22 NOVEMBER 2013

ORDER

CERTAIN ACTIVITIES CARRIED OUT BY NICARAGUA IN THE BORDER AREA

(COSTA RICA *v.* NICARAGUA)

CONSTRUCTION OF A ROAD IN COSTA RICA ALONG THE SAN JUAN RIVER

(NICARAGUA *v.* COSTA RICA)

REQUEST PRESENTED BY COSTA RICA FOR THE INDICATION OF NEW PROVISIONAL MEASURES

CERTAINES ACTIVITÉS MENÉES PAR LE NICARAGUA DANS LA RÉGION FRONTALIÈRE

(COSTA RICA c. NICARAGUA)

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DEMANDE EN INDICATION DE NOUVELLES MESURES CONSERVATOIRES PRÉSENTÉE PAR LE COSTA RICA

22 NOVEMBRE 2013

ORDONNANCE

INTERNATIONAL COURT OF JUSTICE

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ORDER

Present: *President* TOMKA; *Vice-President* SEPÚLVEDA-AMOR; *Judges* OWADA, 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 Articles 41 and 48 of the Statute of the Court and Articles 73, 74 and 75 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") for "the incursion into, occupation of and use by Nicaragua's army of Costa Rican territory", as well as for "serious damage inflicted to its protected rainforests and wetlands", "damage intended [by Nicaragua] to the Colorado River" and "the dredging and canalization activities being carried out by Nicaragua on the San Juan River" (case concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)*, hereinafter the "*Costa Rica* v. *Nicaragua* case"). According to Costa Rica, Nicaragua's actions included the construction of a canal (referred to in Spanish as "caño") across Costa Rican territory from the San Juan River to Laguna Los Portillos.

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

3. By an Order of 8 March 2011 made in that case (hereinafter the "Order of 8 March 2011"), the Court indicated the following provisional measures to both Parties:

> "(1) Each Party shall refrain from sending to, or maintaining in the disputed territory, including the *caño*, any personnel, whether civilian, police or security;
>
> (2) Notwithstanding point (1) above, Costa Rica may dispatch civilian personnel charged with the protection of the environment to the disputed territory, including the *caño*, but only in so far as it is necessary to avoid irreparable prejudice being caused to the part of the wetland where that territory is situated; Costa Rica shall consult with the Secretariat of the Ramsar Convention in regard to these actions, give Nicaragua prior notice of them and use its best endeavours to find common solutions with Nicaragua in this respect;
>
> (3) Each Party shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve;
>
> (4) Each Party shall inform the Court as to its compliance with the above provisional measures." (*Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, pp. 27-28, para. 86.)

4. 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 in the case of a Memorial by Costa Rica and a Counter-Memorial by Nicaragua. The Memorial and the Counter-Memorial were filed within the time-limits thus prescribed.

5. At a meeting held by the President of the Court with the 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 *Costa Rica* v. *Nicaragua* case.

6. By an Application filed with the Registry of the Court on 22 December 2011, Nicaragua instituted proceedings against Costa Rica for "violations of Nicaraguan sovereignty and major environmental damages on its territory", contending, in particular, that Costa Rica was undertaking "major works. . . a few metres from the border area" between the two countries along the San Juan River in the context of the construction of a new road (case concerning the *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)*, hereinafter the "*Nicaragua* v. *Costa Rica* case"). Further, Nicaragua, in its Application, claimed that the new road caused ongoing damage to the river, on a large scale, "by the impetus it inevitably gives to agricultural and industrial activities".

7. By an Order of 23 January 2012, the Court fixed 19 December 2012 and 19 December 2013 as the respective time-limits for the filing of a Memorial by Nicaragua and a Counter-Memorial by Costa Rica in this latter case. The Memorial was filed within the time-limit thus prescribed.

8. At the time of the filing of its Memorial in the *Nicaragua* v. *Costa Rica* case, Nicaragua requested the Court, *inter alia*, to "decide *proprio motu* whether the circumstances of the case require[d] the indication of provisional measures". By letters dated 11 March 2013, the Registrar informed the Parties that the Court was of the view that the circumstances of the case, as they presented themselves to it at that time, were not such as to require the exercise of its power under Article 75 of the Rules of Court to indicate provisional measures *proprio motu*.

9. By two separate Orders dated 17 April 2013, the Court joined the proceedings in the *Costa Rica* v. *Nicaragua* and *Nicaragua* v. *Costa Rica* cases.

10. On 23 May 2013, Costa Rica, with reference to Article 41 of the Statute of the Court and Article 76 of the Rules of Court, filed with the Registry a request for the modification of the Order of 8 March 2011 (see paragraph 3 above). In its written observations thereon, Nicaragua asked the Court to reject Costa Rica's request, while in its turn requesting the Court to modify or adapt the Order of 8 March 2011 on the basis of Article 76 of the Rules of Court.

11. By an Order of 16 July 2013, the Court found that the circumstances, as they then presented themselves to the Court, were not such as to require the exercise of its power to modify the measures indicated in the Order of 8 March 2011. The Court however reaffirmed the provisional measures indicated on 8 March 2011, in particular the requirement that the Parties "shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve".

12. On 24 September 2013, Costa Rica, with reference to Article 41 of the Statute of the Court and Articles 73, 74 and 75 of the Rules of Court, filed with the Registry a Request for the indication of new provisional measures in the *Costa Rica* v. *Nicaragua* case, dated 23 September 2013. Costa Rica specified that it did not seek the modification of the Order of 8 March 2011, but rather that its request was "an independent [one] based on new facts".

13. In its Request, Costa Rica stated that, since the Court's Order of 16 July 2013 on the Parties' requests to modify the measures indicated in its Order of 8 March 2011, it had found out about "new and grave activities by Nicaragua in the disputed territory", through satellite imagery of that area. In particular, Costa Rica contended that Nicaragua had commenced construction of two new artificial *caños* in the disputed territory. Both *caños* were located, according to the Applicant, in the northern part of the disputed territory, the larger of the two being that to the east (hereinafter the "eastern *caño*").

14. Costa Rica further stated in its Request that, following its discovery of these two new *caños*, it had "immediately protested to Nicaragua" by letter dated 16 September 2013. In that letter, it had requested that Nicaragua at once cease all construction activities in the disputed territory, provide an explanation regarding its activities and the presence of Nicaraguan equipment and personnel in the disputed territory, and keep the disputed territory clear of any persons coming from its territory. Costa Rica asserted that Nicaragua, in a letter in reply dated 18 September 2013, had "refused to immediately cease its construction activities", even "going so far as to deny the existence of the new artificial *caños* in the face of incon[tro]vertible evidence in satellite images".

15. At the end of its Request for the indication of new provisional measures, Costa Rica asked the Court:

> "as a matter of urgency to order the following provisional measures so as to prevent further breaches of Costa Rica's territorial integrity and further irreparable harm to the territory in question, pending the determination of [the] case on the merits:
>
> (1) the immediate and unconditional suspension of any work by way of dredging or otherwise in the disputed territory, and specifically the cessation of work of any kind on the two further artificial *caños* in the disputed territory, as shown in the satellite images attached as Attachment PM-8 [to the Request];
>
> (2) that Nicaragua immediately withdraw any personnel, infrastructure (including lodging tents) and equipment (including dredgers) introduced by it, or by any persons under its jurisdiction or coming from its territory, from the disputed territory;
>
> (3) that Costa Rica be permitted to undertake remediation works in the disputed territory on the two new artificial *caños* and the surrounding areas, to the extent necessary to prevent irreparable prejudice being caused to the disputed territory; and
>
> (4) that each Party shall immediately inform the Court as to its compliance with the above provisional measures not later than one week of the issuance of the Order".

Costa Rica added that it "reserve[d] its right to amend [the] Request and the measures sought in light of further information which [might] be received as to Nicaragua's unilateral plans and actions".

16. The Registrar immediately communicated a copy of the said Request to the Government of Nicaragua. The Registrar also notified the Secretary-General of the United Nations of the filing of the Request for the indication of new provisional measures by Costa Rica.

17. At the public hearings held on 14, 15, 16 and 17 October 2013, in accordance with Article 74, paragraph 3, of the Rules of Court, oral observations on the Request for the indication of new provisional measures were presented by:

On behalf of Costa Rica: H.E. Mr. Edgar Ugalde Álvarez, *Agent*,
Mr. Sergio Ugalde, *Co-Agent*,
Mr. Samuel Wordsworth,
Mr. James Crawford,
Mr. Marcelo Kohen.

On behalf of Nicaragua: H.E. Mr. Carlos José Argüello Gómez, *Agent*,
Mr. Paul S. Reichler,
Mr. Stephen C. McCaffrey,
Mr. Alain Pellet.

18. During the hearings, questions were put by some Members of the Court to Nicaragua, to which replies were given orally; Costa Rica availed itself of its right to comment orally on those replies.

19. At the end of its second round of oral observations, Costa Rica asked the Court to indicate provisional measures in the same terms as included in its Request (see paragraph 15 above).

20. At the end of its second round of oral observations, Nicaragua stated the following:

> "In accordance with Article 60 of the Rules of Court and having regard to the Request for the indication of provisional measures of the Republic of Costa Rica and its oral pleadings, the Republic of Nicaragua respectfully submits that,
>
> — for the reasons explained during these hearings and any other reasons the Court might deem appropriate, the Republic of Nicaragua asks the Court to dismiss the Request for provisional measures filed by the Republic of Costa Rica."

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I. Prima facie jurisdiction

21. The Court may indicate provisional measures only if the provisions relied on by the Applicant appear, prima facie, to afford a basis on which its jurisdiction could be founded, but the Court need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case (see, for example, *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 147, para. 40).

22. Costa Rica seeks to found the jurisdiction of the Court in this case on Article XXXI of the American Treaty on Pacific Settlement signed at Bogotá on 30 April 1948. 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 (as 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.

23. The Court recalls that, in its Order of 8 March 2011, it found that "the instruments invoked by Costa Rica appear, prima facie, to afford a basis on which the Court might have jurisdiction to rule on the merits, enabling it to indicate provisional measures if it considers that the circumstances so require" (*Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 18, para. 52). Moreover, the Court notes that, within the time-limit set out in Article 79, paragraph 1, of the Rules of Court, Nicaragua did not raise any objection to the jurisdiction of the Court. In these circumstances, the Court considers that it may entertain the present Request for the indication of new provisional measures.

II. The rights whose protection is sought and the measures requested

24. The power of the Court to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights claimed by the parties in a case, pending its decision on the merits thereof. It follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by it to belong to either party. Therefore, the Court may exercise this power only if it is satisfied that the rights asserted by the requesting party are at least plausible (see, for example, *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 18, para. 53).

25. Moreover, a link must exist between the rights which form the subject of the proceedings before the Court on the merits of the case and the provisional measures being sought (*ibid.*, para. 54).

26. The rights which Costa Rica seeks to protect are the rights it claims to sovereignty over the territory which it refers to as Isla Portillos, to territorial integrity and its right to protect the environment in those areas over which it is sovereign. These rights are at issue because Nicaragua, for its part, contends that it holds the title to sovereignty over the northern part of Isla Portillos, that is to say, the area identified as the "disputed territory" in paragraph 55 of the Court's Order of 8 March 2011.

27. At this stage of the proceedings, the Court does not need to settle the Parties' claims to sovereignty over the disputed territory and is not called upon to determine definitively whether the rights which Costa Rica wishes to see protected exist, or whether those which Nicaragua considers itself to possess exist. For the purposes of considering the present Request for the indication of new provisional measures, the Court need only decide whether the rights claimed by Costa Rica on the merits, and for which it is seeking protection, are plausible.

28. As the Court stated in its Order of 8 March 2011, while "the provisional measures it may indicate would not prejudge any title", it appears "that the title to sovereignty claimed by Costa Rica over the entirety of Isla Portillos is plausible" (*Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 19, para. 58). The Court sees no reason to depart from this conclusion in the context of Costa Rica's present Request. Moreover, to the extent that Costa Rica's claimed title is plausible, the Court considers that any future environmental harm caused in the disputed territory would infringe Costa Rica's alleged territorial rights. The Court therefore finds that the rights for which Costa Rica seeks protection are plausible.

29. The Court now turns to the issue of the link between the rights claimed and the provisional measures requested.

30. The first provisional measure requested by Costa Rica is aimed at ensuring the immediate and unconditional suspension of dredging or other activity, and specifically the cessation of work of any kind on the two new *caños* in the disputed territory. In this regard, Costa Rica has called the Court's attention to the possible effect of the construction of these two *caños* on the disputed territory and on the course of the San Juan River. This construction could affect Costa Rica's rights of sovereignty, as well as environmental rights connected thereto, to be adjudged on the merits. Therefore, a link exists between Costa Rica's claimed rights and the first provisional measure being sought.

31. The second provisional measure requested by Costa Rica is that Nicaragua immediately withdraw from the disputed territory any personnel, infrastructure (including lodging tents) and equipment (including dredgers) introduced by it, or by any persons under its jurisdiction or coming from its territory. In this regard, the Court considers that the presence of Nicaraguan personnel, infrastructure and equipment on the disputed territory would be likely to affect the rights of sovereignty which might be adjudged on the merits to belong to Costa Rica. Therefore, a link exists between Costa Rica's claimed rights of sovereignty and the second provisional measure being sought.

32. The third provisional measure sought by Costa Rica is aimed at ensuring that Costa Rica be permitted to undertake remediation works in the disputed territory on the two new *caños* and the surrounding areas, to the extent necessary to prevent irreparable prejudice being caused to the disputed territory. In the view of the Court, a link exists between Costa Rica's claimed rights of sovereignty over the disputed territory and the third provisional measure sought.

33. The fourth provisional measure requested by Costa Rica is that each Party shall inform the Court as to its compliance with any provisional measures that may be indicated by the Court, not later than one week from the issuance of the Order. This request, which supplements the first three, does not aim to protect Costa Rica's rights but rather seeks to ensure compliance with any provisional measures indicated by the Court. There is therefore no need to establish a link between Costa Rica's claimed rights and the fourth measure sought.

III. Risk of irreparable prejudice and urgency

34. The Court, pursuant to Article 41 of its Statute, has the power to indicate provisional measures when irreparable prejudice could be caused to rights which are the subject of the judicial proceedings (see, for example, *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 21, para. 63).

35. The power of the Court to indicate provisional measures will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to the rights in dispute before the Court has given its final decision (*ibid.*, pp. 21-22, para. 64). The Court must therefore consider whether such a risk exists in these proceedings.

* *

36. Costa Rica states that Nicaragua, through its construction and ongoing dredging of the *caños*, has sought unilaterally to modify, to its own benefit, the location and configuration of the San Juan River. According to Costa Rica these activities of Nicaragua create a real and imminent risk of irreparable prejudice to its rights. In support of its arguments, Costa Rica submitted two expert reports.

In that context, Costa Rica refers, in particular, to a trench on the beach to the north of the eastern *caño*, already visible in an aerial photograph taken on 18 September 2013, arguing that Nicaragua has been intent on artificially cutting across the beach with this trench, thus connecting the eastern *caño* to the Caribbean Sea in an attempt to create a new course for the San Juan River. It submits that, between 18 September 2013 and 5 October 2013, the works on the beach progressed to such an extent that the distance between the end of the trench and the sea was reduced to only seven metres.

Moreover, Costa Rica maintains that, during the same period, a new entrance to the eastern *caño* from the San Juan River was created.

37. Costa Rica argues that, although the dredging operations have been carried out under the direction of an individual, Mr. Pastora, Nicaragua is responsible for these works because Mr. Pastora was working with the National Port Authority and the Nicaraguan military was aware of his activities. According to Costa Rica, Mr. Pastora was appointed by the President of Nicaragua and his activities were approved by the Nicaraguan Ministry of Environmental and Natural Resources. Moreover, Costa Rica adds that Mr. Pastora himself said that he was conducting the operations under the instructions of the Nicaraguan Government.

38. Costa Rica further asserts that the presence of Nicaraguan nationals in the disputed territory, including members of Nicaragua's armed forces, risks causing further irreparable prejudice to Costa Rica's rights which are the subject of the present case. Costa Rica contends that Nicaragua's encampment near the eastern *caño* is a military encampment located in the disputed territory, i.e., in the territory between the right bank of the San Juan River and the Harbor Head Lagoon.

39. Finally, Costa Rica argues that remedial activities are necessary to avoid the risk of a shift in the San Juan River. It maintains that, if the course of the river were altered, it would be extremely difficult, perhaps impossible, to shift it back through civil engineering works, and that any such works would, in any event, be likely to cause environmental damage. It affirms that there is urgency because the rainy season is beginning, during which the river flow will be at its highest, causing erosion and a potential switch in the alignment of the river from its natural course. According to Costa Rica, the works on the eastern *caño* are so advanced that there is a risk of a diversion of the course of the San Juan River. In addition to the risk presented by natural forces, Costa Rica refers to the risk of the San Juan River being diverted if Nicaragua should continue its dredging operations or proceed to enlarge further the trench next to the eastern *caño*.

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40. Nicaragua asserts that the two expert reports provided by Costa Rica both concluded that the course of the San Juan River could be altered only if the digging of the trench were to continue so as to connect the eastern *caño* to the sea. According to Nicaragua, all of Costa Rica's claims concerning irreparable prejudice are predicated on the assumption that the work on the *caños* will continue and result in the breaching of the barrier between the eastern *caño* and the Caribbean Sea. Nicaragua acknowledges that the trench has been dug next to the eastern *caño*, and that it could be extended seawards without significant effort. However, Nicaragua underlines the fact that, pursuant to instructions issued by the President of Nicaragua, Mr. Daniel Ortega, on 21 September 2013, all work on the *caños* and the beach, including work on the trench, has ceased. Although Nicaragua does not deny that dredging activities have occurred prior to this date, it argues that since those activities have now ceased and will not resume, there is no real and imminent risk that irreparable prejudice will be caused to Costa Rica's claimed rights before the Court has given its final decision.

With respect to the new entrance to the eastern *caño* which Costa Rica claims is visible on the image of 5 October 2013, Nicaragua argues that, if such a new entry does exist, it is miniscule and not of a size likely to divert a sufficient flow of the river and to trigger the scouring of the *caño* or carving of a new route to the sea.

Regarding the trench, which appears enlarged on the image of 5 October 2013, Nicaragua argues that the danger claimed by Costa Rica would only become real if the trench were completed.

41. Nicaragua maintains that it did not send Mr. Pastora to the disputed territory or authorize him to conduct dredging there, and that it became aware of his activities only on 18 September 2013. It acknowledges that Mr. Pastora was observed by its military but states that those who observed him may have assumed that he was authorized to be in the area. According to Nicaragua, any responsibility it might have for Mr. Pastora's actions cannot be determined at the provisional measures stage.

42. Referring to the presence of personnel and equipment in the disputed territory, Nicaragua points out that, as soon as it verified that there had been an unauthorized entry into the disputed territory, President Ortega, on 21 September 2013, gave an instruction for the immediate withdrawal of all personnel, infrastructure and equipment, and that all such personnel, infrastructure and equipment were immediately removed in accordance with this instruction. Moreover, Nicaragua argues that it has the right to station troops, or anyone else, on what it describes as a sand bank running along the beach in front of the disputed territory. In response to a question from a Member of the Court, Nicaragua states that it understands the beach north of the two new *caños* to be "the sand bank, or island, that has always been considered part of Nicaraguan undisputed territory".

43. Nicaragua contends that remediation works are not necessary since, even in the absence of any such works, the silting from the San Juan River would find its way into the *caños* and eventually fill them with mud, to the point where they will dry up. Nicaragua states, moreover, that it is willing to fill the trench on the beach back up again, and that this could be completed within a few days.

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44. The Court observes that, since its Order of 16 July 2013 on the requests for the modification of the Order of 8 March 2011 indicating provisional measures (see paragraph 11 above), there has been a change in the situation in the disputed territory. This territory was identified by the Court in its Order of 8 March 2011 as follows: "the northern part of Isla Portillos, that is to say, the area of wetland of some 3 square kilometres between the right bank of the [2011] disputed *caño*, the right bank of the San Juan River up to its mouth at the Caribbean Sea and the Harbor Head Lagoon" (*Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 19, para. 55). The evidence submitted to the Court shows that two new *caños* have been built in that territory. The satellite images submitted by Costa Rica demonstrate that while, on

30 June 2013, there was no evidence of the existence of any *caños* in the northern part of the disputed territory, on 5 September 2013, two new *caños* were clearly visible. Furthermore, the photograph of 18 September 2013 presented by Costa Rica depicts a shallow trench which begins at the seaward end of the eastern *caño*. It is apparent from the satellite image of 5 October 2013 that this trench has been extended and currently cuts across the beach, with only a narrow stretch of sand separating it from the sea. Nicaragua furthermore recognizes the existence of the two new *caños* and the trench, although it states that all work relating to these features stopped following President Ortega's instructions of 21 September 2013.

45. Nicaragua admits that the dredging operations for the construction of the *caños* were carried out by a group of its nationals led by Mr. Pastora, in the context of the implementation of a project for the improvement of navigation on the San Juan River. This project, which, according to the Report of the National Port Authority, was designed "to guarantee the natural flow of the San Juan River into the river mouth Delta", included the "use of a suction dredger". It was approved by the Nicaraguan Ministry of Environmental and Natural Resources. Mr. Pastora was appointed by the President of Nicaragua to carry out this project and was addressed by the National Port Authority as "Government Delegate for Dredging Works".

46. The Court further notes that the evidence submitted to it establishes the presence in the disputed territory of Nicaraguan personnel carrying out dredging operations, as well as infrastructure (including lodging tents), and equipment (including dredgers). In addition, the Court notes that the presence of a Nicaraguan army encampment on the beach is visible on a photograph dated 5 February 2013; thus, at least since that date, Nicaraguan military personnel have been stationed there. Nicaragua acknowledges the presence of its military encampment on the beach north of the two new *caños* which it understands to be a sand bank (see paragraph 42 above). The Court considers however that, contrary to what Nicaragua alleges, this encampment is located on the beach and close to the line of vegetation, and is therefore situated in the disputed territory as defined by the Court in its Order of 8 March 2011 (see paragraph 44 above). The ongoing presence of this encampment is confirmed by the satellite images of 5 and 14 September 2013 and the photograph of 18 September 2013.

47. With regard to the presence, in the disputed territory, of Nicaraguan nationals, other than those referred to in operative paragraph 1 of its Order of 8 March 2011 (see paragraph 3 above), the Court has already expressed its concerns in this respect in its Order of 16 July 2013. In particular, the Court referred to members of the *Guardabarranco Environmental Movement*, an entity which Nicaragua describes as a private movement whose main objective is to implement environmental conservation programmes and projects. The Court considered that their presence carried the risk of incidents which could aggravate the dispute, given that the situation may be exacerbated by the limited size of the area and the numbers of Nicaraguan nationals who were regularly present there (Order of 16 July 2013, para. 37). The continuing access of the members of the *Guardabarranco* to the disputed territory is referred to, in particular, in a Diplomatic Note addressed on 16 September 2013 by the Costa Rican Minister for Foreign Affairs to his Nicaraguan counterpart.

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48. The Court now turns to the question of whether the situation in the disputed territory, and in particular, the *caños* and the trench as they currently stand, pose a risk of irreparable prejudice to the rights claimed by Costa Rica.

49. It observes that, while the two expert reports provided by Costa Rica and prepared in October 2013 concluded that the course of the San Juan River could be altered only if the digging of the trench next to the eastern *caño* were to continue, that assessment was made on the basis of information regarding the trench as shown on the satellite images taken on 5 and 14 September 2013 and in the photograph taken on 18 September 2013. However, in view of the length, breadth and position of that trench, as visible on the satellite image of 5 October 2013, the Court considers that there is a real risk that the trench could reach the sea either as a result of natural elements or by human actions, or a combination of both. Such an outcome would have the effect of connecting the San Juan River with the Caribbean Sea through the eastern *caño*. Given the evidence before it, the Court is satisfied that an alteration of the course of the San Juan River could ensue, with serious consequences for the rights claimed by Costa Rica. The Court is therefore of the opinion that the situation in the disputed territory reveals the existence of a real risk of irreparable prejudice to the rights claimed by the Applicant in this case.

50. The Court moreover considers that there is urgency. The risk of irreparable prejudice as identified in the previous paragraph is not only real but also appears to be imminent, for the following reasons. First, during the rainy season, the increased flow of water in the San Juan River and consequently in the eastern *caño* could extend the trench and connect it with the sea, thereby potentially creating a new course for the San Juan River. Secondly, the trench could also easily be connected to the sea, with minimum effort and equipment, by persons accessing this area from Nicaraguan territory. Thirdly, a Nicaraguan military encampment is located only metres away from the trench, in an area that Nicaragua regards as lying outside the disputed territory. Fourthly, in response to a question from a Member of the Court regarding the location of equipment used in the construction of the *caños*, Nicaragua advised the Court of the location of the dredgers, but did not rule out the presence in the disputed territory of other equipment that could be used to extend the trench. In this regard, the Court takes note of the instructions given on 21 September 2013 by the President of Nicaragua to the Executive President of the National Port Authority to "immediately cease the cleansing works in the Delta area" and to "withdraw the personnel and machinery" in the disputed territory. The Court further takes note of the assurances of Nicaragua, as formulated by its Agent at the hearings in response to a question put by a Member of the Court, that it considers itself bound not to undertake activities likely to connect any of the two *caños* with the sea and to prevent any person or group of persons from doing so. However, the Court is not convinced that these instructions and assurances remove the imminent risk of irreparable prejudice, since, as Nicaragua recognized, persons under its jurisdiction have engaged in activities in the disputed territory, namely the construction of the two new *caños*, which are inconsistent with the Court's Order of 8 March 2011.

IV. Measures to be adopted

51. The Court concludes from the foregoing that, in view of the circumstances, and given that all the conditions required by its Statute for it to indicate provisional measures have been met, it ought to indicate such measures to address the new situation prevailing in the disputed territory. These measures will supplement those already in force under the Order of 8 March 2011.

52. The Court recalls that it has the power, under its Statute, when a request for provisional measures has been made, to indicate measures that are in whole or in part other than those requested. Article 75, paragraph 2, of the Rules of Court specifically refers to this power of the Court. The Court has already exercised this power on several occasions in the past (see, for example, *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning* the Temple of Preah Vihear (Cambodia *v.* Thailand) *(Cambodia* v. *Thailand), Provisional Measures, Order of 18 July 2011, I.C.J. Reports 2011 (II)*, p. 551, para. 58). In the present case, having considered the terms of the provisional measures requested by Costa Rica, the Court finds that the measures to be indicated need not be identical to those requested.

53. The Court is of the opinion that the filling of the trench next to the eastern *caño* must be carried out immediately. In light of the circumstances of the case and in particular of the fact that the digging of the trench was carried out by Nicaragua's personnel, it is for Nicaragua now to fill it, notwithstanding point 1 of paragraph 86 of the Court's Order of 8 March 2011. Nicaragua shall do so within two weeks of the date of the present Order. It shall immediately inform the Court of the completion of the filling of the trench and shall submit to it, within one week of said completion, a report containing all necessary details, including photographic evidence.

54. With regard to the two new *caños*, the Court recalls that they are situated in the disputed territory in the "Humedal Caribe Noreste" wetland in respect of which Costa Rica bears obligations under the Ramsar Convention. Therefore, pending delivery of the Judgment on the merits, Costa Rica shall consult with the Secretariat of the Ramsar Convention for an evaluation of the environmental situation created by the construction of the two new *caños*. Taking into account any expert input from the Secretariat, Costa Rica may take appropriate measures related to the new *caños*, to the extent necessary to prevent irreparable prejudice to the environment of the disputed territory. In taking these measures, Costa Rica shall avoid any adverse effects on the San Juan River. Costa Rica shall give Nicaragua prior notice of any such measures.

55. With regard to the presence of Nicaraguan personnel, infrastructure and equipment on the disputed territory, the Court recalls that, in its Order of 8 March 2011, it indicated a first provisional measure, according to which, "[e]ach Party shall refrain from sending to, or maintaining in the disputed territory . . . any personnel, whether civilian, police or security" (*Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 27, para. 86, point 1). The Court now considers that, in view of its above findings with regard to the presence in the disputed territory of the personnel carrying out the dredging operations and the Nicaraguan army

encampment, the provisional measure indicated in its Order of 8 March 2011 must be reinforced and supplemented. Therefore, the Court considers that Nicaragua, after having filled the trench on the beach, shall (i) cause the removal from the disputed territory of any personnel, whether civilian, police or security; and (ii) prevent any such personnel from entering the disputed territory.

56. With regard to the presence in the disputed territory of private persons under Nicaragua's jurisdiction or control, the Court has already expressed its concern in this respect in its Order of 16 July 2013 (Order of 16 July 2013, para. 37). In view of the continuing access of the members of the *Guardabarranco Environmental Movement* to the disputed territory (see paragraph 47 above), the Court considers that Nicaragua shall cause the removal from and prevent the entrance into the disputed territory of any private persons under its jurisdiction or control.

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57. The Court reiterates that its "orders on provisional measures under Article 41 [of the Statute] have binding effect" (*LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 506, para. 109) and thus create international legal obligations with which both Parties are required to comply (see, for example, *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, pp. 26-27, para. 84). It further recalls that the question of compliance with provisional measures indicated in a case may be considered by the Court in the principal proceedings (see *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)*, Counter-Claims, Order of 18 April 2013, para. 40).

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58. The decision given in the present proceedings in no way prejudges any questions relating to the merits or any other issues to be decided at that stage. It leaves unaffected the right of the Governments of Costa Rica and Nicaragua to submit arguments in respect of those questions.

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59. For these reasons,

THE COURT,

(1) Unanimously,

Reaffirms the provisional measures indicated in its Order of 8 March 2011;

(2) *Indicates* the following provisional measures:

(A) Unanimously,

Nicaragua shall refrain from any dredging and other activities in the disputed territory, and shall, in particular, refrain from work of any kind on the two new *caños*;

(B) Unanimously,

Notwithstanding the provisions of point 2 (A) above and paragraph 86 (1) of the Order of 8 March 2011, Nicaragua shall fill the trench on the beach north of the eastern *caño* within two weeks from the date of the present Order; it shall immediately inform the Court of the completion of the filling of the trench and, within one week from the said completion, shall submit to it a report containing all necessary details, including photographic evidence;

(C) Unanimously,

Except as needed for implementing the obligation under point 2 (B) above, Nicaragua shall (i) cause the removal from the disputed territory of any personnel, whether civilian, police or security; and (ii) prevent any such personnel from entering the disputed territory;

(D) Unanimously,

Nicaragua shall cause the removal from and prevent the entrance into the disputed territory of any private persons under its jurisdiction or control;

(E) By fifteen votes to one,

Following consultation with the Secretariat of the Ramsar Convention and after giving Nicaragua prior notice, Costa Rica may take appropriate measures related to the two new *caños*, to the extent necessary to prevent irreparable prejudice to the environment of the disputed territory; in taking these measures, Costa Rica shall avoid any adverse effects on the San Juan River;

IN FAVOUR: *President* Tomka; *Vice-President* Sepúlveda-Amor; *Judges* Owada, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari; *Judge* ad hoc Dugard;

AGAINST: *Judge* ad hoc Guillaume;

(3) Unanimously,

Decides that the Parties shall regularly inform the Court, at three-month intervals, as to the compliance with the above provisional measures.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-second day of November, 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 of the Court; Judges *ad hoc* GUILLAUME and DUGARD append declarations to the Order of the Court.

(Initialled) P. T.

(Initialled) Ph. C.

SEPARATE OPINION OF JUDGE CANÇADO TRINDADE

TABLE OF CONTENTS

I. INTRODUCTION

1. In its previous Order, of 16.07.2013, in the present case opposing Costa Rica to Nicaragua, in which the International Court of Justice [ICJ] refrained from indicating new provisional measures of protection, I presented a Dissenting Opinion expressing the foundations of my personal position on the matter; today, 22.11.2013, as the Court has now decided to order new provisional measures of protection in the case concerning *Certain Activities Carried out by Nicaragua in the Border Area*, I have concurred with my vote to the adoption of the present Order. As there are still a couple of points which appear to me deserving of closer attention, I feel thus obliged to leave on the records the reflections which form the present Separate Opinion, wherein I care — under the merciless pressure of time — to address those points and to lay the foundation of my personal position thereon.

2. To start with, I deem it appropriate to extract, from the corresponding *dossier* of the present case, the submissions of the parties which seem to me particularly pertinent for the consideration of the new factual situation brought to the attention of the Court. I shall then move onto the juridico-epistemological level, so as to focus on the questions of the configuration of the autonomous legal regime (as I perceive and conceive it) of Provisional Measures of Protection. In doing so, I shall address the task of international tribunals, and a reassuring jurisprudential construction (2000-2013). I shall, in sequence, overview the on-going construction of an autonomous legal regime of provisional measures of protection. The way will then be paved for the presentation of my final considerations on the matter.

II. Submissions of the Parties in the Course of the Present Proceedings

1. Submissions in the Written Phase

3. May I start at the factual level. In its new *Request for Provisional Measures* lodged with the Court on 24.09.2013, Costa Rica stated that this new Request was "an independent request based on new facts" (para. 4). After invoking its rights to territorial sovereignty and integrity, and to non-interference with its land and environmentally-protected areas (paras. 21-22), Costa Rica asked the Court for four provisional measures, transcribed in paragraph 15 of the present Order. The *next* facts brought to the Court's attention in the present Request for new provisional measures in the *cas d'espèce* concerning *Certain Activities Carried out by Nicaragua in the Border Area*, are in fact, all of them, subsequent to the Court's previous Orders in the present case (of 08.03.2011 and 16.07.2013), and pertain to the construction of two "*caños*", and the existence of a Nicaraguan military encampment, allegedly in the "disputed territory".

4. Costa Rica argued that the new dredging and dumping activities allegedly conducted by Nicaragua were affecting the disputed territory and its ecology (paras. 1 and 10-11). For its part, in a *Diplomatic Note* of 18.09.2013, Nicaragua opposed those contentions, arguing that, in its previous Order of 16.07.2013, the ICJ determined that the provisional measures previously indicated (on 08.03.2011) could not be modified, as Costa Rica had not demonstrated urgency nor risk of irreparable harm (pp. 1-2).

5. The present proceedings concerning *Certain Activities Carried out by Nicaragua in the Border Area* have demonstrated the importance of holding public sittings of the ICJ, in the matter of provisional measures, for the clarification of a given factual situation. After all, to the effect of the adoption of its Orders on such matters, the ICJ gathers *prima facie* — rather than substantial — evidence (*summaria cognitio*), and then renders a *binding* decision, as its provisional measures are endowed with a conventional basis (Article 41 of its Statute).

2. First Round of Oral Arguments

6. It was, in effect, in the oral proceedings (rather than in the written phase) that the two contending parties found the occasion to present to the ICJ their submissions in a more elaborate way. The public hearings of 14-17 October 2013 were in my view essential for the clarification of the position of the parties as to the newly requested provisional measures of protection lodged with the Court. I shall next review such submissions, and then proceed to a general assessment of them.

7. In the first round of oral arguments, Costa Rica argued that, despite the provisional measures of protection indicated by the Court in its Order of 08.03.2011[1], and its concerns expressed in its Order of 16.07.2013, "Nicaragua continues to send groups of Nicaraguan nationals to the disputed area", and, furthermore, "it is engaged in the construction of two new *caños* in the northern part of Isla Portillos", with a "real risk" of creating "a fait accompli involving irreparable

[1] ICJ, *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica *versus* Nicaragua), Provisional Measures, Order of 08.03.2011, *I.C.J. Reports* (2011) p. 6.

damage", before the case is finally settled by the ICJ[2]. There has thus been, — Costa Rica proceeded, — an "egregious breach" of the provisional measures[3]. Costa Rica then stated that

> "Since that time, work on the Pastora first *caño* has been continued, including by more than 10,000 Sandinista youth who have been officially brought to the area to further Nicaragua's policies. (...) Nicaraguan personnel have been in the disputed territory carrying out dredging and other works, as late as 18 September 2013"[4].

8. After the Court's Order of 08.03.2011, — Costa Rica proceeded, — Nicaragua "changed the existing situation by occupying the territory", and continuing "to send government personnel and, in particular, the head of the works, Commander Pastora, as well as numerous contingents of Nicaraguans who, by the Respondent's own admission, are engaging in so-called 'environmental' activities"[5]. In Costa Rica's perception, "Nicaragua has resorted to a piece of 'sophistry'", namely, that the provisional measures ordered by the ICJ "prevented Nicaraguan personnel, but not citizens, from entering the disputed territory and planting trees"[6]. And Costa Rica added that

> "(...) Nicaragua has undertaken action on that territory on a major scale, with dredgers and chainsaws, which it has taken several weeks to carry out. It is thus not sufficient to remind the Parties of the existing obligation not to send personnel, but it is necessary to order a measure requiring the cessation of all canalization, dredging or other works in the disputed territory, and that no further works should be carried out in the future. It also requires that Nicaragua be ordered to dismantle all infrastructure on the territory and to refrain from introducing any more *pendente lite*. The same applies to the equipment used to carry out the works of canalization. (...) [T]he provisional measures of 2011 are incapable of preventing canalization or other works being continued or resumed"[7].

9. Nicaragua retorted that Costa Rica also violated the Court's Order "by overflights and visits to the disputed area" without fulfilling its requirements, and by the construction of the road "running along 160 km of the border of Nicaragua and Costa Rica and along the margin of the greater part of the San Juan River (...) without any environmental impact assessment and without any notice to Nicaragua"[8]. Nicaragua then denied that 10,000 members of the *Guardabarranco* group had been in the territory in dispute, as alleged by Costa Rica; there were only "small groups of youngsters" visiting "the place for a short period of time"; they "have not performed any work on the *caño*", and they caused no damages to the disputed territory[9].

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[2]ICJ, doc. CR 2013/24, p. 14, para. 8.

[3]Costa Rica added that, moreover, Nicaragua announced, "at the very last moment", that "it had withdrawn from the disputed territory, though without admitting it had ever been there (...) in the first place" ICJ, doc. CR 2013/24, p. 34, para. 1.

[4]ICJ, doc. CR 2013/24, p. 36, para. 7, and cf. p. 44, para. 32.

[5]ICJ, doc. CR 2013/24, p. 54, para. 24.

[6]ICJ, doc. CR 2013/24, pp. 59-60, para. 37.

[7]ICJ, doc. CR 2013/24, pp. 55-56, paras. 28-29.

[8]ICJ, doc. CR 2013/25, pp. 9-10, paras. 6-7.

[9]ICJ, doc. CR 2013/25, pp. 12-13, paras. 20-22.

10. Nicaragua then added that Mr. E. Pastora "was wrong" in claiming (in a television interview in a news programme) that his works of "clearing or constructing *caños*" at the mouth of the San Juan River were conducted "in areas not covered by the Court's Order"[10]. Nicaragua observed that it "had not authorized any dredging or *caño* clearing activities in the disputed area", to comply "fully" with the Court's Order of 08.03.2011. And Nicaragua added:

> "Mr. Pastora himself knew that this was Nicaragua's policy. In the television interview (...) he insisted repeatedly that his actions were consistent with the Court's Order, as he understood it. Of course, he was wrong; and this does not exonerate Nicaragua of responsibility for his behaviour. Nicaragua has never said otherwise. But it does explain what happened. (...) There was no intention by Nicaragua to change the natural course of the San Juan River. What happened was that Mr. Pastora exceeded his mandate, and engaged in activities in the disputed area because he had an erroneous understanding of the Court's Order, specifically in regard to what constituted the disputed area, which was different from Nicaragua's understanding, and which Nicaragua did not appreciate, until 18 September [2013]. Since that date, when it learned of his activities, Nicaragua has not denied that they occurred or that they were inconsistent with the Court's Order. To the contrary, what Nicaragua contends, what it has consistently contended, is that it did not instructor intend for Mr. Pastora to conduct any activities in the disputed area. They were the result of a misunderstanding, not a conspiracy"[11].

11. Nicaragua further added that it had not intended to send Mr. E. Pastora "into the disputed area", but only "to clean up the river and the channels in Nicaragua's undisputed waters. It accepts responsibility for his mistaken and unauthorized actions in the disputed area, and has taken concrete steps to prevent their recurrence"[12]. Yet, — it went on, — the problem now raised before the ICJ is not whether Nicaragua is responsible for the acts *ultra vires* of Mr. E. Pastora; it is a distinct one[13].

3. Second Round of Oral Arguments

12. In the second round of oral arguments, Costa Rica began by stating that "Mr. Pastora and the National Port Authority were organs of the Nicaraguan State", with "actual authority" (at least until 22.09.2013) "to carry out the works in the disputed territory"[14]. Costa Rica stressed that "[t]he only evidence on the record is the specific authorization for Mr. Pastora and the National Port Authority to carry out the project for the 'Improvement of Navigation on the San Juan de Nicaragua River'. We heard nothing about *ultra vires* action on the previous Request"[15]. Costa Rica then added that

> "Nicaragua now finally accepts that its personnel were constructing and dredging the *caños* (...), its personnel have entered the disputed territory in breach of [the Court's] Order and carried out activities there. It finally accepts that its army, camped in close

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[10]In its clarification, it was "plain to Nicaragua from Mr. Pastora's indication of the location of his activities that they were inside the disputed territory, as defined in the Order"; ICJ, doc. CR 2013/25, p. 22, para. 17.

[11]ICJ, doc. CR 2013/25, pp. 22-23, paras. 20-21.

[12]ICJ, doc. CR 2013/25, pp. 28-29, paras. 42-43.

[13]ICJ, doc. CR 2013/25, pp. 50-51, paras. 21-22.

[14]Costa Rica added that, following the Court's Order of 08.03.2011, "they were never prohibited from doing so by any Nicaraguan instruction in evidence"; ICJ, doc. CR 2013/26, p. 12, para. 12.

[15]ICJ, doc. CR 2013/26, p. 12, para. 13.

> and convenient proximity to the lagoon at the end of the eastern *caño*, must have known of it. It accepts that it is responsible for the acts of Mr. Pastora, its Government Delegate, and it is responsible for the acts of its government department, the National Port Authority. These reluctant concessions can hardly be considered timely: they finally came yesterday, 36 days after we wrote to protest, 36 days after we provided the co-ordinates of the new *caños.* But Nicaragua has still not admitted that its Mr. Pastora, his dredgers and the National Port Authority personnel were authorized to go there in the first place. (...) [T]hey had ostensible authority to do so, and there is nothing in the evidentiary record to suggest otherwise"[16].

13. Moreover, Costa Rica retorted that "the construction of the new *caños*" could not be portrayed as a "simple blunder". It insisted on its argument pertaining to the presence of "the Sandinista youths" in the "disputed area", stating that there was evidence to this effect. Thus, its Note to Nicaragua of 16.09.2013 "not only protested the construction of new *caños*, but it pointed out that the Nicaraguan media reported on 9 September that some 10,000 youths had already visited the area"[17]. Costa Rica further stated that "Nicaragua admitted that it has breached the 2011 Order"; yet, it has provided "no evidence (...) about the present state of the *caño*, its depth, its carrying capacity, its length"[18]. To Costa Rica,

> "Nicaragua's belated explanations (...) do not provide sufficient protection of Costa Rica's rights. (...) Yesterday Nicaragua told [the ICJ] that it had breached [its] 2011 Order; (...) the measures Costa Rica requests are urgently needed to prevent irreparable prejudice to its rights. (...) Costa Rica merely asks the Court to exercise its power to preserve and protect Costa Rica's rights; rights which are at imminent risk of being irreparably harmed"[19].

14. For its part, Nicaragua, at the second round of oral arguments, began by stating that "Mr. Pastora did what he did, and Nicaragua does not deny responsibility for his actions. (...) The evidence shows that Nicaragua did not 'send' Mr. Pastora to the disputed area, or 'maintain' him there, as prohibited by the first operative paragraph of the Court's March 2011 Order"[20]. And Nicaragua added that

> "It is notable that Costa Rica's Request for New Provisional Measures does not complain about the presence of this military camp, which is in plain sight. (...) This is offered as evidence that a crew of workmen was clearing *caños* in the wetland, not that Nicaragua is unlawfully (...) maintaining a small military camp on the beach. There is no mention of the military camp anywhere in Costa Rica's Request"[21].

15. As to the works carried out under the direction of Mr. E. Pastora, — which Costa Rica alleges were undertaken in the "territoire contesté", — Nicaragua argues that, in requesting "le retrait du petit détachement nicaraguayen stationné sur la rive gauche, le Costa Rica modifie la définition même du 'territoire contesté' (...). (...) [C]eci constitue une prétention nouvelle qui ne saurait être formulée à ce stade: c'est la requête qui fixe les contours de l'affaire (...). Le

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[16]ICJ, doc. CR 2013/26, pp. 20-21, para. 43, and cf. paras. 40 and 46.

[17]ICJ, doc. CR 2013/26, p. 22, para. 47.

[18]ICJ, doc. CR 2013/26, p. 22**,** para. 48.

[19]ICJ, doc. CR 2013/26, p. 34, para. 3.

[20]ICJ, doc. CR 2013/27, p. 13, para. 22.

[21]ICJ, doc. CR 2013/27, p. 17, para. 36.

Costa Rica ne peut aujourd'hui s'en dédire pour élargir la portée de sa requête en redéfinissant subrepticement son champ d'application territoriale"[22]. Yet, it conceded that

> "le Nicaragua était 'peut-être' responsable des actions de M. Pastora. (...) [M]ême s'il n'est pas ministre mais seulement assimilé à un directeur d'administration centrale, M. Pastora exerce des fonctions officielles; — les travaux effectués sur les canaux (...) sont, sans aucun doute, incompatibles avec les indications de votre ordonnance de 2011; et — ces mesures (...) sont juridiquement obligatoires pour les Parties" (ICJ, doc. CR 2013/27, p. 33, para. 18).

4. General Assessment

16. The point which was object of most submissions of the parties (*supra*) during the oral hearings of 14-17 October 2013 was the dredging and dumping works undertaken, allegedly by Nicaragua, after June 2013, in the construction of the two "*caños*" in the disputed area. In its own assessment, the Court found, in the present Order, that, in the new situation thus created in the "disputed territory", the requisites of urgency and real and imminent risk of "irreparable prejudice" are present therein (paras. 49-50), requiring from it new Provisional Measures of Protection.

17. The dredging operations for the construction of the two "*caños*", the Court added, — "were carried out by a group of [Nicaraguan] nationals led by Mr. Pastora", who was officially appointed "to carry out this project" (para. 45). In carrying out such construction and the digging of the trench, they have caused "a change in the situation in the disputed territory", after its recent Order of 16.07.2013 (para. 44). The Court then decided to indicate the new Provisional Measures contained in the Order it has just adopted today, 22.11.2013.

18. As to the other point which was object of submissions of the parties, concerning the Nicaraguan military encampment in the area, it appears from the arguments of the parties during the oral hearings held in October 2013[23], and from the complementing evidence which the Parties submitted to the Court (photographs and satellite images), that a Nicaraguan military encampment indeed exists in the region, and after the Court's previous Order of 08.03.2011. As to its location, the contending parties submitted arguments as to its presence within "disputed territory"[24], as defined by the Court's Order of 08.03.2011[25].

19. The evidence submitted to the Court, however, led to its finding that the military encampment is indeed located within the "disputed territory", as the Court has concluded in the present Order (para. 46); the Court added that the "ongoing presence of this encampment" is confirmed by recent satellite images and photograph (para. 46). Recalling, in this respect, that the previous Order of 08.03.2011 determined that the Parties ought to "refrain from sending to, or maintaining in the disputed territory, including the *caño*, any personnel, whether civilian, police or

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[22]ICJ, doc. CR 2013/27, p. 31, para. 13.

[23]Cf., e.g., ICJ, doc. CR 2013/26, pp. 19-20, paras. 35-39 (Costa Rica); doc. CR 2013/25, p. 29, paras. 43-44 (Nicaragua), and doc. CR 2013/27, pp. 16-17, paras. 35-37 (Nicaragua).

[24]The Court defined the "disputed territory" as "the northern part of Isla Portillos, that is to say, the area of wetland of some 3 square kilometres between the right bank of the disputed *caño*, the right bank of the San Juan River up to its mouth at the Caribbean Sea and the Harbor Head Lagoon" (para. 55).

[25]While Costa Rica claimed that the encampment is within the "disputed territory" as defined by the Court, Nicaragua contended that Costa Rica did not complain about the camps until the first day of the hearings, and that, in any event, the encampment is not located within the "disputed territory" as defined by the Court. Cf., e.g., doc. CR 2013/25, p. 29, paras. 43-44, and cf. also doc. CR 2013/27, pp. 16-17, paras. 35-37.

security" (para. 86(1)), it has become undisputable that the presence of the Nicaraguan military encampment in the disputed territory, after the Order of 08.03.2011, is in clear breach of that Order.

III. THE CONFIGURATION OF THE AUTONOMOUS LEGAL REGIME OF PROVISIONAL MEASURES OF PROTECTION

1 The Task of International Tribunals

20. The new facts of the present case (*supra*) bring to the fore, in a prominent way, the issue of the necessary *compliance* with Provisional Measures of Protection. This issue can be properly addressed, in my understanding, within the framework of what I behold as the *autonomous* legal regime of those measures. To embark on this task, I move from the factual context onto my considerations at the juridico-epistemological level. Preliminarily, I deem it fit to point out that, it has been in the era of contemporary international tribunals that Provisional Measures of Protection have seen the light of day, and have flourished, in international legal procedure.

21. It was indeed with the advent of international tribunals that the conditions were met to move ahead with provisional measures, in the pursuit of the realization of justice, to the benefit of the *justiciables* in distinct domains of international law. In the historical trajectory of international tribunals, there are antecedents disclosing that, even at an early stage, one purported to ascribe *obligatory* character to provisional measures indicated or ordered by them. This is pointed out, for example, in a pioneering study on the matter by Paul Guggenheim, given to the public in 1931[26]. Yet, progress in this respect has been very slow: for example, it has taken more than half a century for the ICJ to reach the obvious conclusion, in 2001, that provisional measures are, under its Statute[27], binding.

22. Yet, since the beginning of the evolution of Provisional Measures of Protection in international legal procedure, the issue of compliance with them was already present, but was not sufficiently studied and cultivated, and, after several decades, there still remains nowadays much to be studied and cultivated in this matter. Already in the days of the Permanent Court of International Justice (PCIJ), there were indications that provisional measures were meant to be obligatory, in particular those ordered by the PCIJ and other international tribunals (such as the old Central American Court of Justice)[28]; already in the era of the League of Nations, those measures were meant to have *legal effects*[29].

23. In his early study, P. Guggenheim lucidly drew attention to the importance of Provisional Measures of Protection, ultimately, to the progressive development of international law itself[30]. Writing in 1931, the learned author warned that one of the points to be solved in the future, was *to*

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[26]Cf. P. Guggenheim, *Les mesures provisoires de procédure internationale et leur influence sur le développement du droit des gens*, Paris, Rec. Sirey, 1931, p. 177.

[27]I.e., endowed with a conventional basis (Article 41).

[28]Cf., in this sense, P. Guggenheim, *op. cit. supra* n. (26), pp. 24-25, 71-72, 177 and 187, and cf. p. 33.

[29]*Ibid*., p. 58.

[30]Cf. *ibid*., pp. 195-196.

secure compliance with, and the faithful execution of, those provisional measures[31]. And the learned author added, with insight, as to the consequences of breach of provisional measures, that

> "Tôt ou tard, la jurisprudence de la Cour Permanente de Justice Internationale ou des tribunaux compétents réussira certainement à faire admettre que l'inexécution des mesures provisoires ordonnées par ces juridictions, en raison du dommage causé (avec ou sans la faute de l'auteur), a pour effet juridique d'ouvrir un droit à la réparation du dommage. (...)
>
> (...) [I]l ne semble guère possible de substituer à la responsabilité qui incombe en dernier lieu à ces membres [de la communauté internationale elle-même] des mesures provisoires des organes collectifs institués par eux. Néanmoins, les grandes décisions 'définitives' de la vie internationale — qu'elles soient d'ordre politique ou d'ordre juridique — ont, elles aussi, en fin de compte, un caractère provisoire, conformément à l'adage, d'une si profonde vérité : 'Il n'y a que le provisoire qui dure'"[32] .

24. As I pointed out almost one decade ago, the gradual conceptualization of the *autonomous* international responsibility in respect of Provisional Measures of Protection owes much to the expansion of those measures at international level in our times, calling for the configuration of a legal regime of their own[33], thanks to the operation of contemporary international tribunals. In our days, there is indeed a growing attention to the importance of Provisional Measures of Protection in expert writing[34], but advances in case-law remain rather slow, as international tribunals have not yet elaborated on their *autonomous legal regime*, nor have they so far extracted the legal consequences of non-compliance with those measures. But at least the issue has been identified for forthcoming developments, hopefully.

2. A Reassuring Jurisprudential Construction (2000-2013)

25. And there have, however, been some endeavours clearly to this effect. Within the ICJ, for example, in my Dissenting Opinion in the Court's Order (of 28.05.2009) in the case of *Questions Relating to the Obligation to Prosecute or Extradite* (Belgium *versus* Senegal), in which the Court refrained from indicating the requested provisional measures of protection, I deemed it fit to examine, *inter alia*, the transposition of such measures from legal proceedings in comparative domestic procedural law onto the international legal procedure (paras. 5-7) and their juridical nature and effects (paras. 8-13). I then drew attention to the relevance of *compliance* with provisional measures of protection, which has "a direct bearing upon the rights invoked by the contending parties" (para. 14).

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[31] As "le droit international, de nos jours, ne dispose pas encore, le plus souvent, de moyens propres pour assurer l'exécution de ses ordres ou pour contrôler du moins l'exécution des ordonnances de ses organes collectifs"; *ibid*., p. 175, and cf. p. 59.

[32] *Ibid*., pp. 197-198.

[33] Cf. A.A. Cançado Trindade, "Les Mesures provisoires de protection dans la jurisprudence de la Cour Interaméricaine des Droits de l'Homme", *in Mesures conservatoires et droits fondamentaux* (eds. G. Cohen Jonathan and J.-F. Flauss), Brussels, Bruylant/Nemesis, 2005, pp. 145-163.

[34] Cf., *inter alia*, e.g., [Various Authors,] *Le contentieux de l'urgence et l'urgence dans le contentieux devant les juridictions internationales: regards croisés* (eds. H. Ruiz Fabri and J.-M. Sorel), Paris, Pédone, 2003, pp. 7-180 and 205 210; A.A. Cançado Trindade, "La Expansión y la Consolidación de las Medidas Provisionales de Protección en la Jurisdicción Internacional Contemporánea", *in Retos de la Jurisdicción Internacional* (eds. S. Sanz Caballero and R. Abril Stoffels), Cizur Menor (Navarra), Civitas/Thomson Reuters, 2012, pp. 99-117; T. Treves, "Mesures conservatoires et obligations environnementales — Tribunal International du Droit de la Mer et Cour Internationale de Justice", *in ibid.*, pp. 119-137; and cf., for a general study, Eva Rieter, *Preventing Irreparable Harm — Provisional Measures in International Human Rights Adjudication*, Maastricht, Intersentia, 2010, pp. 3-1109.

26. In reality, depending on the rights which are at stake, provisional measures may assume a character, more than precautionary, truly *tutelary*, directly related, as they are, to the realization of justice itself. In that same Dissenting Opinion I pondered that, this being so, provisional measures of protection, "with their preventive dimension, can indeed contribute to the development of international law" (para. 94). For that to happen, there remains a long way to go, in the refinement of their autonomous legal regime, as I have further pointed out on earlier occasions.

27. It is necessary, to start with, to bear in mind the advances already achieved in international case-law in this respect. One decade ago, in 2000, I had the occasion, in another international jurisdiction, to dwell upon the *legal nature* of provisional measures of protection[35]. Half a decade later the time seemed ripe, on the basis of the experience accumulated on the matter, to dwell upon the *autonomous legal regime* of those measures[36]. Thus, in the case of the *Community of Peace of San José of Apartadó* (Resolution of 02.02.2006), I stated that

> "Provisional Measures of Protection bring about obligations for the States at issue, which are distinguished from the obligations which emanate from the respective Judgments as to the merits of the respective cases. There are effectively obligations emanated from Provisional Measures of Protection *per se*. They are entirely distinct from the obligations which eventually ensue from a Judgment as to the merits (and also, reparations) on the *cas d'espèce*. This means that Provisional Measures of Protection constitute a juridical institute endowed with an *autonomy* of its own, what, in turn, reveals the high relevance of the *preventive* dimension (...). Provisional Measures of Protection, endowed as they are with autonomy, have a legal regime of their own, and non-compliance with them generates the responsibility of the State, has legal consequences, besides singling out the central position of the victim (of such non-compliance), without prejudice to the examination and resolution of the concrete case as to the merits"[37].

28. One has here in mind, of course, Provisional Measures of Protection endowed with a *conventional* basis, and ordered or indicated by international tribunals. The figure of the "injured party" may thus also appear, in my perception, in the realm of Provisional Measures of Protection, in case of non-compliance with them. Accordingly, non-compliance with, or breach of, such measures, engages autonomously the international responsibility of the State at issue, within the

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[35]Cf. Inter-American Court of Human Rights [IACtHR], case of the *Haitians and Dominicans of Haitian Origin in the Dominican Republic* (Resolution of 18.08.2000), Concurring Opinion of Judge Cançado Trindade, paras 13-25.

[36]Cf. IACtHR. case of *Eloísa Barrios and Others* (Resolution of 29.06.2005), Concurring Opinion of Judge Cançado Trindade, paras. 4-11; IACtHR. case of *Eloísa Barrios and Others* (Resolution of 22.09.2005), Concurring Opinion of Judge Cançado Trindade, paras. 2-9; IACtHR, case of the *Children and Adolescents Deprived of Their Freedom in the 'Complex of Tatuapé' of FEBEM* (Resolution of 17.11.2005), Concurring Opinion of Judge Cançado Trindade, paras. 1-10.

[37]IACtHR, case of the *Community of Peace of San José of Apartadó* (Resolution of 02.02.2006), Concurring Opinion of Judge Cançado Trindade, paras. 6-7, and cf. also paras. 4 and 8-10; and cf., to the same effect, IACtHR, case of the *Communities of Jiguamiandó and Curbaradó* (Resolution of 07.02.2006), Concurring Opinion of Judge Cançado Trindade, paras. 6-7, and cf. also paras. 4 and 8-11.

domain of Provisional Measures of Protection[38], irrespective of the subsequent Judgments as to the merits of the concrete cases. Hence the utmost importance of compliance with those measures[39], for the realization of justice itself.

IV. The On-Going Construction of an Autonomous Legal Regime of Provisional Measures of Protection

29. In the previous Court's Order of 16.07.2013, where it refrained from indicating the requested Provisional Measures of Protection, I presented a Dissenting Opinion wherein, *inter alia*, I sought to demonstrate the need to proceed in the conceptual construction of an *autonomous legal regime* of Provisional Measures of Protection (paras. 69-76). To that end, I pondered that

> "Compliance with provisional measures of protection runs parallel to the course of proceedings leading to the Court's subsequent decision on the merits of the cases at issue. Should the Court find, e.g., a breach of international law in its decision on the merits of a given case, and, parallel to that, it further finds non-compliance with its provisional measures, this latter is an *additional* breach of an international obligation. In its work in the present context, the Court still has before itself the task of elaborating on the *legal consequences* of non-compliance with provisional measures, endowed, in my perception, with an autonomy of their own.
>
> Provisional measures of protection indicated or ordered by the ICJ (or other international tribunals) generate *per se* obligations for the States concerned, which are distinct from the obligations which emanate from the Court's (subsequent) Judgments on the merits (and on reparations) of the respective cases. In this sense, in my conception, provisional measures have an autonomous legal regime of their own, disclosing the high relevance of their *preventive* dimension. Parallel to the Court's (subsequent) decisions on the merits, the international responsibility of a State may be engaged for non-compliance with, or breach of, a provisional measure of protection ordered by the Court (or other international tribunals).
>
> My thesis, in sum, is that provisional measures, endowed with a conventional basis, — such as those of the ICJ (under Article 41 of the Statute), — are also endowed with autonomy, have a legal regime of their own, and non-compliance with them generates the responsibility of the State, entails legal consequences, without prejudice of the examination and resolution of the concrete cases as to the merits. This discloses their important preventive dimension, in their wide scope. The proper treatment of this subject-matter is the task before this Court, now and in the years to come" (paras. 70-72).

30. This is, after all, — I then proceeded, — a matter of much importance for the progressive development international law (para. 74). A related aspect to be kept in mind, I continued, is

> "The *juridical nature* of provisional measures, with their preventive dimension, has lately been clarified by a growing case-law on the matter, — as those measures

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[38]Cf. also, in this sense, IACtHR, case of the *Prisons of Mendoza* (Resolution of 30.03.2006), Concurring Opinion of Judge Cançado Trindade, paras. 11-12; IACtHR, case of the *Prison of Araraquara* (Resolution of 30.09.2006), Concurring Opinion of Judge Cançado Trindade, paras. 24-25.

[39]Cf. in this sense, IACtHR, case of the *Communities of Jiguamiandó and Curbaradó* (Resolution of 15.03.2005), Concurring Opinion of Judge Cançado Trindade, paras. 4 and 10; case of the *Community of Peace of San José of Apartadó* (Resolution of 15.03.2005), Concurring Opinion of Judge Cançado Trindade, paras. 4 and 10; case of the *Indigenous People of Sarayaku* (Resolution of 06.07.2004), Concurring Opinion of Judge Cançado Trindade, paras. 2 and 30.

> came to be increasingly indicated or ordered, in recent years, by contemporary international[40], as well as national[41], tribunals[42]. Soon the recourse to provisional measures of protection, also at international level, had the effect of expanding the domain of international jurisdiction, with the consequent reduction of the so-called 'reserved domain' of the State[43]. This grows in importance in respect of regimes of *protection*, such as those of the human person as well as of the environment. The clarification of the juridical nature of provisional measures is, however, still the initial stage of the evolution of the matter, — to be followed, in our days, in my understanding, by the elaboration on the *legal consequences* of non-compliance with those measures, and the conceptual development of what I deem it fit to call their *autonomous legal regime*. (...)
>
> In effect, the notion of victim (or of *potential* victim[44]), of injured party, can thus emerge also in the context proper to provisional measures of protection, parallel to the merits (and reparations) of the *cas d'espèce*. Provisional measures of protection generate obligations (of prevention) for the States concerned, which are distinct from the obligations which emanate from the Judgments of the Court as to the merits (and reparations) of the respective cases. This ensues from their autonomous legal regime, as I conceive it. There is, in my perception, pressing need nowadays to refine and to develop conceptually this autonomous legal regime,— focused, in particular, on the contemporary expansion of provisional measures, the means to secure due and prompt compliance with them, and the legal consequences of non-compliance, — to the benefit of those protected thereunder" (paras. 73 and 75).

31. By means of the construction of the propounded autonomous legal regime of Provisional Measures of Protection, — I added, — contemporary international tribunals can

> "contribute effectively to the avoidance or prevention of irreparable harm in situations of urgency, to the ultimate benefit of *all* subjects of international law, — States as well as groups of individuals, and *simples particuliers*. After all, the human person (living in harmony in her natural habitat) occupies a central place in the new *jus gentium* of our times" (para. 76).

The contribution of contemporary international tribunals to the conceptualization of the legal regime of Provisional Measures of Protection has been taking place, is on-going; yet, there is still much to be done, there remains a long way to go, in the perennial search for the realization of justice.

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[40]Cf. R. Bernhardt (ed.), *Interim Measures Indicated by International Courts*, Berlin/Heidelberg, Springer-Verlag, 1994, pp. 1-152.

[41]Cf. E. García de Enterria, *La Batalla por las Medidas Cautelares*, 2nd. [enlarged] ed., Madrid, Civitas, 1995, pp. 25-385.

[42]Cf. also L. Collins, "Provisional and Protective Measures in International Litigation", 234 *Recueil des Cours de l'Académie de Droit International de La Haye* (1992) pp. 23, 214 and 234.

[43]P. Guggenheim, *Les mesures provisoires de procédure internationale et leur influence sur le développement du droit des gens*, Paris, Libr. Rec. Sirey, 1931, pp. 15, 174, 186, 188 and 14-15, and cf. pp. 6-7 and 61-62.

[44]On the notion of *potential* victims in the framework of the evolution of the notion of victim or the condition of the complainant in the domain of the international protection of human rights, cf. A.A. Cançado Trindade, "Co-Existence and Co-Ordination of Mechanisms of International Protection of Human Rights (At Global and Regional Levels)", 202 *Recueil des Cours de l'Académie de Droit International de Haye* (1987), ch. XI, pp. 243-299, esp. pp. 271-292.

V. FINAL CONSIDERATIONS

32. In the domain of Provisional Measures of Protection, the ICJ has recently moved forward, in ordering provisional measures, in the case of the *Temple of Preah Vihear* (Cambodia *versus* Thailand, Order of 18.07.2011), to the effect of the withdrawal of military personnel from a provisional demilitarized zone that it defined in the Order itself (para. 62). In my Separate Opinion appended to it, I dwelt upon the relation between time and law (paras. 3-42), and the *legal effects* of the aforementioned measures in connection with the importance of prevention of irreparable harm for the protection of people in territory, and of cultural and spiritual heritage, altogether (paras. 64-70, 82-94 and 96-117). There is thus reason for hope that, on the basis of this precedent, the Court will keep on advancing in the present domain of Provisional Measures of Protection, to the benefit of the *justiciables*.

33. In the present Order that it has just adopted today, 22.11.2013, the Court finds that there has indeed been "a change in the situation in the disputed territory" (para. 44) since it adopted its last Order (of 16.07.2013). Accordingly, the Court, in the present Order, decided, at last, that the earlier provisional measures (indicated in the Order of 08.03.2011) "must be reinforced and supplemented" (para. 55), especially concerning, in addition, the presence of private individuals in the "disputed territory" (para. 56). However, in its previous Order of 16.07.2013 concerning the Parties' Requests for modification of the Court's Order of 08.03.2011, the Court did not find, on the basis of the facts presented to it, any "evidence of urgency that would justify the indication of further provisional measures"; the Court thus decided — with my dissent — that it had then not yet been sufficiently demonstrated that there was a risk of irreparable prejudice to the rights claimed by Costa Rica[45].

34. Yet, the presence of private individuals in the disputed territory already configured a change in the situation, by the time the Order of 16.07.2003 was adopted; the Court should *then*, four months ago, have modified the earlier Order of 08.03.2011, by means of its Order of 16.07.2003, so as expressly to provide for the prohibition not only of the presence of personnel, but also of incursion of private individuals as well into the disputed territory. By then, last July, in my perception there had already occurred a change in the situation in the disputed territory, disclosing urgency and the risk of irreparable harm, thus calling for the ordering of *new* provisional measures.

35. Indeed, the new, changed situation had already been clearly formed by the time the ICJ was called to issue its Order of 16.07.2013; the earlier Order of 08.03.2011, having referred only to "personnel", had become too narrow. In the Order of 16.07.2013 the Court took note of the presence of Nicaraguan private individuals in the disputed area as an aggravating circumstance, yet it did nothing concrete about it. Only now, in the present Order of 22.11.2013, it has done so, in order to prevent the deterioration of the situation. The Court has at last clarified that the disputed area is to be free of *all* persons, comprising personnel and private individuals (apart from the remediation work to be promptly done in the eastern *caño*).

36. So, only with the worsening of the situation (with the dredging and construction of the two new *caños*) in the disputed territory, the Court reconsidered its previous "self-restrained" approach. This worsening of the situation once again demonstrates that the worst possible posture that an international tribunal can take is that of judicial inactivism. Fortunately the Court has now taken a distinct stand. This time, four months later, the provisional measures just indicated or

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[45] When Costa Rica requested (on 23.05.2013) it to do so alleging that there were private Nicaraguan nationals present in the disputed territory (cf. para. 35.)

ordered today (22.11.2013) by the Court address both *personnel* and *private persons*, to be kept all away from the disputed territory (resolutory points 2(C) and (D)); they also order the cessation of any dredging and other activities in the disputed territory (resolutory point 2(A)), in addition to what I perceive as remediation work in respect of the eastern *caño* (resolutory point 2(B)).

37. The two contending parties do not actually controvert the responsibility for non-compliance (cf. *supra*) with the Court's earlier Order of 08.03.2011[46]. The only point surrounded by some controversy is that of the *attribution* of responsibility (cf. *supra*) for such non-compliance. To me, this point is clear, as responsibility for non-compliance is necessarily accompanied by the attribution of that responsibility to the State concerned. There is an autonomous breach of a conventional obligation (concerning provisional measures), without prejudice to what will later be decided by the Court as to the merits.

38. Had the Court last July, on the occasion of the adoption of its Order of 16.07.2013, indicated or ordered the provisional measures of protection requested, probably the present situation in the disputed territory (created in the last four months) would not have arisen. Be that as it may, this new situation has been created, and the Court now, in the Order of today (22.11.2013), has just taken the right decision to order the present provisional measures of protection. Better late, and still in time, than never.

39. In any case, in the handling of the present controversy between two States which share the longstanding and respectable Latin American tradition in international legal doctrine, the ICJ has been provided with the occasion to dwell at greater depth upon the legal nature and effects of provisional measures, endowed with a relevant preventive dimension. The Court could have gone further than it did, in its analysis of this legal issue, — an analysis which does not need to be deferred to the merits. The present case reveals an *additional* ground of responsibility (irrespective of any decision on the merits), for non-compliance with provisional measures.

40. The *legal effects* of these latter, without prejudice to the subsequent decision of the Court as to the merits of the case, can be more appropriately examined within the framework of the *autonomous* legal regime of Provisional Measures of Protection. Non-compliance with such measures entails an *additional* ground of responsibility; the task ahead of us is to extract the consequences ensuing therefrom. The day this is done, an additional service will be rendered to the cause of the realization of justice at international level.

(Signed) Antônio Augusto CANÇADO TRINDADE.

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[46] Admitted by the respondent State itself, as pointed out by the Court in the present Order (cf. ICJ, doc. CR 2013/27, p. 33, para. 18, and ICJ, doc. CR 2013/25, pp. 22-23, paras. 20-21, transcribed *supra*).

DÉCLARATION DE M. LE JUGE *AD HOC* GUILLAUME

Activités des deux Etats sur le territoire litigieux — Protection de l'environnement — Coopération nécessaire du Costa Rica et du Nicaragua.

1. La Cour avait dans son ordonnance du 8 mars 2011 demandé tant au Nicaragua qu'au Costa Rica de s'abstenir «d'envoyer ou de maintenir sur le territoire litigieux … des agents, qu'ils soient civils, de police ou de sécurité». Estimant ces mesures insuffisantes, le Costa Rica s'était plaint en mai 2013 de la présence sur ce territoire de ressortissants nicaraguayens appartenant au mouvement Guardabarranco et des activités de ces ressortissants. Par ordonnance du 16 juillet 2013, la Cour avait écarté la demande de mesures conservatoires présentée alors par le Costa Rica. Elle avait cependant noté la présence en ces lieux de groupes nicaraguayens organisés «comport[ant] un risque d'incidents susceptibles d'aggraver» le différend et avait exprimé «sa préoccupation à cet égard».

2. Depuis lors, ces groupes organisés sont demeurés présents dans le territoire litigieux. En outre, deux *caños* ont été creusés dans le secteur sous la direction de M. Pastora, «délégué du gouvernement responsable des travaux de dragage» au risque de modifier le cours du Río San Juan. Enfin, un campement militaire nicaraguayen a été établi sur une plage qui, *prima facie*, semble appartenir au territoire litigieux. C'est dans ces circonstances que le Costa Rica a saisi la Cour d'une nouvelle demande de mesures conservatoires.

3. La Cour, au vu de cette demande, a réaffirmé les mesures qu'elle avait indiquées en 2011. Elle a en outre invité le Nicaragua à cesser toute activité de dragage ou autre activité dans le territoire litigieux. Elle lui a demandé de combler la tranchée qui à travers la plage était susceptible de faire communiquer le *caño* oriental avec la mer. Elle a invité le Nicaragua à évacuer ses agents se trouvant dans le secteur et à évacuer en particulier le camp militaire proche de l'extrémité du *caño* oriental. Regrettant que le Nicaragua n'ait pas donné suite aux préoccupations qu'elle avait exprimées en juillet 2013, la Cour a enfin exigé que les personnes privées relevant de la juridiction ou du contrôle nicaraguayen, telles que les membres du mouvement Guardabarranco, quittent la zone. J'ai souscrit à ces diverses mesures adoptées à l'unanimité par la Cour, car elles étaient les conséquences inéluctables des activités menées, tolérées ou encouragées par le Nicaragua dans le territoire contesté. Je regrette seulement que certaines de ces indications n'aient pas également visé le Costa Rica, tout en exprimant le vœu que ce dernier s'abstienne lui aussi dans l'avenir de toute activité dans le territoire litigieux autre que celles prévues au point 2 E) de l'ordonnance.

4. Selon ce point,

> «Après avoir consulté le Secrétariat de la convention de Ramsar et préalablement informé le Nicaragua, le Costa Rica pourra prendre des mesures appropriées au sujet des deux nouveaux *caños*, dès lors que de telles mesures seront nécessaires pour empêcher qu'un préjudice irréparable soit causé à l'environnement du territoire litigieux ; ce faisant, le Costa Rica évitera de porter atteinte de quelque façon que ce soit au fleuve San Juan.»

5. Je n'ai pu souscrire à cette dernière mesure conservatoire qui me paraît à la fois d'une utilité contestable et d'une mise en œuvre difficile pour les raisons qui suivent.

6. On se souviendra qu'en 2011, lors de la construction d'un premier *caño* plus important, la Cour avait constaté que le territoire litigieux faisait partie d'une zone humide d'importance internationale déclarée telle par le Costa Rica en vertu de la convention de Ramsar du 2 février 1971. Elle s'était demandée si l'existence même du *caño* ne risquait pas d'engendrer un préjudice irréparable à l'environnement ainsi protégé. Elle avait apporté à cette question une réponse négative et s'était par suite abstenue d'indiquer des mesures conservatoires destinées à prévenir de tels risques. La Cour a adopté la même attitude en l'espèce et j'en suis d'accord.

7. Mais la Cour, dans son ordonnance du 8 mars 2011, n'en avait pas moins jugé qu'il pourrait être utile que des personnels civils en charge de la protection de l'environnement soient en mesure de se rendre dans le territoire litigieux dans la stricte mesure où un tel envoi serait nécessaire pour éviter qu'un préjudice irréparable n'apparaisse dans l'avenir. Dans cette perspective, elle avait décidé que :

> «le Costa Rica pourra envoyer sur le territoire litigieux, y compris le *caño*, des agents civils chargés de la protection de l'environnement dans la stricte mesure où un tel envoi serait nécessaire pour éviter qu'un préjudice irréparable ne soit causé à la partie de la zone humide où ce territoire est situé ; le Costa Rica devra consulter le Secrétariat de la convention de Ramsar au sujet de ces activités, informer préalablement le Nicaragua de celles-ci et faire de son mieux pour rechercher avec ce dernier des solutions communes à cet égard» (*C.I.J. Recueil 2011 (1)*, p. 27, par. 86 2)).

8. J'avais alors souligné qu'il me paraissait peu vraisemblable que le creusement du *caño* puisse créer un préjudice irréparable à l'environnement. Le Río San Juan est un fleuve charriant d'abondants sédiments qui ont naturellement tendance à se déposer dans les chenaux de son delta. Il m'apparaissait que de ce fait le *caño* se comblerait aisément et que la végétation naturelle y retrouverait spontanément sa place. Les visites effectuées depuis lors sur les lieux par les agents du Costa Rica et la documentation produite par le Nicaragua lors de l'audience du 17 octobre 2013 confirment l'opinion que j'avais exprimée à l'époque. J'estime qu'il en est *a fortiori* de même pour les deux nouveaux petits *caños* dès lors que des mesures seront prises afin qu'ils ne communiquent pas avec la mer.

9. J'avais également précisé en 2011 qu'il eut été préférable pour les motifs que j'avais alors exposés de confier la surveillance des lieux aux deux Etats agissant conjointement. Il aurait dû en être de même dans la présente affaire.

10. Je relève enfin qu'en 2011, la Cour avait prévu l'envoi sur place d'agents du Costa Rica chargés d'évaluer la situation. Aujourd'hui la Cour précise que le Costa Rica pourra prendre des mesures appropriées au sujet des deux nouveaux *caños* si de telles mesures se révèlent «nécessaires pour empêcher qu'un préjudice irréparable soit causé à l'environnement du territoire litigieux». Il est évident que l'adoption de ces mesures doit, comme l'impliquait l'ordonnance de 2011, être précédée d'une évaluation de la situation, mais il est regrettable que la Cour ne l'ait pas explicitement indiqué.

(Signé) Gilbert GUILLAUME.

DECLARATION OF *AD HOC* JUDGE DUGARD

1. I have voted in favour of the Order and fully support the measures contained in the Order. There is, however, one issue that was not dealt with in the Order, which I believe should have received attention. This is the question of Costa Rica's access to the disputed territory by means of the San Juan River to enable it to take appropriate measures relating to the two new *caños* if, after consultation with the Secretariat of the Ramsar Convention, and after giving notice to Nicaragua, it considers it necessary to take such measures to prevent irreparable prejudice to the environment of the disputed territory. In my view this matter should have been addressed as it is clear that there is no agreement between the Parties on this subject and without proper regulation it could lead to conflict.

2. In the proceedings Nicaragua made it clear that it regards the San Juan River as being subject to its absolute sovereignty and jurisdiction except for the right that Costa Rica enjoys to navigate it for the "purposes of commerce" in terms of the Treaty of Limits of 1858. Relying on the decision of the Court in the *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Report 2009*, p. 213, Nicaragua declared that it would not allow Costa Rica access to the San Juan River in order to carry out remediation work on the two *caños* in the disputed territory. At the same time it argued that the Court could not order provisional measures permitting Costa Rica to navigate on the San Juan River in order to gain access to the disputed territory on the grounds that this would impugn the territorial sovereignty of Nicaragua over the San Juan River.

3. Costa Rica, on the other hand, argued that the only way of reaching the disputed territory in order to carry out remediation work was by means of the San Juan River. It maintained that the terrain made it practically impossible to reach the two new *caños* by land or helicopter. Costa Rica argued that navigation on the San Juan River for the purpose of gaining access to the new *caños* would not prejudge the positions of the Parties *pendente lite* and pose no problem for Nicaragua.

4. In these circumstances I believe that the Court should in its Order have regulated Costa Rica's access to the two new *caños* in the disputed territory, if necessary by making provision for it to use the San Juan River. Instead provisional measure 2 (E) allows Costa Rica to "take appropriate measures related to the new *caños*, to the extent necessary to prevent irreparable prejudice to the environment of the disputed territory" without any indication as to how this may be done. The only limitation imposed on Costa Rica in taking these measures is that it "shall avoid any adverse effects on the San Juan River". In effect this leaves it open to Costa Rica to access the new *caños* in the disputed territory by sea, land, air or river.

5. The uncertainty relating to access to the two new *caños* is aggravated by the fact that it is not clear that the decision of the Court in the *Dispute regarding Navigational Rights (ibid.)* imposes an absolute prohibition on Costa Rica's right to navigate the San Juan River for purposes other than commerce. There is language in the decision which suggests that the protection of the environment should be considered in interpreting the legal régime to govern navigation on the San Juan River and that Nicaragua should not regulate navigation in an unreasonable manner. The Court makes it clear that the protection of the environment is a "legitimate purpose" to consider in regulating traffic on the San Juan River (*ibid.*, p. 250, paras. 88-89; p. 261, para. 127). Moreover, it stated that the power of Nicaragua to regulate the exercise by Costa Rica of its right to freedom of navigation under the 1858 Treaty of Limits "is not unlimited, being tempered by the rights and obligations of the Parties" (*ibid.*, p. 249, para. 87) and that any such regulation "must not be unreasonable, which means that its negative impact on the exercise of the right in question must not

be manifestly excessive when measured against the protection afforded to the purpose invoked" (*ibid.*, p. 249-250, para. 87 (5)). It may therefore be persuasively argued that it would be unreasonable for Nicaragua to prevent Costa Rica from using the San Juan River to gain access to the new *caños* to carry out remediation work on the ground that the protection of the environment is a "legitimate purpose" for regulating traffic on the river. The legitimacy of such a purpose and the reasonableness of such action might be seen to be a necessary consequence of the illegality of Nicaragua's construction of two new *caños* in an environmentally protected area.

6. In these circumstances it might have been wise for the Court to have ordered that Nicaragua should not obstruct Costa Rica's free access to the two new *caños* by means of the San Juan River, along the lines of its Order by way of provisional measures to Thailand not to obstruct the free access of Cambodians to the Temple of Preah Vihear (*Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the* Temple of Preah Vihear (Cambodia v. Thailand) *(Cambodia* v. *Thailand)*, *Order of 18 July 2011, I.C.J. Reports 2011 (II)*, p. 555, para. 69 (2)).

7. The subject of how Costa Rica is to gain access to the disputed territory if it considers it necessary to take appropriate measures to prevent irreparable prejudice to the environment as a result of the construction of the two new *caño*s remains unsettled. The fact that Costa Rica is required to give prior notice of its intention relating to the taking of any such measures to Nicaragua provides some assurance that this process will be conducted peacefully. This is, however, a matter for the exercise of restraint on the part of both Parties. Both Nicaragua and Costa Rica attach great importance to the protection of the environment of the disputed territory. This should be the guiding and paramount interest on the part of both Parties in respect of any remediation works on the new *caños.*

(Signed) John DUGARD.

SEPARATE OPINION OF JUDGE CANÇADO TRINDADE

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I. Introduction

1. In its previous Order, of 16 July 2013, in the present case opposing Costa Rica to Nicaragua, in which the International Court of Justice [ICJ] refrained from indicating new provisional measures of protection, I presented a dissenting opinion expressing the foundations of my personal position on the matter; today, 22 November 2013, as the Court has now decided to order new provisional measures of protection in the case concerning *Certain Activities Carried Out by Nicaragua in the Border Area*, I have concurred with my vote to the adoption of the present Order. As there are still a couple of points which appear to me deserving of closer attention, I feel thus obliged to leave on the records the reflections which form the present separate opinion, wherein I care — under the merciless pressure of time — to address those points and to lay the foundation of my personal position thereon.

2. To start with, I deem it appropriate to extract, from the corresponding *dossier* of the present case, the submissions of the Parties which seem to me

particularly pertinent for the consideration of the new factual situation brought to the attention of the Court. I shall then move onto the juridico-epistemological level, so as to focus on the questions of the configuration of the autonomous legal régime (as I perceive and conceive it) of provisional measures of protection. In doing so, I shall address the task of international tribunals, and a reassuring jurisprudential construction (2000-2013). I shall, in sequence, overview the ongoing construction of an autonomous legal régime of provisional measures of protection. The way will then be paved for the presentation of my final considerations on the matter.

II. Submissions of the Parties in the Course of the Present Proceedings

1. Submissions in the Written Phase

3. May I start at the factual level. In its new request for provisional measures lodged with the Court on 24 September 2013, Costa Rica stated that this new request was "an independent request based on new facts" (para. 4). After invoking its rights to territorial sovereignty and integrity, and to non-interference with its land and environmentally-protected areas (paras. 21-22), Costa Rica asked the Court for four provisional measures, transcribed in paragraph 15 of the present Order. The *next* facts brought to the Court's attention in the present request for new provisional measures in the *cas d'espèce* concerning *Certain Activities Carried Out by Nicaragua in the Border Area*, are in fact, all of them, subsequent to the Court's previous Orders in the present case (of 8 March 2011 and 16 July 2013), and pertain to the construction of two *"caños"*, and the existence of a Nicaraguan military encampment, allegedly in the "disputed territory".

4. Costa Rica argued that the new dredging and dumping activities allegedly conducted by Nicaragua were affecting the disputed territory and its ecology (paras. 2 and 10-11). For its part, in a diplomatic Note of 18 September 2013, Nicaragua opposed those contentions, arguing that, in its previous Order of 16 July 2013, the ICJ determined that the provisional measures previously indicated (on 8 March 2011) could not be modified, as Costa Rica had not demonstrated urgency nor risk of irreparable harm (pp. 1-2).

5. The present proceedings concerning *Certain Activities Carried Out by Nicaragua in the Border Area* have demonstrated the importance of holding public sittings of the ICJ, in the matter of provisional measures, for the clarification of a given factual situation. After all, to the effect of the adoption of its Orders on such matters, the ICJ gathers prima facie — rather than substantial — evidence *(summaria cognitio)*, and then renders

a *binding* decision, as its provisional measures are endowed with a conventional basis (Article 41 of its Statute).

2. First Round of Oral Arguments

6. It was, in effect, in the oral proceedings (rather than in the written phase) that the two contending Parties found the occasion to present to the ICJ their submissions in a more elaborate way. The public hearings of 14-17 October 2013 were in my view essential for the clarification of the position of the Parties as to the newly requested provisional measures of protection lodged with the Court. I shall next review such submissions, and then proceed to a general assessment of them.

7. In the first round of oral arguments, Costa Rica argued that, despite the provisional measures of protection indicated by the Court in its Order of 8 March 2011[1], and its concerns expressed in its Order of 16 July 2013, "Nicaragua continues to send groups of Nicaraguan nationals to the disputed area", and, furthermore, "it is engaged in the construction of two new *caños* in the northern part of Isla Portillos", with a "real risk" of creating "a fait accompli involving irreparable damage", before the case is finally settled by the ICJ[2]. There has thus been, Costa Rica proceeded, an "egregious breach" of the provisional measures[3]. Costa Rica then stated that

> "[s]ince that time, work on the Pastora first *caño* has been continued, including by more than 10,000 Sandinista youth who have been officially brought to the area to further Nicaragua's policies. (. . .) Nicaraguan personnel have been in the disputed territory carrying out dredging and other works, as late as 18 September 2013"[4].

8. After the Court's Order of 8 March 2011, Costa Rica proceeded, Nicaragua "changed the existing situation by occupying the territory", and continuing "to send government personnel and, in particular, the head of the works, Commander Pastora, as well as numerous contingents of Nicaraguans who, by the Respondent's own admission, are engaging in so-called 'environmental' activities"[5]. In Costa Rica's perception, "Nicaragua has resorted to a piece of 'sophistry'", namely, that the

[1] *Certain Activities Carried Out by Nicaragua in the Border Area* (*Costa Rica* v. *Nicaragua*), *Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 6.

[2] Compte rendu (CR) 2013/24, p. 14, para. 8.

[3] Costa Rica added that, moreover, Nicaragua announced, "at the very last moment", that "it had withdrawn from the disputed territory, though without admitting it had ever been there (. . .) in the first place" (*ibid.*, p. 34, para. 1).

[4] *Ibid.*, p. 36, para. 7, and cf. p. 44, para. 32.

[5] *Ibid.*, p. 54, para. 24.

provisional measures ordered by the ICJ "prevented Nicaraguan personnel, but not citizens, from entering the disputed territory and planting trees"[6]. And Costa Rica added that:

> "Nicaragua has undertaken action on that territory on a major scale, with dredgers and chainsaws, which it has taken several weeks to carry out. It is thus not sufficient to remind the Parties of the existing obligation not to send personnel, but it is necessary to order a measure requiring the cessation of all canalization, dredging or other works in the disputed territory, and that no further works should be carried out in the future. It also requires that Nicaragua be ordered to dismantle all infrastructure on the territory and to refrain from introducing any more *pendente lite*. The same applies to the equipment used to carry out the works of canalization. (. . .) [T]he provisional measures of 2011 are incapable of preventing canalization or other works being continued or resumed."[7]

9. Nicaragua retorted that Costa Rica also violated the Court's Order "by overflights and visits to the disputed area" without fulfilling its requirements, and by the construction of the road "running along 160 km of the border of Nicaragua and Costa Rica and along the margin of the greater part of the San Juan River (. . .) without any environmental impact assessment and without any notice to Nicaragua"[8]. Nicaragua then denied that 10,000 members of the Guardabarranco group had been in the territory in dispute, as alleged by Costa Rica; there were only "small groups of youngsters" visiting "the place for a short period of time"; they "have not performed any work on the *caño*", and they caused no damages to the disputed territory[9].

10. Nicaragua then added that Mr. E. Pastora "was wrong" in claiming (in a television interview in a news programme) that his works of "clearing or constructing *caños*" at the mouth of the San Juan River were conducted "in areas not covered by the Court's Order"[10]. Nicaragua observed that it "had not authorized any dredging or *caño* clearing activities in the disputed area", to comply "fully" with the Court's Order of 8 March 2011. And Nicaragua added:

> "Mr. Pastora himself knew that this was Nicaragua's policy. In the television interview (. . .) he insisted repeatedly that his actions were

[6] CR 2013/24, pp. 59-60, para. 37.
[7] *Ibid.*, pp. 55-56, paras. 28-29.
[8] CR 2013/25, pp. 9-10, paras. 6-7.
[9] *Ibid.*, pp. 12-13, paras. 20-22.
[10] In its clarification, it was "plain to Nicaragua from Mr. Pastora's indication of the location of his activities that they were inside the disputed territory, as defined in the Order" (*ibid.*, p. 22, para. 17).

> consistent with the Court's Order, as he understood it. Of course, he was wrong; and this does not exonerate Nicaragua of responsibility for his behaviour. Nicaragua has never said otherwise. But it does explain what happened. (. . .) There was no intention by Nicaragua to change the natural course of the San Juan River. What happened was that Mr. Pastora exceeded his mandate, and engaged in activities in the disputed area because he had an erroneous understanding of the Court's Order, specifically in regard to what constituted the disputed area, which was different from Nicaragua's understanding, and which Nicaragua did not appreciate, until 18 September [2013]. Since that date, when it learned of his activities, Nicaragua has not denied that they occurred or that they were inconsistent with the Court's Order. To the contrary, what Nicaragua contends, what it has consistently contended, is that it did not instruct or intend for Mr. Pastora to conduct any activities in the disputed area. They were the result of a misunderstanding, not a conspiracy."[11]

11. Nicaragua further added that it had not intended to send Mr. E. Pastora "into the disputed area", but only "to clean up the river and the channels in Nicaragua's undisputed waters. It accepts responsibility for his mistaken and unauthorized actions in the disputed area, and has taken concrete steps to prevent their recurrence"[12]. Yet, it went on, the problem now raised before the ICJ is not whether Nicaragua is responsible for the acts *ultra vires* of Mr. E. Pastora; it is a distinct one[13].

3. Second Round of Oral Arguments

12. In the second round of oral arguments, Costa Rica began by stating that "Mr. Pastora and the National Port Authority were organs of the Nicaraguan State", with "actual authority" (at least until 22 September 2013) "to carry out the works in the disputed territory"[14]. Costa Rica stressed that

> "[t]he only evidence on the record is the specific authorization for Mr. Pastora and the National Port Authority to carry out the project for the 'Improvement of Navigation on the San Juan de Nicaragua River'. We heard nothing about *ultra vires* action on the previous request."[15]

[11] CR 2013/25, pp. 22-23, paras. 20-21.
[12] *Ibid.*, pp. 28-29, paras. 42-43.
[13] *Ibid.*, pp. 50-51, paras. 21-22.
[14] Costa Rica added that, following the Court's Order of 8 March 2011, "they were never prohibited from doing so by any Nicaraguan instruction in evidence" (CR 2013/26, p. 12, para. 12).
[15] *Ibid.*, p. 12, para. 13.

Costa Rica then added that:

> "Nicaragua now finally accepts that its personnel were constructing and dredging the *caños* (. . .), its personnel have entered the disputed territory in breach of [the Court's] Order and carried out activities there. It finally accepts that its army, camped in close and convenient proximity to the lagoon at the end of the eastern *caño*, must have known of it. It accepts that it is responsible for the acts of Mr. Pastora, its government delegate, and it is responsible for the acts of its government department, the National Port Authority. These reluctant concessions can hardly be considered timely: they finally came yesterday, 36 days after we wrote to protest, 36 days after we provided the co-ordinates of the new *caños.* But Nicaragua has still not admitted that its Mr. Pastora, his dredgers and the National Port Authority personnel were authorized to go there in the first place. (. . .) [T]hey had ostensible authority to do so, and there is nothing in the evidentiary record to suggest otherwise."[16]

13. Moreover, Costa Rica retorted that "the construction of the new *caños*" could not be portrayed as a "simple blunder". It insisted on its argument pertaining to the presence of "the Sandinista youths" in the "disputed area", stating that there was evidence to this effect. Thus, its Note to Nicaragua of 16 September 2013 "not only protested the construction of new *caños*, but it pointed out that the Nicaraguan media reported on 9 September that some 10,000 youths had already visited the area"[17]. Costa Rica further stated that "Nicaragua admitted that it has breached the 2011 Order"; yet, it has provided "no evidence (. . .) about the present state of the *caño*, its depth, its carrying capacity, its length"[18]. To Costa Rica,

> "Nicaragua's belated explanations (. . .) do not provide sufficient protection of Costa Rica's rights. (. . .) Yesterday Nicaragua told [the ICJ] that it had breached [its] 2011 Order. (. . .) the measures Costa Rica requests are urgently needed to prevent irreparable prejudice to its rights. (. . .) Costa Rica merely asks the Court to exercise its power to preserve and protect Costa Rica's rights; rights which are at imminent risk of being irreparably harmed."[19]

14. For its part, Nicaragua, at the second round of oral arguments, began by stating that "Mr. Pastora did what he did, and Nicaragua does not deny responsibility for his actions. (. . .) The evidence shows that Nicaragua did not 'send' Mr. Pastora to the disputed area, or 'maintain'

[16] CR 2013/26, pp. 20-21, para. 43, and cf. paras. 40 and 46.
[17] *Ibid.*, p. 22, para. 47.
[18] *Ibid.*, p. 22, para. 48.
[19] *Ibid.*, p. 34, para. 3.

him there, as prohibited by the first operative paragraph of the Court's March 2011 Order"[20]. And Nicaragua added that

> "It is notable that Costa Rica's request for new provisional measures does not complain about the presence of this military camp, which is in plain sight. (. . .) This is offered as evidence that a crew of workmen was clearing *caños* in the wetland, not that Nicaragua is unlawfully (. . .) maintaining a small military camp on the beach. There is no mention of the military camp anywhere in Costa Rica's request."[21]

15. As to the works carried out under the direction of Mr. E. Pastora — which Costa Rica alleges were undertaken in the "contested territory" — Nicaragua argues that, in requesting

> "the withdrawal of the small Nicaraguan detachment stationed on the left bank, Costa Rica is modifying the very definition of the 'disputed territory' (. . .). [T]his constitutes a new claim, which cannot be made at this stage: it is the Application which defines the limits of the case (. . .). Costa Rica cannot today go back on what it wrote in order to enlarge the scope of its Application by surreptitiously redefining its territorial scope."[22]

Yet, it conceded that:

> "Nicaragua was 'perhaps' responsible for the actions of Mr. Pastora. (. . .) [E]ven if he is not minister, but only treated as a senior government official, Mr. Pastora does exercise official duties; (. . .) the work on the canals (. . .) is, without any doubt, incompatible with the terms of your Order of 2011; and these terms (. . .) are legally binding on the Parties."[23]

4. General Assessment

16. The point which was object of most submissions of the Parties *(supra)* during the oral hearings of 14-17 October 2013 was the dredging and dumping works undertaken, allegedly by Nicaragua, after June 2013, in the construction of the two *"caños"* in the disputed area. In its own assessment, the Court found, in the present Order, that, in the new situation thus created in the "disputed territory", the requisites of urgency and real and imminent risk of "irreparable prejudice" are present therein (paras. 49-50), requiring from it new provisional measures of protection.

[20] CR 2013/27, p. 13, para. 22.
[21] *Ibid.*, p. 17, para. 36.
[22] *Ibid.*, p. 31, para. 13.
[23] *Ibid.*, p. 33, para. 18.

17. The dredging operations for the construction of the two *"caños"*, the Court added, "were carried out by a group of [Nicaraguan] nationals led by Mr. Pastora", who was officially appointed "to carry out this project" (para. 45). In carrying out such construction and the digging of the trench, they have caused "a change in the situation in the disputed territory", after its recent Order of 16 July 2013 (para. 44). The Court then decided to indicate the new provisional measures contained in the Order it has just adopted today, 22 November 2013.

18. As to the other point which was the object of submissions of the Parties, concerning the Nicaraguan military encampment in the area, it appears from the arguments of the Parties during the oral hearings held in October 2013[24], and from the complementing evidence which the Parties submitted to the Court (photographs and satellite images), that a Nicaraguan military encampment indeed exists in the region, and after the Court's previous Order of 8 March 2011. As to its location, the contending Parties submitted arguments as to its presence within "disputed territory"[25], as defined by the Court's Order of 8 March 2011[26].

19. The evidence submitted to the Court, however, led to its finding that the military encampment is indeed located within the "disputed territory", as the Court has concluded in the present Order (para. 46); the Court added that the "ongoing presence of this encampment" is confirmed by recent satellite images and [a] photograph (para. 46). Recalling, in this respect, that the previous Order of 8 March 2011 determined that the Parties ought to "refrain from sending to, or maintaining in the disputed territory, including the *caño*, any personnel, whether civilian, police or security" (para. 86 (1)), it has become undisputable that the presence of the Nicaraguan military encampment in the disputed territory, after the Order of 8 March 2011, is in clear breach of that Order.

III. The Configuration of the Autonomous Legal Régime of Provisional Measures of Protection

1. The Task of International Tribunals

20. The new facts of the present case *(supra)* bring to the fore, in a prominent way, the issue of the necessary *compliance* with provisional mea-

[24] CR 2013/26, pp. 19-20, paras. 35-39 (Costa Rica); CR 2013/25, p. 29, paras. 43-44 (Nicaragua); and CR 2013/27, pp. 16-17, paras. 35-37 (Nicaragua).

[25] The Court defined the "disputed territory" as "the northern part of Isla Portillos, that is to say, the area of wetland of some 3 square kilometres between the right bank of the disputed *caño*, the right bank of the San Juan River up to its mouth at the Caribbean Sea and the Harbor Head Lagoon" (Order, para. 55).

[26] While Costa Rica claimed that the encampment is within the "disputed territory" as defined by the Court, Nicaragua contended that Costa Rica did not complain about the camps until the first day of the hearings, and that, in any event, the encampment is not located within the "disputed territory" as defined by the Court. Cf., e.g., doc. CR 2013/25, p. 29, paras. 43-44, and cf. also doc. CR 2013/27, pp. 16-17, paras. 35-37.

sures of protection. This issue can be properly addressed, in my understanding, within the framework of what I behold as the *autonomous* legal régime of those measures. To embark on this task, I move from the factual context onto my considerations at the juridico-epistemological level. Preliminarily, I deem it fit to point out that, it has been in the era of contemporary international tribunals that provisional measures of protection have seen the light of day, and have flourished, in international legal procedure.

21. It was indeed with the advent of international tribunals that the conditions were met to move ahead with provisional measures, in the pursuit of the realization of justice, to the benefit of the *justiciables* in distinct domains of international law. In the historical trajectory of international tribunals, there are antecedents disclosing that, even at an early stage, one purported to ascribe *obligatory* character to provisional measures indicated or ordered by them. This is pointed out, for example, in a pioneering study on the matter by Paul Guggenheim, given to the public in 1931[27]. Yet, progress in this respect has been very slow: for example, it has taken more than half a century for the ICJ to reach the obvious conclusion, in 2001, that provisional measures are, under its Statute[28], binding.

22. Yet, since the beginning of the evolution of provisional measures of protection in international legal procedure, the issue of compliance with them was already present, but was not sufficiently studied and cultivated, and, after several decades, there still remains nowadays much to be studied and cultivated in this matter. Already in the days of the Permanent Court of International Justice (PCIJ), there were indications that provisional measures were meant to be obligatory, in particular those ordered by the PCIJ and other international tribunals (such as the old Central American Court of Justice)[29]; already in the era of the League of Nations, those measures were meant to have *legal effects*[30].

23. In his early study, Paul Guggenheim lucidly drew attention to the importance of provisional measures of protection, ultimately, to the progressive development of international law itself[31]. Writing in 1931, the learned author warned that one of the points to be solved in the future, was *to secure compliance with, and the faithful execution of*, those provisional measures[32]. And the learned author added, with insight, as to the consequences of breach of provisional measures, that

[27] Cf. P. Guggenheim, *Les mesures provisoires de procédure internationale et leur influence sur le développement du droit des gens*, Paris, Rec. Sirey, 1931, p. 177.

[28] I.e., endowed with a conventional basis (Art. 41).

[29] Cf., in this sense, P. Guggenheim, *op. cit. supra* note 27, pp. 24-25, 71-72, 177 and 187, and cf. p. 33.

[30] *Ibid.*, p. 58.

[31] Cf. *ibid.*, pp. 195-196.

[32] As "today, international law, most often, does not yet have the means to secure compliance with its orders or, at the very least, to supervise the execution of orders issued by its collective bodies" (*ibid.*, p. 175, and cf. p. 59).

"[s]ooner or later, the case law of the Permanent Court of International Justice or of competent tribunals will assuredly succeed in gaining acceptance of the fact that non-compliance with provisional measures ordered by such courts, must, by reason of the harm caused (regardless of the fault, or otherwise, of the author), have the effect in law of giving rise to a right to reparation.

. . . . . .

[I]n my view, the responsibility ultimately incumbent upon those members [of the international community itself] cannot be replaced by provisional measures of the collective bodies established by them. Nevertheless, the major 'final' decisions of international life – whether political or legal – are themselves, in the end, also provisional, in keeping with the adage, so profoundly true: 'Il n'y a que le provisoire qui dure' (only the provisional endures)."[33]

24. As I pointed out almost one decade ago, the gradual conceptualization of the *autonomous* international responsibility in respect of provisional measures of protection owes much to the expansion of those measures at international level in our times, calling for the configuration of a legal régime of their own[34], thanks to the operation of contemporary international tribunals. In our days, there is indeed a growing attention to the importance of provisional measures of protection in expert writing[35], but advances in case law remain rather slow, as international tribunals have not yet elaborated on their *autonomous legal régime*, nor have they so far extracted the legal consequences of non-compliance with those measures. But at least the issue has been identified for forthcoming developments, hopefully.

2. A Reassuring Jurisprudential Construction (2000-2013)

25. And there have, however, been some endeavours clearly to this effect. Within the ICJ, for example, in my dissenting opinion in the

[33] P. Guggenheim, *op. cit. supra* note 27, pp. 197-198 *[translation by the Registry]*.

[34] Cf. A. A. Cançado Trindade, "Les mesures provisoires de protection dans la jurisprudence de la Cour interaméricaine des droits de l'homme", *Mesures conservatoires et droits fondamentaux* (eds. G. Cohen Jonathan and J.-F. Flauss), Brussels, Bruylant/Nemesis, 2005, pp. 145-163.

[35] Cf., *inter alia*, e.g., [Various Authors], *Le contentieux de l'urgence et l'urgence dans le contentieux devant les juridictions internationales: regards croisés* (eds. H. Ruiz Fabri and J.-M. Sorel), Paris, Pedone, 2003, pp. 7-180 and 205-210; A. A. Cançado Trindade, "La Expansión y la Consolidación de las Medidas Provisionales de Protección en la Jurisdicción Internacional Contemporánea", *Retos de la Jurisdicción Internacional* (eds. S. Sanz Caballero and R. Abril Stoffels), Cizur Menor (Navarra), Civitas/Thomson Reuters, 2012, pp. 99-117; T. Treves, "Mesures conservatoires et obligations environnementales — Tribunal international du droit de la mer et Cour internationale de Justice", *ibid.*, pp. 119-137; and cf., for a general study, Eva Rieter, *Preventing Irreparable Harm — Provisional Measures in International Human Rights Adjudication*, Maastricht, Intersentia, 2010, pp. 3-1109.

Court's Order (of 28 May 2009) in the case of *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, in which the Court refrained from indicating the requested provisional measures of protection, I deemed it fit to examine, *inter alia*, the transposition of such measures from legal proceedings in comparative domestic procedural law onto the international legal procedure (paras. 5-7) and their juridical nature and effects (paras. 8-13). I then drew attention to the relevance of *compliance* with provisional measures of protection, which has "a direct bearing upon the rights invoked by the contending parties" (para. 14).

26. In reality, depending on the rights which are at stake, provisional measures may assume a character, more than precautionary, truly *tutelary*, directly related, as they are, to the realization of justice itself. In that same dissenting opinion I pondered that, this being so, provisional measures of protection, "with their preventive dimension, can indeed contribute to the development of international law" (para. 94). For that to happen, there remains a long way to go, in the refinement of their autonomous legal régime, as I have further pointed out on earlier occasions.

27. It is necessary, to start with, to bear in mind the advances already achieved in international case law in this respect. One decade ago, in 2000, I had the occasion, in another international jurisdiction, to dwell upon the *legal nature* of provisional measures of protection[36]. Half a decade later the time seemed ripe, on the basis of the experience accumulated on the matter, to dwell upon the *autonomous legal régime* of those measures[37]. Thus, in the case of the *Community of Peace of San José of Apartadó* (provisional measures of 2 February 2006), I stated that

> "[p]rovisional measures of protection bring about obligations for the States at issue, which are distinguished from the obligations which emanate from the judgments as to the merits of the respective cases. There are effectively obligations emanated from provisional measures of protection *per se*. They are entirely distinct from the obligations which eventually ensue from a judgment as to the merits (and also, reparations) in the *cas d'espèce*. This means that provisional measures of protection constitute a juridical institute endowed with an *autonomy* of its own, what, in turn, reveals the high relevance of the *preventive* dimension (. . .). Provisional measures of protection, endowed

[36] Cf. Inter-American Court of Human Rights [IACtHR], case of the *Haitians and Dominicans of Haitian Origin in the Dominican Republic* v. *Dominican Republic* (provisional measures of 18 August 2000), concurring opinion of Judge Cançado Trindade, paras 13-25.

[37] Cf. IACtHR, case of *Eloísa Barrios and Others* v. *Venezuela* (provisional measures of 29 June 2005), concurring opinion of Judge Cançado Trindade, paras. 4-11; IACtHR, case of *Eloísa Barrios and Others* v. *Venezuela* (provisional measures of 22 September 2005), concurring opinion of Judge Cançado Trindade, paras. 2-9; IACtHR, case of the *Children and Adolescents Deprived of Their Freedom in the 'Complex of Tatuapé' of FEBEM* v. *Brazil* (decision of 17 November 2005), concurring opinion of Judge Cançado Trindade, paras. 1-10.

> as they are with autonomy, have a legal régime of their own, and non-compliance with them generates the responsibility of the State, has legal consequences, besides singling out the central position of the victim (of such non-compliance), without prejudice to the examination and resolution of the concrete case as to the merits." [38]

28. One has here in mind, of course, provisional measures of protection endowed with a *conventional* basis, and ordered or indicated by international tribunals. The figure of the "injured party" may thus also appear, in my perception, in the realm of provisional measures of protection, in case of non-compliance with them. Accordingly, non-compliance with, or breach of, such measures, engages autonomously the international responsibility of the State at issue, within the domain of provisional measures of protection [39], irrespective of the subsequent judgments as to the merits of the concrete cases. Hence the utmost importance of compliance with those measures [40], for the realization of justice itself.

IV. The Ongoing Construction of an Autonomous Legal Régime of Provisional Measures of Protection

29. In the previous Court's Order of 16 July 2013, where it refrained from indicating the requested provisional measures of protection, I presented a dissenting opinion wherein, *inter alia*, I sought to demonstrate the need to proceed in the conceptual construction of an *autonomous legal régime* of provisional measures of protection (paras. 69-76). To that end, I pondered that

> "[c]ompliance with provisional measures of protection runs parallel to the course of proceedings leading to the Court's subsequent decision on the merits of the cases at issue. Should the Court find, e.g., a breach of international law in its decision on the merits of a given case, and, parallel to that, it further finds non-compliance with its

[38] IACtHR, case of the *Community of Peace of San José of Apartadó* v. *Colombia* (provisional measures of 2 February 2006), concurring opinion of Judge Cançado Trindade, paras. 6-7, and cf. also paras. 4 and 8-10; and cf., to the same effect, IACtHR, case of the *Communities of Jiguamiandó and Curbaradó* v. *Colombia* (provisional measures of 7 February 2006), concurring opinion of Judge Cançado Trindade, paras. 6-7, and cf. also paras. 4 and 8-11.

[39] Cf. also, in this sense, IACtHR, case of the *Prisons of Mendoza* v. *Argentina* (provisional measures of 30 March 2006), concurring opinion of Judge Cançado Trindade, paras. 11-12; IACtHR, case of the *Prison of Araraquara* v. *Brazil* (provisional measures of 30 September 2006), concurring opinion of Judge Cançado Trindade, paras. 24-25.

[40] Cf. in this sense, IACtHR, case of the *Communities of Jiguamiandó and Curbaradó* v. *Colombia* (provisional measures of 15 March 2005), concurring opinion of Judge Cançado Trindade, paras. 4 and 10; case of the *Community of Peace of San José of Apartadó* v. *Colombia* (provisional measures of 15 March 2005), concurring opinion of Judge Cançado Trindade, paras. 4 and 10; case of the *Indigenous People of Sarayaku* v. *Ecuador* (provisional measures of 6 July 2004), concurring opinion of Judge Cançado Trindade, paras. 2 and 30.

provisional measures, this latter is an *additional* breach of an international obligation. In its work in the present context, the Court still has before itself the task of elaborating on the *legal consequences* of non-compliance with provisional measures, endowed, in my perception, with an autonomy of their own.

Provisional measures of protection indicated or ordered by the ICJ (or other international tribunals) generate *per se* obligations for the States concerned, which are distinct from the obligations which emanate from the Court's (subsequent) judgments on the merits (and on reparations) of the respective cases. In this sense, in my conception, provisional measures have an autonomous legal régime of their own, disclosing the high relevance of their *preventive* dimension. Parallel to the Court's (subsequent) decisions on the merits, the international responsibility of a State may be engaged for non-compliance with, or breach of, a provisional measure of protection ordered by the Court (or other international tribunals).

My thesis, in sum, is that provisional measures, endowed with a conventional basis — such as those of the ICJ (under Article 41 of the Statute) — are also endowed with autonomy, have a legal régime of their own, and non-compliance with them generates the responsibility of the State, entails legal consequences, without prejudice of the examination and resolution of the concrete cases as to the merits. This discloses their important preventive dimension, in their wide scope. The proper treatment of this subject-matter is the task before this Court, now and in the years to come." (Paras. 70-72.)

30. This is, after all, I then proceeded, a matter of much importance for the progressive development of international law (para. 74). A related aspect to be kept in mind, I continued, is

"The *juridical nature* of provisional measures, with their preventive dimension, has lately been clarified by a growing case law on the matter, as those measures came to be increasingly indicated or ordered, in recent years, by contemporary international[41], as well as national[42], tribunals[43]. Soon the recourse to provisional measures of protection,

[41] Cf. R. Bernhardt (ed.), *Interim Measures Indicated by International Courts*, Berlin/Heidelberg, Springer-Verlag, 1994, pp. 1-152.

[42] Cf. E. García de Enterria, *La Batalla por las Medidas Cautelares*, 2nd [enlarged] ed., Madrid, Civitas, 1995, pp. 25-385.

[43] Cf. also L. Collins, "Provisional and Protective Measures in International Litigation", 234 *Recueil des cours de l'Académie de droit international de La Haye* (1992), pp. 23, 214 and 234.

> also at international level, had the effect of expanding the domain of international jurisdiction, with the consequent reduction of the so-called 'reserved domain' of the State[44]. This grows in importance in respect of régimes of *protection*, such as those of the human person as well as of the environment. The clarification of the juridical nature of provisional measures is, however, still the initial stage of the evolution of the matter, — to be followed, in our days, in my understanding, by the elaboration on the *legal consequences* of non-compliance with those measures, and the conceptual development of what I deem it fit to call their *autonomous legal régime*. (. . .)
>
> In effect, the notion of victim (or of potential victim[45]), or injured party, can thus emerge also in the context proper to provisional measures of protection, parallel to the merits (and reparations) of the cas d'espèce. Provisional measures of protection generate obligations (of prevention) for the States concerned, which are distinct from the obligations which emanate from the judgments of the Court as to the merits (and reparations) of the respective cases. This ensues from their autonomous legal régime, as I conceive it. There is, in my perception, pressing need nowadays to refine and to develop conceptually this autonomous legal régime — focused, in particular, on the contemporary expansion of provisional measures, the means to secure due and prompt compliance with them, and the legal consequences of non-compliance — to the benefit of those protected thereunder." (Paras. 73 and 75.)

31. By means of the construction of the propounded autonomous legal régime of provisional measures of protection, I added, contemporary international tribunals can

> "contribute effectively to the avoidance or prevention of irreparable harm in situations of urgency, to the ultimate benefit of *all* subjects of international law, — States as well as groups of individuals, and *simples particuliers*. After all, the human person (living in harmony in her natural habitat) occupies a central place in the new *jus gentium* of our times." (Para. 76.)

The contribution of contemporary international tribunals to the conceptualization of the legal régime of provisional measures of protection

[44] Paul Guggenheim, *op. cit. supra* note 27, pp. 15, 174, 186, 188 and cf. pp. 6-7 and 61-62.

[45] On the notion of *potential* victims in the framework of the evolution of the notion of victim or the condition of the complainant in the domain of the international protection of human rights, cf. A. A. Cançado Trindade, "Co-Existence and Co-ordination of Mechanisms of International Protection of Human Rights (At Global and Regional Levels)", 202 *Recueil des cours de l'Académie de droit international de La Haye* (1987), Chap. XI, pp. 243-299, esp. pp. 271-292.

has been taking place, is ongoing; yet, there is still much to be done and there remains a long way to go, in the perennial search for the realization of justice.

V. Final Considerations

32. In the domain of provisional measures of protection, the ICJ has recently moved forward, in ordering provisional measures, in the case of the *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the* Temple of Preah Vihear (Cambodia *v.* Thailand) *(Cambodia* v. *Thailand), Provisional Measures* (*Order of 18 July 2011, I.C.J. Reports 2011 (II)*, p. 537) to the effect of the withdrawal of military personnel from a provisional demilitarized zone that it defined in the Order itself (para. 62). In my separate opinion appended to it, I dwelt upon the relation between time and law (paras. 3-42), and the *legal effects* of the aforementioned measures in connection with the importance of prevention of irreparable harm for the protection of people in territory, and of cultural and spiritual heritage, altogether (paras. 64-70, 82-94 and 96-117). There is thus reason for hope that, on the basis of this precedent, the Court will keep on advancing in the present domain of provisional measures of protection, to the benefit of the *justiciables*.

33. In the present Order that it has just adopted today, 22 November 2013, the Court finds that there has indeed been "a change in the situation in the disputed territory" (para. 44) since it adopted its last Order (of 16 July 2013). Accordingly, the Court, in the present Order, decided, at last, that three earlier provisional measures (indicated in the Order of 8 March 2011) "must be reinforced and supplemented" (para. 55), especially concerning, in addition, the presence of private individuals in the "disputed territory" (para. 56). However, in its previous Order of 16 July 2013 concerning the Parties' requests for modification of the Court's Order of 8 March 2011, the Court did not find, on the basis of the facts presented to it, any "evidence of urgency that would justify the indication of further provisional measures"; the Court thus decided — with my dissent — that it had then not yet been sufficiently demonstrated that there was a risk of irreparable prejudice to the rights claimed by Costa Rica[46].

34. Yet, the presence of private individuals in the disputed territory already configured a change in the situation, by the time the Order of 16 July 2003 was adopted; the Court should *then*, four months ago, have modified the earlier Order of 8 March 2011, by means of its Order of 16 July 2003, so as expressly to provide for the prohibition not only of

[46] When Costa Rica requested (on 23 May 2013) it to do so alleging that there were private Nicaraguan nationals present in the disputed territory (cf. para. 35).

the presence of personnel, but also of incursion of private individuals as well into the disputed territory. By then, last July, in my perception there had already occurred a change in the situation in the disputed territory, disclosing urgency and the risk of irreparable harm, thus calling for the ordering of *new* provisional measures.

35. Indeed, the new, changed situation had already been clearly formed by the time the ICJ was called to issue its Order of 16 July 2013; the earlier Order of 8 March 2011, having referred only to "personnel", had become too narrow. In the Order of 16 July 2013 the Court took note of the presence of Nicaraguan private individuals in the disputed area as an aggravating circumstance, yet it did nothing concrete about it. Only now, in the present Order of 22 November 2013, it has done so, in order to prevent the deterioration of the situation. The Court has at last clarified that the disputed area is to be free of *all* persons, comprising personnel and private individuals (apart from the remediation work to be promptly done in the eastern *caño*).

36. So, only with the worsening of the situation (with the dredging and construction of the two new *caños*) in the disputed territory, the Court reconsidered its previous "self-restrained" approach. This worsening of the situation once again demonstrates that the worst possible posture that an international tribunal can take is that of judicial inactivism. Fortunately the Court has now taken a distinct stand. This time, four months later, the provisional measures just indicated or ordered today (22 November 2013) by the Court address both *personnel* and *private persons*, to be kept all away from the disputed territory (resolutory points 2 (C) and (D)); they also order the cessation of any dredging and other activities in the disputed territory (resolutory point 2 (A)), in addition to what I perceive as remediation work in respect of the eastern *caño* (resolutory point 2 (B)).

37. The two contending Parties do not actually controvert the responsibility for non-compliance (cf. *supra*) with the Court's earlier Order of 8 March 2011[47]. The only point surrounded by some controversy is that of the *attribution* of responsibility (cf. *supra*) for such non-compliance. To me, this point is clear, as responsibility for non-compliance is necessarily accompanied by the attribution of that responsibility to the State concerned. There is an autonomous breach of a conventional obligation (concerning provisional measures), without prejudice to what will later be decided by the Court as to the merits.

38. Had the Court last July, on the occasion of the adoption of its Order of 16 July 2013, indicated or ordered the provisional measures of

[47] Admitted by the respondent State itself, as pointed out by the Court in the present Order (cf. CR 2013/27, p. 33, para. 18, and CR 2013/25, pp. 22-23, paras. 20-21, transcribed *supra*).

protection requested, probably the present situation in the disputed territory (created in the last four months) would not have arisen. Be that as it may, this new situation has been created, and the Court now, in the Order of today (22 November 2013), has just taken the right decision to order the present provisional measures of protection. Better late — and still in time — than never.

39. In any case, in the handling of the present controversy between two States which share the long-standing and respectable Latin American tradition in international legal doctrine, the ICJ has been provided with the occasion to dwell at greater depth upon the legal nature and effects of provisional measures, endowed with a relevant preventive dimension. The Court could have gone further than it did, in its analysis of this legal issue, — an analysis which does not need to be deferred to the merits. The present case reveals an *additional* ground of responsibility (irrespective of any decision on the merits), for non-compliance with provisional measures.

40. The *legal effects* of these latter, without prejudice to the subsequent decision of the Court as to the merits of the case, can be more appropriately examined within the framework of the *autonomous* legal régime of provisional measures of protection. Non-compliance with such measures entails an *additional* ground of responsibility; the task ahead of us is to extract the consequences ensuing therefrom. The day this is done, an additional service will be rendered to the cause of the realization of justice at international level.

(*Signed*) Antônio Augusto CANÇADO TRINDADE.

DECLARATION OF JUDGE *AD HOC* GUILLAUME

[Translation]

Activities of the two States on disputed territory — Protection of the environment — Need for co-operation between Costa Rica and Nicaragua.

1. In its Order of 8 March 2011 the Court requested both Nicaragua and Costa Rica to refrain from "sending to, or maintaining in the disputed territory . . . any personnel, whether civilian, police or security". Considering these measures insufficient, in May 2013 Costa Rica complained of the presence on that territory of Nicaraguan nationals belonging to the Guardabarranco Movement and of the activities of those nationals. By Order of 16 July 2013, the Court rejected Costa Rica's request for provisional measures. The Court, however, noted the presence in the area of organized groups of Nicaraguan nationals, which "carrie[d] the risk of incidents which might aggravate" the dispute, and expressed "its concerns in this regard".

2. Since then, these organized groups have remained in the disputed territory. Furthermore, two *caños* have been dug in the area under the direction of Mr. Pastora, "the Government Delegate for the Dredging Works", which risk altering the course of San Juan River. In addition, a Nicaraguan military encampment has been established on a beach which, prima facie, appears to be part of the disputed territory. It is in these circumstances that Costa Rica has submitted a new request for provisional measures to the Court.

3. In response to this request, the Court has reaffirmed the measures indicated by it in 2011. It has further instructed Nicaragua to cease any dredging and other activities in the disputed territory. It has requested it to fill in the trench across the beach potentially connecting the eastern *caño* with the sea. It has ordered Nicaragua to remove its personnel from the area and, in particular, to evacuate the military encampment close to the end of the eastern *caño*. Expressing regret at the fact that Nicaragua has not acted on the concerns expressed by it in July 2013, the Court has further ordered that any private persons under Nicaragua's jurisdiction or control, such as members of the Guardabarranco Movement, leave the area. I have supported these various measures unanimously adopted by the Court, for they were the inevitable consequences of the activities conducted, tolerated or encouraged by Nicaragua in the disputed territory. My only regret is that the Court has not also directed certain of these measures at Costa Rica, and expressed the wish that it too should refrain in the future from any activities in the disputed territory other than those provided for in point 2 (E) of the Order.

4. That point provides as follows:

> "Following consultation with the Secretariat of the Ramsar Convention and after giving Nicaragua prior notice, Costa Rica may take appropriate measures related to the two new *caños*, to the extent necessary to prevent irreparable prejudice to the environment of the disputed territory; in taking these measures, Costa Rica shall avoid any adverse effects on the San Juan River."

5. I have been unable to concur with this last provisional measure, which seems to me to be both of disputable utility and difficult to implement, for the following reasons.

6. It will be recalled that in 2011, when a first, larger *caño* was being dug, the Court found that the disputed territory was part of an international wetland of international importance, designated as such by Costa Rica under the Ramsar Convention of 2 February 1971. The Court, having asked itself whether the existence of the *caño* risked causing irreparable damage to the protected environment, found that this was not the case and accordingly refrained from indicating provisional measures designed to prevent such risks. The Court has adopted a similar attitude in the present proceedings, and I agree with this.

7. However, in its Order of 8 March 2011, the Court nonetheless felt that "civilian personnel charged with the protection of the environment" should be able to visit the disputed territory, but only in so far as was necessary to avoid irreparable prejudice in the future. To that end, the Court decided that:

> "Costa Rica may dispatch civilian personnel charged with the protection of the environment to the disputed territory, including the *caño*, but only in so far as it is necessary to avoid irreparable prejudice being caused to the part of the wetland where that territory is situated; Costa Rica shall consult with the Secretariat of the Ramsar Convention in regard to these actions, give Nicaragua prior notice of them and use its best endeavours to find common solutions with Nicaragua in this respect" (*I.C.J. Reports 2011 (I)*, p. 27, par. 86 (2)).

8. I had pointed out at the time that it seemed to me very unlikely that the digging of the *caño* could cause irreparable prejudice to the environment. The San Juan River carries abundant sediment, which has a natural tendency to be deposited in the channels of its delta. It accordingly appeared to me that the *caño* would easily fill itself in again, and that its natural vegetation would spontaneously regenerate. The visits conducted since then by Costa Rica's personnel and the documentation produced by Nicaragua at the hearing of 17 October 2013 confirmed the view that I had expressed at the time. I consider that the same applies *a fortiori* to the

two new small *caños* once measures have been taken to prevent them from communicating with the sea.

9. I had also made it clear in 2011 that it would have been preferable, for the reasons which I gave at the time, to have inspections of the area carried out by the two States jointly. The same provision should have been made in the present proceedings.

10. Finally, I note that in 2011 the Court had authorized the dispatch of Costa Rican personnel charged with assessing the situation. Today the Court states that Costa Rica may take appropriate measures related to the two new *caños*, if these prove "necessary to prevent irreparable prejudice to the environment of the disputed territory". It is clear that the adoption of such measures must, as implied in the 2011 Order, be preceded by an assessment of the situation, and it is to be regretted that the Court has not expressly so stated.

(Signed) Gilbert GUILLAUME.

DECLARATION OF JUDGE *AD HOC* DUGARD

1. I have voted in favour of the Order and fully support the measures contained in the Order. There is, however, one issue that was not dealt with in the Order, which I believe should have received attention. This is the question of Costa Rica's access to the disputed territory by means of the San Juan River to enable it to take appropriate measures relating to the two new *caños* if, after consultation with the Secretariat of the Ramsar Convention, and after giving notice to Nicaragua, it considers it necessary to take such measures to prevent irreparable prejudice to the environment of the disputed territory. In my view this matter should have been addressed as it is clear that there is no agreement between the Parties on this subject and without proper regulation it could lead to conflict.

2. In the proceedings Nicaragua made it clear that it regards the San Juan River as being subject to its absolute sovereignty and jurisdiction except for the right that Costa Rica enjoys to navigate it for the "purposes of commerce" in terms of the Treaty of Limits of 1858. Relying on the decision of the Court in the *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua)* (*Judgment, I.C.J. Reports 2009*, p. 213), Nicaragua declared that it would not allow Costa Rica access to the San Juan River in order to carry out remediation work on the two *caños* in the disputed territory. At the same time it argued that the Court could not order provisional measures permitting Costa Rica to navigate on the San Juan River in order to gain access to the disputed territory on the grounds that this would impugn the territorial sovereignty of Nicaragua over the San Juan River.

3. Costa Rica, on the other hand, argued that the only way of reaching the disputed territory in order to carry out remediation work was by means of the San Juan River. It maintained that the terrain made it practically impossible to reach the two new *caños* by land or helicopter. Costa Rica argued that navigation on the San Juan River for the purpose of gaining access to the new *caños* would not prejudge the positions of the Parties *pendente lite* and pose no problem for Nicaragua.

4. In these circumstances I believe that the Court should in its Order have regulated Costa Rica's access to the two new *caños* in the disputed territory, if necessary by making provision for it to use the San Juan River. Instead provisional measure 2 (E) allows Costa Rica to "take appropriate measures related to the new *caños*, to the extent necessary to prevent irreparable prejudice to the environment of the disputed territory" without any indication as to how this may be done. The only limitation imposed on Costa Rica in taking these measures is that it "shall avoid

any adverse effects on the San Juan River". In effect this leaves it open to Costa Rica to access the new *caños* in the disputed territory by sea, land, air or river.

5. The uncertainty relating to access to the two new *caños* is aggravated by the fact that it is not clear that the decision of the Court in the *Dispute regarding Navigational Rights* (*I.C.J. Reports 2009*, p. 213) imposes an absolute prohibition on Costa Rica's right to navigate the San Juan River for purposes other than commerce. There is language in the decision which suggests that the protection of the environment should be considered in interpreting the legal régime to govern navigation on the San Juan River and that Nicaragua should not regulate navigation in an unreasonable manner. The Court makes it clear that the protection of the environment is a "legitimate purpose" to consider in regulating traffic on the San Juan River (*ibid.*, p. 250, paras. 88-89; p. 261, para. 127). Moreover, it stated that the power of Nicaragua to regulate the exercise by Costa Rica of its right to freedom of navigation under the 1858 Treaty of Limits "is not unlimited, being tempered by the rights and obligations of the Parties" (*ibid.*, p. 249, para. 87) and that any such regulation "must not be unreasonable, which means that its negative impact on the exercise of the right in question must not be manifestly excessive when measured against the protection afforded to the purpose invoked" (*ibid.*, pp. 249-250, para. 87 (5)). It may therefore be persuasively argued that it would be unreasonable for Nicaragua to prevent Costa Rica from using the San Juan River to gain access to the new *caños* to carry out remediation work on the grounds that the protection of the environment is a "legitimate purpose" for regulating traffic on the river. The legitimacy of such a purpose and the reasonableness of such action might be seen to be a necessary consequence of the illegality of Nicaragua's construction of two new *caños* in an environmentally protected area.

6. In these circumstances it might have been wise for the Court to have ordered that Nicaragua should not obstruct Costa Rica's free access to the two new *caños* by means of the San Juan River, along the lines of its Order by way of provisional measures to Thailand not to obstruct the free access of Cambodians to the Temple of Preah Vihear (*Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the* Temple of Preah Vihear (Cambodia *v.* Thailand) *(Cambodia* v. *Thailand), Provisional Measures, Order of 18 July 2011, I.C.J. Reports 2011 (II)*, p. 555, para. 69 (2)).

7. The subject of how Costa Rica is to gain access to the disputed territory if it considers it necessary to take appropriate measures to prevent irreparable prejudice to the environment as a result of the construction of the two new *caño*s remains unsettled. The fact that Costa Rica is required

to give prior notice of its intention relating to the taking of any such measures to Nicaragua provides some assurance that this process will be conducted peacefully. This is, however, a matter for the exercise of restraint on the part of both Parties. Both Nicaragua and Costa Rica attach great importance to the protection of the environment of the disputed territory. This should be the guiding and paramount interest on the part of both Parties in respect of any remediation works on the new *caños*.

(Signed) John DUGARD.