joinder as a measure of judicial administration, so as to secure *the sound administration of justice (la bonne administration de la justice)*, well before the institute of joinder was at last inserted, and found its place, in the 1978 ICJ's Rules of Court.

12. In the course of the proceedings, the Court may be faced with a situation which requires from it a decision (at procedural level), even if it does not squarely fit into its *interna corporis*. This has often happened in practice — and the aforementioned decisions are not exhaustive. As early as in 1937, G. Morelli perspicaciously pondered that "[s]ettling a legal dispute means substituting certainty for uncertainty regarding the existing legal situation"[11]. And he added, in his sharp criticism of State voluntarism, that the generation of legal effects cannot be subsumed under the "will" of States, or under what they agree upon *inter se*; legal effects of the international *corpus juris* stand "above the will of States" ("*au-dessus de la volonté des Etats*")[12].

V. The Idea of Justice Guiding the Sound Administration of Justice *(la bonne administration de la justice)*

13. In recent times, much discussion has taken place as to whether the sound administration of justice *(la bonne administration de la justice)* is a maxim or a principle, or whether such a distinction is immaterial[13]. Be

[10] Yet, in the *Fisheries Jurisdiction* cases (1972) and the *Nuclear Test* cases (1973), however, the ICJ decided not to join the proceedings.

[11] G. Morelli, "La théorie générale du procès international", 61 *Recueil des cours de l'Académie de droit international de La Haye* (1937), p. 260 *[translation by the Registry]*.

[12] *Ibid.*, p. 263.

[13] Cf., *inter alia,* e.g., R. Kolb, "Les maximes juridiques en droit international public: questions historiques et théoriques", 32 *Revue belge de droit international* (1999), pp. 407-434; A. Lelarge, "L'émergence d'un principe de bonne administration de la justice internationale dans la jurisprudence internationale antérieure à 1945", 27 *L'observateur des Nations Unies* (2009), pp. 23-51.

that as it may, if it flourished as a maxim, this latter clearly gave expression to a principle. The proper exercise of the international judicial function requires the blend of logic and experience *(la sagesse et l'expérience)*, deeply-rooted in legal thinking (of comparative domestic law and of international law). Such blend of logic and experience seeks to secure the sound administration of justice. Positivists try in vain to subsume this latter under the *interna corporis* of the international tribunal at issue, in their well-known incapacity to explain anything that transcends the regulatory texts.

14. I have already referred to joinders effected by the ICJ *avant la lettre*, despite the absence of an express provision regulating the matter, and before the institute of joinder was inserted into the Rules of Court (cf. *supra*). In my understanding, the Court did not do so pursuant to an "implied power" ensuing from the regulatory texts, but rather, and more precisely, pursuant to an "inherent power", proper to the exercise of the international judicial function. It is an "inherent power" of the international tribunal concerned to see to it that the procedure functions properly, so that justice is done and is seen to be done. It is an "inherent power" of an international tribunal such as the ICJ to see to it that the procedure operates in a balanced way, ensuring procedural equality and the guarantees of due process, so as to preserve the integrity of its judicial function.

15. The sound administration of justice enables the international tribunal at issue to tackle questions of procedure even if these latter have "escaped" the regulations of its *interna corporis*. It is, in my perception, the idea of an objective justice that, ultimately, guides the sound administration of justice *(la bonne administration de la justice)*, in the line of jusnaturalist thinking. The proper pursuit of justice is in conformity with the general principles of law. With the reassuring evolution and expansion of judicial settlement in recent decades, there has been, not surprisingly, an increasing recourse to the maxim *la bonne administration de la justice* — which gives expression to a general principle of law, captured by human conscience[14].

16. Writing at the time of the emergence and consolidation of judicial settlement of international disputes, M. Bourquin pondered that many international controversies pertained to a disagreement, not as to the interpretation or application of positive law *(jus positum)*, but rather as to the value of that law. Accordingly, the exercise of the international judicial function is not — cannot be — limited to a simple application of positive law in the *cas d'espèce*; there is a certain element of creativity

[14] On human conscience — the universal juridical conscience — as the ultimate material source of international law, cf. A. A. Cançado Trindade, *International Law for Humankind — Towards a New Jus Gentium*, 1st ed., Leiden/The Hague, Martinus Nijhoff/The Hague Academy of International Law, 2010, Chap. VI, pp. 139-161.

inherent to it, and there are always "superior principles of justice" to be kept in mind[15].

17. The proper handling of international procedure is thus endowed with particular relevance. After all, we are here confronted with common sense, which often appears to be the least common of all senses. As to such proper handling of international procedure, for the sake of the realization of justice, M. Bourquin deemed it fit to warn that

> "The quality of procedures is undoubtedly a factor which must be taken into account. The right procedure helps resolve any difficulties. The wrong procedure, on the other hand, does more harm than good. However, a mechanism, even one that is exceptionally well designed, cannot of itself suffice to resolve such an issue. What is required above all here is a certain mindset, one from which we seem, unfortunately, to be far removed. What is required is calm reason; in other words, that simple yet rare thing called common sense."[16]

18. An international tribunal such as the ICJ has the "inherent power" to take *motu propio* the measures necessary to secure the sound administration of justice. In doing so, *ex officio*, the Court is exercising its *compétence de la compétence*, a prerogative which is "essentially inherent in its judicial function"[17]. International legal procedure has a specificity and a dynamics of its own, and general principles of law applicable therein are not to be assumed to be identical, in operation, to those sedimented in national legal systems[18]. Positivists, anyway, do not feel at ease with general principles of law; they thus keep on trying, repetitiously and in vain, to minimize their presence and relevance.

VI. The Sound Administration of Justice and the Procedural Equality of the Parties

19. The sound administration of justice *(la bonne administration de la justice)* is not an isolated illustration of the kind — of the incidence and relevance of a general principle. Other such examples could be recalled,

[15] M. Bourquin, "Stabilité et mouvement dans l'ordre juridique international", 64 *Recueil des cours de l'Académie de droit international de La Haye* (1938), pp. 371, 408 and 422.

[16] *Ibid.*, p. 472.

[17] M. Kawano, "The Administration of Justice by the International Court of Justice and the Parties", *Multiculturalism and International Law — Essays in Honour of Edward McWhinney* (eds. Sienho Yee and J.-Y. Morin), Leiden, Martinus Nijhoff, 2009, pp. 298-299, and cf. pp. 286 and 293-294.

[18] A word of caution has been uttered as to such an analogy; cf., e.g., H. von Mangoldt, "La comparaison des systèmes de droit comme moyen d'élaboration de la procédure des tribunaux internationaux", 40 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1980), pp. 554-572.

such as, *inter alia*, that of the maxim *audiatur et altera pars* (or *audi alteram partem*), which gave expression to the general principle of law providing for *procedural equality* between the contending parties in the course of judicial proceedings[19]. Another principle, of international procedural law, is that of *jura novit curia*: originated in Roman law (civil procedure, as from the seventeenth century), it acknowledges the freedom and autonomy of the judge in searching for and determining the law applicable to a given dispute, without being restrained by the arguments of the parties. The examples abound.

20. In my perception, the presence of the idea of justice, guiding the sound administration of justice, is ineluctable. Not seldom the text of the Court's *interna corporis* does not suffice; in order to impart justice, in circumstances of this kind, an international tribunal such as the ICJ is guided by the *prima principia*. To attempt to offer a definition of the sound administration of justice that would encompass all possible situations that could arise would be far too pretentious, and fruitless. An endless diversity of situations may be faced by the ICJ, leading it — in its pursuit of the realization of justice — to deem it fit to have recourse to the principle of the sound administration of justice *(la bonne administration de la justice)*; this general principle, in sum, finds application in the most diverse circumstances.

21. Moving from the general to the particular, the incidence or application of this general principle has enabled international tribunals to secure the *procedural equality* of the contending parties. The ICJ has, on successive occasions, expressed its concern as to the need to secure such procedural equality. Thus, in its most recent Advisory Opinion, of 1 February 2012, on the *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*, the ICJ insisted on "the right to equality in the proceedings" (*I.C.J. Reports 2012 (I)*, p. 24, para. 30), on "the principle of equality before the Court" as "a central aspect of the good administration of justice" (*ibid.*, pp. 25 and 29, paras. 35 and 44), on "equality of access" to justice (*ibid.*, pp. 26-27, 29 and 31, paras. 37, 39, 43 and 48), on "the concept of equality before courts and tribunals" (*ibid.*, pp. 26-27, paras. 38 and 40), on the guarantee of "equal access and equality of arms" (*ibid.*, p. 27, para. 39), on "the principle of equality in the proceedings before the Court, required by its inherent judicial character and by the good administration of justice" (*ibid.*, p. 30, para. 47).

22. In my separate opinion (*ibid.*, pp. 81-93, paras. 82-118) appended to this recent Advisory Opinion of the ICJ of 2012, I have dwelt in depth upon the imperative of securing the equality of the parties in the international legal process. Earlier on, the Court itself related the "principle of procedural fairness" to the "sound administration of justice" (case con-

[19] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, London, Stevens, 1953, p. 291.

cerning the *Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, p. 325, para. 116). Almost two decades earlier, the ICJ stated that "the equality of the parties to the dispute must remain the basic principle for the Court" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 26, para. 31). The ICJ again stressed the relevance of "the principle of equality of the parties" in its Advisory Opinion of 20 July 1982, regarding an *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal* (*I.C.J. Reports 1982*, pp. 338-340 and 365-366, paras. 29-32 and 79).

23. Three decades earlier, the ICJ had again relied upon that principle in its Advisory Opinion of 23 October 1956 on *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco (I.C.J. Reports 1956*, pp. 85-86); on that occasion, the Court stated, in a rather clumsy way, that the "principle of equality of the parties follows from the requirements of good administration of justice" (*ibid.*, p. 86). The Court, in my understanding, would have been more precise had it stated that the principle of equality of the parties *orients* or *guides* the requirements of good administration of justice. Principles *(prima principia)* stand higher than rules or requirements, and orient them.

VII. Epilogue: Final Considerations

24. In its Order of joinder of the proceedings in the present case concerning *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* with those in the case concerning *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)*, the ICJ has taken into due account that

> "The two cases here concerned involve the same Parties and relate to the area where the common border between them runs along the right bank of the San Juan River.
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> Both cases are based on facts relating to works being carried out in, along, or in close proximity to the San Juan River, namely the dredging of the river by Nicaragua and the construction of a road along its right bank by Costa Rica. Both sets of proceedings are about the effect of the aforementioned works on the local environment and on the free navigation on, and access to, the San Juan River. In this regard, both Parties refer to the risk of sedimentation of the San Juan River.
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> In the present case and in the *Nicaragua* v. *Costa Rica* case, the Parties make reference, in addition, to the harmful environmental effect of the works in and along the San Juan River on the fragile fluvial ecosystem (including protected nature preserves in and along the river).

In both cases, the Parties refer to violations of the 1858 Treaty of Limits, the Cleveland Award, the Alexander Awards and the Ramsar Convention.

A decision to join the proceedings will allow the Court to address simultaneously the totality of the various interrelated and contested issues raised by the Parties. (. . .)" (Paras. 19-23.)

25. Such is the *ratio decidendi* of the present decision of the Court. Its foundations lie in the realm of principles, as I have endeavoured to demonstrate in the present separate opinion. The *Kompetenz Kompetenz/la compétence de la compétence* of an international tribunal such as the ICJ is inherent to its exercise of the international judicial function. The ICJ and its predecessor, the PCIJ, have both effected joinders *avant la lettre*, even in the absence (before 1978) of a provision to that effect in their *interna corporis*. The idea of justice guides the sound administration of justice, as manifested, e.g., in decisions aiming at securing the *procedural equality* of the contending parties.

26. General principles of law have always marked presence in the pursuit of the realization of justice. In my understanding, they comprise not only those principles acknowledged in national legal systems[20], but likewise the general principles of international law. They have been repeatedly reaffirmed, time and time again, and — even if regrettably neglected by segments of contemporary legal doctrine — they retain their full validity in our days. An international tribunal like the ICJ has consistently had recourse to them in its *jurisprudence constante*. Despite the characteristic attitude of legal positivism to attempt, in vain, to minimize their role, the truth remains that, without principles, there is no legal system at all, at either national or international level.

27. General principles of law inform and conform the norms and rules of legal systems. In my understanding, sedimented along the years, general principles of law form the *substratum* of the national and international legal orders, they are indispensable (forming the *jus necessarium*, going well beyond the mere *jus voluntarium*), and they give expression to the idea of an *objective* justice (proper of jusnaturalist thinking), of universal scope. Last but not least, it is the general principles of law that inspire the interpretation and application of legal norms, and also the law-making process itself[21]. In the present case concerning *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicara-*

[20] Cf. H. Mosler, "To What Extent Does the Variety of Legal Systems of the World Influence the Application of the General Principles of Law within the Meaning of Article 38 (1) *(c)* of the Statute of the International Court of Justice", *International Law and the Grotian Heritage* (Hague Colloquium of 1983), The Hague, T. M. C. Asser Instituut, 1985, pp. 173-185.

[21] A. A. Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium*, *op. cit. supra* note 14, Chap. III, pp. 85-121, esp. pp. 90-92.

gua), the ICJ has relied on the provision on joinder of Article 47 of the Rules of Court, and has significantly acknowledged that the joinder it has effected was in accordance with the principle of the sound administration of justice *(la bonne administration de la justice)* [22].

(Signed) Antônio Augusto CANÇADO TRINDADE.

[22] Paras. 18 and 24.