

CR 2013/25

**International Court
of Justice**

**Cour internationale
de Justice**

THE HAGUE

LA HAYE

YEAR 2013

Public sitting

held on Tuesday 15 October 2013, at 10 a.m., at the Peace Palace,

President Tomka presiding,

*in the cases concerning Certain Activities carried out by Nicaragua in the Border Area
(Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica
along the San Juan River (Nicaragua v. Costa Rica)*

VERBATIM RECORD

ANNÉE 2013

Audience publique

tenue le mardi 15 octobre 2013, à 10 heures, au Palais de la Paix,

sous la présidence de M. Tomka, président,

*dans les affaires relatives à Certaines activités menées par le Nicaragua dans la région
frontalière (Costa Rica c. Nicaragua) et Construction d'une route au Costa Rica
le long du fleuve San Juan (Nicaragua c. Costa Rica)*

COMPTE RENDU

Present: President Tomka
 Vice-President Sepúlveda-Amor
 Judges Owada
 Keith
 Bennouna
 Skotnikov
 Caçado Trindade
 Yusuf
 Greenwood
 Xue
 Donoghue
 Gaja
 Sebutinde
 Bhandari
Judges *ad hoc* Guillaume
 Dugard

 Registrar Couvreur

Présents : M. Tomka, président
M. Sepúlveda-Amor, vice-président
MM. Owada
Keith
Bennouna
Skotnikov
Cançado Trindade
Yusuf
Greenwood
Mmes Xue
Donoghue
M. Gaja
Mme Sebutinde
M. Bhandari, juges
MM. Guillaume
Dugard, juges *ad hoc*

M. Couvreur, greffier

The Government of Costa Rica is represented by:

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as Agent;

H.E. Mr. Jorge Urbina, Ambassador of Costa Rica to the Kingdom of the Netherlands,

as Co-Agent;

Mr. Sergio Ugalde, Special Adviser to the Ministry of Foreign Affairs and Worship of Costa Rica, Member of the Permanent Court of Arbitration,

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Mr. Marcelo Kohen, Professor of International Law at the Graduate Institute of International and Development Studies, Geneva; associate member of the Institut de droit international,

Mr. Samuel Wordsworth Q.C., member of the English Bar, member of the Paris Bar, Essex Court Chambers,

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Mr. Gustavo Campos, Minister Counsellor and Consul General of Costa Rica to the Kingdom of the Netherlands,

Ms Ana Marcela Calderón, Minister Counsellor at the Costa Rican Embassy in the Kingdom of the Netherlands,

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comme conseils adjoints.

The PRESIDENT: Please be seated. The sitting is now open and the Court meets this morning to hear the first round of oral observations of Nicaragua on the Request for indication of provisional measures submitted by Costa Rica. Before giving the floor to the Agent, I wish to announce that unfortunately Judge Abraham is not able to join the Court for the hearings this week and he will not participate in consideration by the Court of the request.

As far as the second round of arguments is concerned, we will proceed as indicated earlier by the Registrar, in his letter. It means that Costa Rica will present arguments in the second round tomorrow morning from 10 to 11.30 a.m. and Nicaragua will have the opportunity to address the Court on Thursday from 10 to 11.30 a.m.

And I now call upon His Excellency Ambassador Carlos Argüello Gómez, Agent of Nicaragua. Your Excellency, you have the floor.

Mr. ARGUELLO: Mr. President, Members of the Court and *ad hoc* judges, it is always an honour to be before the Court representing my country.

1. Two cases involving Nicaragua and Costa Rica have been brought before the Court. The first one is the case concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*. This case concerns Nicaragua's right to dredge the San Juan River and also a dispute as to the exact location of the mouth of the San Juan River that involves a question of sovereignty over roughly 250 hectares of swampland. We will refer to this dispute as the *Costa Rica v. Nicaragua* case. The second case is that concerning the *Construction of a Road along the San Juan River (Nicaragua v. Costa Rica)*. This case concerns a 160 km road still in process of construction by Costa Rica and located largely on the right margin and very close to the waters of the San Juan River. We will refer to this dispute as the *Nicaragua v. Costa Rica* case.

2. Both cases were joined by Order of the Court dated 17 April 2013¹.

3. In the first case, *Costa Rica v. Nicaragua*, the Court indicated three provisional measures in its Order of 8 March 2011 that are pertinent to these proceedings. The first two measures

¹Listed in the Court's docket as *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* Proceedings joined with *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)* on 17 April 2013.

referred to the territory in dispute at the mouth of the river. Thus, the first provisional measure indicated that:

“Each Party shall refrain from sending to, or maintaining in the disputed territory, including the *caño*, any personnel, whether civilian, police or security”²;

and the second measure indicated that:

“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

4. It should be recalled that this case is not exclusively related to the dispute over 250 hectares of swampland at the mouth of the San Juan River, but also and more importantly on the right of Nicaragua, questioned by Costa Rica, to clean and dredge this river and return its water flow to the level existing in 1858 when the Jerez-Cañas Treaty was entered into.

5. The third provisional measure of the 8 March Order did not refer specifically to the territory in dispute but more generally, it indicated that:

“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

6. In the present proceedings, what remains completely out of focus is the fact that Costa Rica has not only repeatedly violated the Court’s Order by overflights and visits to the disputed area without fulfilling the requirements of the Court’s Order, but also by a gross violation of that Order that was done quite openly and under orders of its highest authorities⁵.

7. I refer to 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. As the Court is well

²*Order of 8 March 2011, I.C.J. Reports 2011 (I).*

³*Idem.*

⁴*Idem.*

⁵See Counter-Memorial of Nicaragua (CMN) of 6 August 2012 in the dispute concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Chap. 9, p. 415; see also Memorial of Nicaragua (MN) of 19 December 2012 in the dispute concerning *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Chap. 5, p. 149.

aware, this construction was done without any environmental impact assessment and without any notice to Nicaragua⁶.

8. Clearly, if there is to be a scientifically-based concern over environmental impacts to the San Juan de Nicaragua River, and the surrounding area, the priority should be impacts of land-use activities in Costa Rica upstream.

9. The alleged impacts of the *caño* in the disputed territory are trivial in the larger context of impacts to the San Juan de Nicaragua River (including the disputed territory), notably from erosion caused by poor land use and damaging road construction in Costa Rica. The construction of Route 1856 on the Costa Rican bank of the Río San Juan has caused severe erosion from over 100 km of exposed land, much of it steep, highly erodible terrain, resulting in increased sediment delivery to the river.

10. In the context of the extensive environmental destruction caused by the reckless construction practices used on Route 1856 along over 160 km of the river's south bank, and destructive ongoing land-use practices in thousands of hectares in the Costa Rican tributary basins, the language used in Costa Rica's Request referring to an "irreversible harm to the environment and ecology" caused by the *caños* is misplaced.

11. The potential impacts of these *caños* can be viewed in the larger context of the river system. On the screen you can see a map, included in your judges' folders as tab 1. This map was submitted as part of the evidence in the Memorial of Nicaragua in the *Nicaragua v. Costa Rica* case⁷. Inside the yellow box, only an area of 41.6 km is reflected, a small sample of the mega project that Costa Rica has built and intends to continue building along the right bank of the San Juan de Nicaragua River, in contrast to what they claim in the *Costa Rica v. Nicaragua* case.

12. The close-up of the mouth of the river area shows the disputed territory which consists of an area of approximately 250 hectares. Another close-up is needed in order to see the area referred by Costa Rica in its present Request. This smaller area is about 35 hectares in size and the ditch

⁶*Idem.*

⁷See G. Mathias Kondolf, Danny Hagans, Bill Weaver and Eileen Weppner; Environmental Impacts of Juan Rafael Mora Porras Route 1856, Costa Rica, on the Río San Juan, Nicaragua, December 2012 (MN, Vol. I, Ann. 1).

that is the object of these hearings is approximately 150 m long and 25 m wide, that is, an area of under 4000 sq m.

13. This is the reality of the area. As explained in the larger context of the river system, the question to be asked is who is really causing irreparable prejudice to the disputed area, the internationally protected areas and the need for cleaning and dredging of the river? Is it the 160 km road or the 150 m-long ditch that is presently the object of Costa Rica in these hearings?

14. If this road is not a colossal aggravation of the dispute before the Court, then what constitutes such an aggravation?

15. All the representatives of Costa Rica have in one way or another stated yesterday morning that the only intention of the new measures it is requesting is to re-establish the *status quo ante*. How will Costa Rica accomplish that feat with the 160 km road it constructed and is still under construction along the San Juan River?

16. Mr. President, Members of the Court, Nicaragua considers that the territory in dispute is part of its own indisputable territory over which it has sovereignty and exercises rights to clean and dredge the San Juan River confirmed by Treaty and Arbitral Awards. The deterioration of the navigation conditions on the San Juan, and the silting of some of its channels, are not due to the normal course of nature. The World Bank has issued a report indicating that between 74 and 85 per cent of the sedimentation deposited on the San Juan River comes from the Costa Rican side⁸.

17. The only reason why Nicaragua accepts that it cannot enter and execute works in the territory identified as in dispute by the Court is because of the provisional measures indicated in its 8 March Order. That is the reason why as soon as the Nicaraguan Government verified that there had been an unauthorized entry into the area, it ordered the immediate withdrawal of all personnel and equipment.

18. This immediate reaction by the highest Nicaraguan authorities makes the indication of new measures unnecessary. The so-called new measures requested by Costa Rica in the present

⁸Political and Investment Priorities to reduce de environmental degradation of the Lake Nicaragua (Cocibolca) Basin, Main environmental challenges, p. 47, table III. 3, available at: http://www.wds.worldbank.org/external/default/WDSCContentServer/WDSP/IB/2013/04/24/000356161_20130424144325/Rendered/PDF/768860WP0144500Watershed000SPANISH.pdf.

proceedings are in fact already part of the provisional measures indicated in the 8 March Order, or are a rehash of the request for a modification of that Order that Costa Rica had made on 23 May of this year and that the Court in its Order of 16 July 2013 found that the circumstances were “not such as to require the exercise of its power to modify the measures indicated in its Order of 8 March 2011”⁹.

19. This has been recognized by Costa Rica in its own new request for provisional measures, by stating in its request that “Costa Rica’s rights which are the subject of this Request for new provisional measures are the same as those for which the Court indicated provisional measures in its Order of 8 March 2011, that is, its rights to sovereignty, to territorial integrity and to non-interference with its lands and environmentally protected areas”¹⁰.

20. In fact, what Costa Rica is now requesting is that the provision of the 8 March Order prohibiting the entry of personnel into the area in dispute be extended to all persons: that is the precise request it had made on 23 May and that was not accepted by the Court in its Order of 16 July. Why have hearings on this same issue three months after this Order was given? If there was a violation of the Order, in any case unknown and unauthorized by the highest authorities of the Nicaraguan Government, this has already been taken care of and, if any prejudice was caused, this is a question for the merits, and if Nicaragua is found liable for any reparation, it will comply with the Court’s Judgment, as it has always done.

21. But Costa Rica has added another modification to the Order of 8 March. It now requests that the Court Order: “that Costa Rica be permitted to undertake remediation works in the disputed territory”, that is, without consulting Ramsar and without taking the interests of Nicaragua in the territory in dispute into consideration. What Costa Rica is in fact requesting is that the Court authorizes an unlimited and uncontrolled presence of Costa Rican personnel in the territory in dispute. This against the fact that even Costa Rican expert, Professor Thorne, agrees that if the

⁹Order of 16 July 2013, para. 40.

¹⁰Request for the Indication of New Provisional Measures in the case concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, listed in the Court’s docket as *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, proceedings joined with *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)* on 17 April 2013, p. 12, para. 21, 23 Sept. 2013.

works being carried out in the area in dispute were stopped, no irreparable damage would be caused to the territory in dispute¹¹.

Guardabarranco

22. The presence of young people from the environmental group called Guardabarranco has been the object of comment by all the representatives of Costa Rica during the course of yesterday's pleadings. Costa Rican counsel asserts that 10,000 members of the group have been in the territory in dispute. This is a fallacy. Nicaragua has pointed out that this number refers to the members of this group that have been doing environmental work and study along the whole area of the San Juan River. It is apparent to anyone looking at the photos of the area where these youngsters are located that it is physically impossible for that number to have been in the area in dispute. Reports are that small groups of youngsters visit the place for a short period of time. They have not performed any work on the *caño* that is subject to the Court's Order. There have been no reports of damages caused by these youngsters to the territory in dispute in the reports filed by Costa Rica with the Court to this date¹².

23. The question of the presence of members of the Guardabarranco group was the object of pleadings by both Parties with respect to the request made by Costa Rica for a modification of the provisional measures indicated in the Order of 8 March. The first modification that Costa Rica requested was that the Court should order "(1) the immediate and unconditional withdrawal of all Nicaraguan persons from the Area indicated by the Court in its Order of provisional measures of 8 March 2011"¹³. In its Order of 16 July 2013, the plain fact is that the Court found "that the circumstances, as they now present themselves to the Court, are not such as to require the exercise of its power to modify the measures indicated in the Order of 8 March 2011"¹⁴. In practical terms

¹¹See Colin Thorne, Report on the Impact of the Construction of two New Caños on Isla Portillos, 10 Oct. 2013, p. 8, para. 5.1 (f).

¹²See Nicaragua's Written Observations on the request by Costa Rica for the modification of the Court's Order of 8 March 2011 in the case concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, 14 June 2013.

¹³Request for the modification of the Court's Order of 8 March 2011 in the case concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, 23 May 2013, p. 8.

¹⁴Order of 16 July 2013, para. 40 (1).

what the Court found is that the presence of these youngsters did not provide a basis for a modification of the provisional measures in place.

24. Now three months after this finding by the Court, Costa Rica returns with the same request under the mantle of the unauthorized works being conducted by Mr. Pastora in the territory in dispute. Thus, the second measure requested by Costa Rica is “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”¹⁵.

25. The addition of the phrase “or by any persons under its jurisdiction or coming from its territory” is not addressed to the new situation claimed by Costa Rica as the motivation of this request since Costa Rican counsel insist on pointing out the official capacity of Mr. Pastora and thus that the persons doing the work were Nicaraguan personnel. The presence of these persons in the area in dispute is clearly covered by the Order of 8 March. If it were not so, these hearings would not be taking place.

26. President Ortega has invited Costa Rica on several occasions to work together towards the conservation of the whole San Juan de Nicaragua River, including the area in dispute. He has been empathic in calling for “ecological brigades” of both countries “so that we can all protect that area . . . develop it together” as “this area is a common good of humanity”¹⁶. In line with President Ortega’s offer, the Minister of Foreign Affairs of Nicaragua restated the offer in writing and informed Costa Rica that the environmentalist movement has “performed [its tasks] along the entire riverbank” and, in support of what President Ortega offered to Costa Rica, the Foreign Minister stated that Nicaragua “sees with great pleasure that Nicaraguan and Costa Rican citizens take initiatives to protect the environment in the area, and does not consider that the planting of trees will damage Costa Rican interests”¹⁷.

¹⁵Request for the Indication of New Provisional Measures, 23 September 2013, p. 15, para. 27 (2).

¹⁶Speech of President Daniel Ortega, 19 July 2011, available at: http://www.presidencia.gob.ni/index.php?option=com_content&view=article&id=367:50-aniversario-de-fundacion-del-fsln&catid=87:julio-2011&Itemid=54&showall=1.

¹⁷See Diplomatic Note of 5 Mar. 2013 attached to Costa Rica’s Report to the Court dated 15 Mar. 2013.

Access to area in the disputed territory by the San Juan River

27. The third new measure requested by Costa Rica is that it “be permitted to undertake remediation works in the disputed territory on the new artificial *caños* and the surrounding areas, to the extent necessary to prevent irreparable prejudice being caused to the disputed territory”¹⁸.

28. This measure in effect would convert the territory in dispute into a territory under Costa Rican jurisdiction pending the judgment on the merits. Costa Rica could decide *proprio motu* without any supervision the type of equipment and personnel needed in the area, as well as the timetable for executing the proposed works. The lack of necessity for granting this request will be addressed later by Professor McCaffrey.

29. If this measure were granted, that is, the unrestricted authority to occupy the area without consultations, Costa Rican counsel in a sort of “by the way fashion” argued that the access to the area where Mr. Pastora had entered was very difficult except by the river itself and that Nicaragua should be ordered to let the Costa Rican personnel and equipment navigate down the San Juan River¹⁹.

30. The question of navigation on the San Juan River by Costa Rican authorities was the object of a separate case and Judgment by the Court, the *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*; that determined that the right of navigation by Costa Rica along the river is exclusively for purposes of commerce²⁰. The concept of commercial purposes cannot be stretched to include the transportation of Costa Rican Authorities on official business along the river.

31. Costa Rican counsel also added that the installations placed by Nicaragua in this area had to be removed²¹. There are no installations in the territory in dispute put up by the Government of Nicaragua. The references made by Costa Rican counsel to the installations along the sandbank running along the beach in front of Harbor Head Lagoon and of the coastal area of the territory in dispute. This area has never been in dispute.

¹⁸Request for the Indication of New Provisional Measures, 23 Sept. 2013, p. 15, para. 27 (3).

¹⁹CR 2013/24, para. 32 (Kohen).

²⁰Judgment of 13 July 2009, *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, para. 156.

²¹CR 2013/24, para. 30 (Kohen).

32. Mr. Reichler will address this new claim by Costa Rica to territory that, up to and including the Costa Rican Memorial in the present proceedings, was accepted as being indisputably part of the Nicaraguan territory.

33. Costa Rican counsel brushed off the Nicaraguan assertions that the President had no information on exactly what Mr. Pastora was doing, calling it unjustifiable ignorance (“ignorance inexcusable”)²² and that it showed that Nicaragua did not have the capacity of guarding and controlling the disputed territory.

34. On this question of unjustifiable ignorance it would be well for Costa Rican counsel to look to their own client. The President of Costa Rica, Ms Chinchilla, when asked about the road and the environmental damage it was causing, during an interview she emphatically stated: “I did not sit and work with the technicians. . . let’s say that they do not ask one where to use the machinery, Oh God, they do not ask one which tree to cut or anything, one cannot be over such details, that is always in the hand of those conducting the works from the technical point of view.”²³

35. Costa Rican counsel have remarked that it does not seem plausible that the Armed forces contingent located near the territory in dispute would not be aware of the activity taking place in that area²⁴. In this respect it is important to keep in mind that Mr. Pastora is a well-known figure in Nicaragua, as well as in Costa Rica. It would have been quite strange that a young lieutenant in charge of the nearby areas would question what Mr. Pastora was doing.

36. Costa Rica claims that it needs a closer right of inspection and visit in the territory in dispute. Yet Costa Rica has stated publicly that it constructed the very costly — financially and environmentally — road along the river in order to expedite transportation and vigilance of the territory in dispute. Likewise it has security forces stationed along the Costa Rican side of the territory in dispute and has built towers for keeping watch — including listening to what is happening — in the area in dispute. Furthermore, Costa Rica has the right granted by the Court’s

²²CR 2013/24, para. 35 (Kohen).

²³*La Prensa*, Nicaragua (taken from *La Nacion*, Costa Rica), Chinchilla blames government officials, 26 May 2012, available at: <http://www.laprensa.com.ni/2012/05/26/ambito/102748-chinchilla-culpa-a-funcionarios>.

²⁴CR 2013/24, para. 27 (Crawford).

Order of 8 March to visit the territory under special conditions that safeguard the nature of the territory as one in dispute.

37. Costa Rican counsel has insisted that Nicaragua's word cannot be trusted because it does not accept responsibility for Mr. Pastora's actions. This is a misrepresentation of the situation. In Nicaragua's letters to the Court of 10 and 11 of this month, it stated that as soon as the President of Nicaragua confirmed the presence of Nicaraguan personnel in the area in dispute, he ordered the immediate evacuation of the area including any equipment that had been introduced. This statement clearly acknowledges a subordination of such personnel to the Central Government which, consequently, is responsible for their acts. If any prejudice has been done to Costa Rica, this will be determined at the merits stage and, as indicated above, Nicaragua will naturally honour any Judgment of the Court on this issue.

38. At this point it might be well to recall that Nicaragua has been an example of compliance with the Judgments of the Court. Nicaragua has had recourse to the Court on many occasions and has always complied with the Judgments and Orders of the Court.

39. Costa Rican counsel have given a series of reasons why the assurances by Nicaragua that it would comply with the Order of the Court were not acceptable, that is, that Nicaragua could not be trusted²⁵. The first reason given was that Nicaragua had not admitted the facts. This statement is surprising in view of the fact that Nicaragua acknowledges that it has given orders for the evacuation of the personnel that had entered the territory in dispute. What other way of acknowledgment is needed?

40. Another reason adduced by Costa Rican counsel for not trusting Nicaragua is that Nicaragua had done this before. When did this occur? If the reference is to the *caño* cleared in 2010, this was done by Nicaragua before there was any Order of the Court prohibiting this activity. If the reference is to the installations along the sand bank that separates Harbour Head Lagoon from the sea, these installations are located in an area that Costa Rica has always accepted to be Nicaraguan.

²⁵CR 2013/24, paras. 30-35 (Crawford).

41. The assertion is also made that Nicaraguan troops are in the disputed territory. This is not true. There were no troops with the personnel under the orders of Mr. Pastora or in the area where the *caño* of 2010 is located.

42. Costa Rican counsel — very strangely — warned the Court that if it did not order the new measures requested by Costa Rica its authority would be flouted and somehow diminished²⁶. If Nicaragua cannot be trusted to comply, then what are we doing here? If Nicaragua is unworthy of trust, what is the object of requesting further measures?

Mr. President, the sequence of the presentations will be as follows: Mr. Reichler will address the issues of evidence and the facts, in general, and of the lack of urgency for the indication of provisional measures. Professor McCaffrey will address the lack of irreparable harm alleged by Costa Rica and the reasons why Costa Rica's requested third provisional measure should be denied. And Professor Pellet will wrap up and address the legal issues involved in Costa Rica's request.

Thank you, Mr. President. May I ask you to call Mr. Reichler to the podium please.

The PRESIDENT: Thank you very much, Ambassador, for the opening presentation, and I now call on Mr. Reichler. You have the floor, Sir.

Mr. REICHLER:

THE FACTS

1. Mr. President, Members of the Court, good morning. As always, it is an honour for me to appear before you. And it is a privilege for me to speak on behalf of the Republic of Nicaragua once again.

2. Mr. President, as I think you might be aware, I have been expecting for a long time to appear before you on this date at this very time. Early this year, the Court fixed Tuesday morning, 15 October, as the day for Ecuador's second round against Colombia in the *Aerial Herbicide Spraying* case, and I was going to speak on behalf of Ecuador. However, as the Court is aware, a few days before the oral hearings were scheduled to begin, the case was discontinued, after Colombia agreed to everything that Ecuador had demanded, and Ecuador determined that, having

²⁶CR 2013/24, para. 33 (Crawford).

achieved everything it set out for, there was no need to impose on the Court for the purpose of seeking an Order requiring Colombia to do what it had already agreed to do.

3. Mr. President, the same could have happened here. In its Request for the Indication of New Provisional Measures, filed on 23 September, Costa Rica asked the Court to order Nicaragua to suspend immediately any work in the disputed territory, and specifically to cease “any work of any kind on the two further artificial *caños* in the disputed territory”. As the evidence before the Court shows, Nicaragua has terminated these activities. In fact, it had already caused all such activity to cease before Costa Rica filed its Request with the Court. Yesterday, Costa Rica did not dispute this. They offered no evidence of any activity in the disputed territory after 18 September.

4. Costa Rica also requested that Nicaragua “withdraw any personnel, infrastructure . . . and equipment, introduced by it or any persons under its jurisdiction, from the disputed territory”. Again, the evidence shows that all personnel, infrastructure and equipment have been removed from the disputed territory and, indeed, that this, too, was done by the time Costa Rica filed its Request. And, again, Costa Rica did not offer any evidence to dispute this. They said only that they had no knowledge whether there were any personnel, infrastructure or equipment in the disputed territory after 18 September.

5. Had there been any activity, personnel or equipment in the disputed area, the Court would certainly have heard about it yesterday. Costa Rica demonstrated that it was fully capable, by satellite and aerial photography, of documenting what was happening in the disputed area. It is telling, therefore, that they presented no satellite or aerial photography of the disputed area for any of the 26 days between 18 September and their presentation yesterday.

6. What the evidence shows is not only that there were no activities, personnel or equipment in the disputed territory as of the time Costa Rica filed its Request with the Court, but further, on 21 September, two days before Costa Rica filed its Request, the President of Nicaragua ordered the Commander of the Nicaraguan Army to conduct regular patrols along the San Juan River adjacent to the disputed area to assure that no Nicaraguan Government officials or employees, including Mr. Pastora, enter it again, and that the Court’s Order of 8 March 2011 is strictly complied with.

7. Based on these facts, which are all well documented, Nicaragua wrote to the Court on 10 October that the measures requested by Costa Rica were “superfluous”. Nothing that Costa Rica offered into evidence yesterday contradicts any of these facts.

8. Yet, Costa Rica persists in asking the Court to order Nicaragua to do what it has already done, not to mention what it recognizes that it is already bound to do by virtue of the Court’s Order of 8 March 2011. And yet, unlike Ecuador, Costa Rica refuses to take “Yes” for an answer. It insists on an Order, *another* Order, from the Court.

9. As Professor Crawford made clear yesterday, Costa Rica’s argument for provisional measures is not based on any present or ongoing activities by Nicaragua. Nor is Costa Rica’s request based on a need for expansion of the protections afforded by the Court’s prior Order. It is admitted by Costa Rica, as to the first two measures that have been requested, that they are redundant with the Order of 8 March 2011; both Parties agree that the activities of which Costa Rica complains are already covered by that Order.

10. In these circumstances, Mr. President, as Professor Crawford made very clear yesterday, Costa Rica’s request for new provisional measures is now based on a single proposition: that Nicaragua cannot be trusted. Specifically, Nicaragua’s assurances that it has stopped all activities in the disputed area and removed the personnel and equipment associated with those activities cannot be trusted, even though they are confirmed by contemporaneous documentary evidence. Nor can Nicaragua be trusted to comply with its obligations under the Court’s Order of 8 March 2011, which Costa Rica admits, already prohibits the activities that are the subject of its present Request.

11. This, then, has turned into a rather remarkable Request. Let there be no mistake or confusion about what the Court is now being asked to do. In the admitted absence of any ongoing activities by Nicaragua that threaten Costa Rica’s rights, Costa Rica asks nothing less of the Court than that it find that Nicaragua cannot be trusted to refrain from prohibited activity in the future and, on the basis of this finding, to order the provisional measures that have been requested.

12. I will return later to Costa Rica’s assault on Nicaragua’s character and good faith, and explain why it is both unjustified and an insufficient basis to support the indication of provisional measures.

13. But first I will demonstrate why the measures requested by Costa Rica are unnecessary and superfluous, and why its Request of 23 September is moot. I will review the evidence showing that the activities in the disputed area have been terminated, and the personnel, infrastructure and equipment have been removed, and that consequently there is no present threat to any right claimed by Costa Rica, and therefore no basis on which provisional measures can be ordered.

What the documentary evidence shows

14. With your indulgence, Mr. President, I will take you through the chronology of events, as shown in the documentation that was submitted to the Court before these hearings began. Professor Crawford reviewed some of this evidence yesterday, but he left out important parts of it.

15. Costa Rica first complained to Nicaragua about clearing activities in the disputed area in its Diplomatic Note of 16 September. Up to that point, the evidence shows that the Government in Managua had no knowledge of any such activities in that area. It had never authorized Mr. Pastora or anyone else to perform clearing or any other activities in the territory covered by the Court's Order of 8 March 2011. Nevertheless, in response to Costa Rica's Note, on 17 September — the very next day — President Ortega instructed the Executive President of the National Ports Company, which is responsible for dredging and clearing activities to maintain and improve the navigability of the San Juan River and control flooding, to provide him with a report on the works then being carried out at the mouth of the river “to learn about the status of such cleansing works in view of the protests made by the Republic of Costa Rica”²⁷ [this is at tab 2 of your judges' folder].

16. On the morning of the following day, 18 September, the Nicaraguan Foreign Ministry responded to Costa Rica's Diplomatic Note of 16 September, assuring Costa Rica that no activities in the disputed territory had been authorized by Nicaragua²⁸ [this is at tab 3 of your judges' folder]. In retrospect, it would have been better if the Foreign Ministry had waited until the investigation ordered by President Ortega was completed, or at least until the following day. But what the Foreign Minister said on 18 September was true. Nicaragua had not authorized anyone to enter the

²⁷Nicaragua's Letter to the Court dated 11 Oct. 2013, Ann. 1.

²⁸Costa Rica's 23 Sept. 2013 Request for the Indication of Provisional Measures, Attachment PM-5.

disputed territory, much less to carry out works there that were prohibited by the Court's Order of 8 March 2011.

17. Later in the day, after Nicaragua's Note was sent, Mr. Pastora was interviewed on a television news programme and identified on a map exactly where he had been clearing or constructing *caños*. Although Mr. Pastora protested that his activities at the mouth of the San Juan River were in areas not covered by the Court's Order, he was wrong. 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.

18. This was not so plain to the Nicaraguan Foreign Ministry before Mr. Pastora's interview. Yesterday, Costa Rica's advocates ridiculed Nicaragua's Foreign Ministry for denying what they called clear evidence from the satellite photos attached to the Costa Rican Note of 16 September, and for suggesting that the appearance of new *caños* may have been attributable to natural causes, including heavy rains. But the satellite photos that accompanied the Costa Rican Note were not the same ones that counsel showed you yesterday. Here are the three photos that Costa Rica sent Nicaragua on 16 September²⁹ [they are at tab 4 of the judges' folder].

19. Mr. President, it would have been anything but clear to the Foreign Minister from these photos that artificial *caños* were being constructed, or that any similar activities were taking place, in the disputed area. By contrast, here are the photos Mr. Ugalde showed you yesterday, dated 5 and 14 September, which could have been, but were not, sent to Nicaragua on 16 September³⁰ [tab 5]. The impression may have been left yesterday that these were the photos sent to Nicaragua on 16 September. They were not. In fact, Nicaragua did not see these photos, or any of the others submitted by Costa Rica, until they were included as annexes to the Request of 23 September.

20. The Foreign Minister was not persuaded by Costa Rica's Note because he knew that the Government in Managua had not authorized any dredging or *caño* clearing activities in the disputed area, and that it been Nicaragua's strict and consistent policy to fully comply with the Court's Order of 8 March 2011, and to avoid any further works in that area. Mr. Pastora himself knew that this was Nicaragua's policy. In the television interview — as the transcript submitted by Costa

²⁹*Ibid.*, Attachment PM-1.

³⁰Costa Rica, judges' folder, tabs 6 & 12.

Rica shows — he insisted repeatedly that his actions were consistent with the Court’s Order, as he understood it.

21. 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 diabolical plan by Nicaragua to violate or circumvent the Court’s Order. 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. 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.

22. Did Nicaragua take immediate action to stop Mr. Pastora and remove him from the disputed area once it learned what he was doing? Yes! And has Nicaragua now issued clear instructions to Mr. Pastora to stay out of the area, and taken measures — including military patrols — to prevent any further unauthorized activity? Again, yes! The documentary evidence is uncontroverted.

23. Professor Crawford asks: “Where are [Mr. Pastora’s] earlier instructions? Nicaragua has them; you do not.”³¹ He suggests that Nicaragua is hiding something from the Court. That is an accusation which should not be made lightly, particularly in this Court. And especially when it is entirely unfounded, as it is here. In fact, the documents submitted to the Court show what Mr. Pastora’s initial instructions were. They are stated in the report of the National Port Company that Professor Crawford neglected to mention:

“During the second half of last July of the current year, due to torrential rainfall and the great amount of sediment from the San Juan River tributaries . . . there were obstructions in the natural outlets of the San Juan River Delta, which required cleansing to avoid further flooding in the area, as well as cleansing works of excessive

³¹CR 2013/24, para. 30 (Crawford).

sediments that may affect the wetlands, especially flooding of the populations living along the riverbanks and the airport.”³²

This is a reference to works on the Nicaraguan side of the river, because in this area the riverine population and the airport — shown on the extreme left at the bottom of the satellite photo — are only on the Nicaraguan side. [These are at tab 6 of your judges’ folder]. The report continues: “Due to the above, cleansing works began in August in order to guarantee the natural flow of the San Juan River into the river mouth Delta. These works include the use of a suction dredger.”³³

24. While he was performing these works in the area, Mr. Pastora took it upon himself to extend his activities into the disputed territory. What the evidence shows is that, as soon as Nicaragua appreciated that Mr. Pastora was performing these activities in the area that Nicaragua knew to be disputed, it took immediate action to stop him.

25. By *the* time President Ortega received the report from the National Ports Company on 21 September, Mr. Pastora had appeared on television and made his misunderstanding known. President Ortega therefore instructed the Executive President of the National Ports Company:

“In order to avoid any possible confusion, immediately cease the cleansing works in the Delta area that may affect the area in dispute; in the same manner, immediately withdraw the personnel and machinery that is in said area. You are hereby informed that instructions . . . were *issued* to the Army of Nicaragua to guarantee that the area in dispute should remain free of personnel and machinery. The San Juan River cleansing works should continue only in the areas that are not part of what the International Court of Justice denominated ‘territory under dispute’ in order to safeguard the wellbeing of the population, the environment or any damage to the airport.”³⁴ [This document is at tab 7 of your judges’ folder.]

26. These instructions were issued by President Ortega two days before Costa Rica filed its Request for the indication of new provisional measures with the Court on 23 September.

27. On 22 September, one day before Costa Rica filed its Request, the Executive President of the National Port Company sent the following communication to Mr. Pastora:

“I hereby inform you the instructions from the President of the Republic, Commander Daniel Ortega Saavedra, for due compliance:

‘In order to avoid any possible confusion, immediately cease all of the cleansing works in the Delta area that may affect the area in dispute, as well as immediately withdraw the personnel and machinery that are located in such area. Likewise, you are informed that instructions have

³²Nicaragua’s Letter to the Court dated 11 Oct. 2013, Ann. 3.

³³*Ibid.*

³⁴*Ibid.*, Ann. 6.

been issued to the Army of Nicaragua to safeguard that the area in dispute remains free of personnel and machinery.”³⁵ [This document is at tab 8.]

28. On the same day, 22 September, President Ortega wrote to the Commander in Chief of the Army of Nicaragua, General Julio Cesar Aviles Castillo:

“In view of the protest by the Republic of Costa Rica in relation to the activities in the area under dispute . . . proceed with following measures: 1. Monitor and secure that no official or employee of the Government of Nicaragua enters into the area under dispute, exactly as defined by the International Court of Justice in its Order dated March 08, 2011.”³⁶ [This is at tab 9.]

29. Pursuant to these instructions emanating directly from the President of the Republic, Mr. Pastora promptly evacuated the disputed area, along with his personnel and equipment. As I have indicated, despite its access to satellite and aerial photography, Costa Rica has submitted no photographs dated after 18 September. What does this tell us? If it is true that a picture is worth a thousand words, here the absence of a picture is worth at least that many.

30. On 24 September, before Nicaragua was able to inform Costa Rica that it had taken these actions and that the problem notified to it on 16 September had been resolved, it was informed by the Court that Costa Rica had filed a request for the indication of new provisional measures on the previous day. Costa Rica asks why Nicaragua did not inform it or the Court until 10 October that it had terminated the activities in the disputed area and removed all personnel and equipment. This is not a difficult question to answer. First, after Costa Rica had brought its complaint to the Court, Nicaragua decided that it should deliver its answer in this same forum, rather than to Costa Rica directly. Second, it took some time for Nicaragua to assemble its legal team, analyse the facts, and prepare its submission to the Court, including the collection and translation of the pertinent documentary evidence, which Nicaragua hurried to present to the Court in advance of these hearings.

31. Mr. President, my task today is to address the facts pertinent to Costa Rica’s Request for the indication of new provisional measures. My esteemed colleague and friend, Professor Pellet will discuss the legal aspects. Among other things, he will point out that it is not the Court’s practise to indicate provisional measures that are superfluous, or unnecessary, or that are rendered moot by the conduct of the parties. And that is precisely the situation we have here.

³⁵*Ibid*, Ann. 8.

³⁶*Ibid*, Ann. 9.

32. Provisional measures are not indicated for the purpose of punishing or embarrassing a State. They are intended to prevent imminent and irreparable harm to a right in dispute. Here, the harm, if any, is alleged by Costa Rica to result from activities that have been terminated, and subject to a commitment by Nicaragua that they will not be allowed to recur. There is, plainly and simply, no current threat to any right claimed by Costa Rica, let alone an imminent threat. The provisional measures it seeks are superfluous and unnecessary, and its Request is moot.

The assault on Nicaragua's character

33. I will now respond to the argument of Professor Crawford, that provisional measures are warranted — even though the activities in the disputed area have ceased and the personnel and equipment have been removed, and even though the Court's Order of 8 March 2011 already prohibits these activities — because, he says, Nicaragua cannot be trusted to refrain from prohibited activities in the future, or to honour its solemn assurances to the Court, or its obligations under the Court's prior Order.

34. Professor Crawford made one legal argument, and many characterizations of the facts. My good friend may have been right on the law, as he frequently is. But he was very wrong on the facts. As a legal matter, he insisted that Nicaragua is responsible for Mr. Pastora's conduct. He said that it was ridiculous for Nicaragua to argue otherwise. Well, he need not have been so insistent. Nicaragua accepts that it is responsible for Mr. Pastora's behaviour. It has not denied this. That is why it shut him down as soon as it became aware of what he was doing.

35. Where Professor Crawford exaggerates is on the facts, particularly those facts that bear on Nicaragua's conduct and its good faith. The litigation strategy is clear: to divert the attention of the Court from what should be the central issue of these hearings — which is whether Nicaragua is presently engaged in activities that threaten imminent and irreparable harm to Costa Rica's rights — and to refocus it instead on the thesis that Nicaragua is contemptible and untrustworthy. To this end, the facts are routinely twisted to make Nicaragua appear the villain. But if the Court reviews the evidence dispassionately — laying to one side Professor Crawford's righteous indignation — it will see that he has presented a very biased view of the evidence.

36. Take his very first assertion, that Nicaragua “said it had withdrawn from the disputed territory, though without admitting it had ever been there”³⁷. This leads to his challenge that, before it is worthy of the Court’s trust, the first thing Nicaragua must do is admit the truth³⁸. This, he says, Nicaragua will not do³⁹. But Nicaragua has already done it. It acknowledges that Mr. Pastora and his crew were performing clearing activities in the disputed area. It could not have advised that it withdrew them without recognizing that they were there in the first place. Professor Crawford pretends that Nicaragua’s last word on the subject was its 18 September Diplomatic Note, which stated, accurately, that no activities in the disputed area had been authorized. At the time, as the evidence shows, the Foreign Minister did not know where Mr. Pastora had been operating. The Government in Managua found out when he announced this on television. At no time after that did Nicaragua deny that he had been there.

37. Professor Crawford unfairly accuses Nicaragua of “oscillating between three different positions”, which according to his characterization, were “hopelessly inconsistent”⁴⁰. That is not the case. The first statement by Nicaragua, in the Diplomatic Note of 18 September, was made before Managua was aware of Mr. Pastora’s location. The second statement, by Mr. Pastora himself, accurately identified where he had been engaged. There was no third statement. Nicaragua never denied Mr. Pastora’s report on his whereabouts.

38. These are not fair or objective charges. They are an advocate’s way of skewing the evidence to make the other party look bad.

39. Here is another example. Professor Crawford told you, Mr. President, that Nicaragua gave three prior assurances to the Court, and “at least two and a half of these assurances were either untrue or shown to be unreliable”⁴¹. In fact, Mr. President, if you look at the evidence, and the Court’s own findings, you will see that Nicaragua has faithfully honoured all of its assurances.

40. First, as Professor Crawford recited, Nicaragua assured the Court in January 2011 that its operations in respect of the first *caño*, which was the subject of the Court’s Order of 8 March 2011,

³⁷CR 2013/24, para. 1 (Crawford).

³⁸*Ibid.*, para. 2.

³⁹*Ibid.*

⁴⁰*Ibid.*, para. 11.

⁴¹*Ibid.*, paras. 6-7.

were over and finished. Nicaragua told you the truth. Professor Crawford told you something different — that work on that *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”⁴². Conspicuously, there is no citation to any evidence in support of this egregious statement. You can check the *compte rendu*.

No citation or other support is provided. And it does not exist. There is no evidence whatsoever that work on the first *caño* was ever resumed by anyone, much less by the young people who have been there. Costa Rica made this unsupported allegation in its request for modification of the existing provisional measures Order. Professor Crawford has simply repeated it, also without providing supporting evidence. It may be instructive that the Court found, in its Order of 16 July 2013, that: “The facts put forward by Costa Rica, whether the presence of Nicaraguan nationals or the activities they are carrying out in the disputed territory, do not appear, in the present circumstances as they are known to the Court, to be such as to cause irreparable harm . . .”⁴³ I do not know who cooked up my friend’s facts for him, but it certainly was not Julia Child.

41. The second assurance, also given by Nicaragua in January 2011, was that “none of its armed forces was stationed on Isla Portillos”⁴⁴. What is the evidence of Nicaragua’s alleged untruthfulness? The *compte rendu* cite is to a photograph that Mr. Ugalde displayed for another purpose yesterday. It shows a very small Nicaraguan army camp alongside the river in the disputed area, which bears the date 19 January 2011. It was closed down permanently a few days later. It has never been reoccupied. Nor has Nicaragua set up any other encampments in the disputed area. Nor has Costa Rica presented evidence of any other Nicaraguan encampments.

42. Nicaragua’s third assurance to the Court, also made in January 2011, “was that it did not intend to send any troops or other personnel to the region nor to establish a military post there in the future”⁴⁵. That assurance was true then, and it has remained so ever since. Professor Crawford

⁴²*Ibid.*, para. 7.

⁴³Order of 16 July 2013, para. 35.

⁴⁴CR 2013/24, para. 6 (Crawford).

⁴⁵*Ibid.*, para. 6.

says that Nicaragua violated it because “Nicaraguan personnel have been in the disputed area carrying out dredging and other works, as late as 18 September 2013”⁴⁶. I have already discussed this matter in detail. The evidence shows that Nicaragua did not “send” or intend to send Mr. Pastora into the disputed area. It sent him 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. It has not breached faith with the Court.

43. Nor has Nicaragua sent any troops to the disputed area. All that Professor Crawford could say about this was: “there are also what appear to be Nicaraguan military camps in the disputed territory, but we have not been able to verify them . . .”. Not even with satellite or aerial photos, which easily provide coverage of this very small area. That is because there are no military camps there.

44. Mr. Ugalde displayed this satellite photograph, indicating the location of a Nicaraguan military detachment (at the very top of the screen) encampment⁴⁷. [This is at tab 10.] But this one is on the beach adjacent to the Caribbean Sea. This is outside the disputed area, on land that Costa Rica has consistently recognized — at least until yesterday — as belonging to Nicaragua. At the time it instituted proceedings in October 2010, at the time of the provisional measures hearings in January 2011, and at the time it filed its Memorial in December 2011, Costa Rica acknowledged that this barrier beach, lying between what it calls Isla Portillos and the sea, belongs to Nicaragua.

45. This really is not a point on which I need detain the Court for long. It can be demonstrated quite simply and quickly using Costa Rica’s own maps submitted with its Memorial on the merits *in this case*. At tab 11 there are three maps. The first one, projected on the screen now, is a copy of figure 2.8 from Costa Rica’s Memorial. It is a reproduction of what Costa Rica itself labels an “official map” of Costa Rica dated 1988 and prepared by Costa Rica’s National Geographic Institute. As the Court will readily see, the barrier beach seaward of the wetland and west of Punta Castilla is plainly depicted as Nicaraguan.

⁴⁶*Ibid.*, para. 7.

⁴⁷Costa Rica, judges’ folder, tab 2.

46. [Tab 11] Projected on the screen now is figure 4.6 from Costa Rica's Memorial (a map, incidentally, which Costa Rica also used in its pleadings in the *Navigational Rights* case). It reflects the same reality: here once again, the barrier beach is unmistakably shown as Nicaragua's sovereign territory.

47. One final map will, I think, be enough to conclude my remarks on this subject [tab 11]. On the screen now is figure 4.10 from Costa Rica's Memorial, which shows the extent and location of Costa Rica's *Caribe Noreste* RAMSAR site. If one looks in the far north corner, the same truth is revealed. Costa Rica recognizes the barrier beach as being Nicaragua's. Nicaragua's right to station troops — or anyone else — in that location is therefore indisputable.

48. But here is a satellite photo displayed by Mr. Ugalde yesterday⁴⁸ at tab 12 of the judges' folder. What are we to make of this? Is Costa Rica making a new territorial claim now — for the first time? Or is Mr. Ugalde as confused as Mr. Pastora is — or should I say, as Mr. Pastora was — about the limits of the disputed area?

49. Costa Rica simply fails in its attempts to show that Nicaragua's assurances were either untrue or unreliable, much less that it has deliberately flouted the Court's Order and authority. The evidence, viewed calmly, dispassionately and objectively, shows otherwise.

50. As would any experienced advocate, Professor Crawford saved his dramatic conclusion for last. In it, he summed up that the Court cannot accept the assurances given by Nicaragua in these proceedings for six reasons. But none of them withstands a fair and impartial analysis.

51. Reason One: "Nicaragua has not admitted the facts. It has not faced up to the truth" because it does not accept responsibility for Mr. Pastora's actions⁴⁹. I am afraid it is not Nicaragua that refuses to recognize the truth here. As the Court has seen, Nicaragua accepts that Mr. Pastora carried out dredging and other activities in the disputed area. Professor Crawford demands that he be fired. Nicaragua has deemed it sufficient to order him out of the disputed area, along with his personnel and equipment, to bar him from returning, and to order military patrols to assure that neither he nor any other government official or employee enters the area. Nicaragua, has indeed, acknowledged the facts, reported them truthfully, and acted in good faith.

⁴⁸Costa Rica, judges' folder, tab 4.

⁴⁹CR 2013/24, para. 30 (Crawford).

52. Reason Two: Nicaragua has violated its assurances before and it will do so again. It is, in Professor Crawford's words, a "repeat offender"⁵⁰. In one of his most unfortunate statements, he accused Nicaragua of "recidivism", a term borrowed from criminal law. Here again, he is incorrect. We have already discussed the three, or two and a half, instances of alleged breach of faith by Nicaragua, and shown that Professor Crawford's allegations are contradicted by the evidence. Nicaragua has not been unfaithful to its assurances, not even once. Let alone repeatedly.

53. Reason three. "Nicaragua's assurances towards Costa Rica in the matter of the San Juan are not to be trusted."⁵¹ But these turn out to be the same three assurances that Nicaragua gave to the Court in January 2011, which the evidence shows Nicaragua did not violate.

54. Reason four. "If you were to say nothing now, the authority of this Court would have been flouted, and would have been seen to be flouted . . . Confidence in the Court, and in the authority of its rulings, would be eroded."⁵² Mr. President, Professor Crawford tells you, quite unnecessarily, that you were not "born yesterday", and then, with this statement, he talks to you as if he thinks you were. He tells you that unless you grant the provisional measures requested by Costa Rica, confidence in your authority will be eroded. How convenient that the interests of his client and the Court match up so perfectly. It's an old ploy, familiar to all of us who spent any time on a school playground, a challenge to one's personhood, to shame him into doing something against his better judgement. I remember the words. "If you really had courage, you would go and beat up that kid next door." Professor Crawford has changed the words, but not the concept.

55. I have two things to say about this. First, accusing Nicaragua of flouting the Court's authority is simply absurd. It has not done so. The evidence does not support the charge. There can be no State that holds the Court in higher regard than Nicaragua does. Nicaragua has appeared before the Court in 12 cases. It has initiated seven of them, including cases concerning its most vital national interests. It has three cases, including these two, pending before the Court now. It has always complied with the Court's Judgments. It is itself the victim of the open and public

⁵⁰CR 2013/24, para. 31 (Crawford).

⁵¹*Ibid.*, para. 32.

⁵²*Ibid.*, para. 33.

defiance of the Court's Judgment by a State not present here. Nicaragua is the last State that would flout your Orders.

56. Second, this Court has no need to prove itself to anyone. It is the International Court of Justice. Full stop.

57. Reason five: the requested provisional measures are urgently required to prevent irreparable harm⁵³. This argument fails, too. It is now undisputed that Nicaragua has terminated the activities that Costa Rica claimed were threatening its rights. If the allegedly harmful activities have terminated, so has the threat to Costa Rica's rights. In any event, Costa Rica has presented no evidence that supports its irreparable harm argument. The reports of Dr. Thorne and the University of Costa Rica actually demonstrate the opposite: that no irreparable harm is threatened. Professor McCaffrey will address this issue in full.

58. And finally, reason six: "If Nicaragua is to be taken at its word, the provisional measures we seek will have little impact on it."⁵⁴ Maybe Professor Crawford would not have made this argument if he had spoken after Professor Kohen, instead of before him. Professor Kohen's speech was quite eye-opening to us. He explained what it is that Costa Rica is really seeking. According to Professor Kohen, the first two measures are not limited to a demand that Nicaragua stop all works on the two *caños* identified in Costa Rica's Request, and remove all personnel and equipment associated with those works. According to Professor Kohen, the measures are also intended to compel Nicaragua to prevent the entry of and/or evict private citizens who are entirely independent of the government. In other words, this is a thinly disguised attempt to revive Costa Rica's Request for modification of the Court's Order of 8 March 2011, which the Court rejected on 16 July. Neither Professor Kohen nor any other Costa Rican advocate introduced any new evidence, or claimed any new developments, since then, that would justify reopening the issue.

59. Professor Kohen also revealed, in regard to the third requested measure, that Costa Rica seeks much more than the protections provided to it by the second operative paragraph of the Order of 8 March 2011. Costa Rica wants the unrestricted ability to enter the disputed area and remediate the allegedly irreparable harm that was done by Nicaragua. According to Professor Kohen, this

⁵³CR 2013/24, para. 34 (Crawford).

⁵⁴*Ibid.*, para. 35.

means the undertaking of major works, involving the introduction of many people and a lot of equipment. All to remediate irreparable harm that does not exist. Professor McCaffrey will also address this point.

60. What is clear, is that, contrary to what Professor Crawford thinks, Professor Kohen has big plans for the disputed area, which would have a very great impact on Nicaragua if the requested provisional measures were indicated. Professor Crawford chides Nicaragua for refusing Costa Rica's proposal, on the eve of these hearings, to consent to the Order it has requested. Nicaragua is "not in earnest", he said, or it would have accepted the proposed Order. Mr. President, I am afraid this is simply another unkind and unjustified attack on Nicaragua's good faith. Without knowing how Costa Rica intended to interpret the proposed Order, Nicaragua would have been naïve to agree to it. Now that it knows, it feels justified in turning it down.

61. Mr. President, Members of the Court, I will sum up very quickly. The activity that caused Costa Rica to file its Request for new provisional measures has been terminated, and Nicaragua has taken concrete steps to assure that it will not recur. As a result, there is no present threat to any right claimed by Costa Rica, let alone an imminent threat, or one that is likely to result in irreparable harm. There is no basis for Costa Rica's Request. They have only one argument: that Nicaragua cannot be trusted to refrain from renewing the activity that gave rise to the Request. They ask the Court to find that Nicaragua is untrustworthy, and to base an Order on this finding. Mr. President, the evidence does not support such a finding, not at all.

62. Thank you, Mr. President, and Members of the Court for your patience and your kind attention. Mr. President, I would ask that you kindly call Professor McCaffrey to the podium, perhaps after the break.

The PRESIDENT: Thank you very much, Mr. Reichler. Professor McCaffrey will have his opportunity to address the Court after the coffee break. We will take a coffee break of 15 minutes. The hearing is suspended.

The Court adjourned from 11.25 a.m. to 11.50 a.m.

The PRESIDENT: Please be seated. The sitting is resumed and I invite Professor McCaffrey to take the floor. You have the floor, Sir.

Mr. McCaffrey:

1. Thank you, Mr. President. Mr. President, distinguished Members of the Court, it is my great pleasure and honour to appear before you again on behalf of the Republic of Nicaragua. Mr. President, distinguished Members of the Court, my task today is twofold: first, to show that the harm claimed by Costa Rica is not, in fact, irreparable, as required under the Court's standards for the ordering of provisional measures; and second, now that my friend and colleague Mr. Reichler has just shown that the first two measures requested by Costa Rica have been rendered moot, I will show why Costa Rica's third request for a provisional measure should likewise not be granted.

1. There is no threat of irreparable harm

2. Mr. President, I turn to my first point, that there is no imminent threat of irreparable harm. Even if Costa Rica could show that imminent harm is threatened to a right that it claims — which Nicaragua has shown it cannot — but even if Costa Rica *could* do this, that would not be enough; to be entitled to provisional measures, Costa Rica must also show that the threatened harm is irreparable. This it cannot do. First of all, Nicaragua disputes that there is *any* threat to Costa Rica's rights, let alone an imminent threat of irreparable harm. If *no* harm is threatened, because the allegedly harmful activity has ceased, there is by definition no threat of harm that is irreparable. But that is not the only reason Costa Rica cannot show irreparable harm. The absence of an imminent risk of irreparable harm is in fact shown by the reports of Costa Rica's own experts.

3. The evidence shows that Costa Rica bases its argument regarding the risk of harm on future actions that have not yet happened — and, as Mr. Reichler has just shown, will not happen. Costa Rica's position comes down to this: if Nicaragua were to continue dredging the two canals *and* were to connect them to the sea, *if* this then increased the flow of water from the San Juan to the *caños*, *and if* this increased water flow were to *eventually* change the course of the San Juan River, *then* there would be irreparable harm. Mr. President, this must surely be too remote a

possibility to satisfy the requirement that there be an imminent risk of irreparable prejudice before the Court will indicate provisional measures.

4. Costa Rica provides two technical assessments inferring the potential harm that Costa Rica claims *could* occur *if* the canal works were to be completed: a report by the University of Costa Rica's Department of Engineering and a report by Dr. Colin Thorne, Costa Rica's technical expert in this case. Both clearly state that Costa Rica's alleged harm is conditioned on Nicaragua's taking additional actions in the future, and *not* based on the work that has already been put to an end. In short, Costa Rica has not claimed that Nicaragua's actions up to this point have given rise to an imminent threat of irreparable harm, nor could its evidence support such a claim.

5. Mr. President, allow me to turn to the first report prepared by Dr. Thorne. Dr. Thorne confines his assessment of the risk of irreparable harm to the so-called "eastern *caño*," because "Construction of the western *caño* is less advanced, making it more difficult to discern its intended purpose."⁵⁵ In fact, his conclusions say nothing about potential irreparable or irreversible harm from the western *caño*. In regard to the "eastern *caño*", Dr. Thorne opines that "*if* the eastern *caño* does change the course of the Rio San Juan, the damage is likely to be irreversible"⁵⁶. (Thorne report, para. 4.6.) He explains, however, that for this to occur, the *caños*

"need to be open to the Caribbean Sea at their downstream ends. [He continues] In the case of the eastern *caño*, the trench already dug part way across the beach *could be* extended to achieve this with very little difficulty. [And further] *Once the trench is completed*, increasing wet season runoff from the catchment of the Rio San Juan will raise the elevation of the water surface . . . creating the gradient necessary to drive flow through the *caño* with sufficient force to scour its bed and enlarge the ditch through the beach . . ."⁵⁷

However, as Dr. Thorne acknowledges, "[a]s at 18 September 2013, this trench did not reach the sea"⁵⁸. He goes on to say that:

"As a result of the above, the risk of irreversible damage will increase significantly *if* either digging or dredging in Isla Portillos *continues*. [He continues] *To avoid this risk, all activities related to enlargement of the existing caños should be stopped immediately and permanently.*"⁵⁹

⁵⁵See Colin Thorne, Report on the Impact of the Construction of two New Caños on Isla Portillos, 10 Oct. 2013, p. 5, para. 4.4.

⁵⁶*Ibid.*, p. 5, para. 4.6.

⁵⁷*Ibid.*, p. 6, para. 4.7.

⁵⁸*Ibid.*, p. 8, para. 5.1 (d).

⁵⁹*Ibid.*, p. 6, para. 4.9.

Mr. President, since all activities related to enlargement of the *caños* were stopped, immediately and permanently, the risk of irreparable harm, according to Dr. Thorne, has been avoided.

6. For the record, Mr. President, I am not taking Dr. Thorne's words out of context. Yesterday my friend Mr. Wordsworth quoted extensively from Dr. Thorne's report but left out crucial sentences that qualified his statements. For example, in his quote from paragraph 4.7 of the Thorne report, Mr. Wordsworth omitted the first sentence, which reads: "For substantive flows to pass through either of the 2013 *caños* they need to be open to the Caribbean sea at their downstream ends." Yet Professor Thorne admits that they are not open to the sea at their downstream ends. For a full picture, let us look at the three last paragraphs of Dr. Thorne's conclusions, in their entirety, which you now see on your screens and are at tab. 13 of your judges' folders. And, with apologies to the interpreters, I will read through these rather quickly because you do have them both on the screens and in your folders but I think it is important to go through them because of his language. [Graphic on]

"(e) *Once the eastern caño is open to the sea, it would provide a short cut for water flowing along the Rio San Juan. Over time, the caño would convey progressively more of the flow, which would reduce the flow downstream in the natural course of the San Juan. There is a significant risk that the present natural course of the San Juan downstream of the caño would close entirely during the next and subsequent dry season.*"

"(f) *Based on my assessment of the works in this remote and sensitive wetland, there is a significant risk that should the work continue and the eastern caño capture all or the greater part of flow in the Rio San Juan, there will be no practical possibility of repairing that outcome and restoring the River to its natural course. Consequently, if the eastern caño does change the course of the Rio San Juan, the damage is likely to be irreversible.*"

"(g) *The risk of irreversible damage will increase significantly if the digging and dredging in Isla Portillos continues; to avoid this risk, all activities to enlarge the 2013 caños or to construct further caños should be stopped immediately and permanently.*" [Graphic off]

7. Mr. President, Members of the Court, from Dr. Thorne's expert opinion, two things are pellucidly clear. First, the risk of irreversible harm arises from the potential connection of the eastern *caño* to the Caribbean Sea, which has not occurred, and will not occur, because all of the activities in the disputed territory have *ceased* and will not be resumed. And second, the risk of irreversible harm can be, and *has* been, avoided by the immediate and permanent cessation of all activities to enlarge or construct the 2013 *caños* or any others.

8. Mr. President, I now turn to the report authored by two Costa Rican engineers at the University of Costa Rica. This report is equally conditional and unconvincing with regard to establishing any imminent threat of irreparable harm. The report acknowledges that “the beach [is] currently obstructing the [eastern canal’s] exit to the Caribbean” and that this canal “*was not completed* as at 18 September”⁶⁰. It specifically states that, as is, “the presence of these obstructions currently *prevents* a substantial proportion of the discharge in the San Juan River from flowing through the canal”⁶¹. As a result, there is only a possibility of significant risk “*once the dredge completes its work and these obstructions are removed*”⁶². As my friend and colleague Mr. Reichler has shown, this will not happen.

9. As for the western *caño*, like Dr. Thorne, Costa Rica’s engineers have little if anything to say about any potential harm *it* might cause. Indeed, their reason for focusing their analysis “solely on the eastern channel” is revealing⁶³. They do not address the western channel precisely because the probability of this channel effecting any change in the course of the San Juan is so low⁶⁴. According to Costa Rica’s report, the possibility of any harm would arise *only* if Nicaragua were to *enlarge* the channel in the *future*⁶⁵. As we well know by now, this will not happen.

10. Mr. President, the Court has often stated that “the *possibility* of . . . prejudice to rights in issue before the Court does *not, by itself*, suffice to justify recourse to its *exceptional* power under Article 41 of the Statute to indicate interim measures of protection”⁶⁶. If the mere possibility of prejudice is insufficient to merit recourse to these exceptional powers then certainly the absence of *any* possibility of prejudice is far from sufficient to justify recourse to them.

11. Furthermore, Costa Rica’s predictions of potential future harm are nothing more than unsupported *assertions* without scientific basis. Dr. Thorne states that, in fact, he cannot predict

⁶⁰Further evidence for the *Request for the Indication of New Provisional Measures by the Republic of Costa Rica*, 9 October 2013, Attachment PM-19, p. 14 (hereinafter “PM-19”).

⁶¹PM-19, p. 10.

⁶²PM-19, p. 10.

⁶³PM-19, p. 10.

⁶⁴PM-19, p. 10.

⁶⁵PM-19, p. 10.

⁶⁶Order of 11 September 1976, *Aegean Sea Continental Shelf*, *I.C.J. Reports 1976*, p. 11, para. 32; see also the Orders of 24 October 1957, *Interhandel*, *I.C.J. Reports 1957*, p. 112 or of 29 July 1991, *Passage through the Great Belt (Finland v. Denmark)*, *I.C.J. Reports 1991*, p. 18, para. 27.

the consequences that additional dredging would have on the course — or morphology — of the San Juan River: “The longer-term morphological consequences of the construction of the *caños* are difficult to predict on the basis of the available information.”⁶⁷ Thus, even Costa Rica’s own river morphology expert, as described by Mr. Wordsworth yesterday, cannot come to any conclusion about the effect of the 2013 *caños* despite the fact that this is his field of expertise. Yet Costa Rica evidently expects the Court to do so. Nor is Dr. Thorne able to determine the potential environmental impacts: “It is difficult to predict precise impacts on the ecosystem on the basis of the limited available information.”⁶⁸

12. The evidentiary support for the University of Costa Rica report is no better. The authors explain that whether enlarging the canal would have the irreparable impacts on the San Juan that Costa Rica claims, will depend on its tractive force. This force determines the amount of sediment that the canal’s waters are able to mobilize and carry. The report openly admits that “it is impossible to determine with complete certainty whether either of the two new canals have the tractive force ratio (when compared to the San Juan River) required to produce the scouring that will enlarge them and, hence, force the San Juan River to take a new course to the Caribbean Sea”⁶⁹. In other words, they really do not know if the irreparable harm they are alleging would, or even could, happen. In fact, they tell us that if the tractive force is relatively low then it “is expected to lead to *closure* of the pilot channel due to insufficient sediment transport capacity”⁷⁰.

2. Costa Rica’s third requested provisional measure should not be granted

13. I come then Mr. President to my second point, the manifest lack of a need for the third provisional measure Costa Rica seeks, namely that it be permitted to undertake unspecified remediation works on the two new *caños*. In Nicaragua’s view, there are a number of compelling reasons that this extraordinary request should not be granted.

⁶⁷Colin Thorne, Report on the Impact of the Construction of two New Caños on Isla Portillos, 10 Oct. 2013, p. 6, para. 4.8.

⁶⁸Colin Thorne, Report on the Impact of the Construction of two New Caños on Isla Portillos, 10 Oct. 2013, p. 7, para. 4.11.

⁶⁹PM-19, p. 10.

⁷⁰PM-19, p. 10,

14. As a threshold matter, Mr. President, the fact is that this aspect of Costa Rica's request defeats itself. Costa Rica seeks permission "to undertake remediation works in the disputed territory on the two artificial *caños*, and the surrounding areas, *to the extent necessary to prevent irreparable prejudice being caused . . .*". Yet, as I have just discussed at some length, there is no longer *any* risk of irreparable prejudice being caused to the area in dispute. As I have shown, all of Costa Rica's claims concerning irreparable prejudice are predicated on the assumption that the work on the *caños* would continue and result in the breaching of the barrier between the eastern *caño* and the Caribbean Sea. That assumption is, of course, wrong. As soon as Nicaragua became aware of the facts, it put a stop to the work. When the work ceased, the alleged threat of irreparable harm was likewise extinguished. Accordingly, no remediation works are, in Costa Rica's words, "necessary to prevent irreparable prejudice being caused". Thus the third provisional measure Costa Rica requests fails by its own terms.

15. A second reason this aspect of Costa Rica's request is not warranted is that the most critical elements of it are already covered, in substance, by the Court's existing Order dated 8 March 2011. In the second operative paragraph of your prior Order, you stated that "Costa Rica may dispatch civilian personnel charged with the protection of the environment to the disputed territory . . . but only in so far as it is necessary to avoid irreparable prejudice being caused . . .". Costa Rica therefore already *has* authorization to dispatch civilian environmental personnel to the disputed area — which includes the two *caños* now at issue — to guard against any irreparable harm, provided only that it give notice to, and make efforts to find common solutions with, Nicaragua. Under the circumstances, especially considering Nicaragua's prompt action to remedy the situation and the absence of any continuing risk of irreparable harm, there is no genuine argument that Costa Rica needs anything more now.

16. That said, there is a rather conspicuous difference between the Court's prior Order and the measure Costa Rica now seeks. But in Nicaragua's view, that difference only underscores the reasons the new measure Costa Rica seeks is unjustified.

17. Whereas the prior Order contemplates only limited monitoring to be done in a co-ordinated fashion with Nicaragua, what Costa Rica now asks the Court to give it is a unilateral right to undertake whatever remedial actions it, Costa Rica, may deem necessary, evidently in its

sole discretion. No co-ordination, no consultation with Nicaragua required. In effect, Costa Rica is asking for a blank cheque to be filled in later as it sees fit. This is not an exaggeration. Even now Costa Rica is not in a position to begin articulating what sort of remediation measures might be involved. Nor are its experts. At page 6 of his report, for example, Professor Thorne specifically states: “I am not qualified to opine on the specific details of the engineering works that would be necessary to remedy the present situation.” In a similar vein, page 16 of the report from the University of Costa Rica states:

“In our capacity, as civil engineers, we believe that remedial activities to close the mouth of the new canals appear necessary to avoid the risk of a shift in the San Juan River course. Notwithstanding, it is not possible to give any detailed answer as to the activities necessary to achieve closure of the canals . . .”

18. Despite this professed uncertainty, Professor Kohen yesterday did not hesitate to make clear just how much Costa Rica intends to draw on the blank cheque it wants. In describing the as yet unspecified remediation works, he stated (and this is a free translation, for which I apologize in advance): “This requires more than sending personnel in charge of the environment. This requires the implementation of some important work to remedy the situation with all that it requires in terms of manpower and equipment.”⁷¹ [quote from paragraph 31 of yesterday’s compte rendu] It also requires, he said, that Nicaragua give Costa Rica unfettered navigational access to the disputed area via the San Juan River⁷², no matter what the Treaty of 1858, the Alexander Award and the Judgment of this Court in the *Navigational* [and related] *Rights* case may provide — I should also mention the Cleveland Award, of course, in that connection. Mr. President, these are breath-taking assertions. Costa Rica’s own experts admit they don’t know what sort of remediation measures might be appropriate. But no matter! Costa Rica already knows that it will need to send many men with machinery via the San Juan to take those measures.

19. Mr. President, Members of the Court, in Nicaragua’s view, granting Costa Rica such an open-ended licence would be as dangerous as it is unjustified by the facts. Relations between the two Parties are, regrettably, strained, particularly where matters relating to the river are concerned.

⁷¹CR 2013/24, para. 31 (Kohen), (“Cela requiert davantage que l’envoi de personnel en charge de l’environnement. Cela requiert la réalisation de travaux d’une certaine importance afin de remédier à la situation, avec ce que cela nécessite en termes de main-d’œuvre et d’équipement.”).

⁷²CR 2013/24, para. 32 (Kohen).

Opening the river to sovereign Costa Rican navigation, the extent of which would effectively be determined by that State alone, is an obvious invitation to still further tensions.

20. Finally, permitting Costa Rica unilaterally to undertake whatever remediation measures it considers appropriate would effectively and impermissibly prejudge the disputed sovereignty issue. Nicaragua understand the basis for the second operative paragraph of the 8 March 2011 Order permitting Costa Rican civilian environmental personnel to continue visiting the area in dispute. In adopting that paragraph, the Court struck a judicious balance between the need to protect the area and the need to avoid prejudging the merits of the dispute.

21. But to broaden Costa Rica's authority still further, and to give it the sole and exclusive right not only to conduct the remediation measures, but also to determine, without any limit or control, what they should be, would, in Nicaragua's estimation, constitute an impermissible provisional decision on the merits. By Costa Rica's own admission, Isla Portillos must be treated as an area in dispute. That being so, neither Party should be empowered to take action to the exclusion of the other.

22. For all of these reasons, because it is unnecessary, because it is excessive and because it is dangerous, the third provisional measure Costa Rica requests should be denied.

Mr. President, Members of the Court, that concludes my presentation. Thank you very much for your kind attention. Mr. President, I would now ask that you call my friend and colleague, Professor Alain Pellet, to the podium.

The PRESIDENT: Thank you very much, Professor McCaffrey. Je passe maintenant la parole à M. le professeur Alain Pellet. Vous avez la parole, Monsieur.

M. PELLET :

LA COUR NE PEUT SE PRONONCER SUR LES DEMANDES DU COSTA RICA

1. Monsieur le président, Mesdames et Messieurs les juges, de nombreuses raisons expliquent pourquoi la Cour ne peut se prononcer sur les demandes du Costa Rica. On peut les regrouper en quatre séries de motifs distincts :

- 1) les demandes du Costa Rica ne remplissent pas les conditions requises par votre jurisprudence : elles ne sont pas urgentes et les dommages allégués, de toute manière mineurs, s'ils étaient avérés, ne seraient nullement irréparables (par contraste avec ceux dont le Nicaragua est fondé à se plaindre en conséquence de la construction bâclée de la route 1856 — mais je crois comprendre que nous aurons l'occasion de revenir là-dessus dans un avenir proche) ;
- 2) ces dommages — si dommages il y a — sont le résultat d'actions que les plus hautes autorités nicaraguayennes ont désavouées dès qu'elles en ont pris connaissance et auxquelles elles ont immédiatement mis fin ;
- 3) les mesures aujourd'hui demandées par le Costa Rica sont une «variante» inutile de celles indiquées par la Cour en 2011, que le Nicaragua accepte pleinement et s'engage à continuer à respecter ; si bien que
- 4) ces demandes sont superflues et dénuées de tout intérêt concret — elles sont «moot» — et, dès lors, la Cour sortirait des limites de ses fonctions strictement judiciaires si elle donnait suite aux demandes de la Partie costa-ricienne.

2. Avec votre permission, Monsieur le président, je me propose de revenir sur chacun de ces quatre points, ce qui me donnera du même coup l'occasion de résumer la position juridique du Nicaragua.

1. Les demandes du Costa Rica ne remplissent pas les conditions requises

3. *Premièrement* donc : les demandes du Costa Rica ne remplissent pas les conditions requises telles que votre jurisprudence les a clairement et fermement établies. Cet aspect ne me retiendra pas très longtemps : ces conditions sont bien connues et il m'a semblé que, grâce aux éloquentes plaidoiries de M^e Reichler et du professeur McCaffrey, les faits parlent d'eux-mêmes. «Pour rappel» donc :

4. Aux termes du paragraphe 1 de l'article 41 de son Statut : «La Cour a le pouvoir d'indiquer, si elle estime que les circonstances l'exigent, quelles mesures conservatoires du droit de chacun doivent être prises à titre provisoire.» La Cour a interprété cette disposition comme signifiant qu'elle ne peut indiquer de mesures conservatoires que si deux conditions essentielles

sont remplies — vous les avez énoncées avec une grande clarté dans l'affaire des *Usines de pâte à papier* :

«[le] pouvoir de la Cour d'indiquer des mesures conservatoires ne peut être exercé que s'il y a nécessité urgente [c'est la première condition] d'empêcher que soit causé un préjudice irréparable à de tels droits, avant que la Cour n'ait eu l'occasion de rendre sa décision définitive»⁷³.

— et c'est la seconde condition. Ni l'une ni l'autre ne sont remplies.

5. Elles sont du reste indissociables :

«le pouvoir de la Cour — avez-vous dit dans votre ordonnance de 2011 — d'indiquer des mesures conservatoires ne sera exercé que s'il y a urgence, *c'est-à-dire* s'il existe un risque réel et imminent qu'un préjudice irréparable soit causé aux droits en litige avant que la Cour n'ait rendu sa décision définitive»⁷⁴.

Le risque d'un préjudice *irréparable* doit donc être *réel et imminent*. Celui invoqué par le Costa Rica ne présente aucune de ces trois «qualités» qui, seules, seraient, *ensemble*, susceptibles de justifier des mesures conservatoires : il n'est ni «réel», ni «irréparable», ni «imminent».

6. Du reste, comme l'a rappelé Stephen McCaffrey, l'expert du Costa Rica lui-même estime, en conclusion de son rapport, que tout risque de dommage irréparable sera écarté si les travaux sur les *caños* sont arrêtés et s'ils ne sont pas repris :

«The risk of irreversible damage will increase significantly if the digging and dredging in Isla Portillos continues; to avoid this risk, all activities to enlarge the 2013 *caños* or to construct further *caños* should be stopped immediately and permanently.»

⁷³ *Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay), mesures conservatoires, ordonnance du 23 janvier 2007, C.I.J. Recueil 2007 (I), p. 11, par. 32. Voir aussi Passage par le Grand-Belt (Finlande c. Danemark), mesures conservatoires, ordonnance du 29 juillet 1991, C.I.J. Recueil 1991, p. 17, par. 23 ; Convention de Vienne sur les relations consulaires (Paraguay c. Etats-Unis d'Amérique), mesures conservatoires, ordonnance du 9 avril 1998, C.I.J. Recueil 1998, p. 257, par. 37 ; Certaines procédures pénales engagées en France (République du Congo c. France), mesures conservatoires, ordonnance du 17 juin 2003, C.I.J. Recueil 2003, p. 107, par. 22 ; Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay), mesures conservatoires, ordonnance du 13 juillet 2006, C.I.J. Recueil 2006, p. 131, par. 70 ; Demande en interprétation de l'arrêt du 31 mars 2004 en l'affaire Avena et autres ressortissants mexicains (Mexique c. Etats-Unis d'Amérique) (Mexique c. Etats-Unis d'Amérique), mesures conservatoires, ordonnance du 16 juillet 2008, C.I.J. Recueil 2008, p. 330, par. 72.*

⁷⁴ *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua), mesures conservatoires, ordonnance du 8 mars 2011, C.I.J. Recueil 2011(I), p. 21-22, par. 64 (les italiques sont de nous). Voir aussi Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay), mesures conservatoires, ordonnance du 23 janvier 2007, C.I.J. Recueil 2007 (I), p. 13, par. 42 ; Questions concernant l'obligation de poursuivre ou d'extrader (Belgique c. Sénégal), mesures conservatoires, ordonnance du 28 mai 2009, C.I.J. Recueil 2009, p. 152-153, par. 62 ou Demande en interprétation de l'arrêt du 15 juin 1962 en l'affaire du Temple de Preah Vihear (Cambodge c. Thaïlande) (Cambodge c. Thaïlande), mesures conservatoires, ordonnance du 18 juillet 2011, C.I.J. Recueil 2011 (II), p. 548, par. 47.*

Ces travaux ont été arrêtés ; et le Nicaragua, qui entend respecter pleinement les mesures indiquées en 2011, n'a nullement l'intention de les reprendre et il s'est, maintenant, donné les moyens d'empêcher toute initiative en ce sens.

7. De l'aveu même de l'expert retenu par le Costa Rica, aucun risque donc de dommage irréparable — et ceci d'autant moins que l'atteinte à l'environnement dont la Partie costa-ricienne fait des gorges chaudes est, au pire, mineure, et que la revégétation sera rapide, comme cela fut le cas pour le «caño de 2010»⁷⁵. En effet, ainsi que le même expert l'avait relevé dans le rapport que le Costa Rica a annexé à son mémoire :

«being unnatural, they [the 'caño' and the secondary channel connecting it] began deteriorating through siltation and vegetation regrowth as soon as they had been created»⁷⁶;

Or, as the same expert also noted :

«by April 2011 the width and depth [which are such a concern for Sam Wordsworth⁷⁷] of the «Caño» had already been reduced from their December [2010] maxima»⁷⁸.

8. Or l'existence d'un préjudice *irréparable* est une condition *sine qua non* de l'adoption de mesures conservatoires, solidement établie par votre jurisprudence⁷⁹. Vous l'avez rappelé dans votre ordonnance du 8 mars 2011, en citant à titre d'exemple la première ordonnance rendue dans l'affaire du *Génocide*⁸⁰ : «la Cour tient de l'article 41 de son Statut le pouvoir d'indiquer des mesures conservatoires lorsqu'un préjudice irréparable risque d'être causé aux droits en litige dans

⁷⁵ CR 2013/14, p. 18, par. 5 (Ugalde).

⁷⁶ C. Thorne, «Assessment of the physical impact of works carried out by Nicaragua since October 2010 on the geomorphology, hydrology and sediment dynamics of the San Juan River and the environmental impacts on Costa Rican territory», p. I-59, par. I.5.2 (MCR, vol. I, p. 383). Voir aussi p. I-55, par. I.4.13 et p. I-56, par. I.4.14.

⁷⁷ CR 2013/14, p. 29-31, par. 10 (Wordsworth).

⁷⁸ *Ibid.*, p. I-59, par. I.5.3.

⁷⁹ Voir notamment *Plateau continental de la mer Egée, mesures conservatoires, ordonnance du 11 septembre 1976, C.I.J. Recueil 1976*, p. 12, par. 33 ; *LaGrand (Allemagne c. Etats-Unis d'Amérique), mesures conservatoires, ordonnance du 3 mars 1999, C.I.J. Recueil 1999 (I)*, p. 15, par. 22 ; *Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay), mesures conservatoires, ordonnance du 13 juillet 2006, C.I.J. Recueil 2006*, p. 129, par. 61 ; *Demande en interprétation de l'arrêt du 31 mars 2004 en l'affaire Avena et autres ressortissants mexicains (Mexique c. Etats-Unis d'Amérique) (Mexique c. Etats-Unis d'Amérique), mesures conservatoires, ordonnance du 16 juillet 2008, C.I.J. Recueil 2008*, p. 328, par. 65 ; *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), mesures conservatoires, ordonnance du 15 octobre 2008, C.I.J. Recueil 2008*, p. 392, par. 128 ou *Demande en interprétation de l'arrêt du 15 juin 1962 en l'affaire du Temple de Preah Vihear (Cambodge c. Thaïlande) (Cambodge c. Thaïlande), mesures conservatoires, ordonnance du 18 juillet 2011, C.I.J. Recueil 2011 (II)*, p. 548, par. 46. Voir aussi *Statut juridique du territoire du sud-est du Groënland, ordonnance du 3 août 1932, C.P.J.I. série A/B n° 48*, p. 284.

⁸⁰ *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Yougoslavie (Serbie et Monténégro), mesures conservatoires, ordonnance du 8 avril 1993, C.I.J. Recueil 1993*, p. 19, par. 34.

une procédure judiciaire»⁸¹. Les mesures demandées doivent donc être «nécessaires pour empêcher que soit causé un préjudice irréparable aux droits en litige»⁸² et elles ne sont indiquées par la Cour que si, et dans la mesure où, «il ne serait pas possible de remédier à de tels manquements au stade du fond»⁸³.

9. L'absence de tout préjudice irréparable rend également sans objet la troisième demande de mesure conservatoire du Costa Rica qui voudrait se voir accorder la permission d'effectuer, sans contrôle, des travaux de remise en l'état au prétexte de prévenir un dommage irréparable — qui n'existe pas.

[Projection n° 1 : Sentence Cleveland (22 mars 1988), par. 3.6.]

10. Et je rappelle⁸⁴ par ailleurs que, même si le Costa Rica pouvait établir, lors de l'examen de l'affaire au fond, que les travaux litigieux lui auraient causé un véritable dommage — ce qui est fort improbable — la seule forme de réparation à laquelle il pourrait prétendre, aux termes du point 3.6 de la sentence Cleveland, serait une indemnisation. Or, conformément à une jurisprudence remontant à la Cour permanente, un préjudice indemnisable ne peut pas être considéré comme «irréparable» au stade des mesures conservatoires⁸⁵. La Cour actuelle l'a confirmé, notamment dans l'affaire du *Plateau continental de la mer Egée*. Dans son ordonnance du 11 septembre 1976, elle a estimé que puisque le fait internationalement illicite allégué pourrait, s'il était établi, «donner lieu à une réparation appropriée», elle n'était «pas en mesure de considérer la violation alléguée des droits de la Grèce comme un risque de préjudice irréparable aux droits en litige devant elle»⁸⁶. Il en va de même dans notre affaire : si vous considériez, Mesdames et Messieurs les juges, lors de l'examen au fond, que, par un comportement illicite qui lui serait

⁸¹ *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua), mesures conservatoires, ordonnance du 8 mars 2011, C.I.J. Recueil 2011(I), p. 21, par. 63.*

⁸² *Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay), mesures conservatoires, ordonnance du 23 janvier 2007, C.I.J. Recueil 2007 (I), p. 11, par. 31. Voir aussi Passage par le Grand-Belt (Finlande c. Danemark), mesures conservatoires, ordonnance du 29 juillet 1991, C.I.J. Recueil 1991, p. 16, par. 16.*

⁸³ *Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay), mesures conservatoires, ordonnance du 13 juillet 2006, C.I.J. Recueil 2006, p. 131, par. 70.*

⁸⁴ Voir CR 2011/12, p. 61, par. 24 (Pellet).

⁸⁵ Voir *Dénonciation du traité sino-belge du 2 novembre 1865, ordonnances des 8 janvier, 15 février et 18 juin 1927, C.P.J.I., série A n° 8, p. 7 ; Usine de Chorzów, ordonnance du 21 novembre 1927, C.P.J.I. série A n° 12, p. 6.*

⁸⁶ *Plateau continental de la mer Egée (Grèce c. Turquie), mesures conservatoires, ordonnance du 11 septembre 1976, C.I.J. Recueil 1976, p. 12, par. 33.*

attribuable, le Nicaragua a causé un dommage au Costa Rica, cet hypothétique préjudice pourrait être réparé (et ne pourrait être réparé *que* — sentence Cleveland oblige) par une indemnisation.
[Fin de la projection n° 1.]

11. Ni réel, ni, à plus forte raison, irréparable, le préjudice allégué ne fait pas davantage l'objet d'un risque «imminent» qui rendrait urgent le prononcé de mesures conservatoires.

12. Selon le Costa Rica, l'urgence des mesures qu'il somme la Cour de prononcer tiendrait à ce que :

- «Nicaraguan presence in the disputed territory includes members of Nicaragua's armed forces»⁸⁷ ; l'agent du Nicaragua l'a écrit⁸⁸ et l'a répété tout à l'heure : c'est inexact ; aucun militaire nicaraguayen n'a pris part aux actions litigieuses ;
- il n'est pas davantage exact que «Nicaragua is currently engaged in detrimental activity to the environment, including dumping of materials»⁸⁹ ou, comme l'agent du Costa Rica l'a dit hier que «[I]es travaux du Nicaragua ... sont actuellement en cours»⁹⁰ : notre agent l'a également écrit et répété à l'audience, aucun «agent» nicaraguayen ne se trouve sur le territoire litigieux — il ne peut, dès lors, être soutenu que le Nicaragua inflige «a continued damage ... on Costa Rican territory which is the subject of the present dispute»⁹¹ (et je remarque en passant qu'en utilisant l'expression «territoire costa-ricien» le Costa Rica postule ce qu'il lui appartiendra de démontrer) ;
- il n'est pas vrai non plus que «the work in both new *caños* is incomplete and ongoing»⁹² — incomplet, assurément, mais «en cours» (*ongoing*), c'est ici encore inexact : toutes les personnes qui avaient pénétré sur le territoire litigieux pour procéder à ces travaux s'en sont retirées sur l'injonction du Gouvernement nicaraguayen, qui veille à ce que les mesures conservatoires indiquées par la Cour en 2011 soient scrupuleusement respectées — je vais y revenir ;

⁸⁷ Demande en indication de mesures conservatoires, par. 23.

⁸⁸ Lettre du Nicaragua à la Cour internationale de Justice datée du 10 octobre 2013 (HOL-EMB-193).

⁸⁹ Demande en indication de mesures conservatoires, par. 23.

⁹⁰ CR 2013/24, p. 15, par. 5 (Álvarez).

⁹¹ *Ibid.*

⁹² *Ibid.*, par. 25.

— il est donc tout aussi faux que «the new artificial *caño* to the east . . . is continuing to be constructed»⁹³, comme il est faux aussi de parler de «Nicaragua’s continued activities in the disputed territory»⁹⁴ or to say that «Nicaragua has organized, directed and sponsored their presence there»⁹⁵ : certes, les activités en question se sont produites — mais elles ont été menées à la seule initiative de M. Pastora et, dès que le chef de l’Etat en a eu vent, il les a réprochées et en a ordonné la cessation.

13. Monsieur le président, la Cour, selon sa propre formule n’exerce son pouvoir d’indiquer des mesures conservatoires «que s’il y a urgence, c’est-à-dire s’il existe un réel risque qu’une action préjudiciable aux droits de l’une ou de l’autre Partie ne soit commise avant que la Cour n’ait rendu sa décision définitive»⁹⁶. Ce n’est pas le cas en l’espèce : l’urgence invoquée par le *Costa Rica* repose au mieux sur la méconnaissance de la situation réelle telle qu’elle prévaut aujourd’hui sur le terrain, suite à la ferme intervention des autorités nicaraguayennes compétentes au plus haut niveau de l’Etat et de l’armée ; au pire, l’invocation de l’urgence par le Costa Rica tient à sa volonté d’opérer une diversion pour que soient oubliées les graves menaces que les comportements du Costa Rica continuent de faire peser sur la rivière San Juan et son environnement.

2. La condamnation des actes litigieux par le Nicaragua

14. Monsieur le président, il me faut, en deuxième lieu, revenir plus précisément sur les conséquences qui s’attachent à la condamnation des actes litigieux par le Nicaragua en ce qui concerne chacune des mesures demandées par le Costa Rica.

⁹³ *Ibid.*, par. 24.

⁹⁴ *Ibid.*, par. 25.

⁹⁵ CR 2013/24, p. 19, par. 8 (Ugalde).

⁹⁶ *Application de la convention internationale sur l’élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), mesures conservatoires, ordonnance du 15 octobre 2008, C.I.J. Recueil 2008, p. 392, par. 129. Voir également Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria), mesures conservatoires, ordonnance du 15 mars 1996, C.I.J. Recueil 1996 (I), p. 22, par. 35 ; LaGrand (Allemagne c. Etats-Unis d’Amérique), mesures conservatoires, ordonnance du 3 mars 1999, C.I.J. Recueil 1999 (I), p. 15, par. 22 ; Mandat d’arrêt du 11 avril 2000 (République démocratique du Congo c. Belgique), mesures conservatoires, ordonnance du 8 décembre 2000, C.I.J. Recueil 2000, p. 201, par. 69 ; Certaines procédures pénales engagées en France (République du Congo c. France), mesures conservatoires, ordonnance du 17 juin 2003, C.I.J. Recueil 2003, p. 107, par. 22 ; Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay), mesures conservatoires, ordonnance du 23 janvier 2007, C.I.J. Recueil 2007 (I), p. 11, par. 32 ou Demande en interprétation de l’arrêt du 31 mars 2004 en l’affaire Avena et autres ressortissants mexicains (Mexique c. Etats-Unis d’Amérique) (Mexique c. Etats-Unis d’Amérique), mesures conservatoires, ordonnance du 16 juillet 2008, C.I.J. Recueil 2008, p. 328-329, par. 66.*

[Projection n° 2 : troisième et quatrième mesures demandées par le Costa Rica.]

15. Laissons de côté la quatrième demande relative à l'information de la Cour — il s'agit d'une demande accessoire, qui n'aurait lieu d'être que si la Cour accédait à l'une ou à l'autre des demandes du Costa Rica et qui, d'ailleurs, recoupe la quatrième mesure indiquée par la Cour dans son ordonnance de 2011. Quant à la troisième demande du Costa Rica, l'absence de tout risque de dommage irréparable suffit à l'écarter puisqu'elle dit viser exclusivement à y parer. Je me permets pour le reste de vous renvoyer, Mesdames et Messieurs les juges, à ce qu'en a dit mon collègue et ami Steve McCaffrey. Restent les deux premières demandes — dont le texte est projeté en ce moment.

[Fin de la projection n° 2 — projection n° 3 : Les première et deuxième mesures demandées par le Costa Rica.]

16. Elles portent, d'une part, sur la suspension des travaux de dragage ou autres dans le territoire contesté, et plus particulièrement sur la cessation de ceux malencontreusement menés par M. Pastora, sans l'autorisation des autorités nicaraguayennes supérieures, dans les deux petits *caños* sur lesquels le Costa Rica a attiré l'attention ; et, d'autre part, sur le retrait de ce même territoire des nationaux nicaraguayens qui y avaient été introduits dans ces circonstances.

17. Or, comme l'agent du Nicaragua l'a indiqué dans sa lettre au greffier du 10 octobre — dont le texte est reproduit à l'onglet n° 17 de vos dossiers :

«As Nicaragua advised Costa Rica by Diplomatic Note on 18 September, it 'has not authorized any type of work in the disputed area and has not sent personnel there.' Nicaragua formally reiterates this statement. Costa Rica's allegation, unsupported by proof or even citation, that 'Nicaraguan presence in the disputed area includes members of Nicaragua's armed forces' is false. There are not, and have not been, any members of Nicaragua's armed forces, in the area that is described in Costa Rica's Request. Nor has Nicaragua authorized Mr. Pastora or any other individual to perform any kind of activity in the disputed area.

Nicaragua had no knowledge of Mr. Pastora's alleged activities inside an area Nicaraguan security forces are not allowed to patrol until, following Costa Rica's public statements, he gave interviews to various Central American news media on 18 September. In response, Mr. Pastora was instructed to withdraw himself, his employees and his equipment from the disputed area, and to remain outside it. Nicaragua has confirmed his compliance with this instruction.»

And even more :

«Further, the Army of Nicaragua has been instructed to conduct regular patrols along the San Juan River adjacent to the disputed area to assure that no Nicaraguan

government officials, employees, contractors or other personnel enters it, and that the Court's order of 08 March 2011 is strictly complied with.»

Il s'agit là d'une longue citation, Monsieur le président, mais il m'a semblé nécessaire de rappeler ces faits essentiels, dont l'énoncé émane du représentant le plus autorisé de la République du Nicaragua devant la Cour : son agent.

18. Déjà, dans votre ordonnance du 8 mars 2011, vous vous étiez refusé à indiquer un certain nombre de mesures conservatoires demandées par le Costa Rica après avoir relevé que le Nicaragua avait donné des informations sur la cessation des faits invoqués. Je cite le paragraphe 74 de cette décision :

«Considérant qu'il ressort des réponses écrites du Nicaragua rapportées ci-dessus ... que les travaux dans la zone du *caño* ont pris fin ; que la Cour en prend note ; et qu'elle conclut dès lors qu'il n'y a pas lieu, dans les circonstances actuelles de l'espèce, d'indiquer les mesures 2), 3) et 4) énoncées au paragraphe 73 ci-dessus.»⁹⁷

19. Cette position est conforme à celle que vous avez prise en d'autres occasions. Pour n'en donner que trois exemples récents :

— dans votre ordonnance du 17 juin 2003, vous avez pris note des déclarations de l'agent et des conseils de la France pour écarter la demande en indication de la République du Congo dans l'affaire relative à *Certaines procédures pénales engagées en France*⁹⁸ ;

— de même, dans votre ordonnance du 13 juillet 2006, rendue dans l'affaire des *Usines de pâte à papier*, vous avez considéré que, puisque l'agent de l'Uruguay avait :

«notamment réitéré, au terme de la procédure orale, la «volonté [de l'Uruguay] de respecter pleinement et totalement le statut du fleuve Uruguay de 1975 et son application» ;

et que, «compte tenu, en particulier, de ces engagements, confirmés par l'Uruguay devant elle, [il n'existait] pas, aux yeux de la Cour, de motifs justifiant qu'elle indique les autres mesures conservatoires demandées par l'Argentine»⁹⁹ ;

— De même encore, dans votre ordonnance du 28 mai 2009, dans l'affaire *Hissène Habré*, vous avez pris «acte des assurances données par le Sénégal, [pour constater] que le risque de

⁹⁷ *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua), mesures conservatoires, ordonnance du 8 mars 2011, C.I.J. Recueil 2011 (I), p. 24, par. 73-74.*

⁹⁸ *Mesures conservatoires, ordonnance du 17 juin 2003, C.I.J. Recueil 2003, p. 109-110, par. 33-25. Voir aussi Passage par le Grand-Belt (Finlande c. Danemark), mesures conservatoires, ordonnance du 29 juillet 1991, C.I.J. Recueil 1991, p. 18, par. 27.*

⁹⁹ *Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay), mesures conservatoires, ordonnance du 13 juillet 2006, C.I.J. Recueil 2006, p. 134, par. 83-84.*

préjudice irréparable aux droits revendiqués par la Belgique n'est pas apparent à la date à laquelle la présente ordonnance est rendue»¹⁰⁰.

20. Nos amis de l'autre côté de la barre ne se sont, à vrai dire, pas montrés très ... amicaux hier matin : pour tenter de sauver leur demande en indication de mesures conservatoires — demande à l'évidence superflue, pour ne pas dire abusive... —, ils ont proféré l'injure ultime des plaideurs en mal d'argument et plaidé la mauvaise foi du Nicaragua :

— «Le Nicaragua s'est engagé dans une campagne constante et de longue date consistant à braver ses obligations internationales vis-à-vis du Costa Rica, en se moquant du principe de bonne foi»¹⁰¹, a tonné M. l'agent du Costa Rica ;

— MM. Ugalde, Wordsworth et Kohen nous accusent assez ouvertement de mensonge¹⁰² ; et,

— pour sa part, le professeur Crawford a, dans une charge très virulente, dénoncé la mauvaise foi du Nicaragua¹⁰³, et mis en doute la bonne foi de son agent et de ses conseils : «the legal representatives of a country have a distinct obligation of good faith»¹⁰⁴. Ne reculant devant aucune outrance, mon adversaire et néanmoins ami, oubliant sans doute que les conseils d'un Etat devant la Cour ont un devoir de retenue et de mesure, est allé, comme l'a rappelé M. Reichler toute à l'heure, jusqu'à traiter le Nicaragua de criminel «récidiviste» (à la fois *repeat offender* et *recidivist* !) ¹⁰⁵. L'imprécation, Monsieur le président, ne me paraît pas être le meilleur moyen de marquer sa déférence pour l'autorité de la Cour, dont il se targue d'être le champion¹⁰⁶.

21. Monsieur le président, la mauvaise foi ne se présume pas¹⁰⁷ et, en reconnaissant immédiatement des faits qu'il n'avait ni voulus, ni encouragés ; en y mettant fin en conformité avec

¹⁰⁰ *Questions concernant l'obligation de poursuivre ou d'extrader (Belgique c. Sénégal), mesures conservatoires, ordonnance du 28 mai 2009, C.I.J. Recueil 2009*, p. 155, par. 2.

¹⁰¹ CR 2013/24, p. 16, par. 8 (Álvarez).

¹⁰² *Ibid.*, p. 25, par. 26 (Ugalde), ou p. 34, par. 24 (Wordsworth), ou p. 52, par. 15 (Kohen).

¹⁰³ *Ibid.* p. 36-47 (Crawford).

¹⁰⁴ *Ibid.*, p. 38, par. 10 (Crawford).

¹⁰⁵ *Ibid.*, p. 44-45, par. 31 (Crawford).

¹⁰⁶ Voir *ibid.*, p. 45, par. 33

¹⁰⁷ *Affaire du Lac Lanoux*, sentence arbitrale du 16 novembre 1957, Nations Unies, RSA., vol. XII, p. 305. Voir aussi l'affaire *Tacna Arica (Chili/Pérou)*, sentence arbitrale du 4 mars 1925, Nations Unies, RSA., vol. II, p. 929-930 ; *Concessions Mavrommatis à Jérusalem, arrêt n° 5, 1925, C.P.J.I. série A n° 5*, p. 43 ; *Certains intérêts allemands en Haute-Silésie polonaise, fond, arrêt n° 7, 1926, C.P.J.I. série A n° 7*, p. 30.

votre ordonnance de 2011, le Nicaragua a, de toute manière, témoigné plus que suffisamment de sa bonne foi pour que la défiance que constituerait un inutile rappel à l'ordre ne soit pas de mise. Et j'ajoute que l'un des arguments favoris du Costa Rica¹⁰⁸ se retourne contre lui : le fait que le Nicaragua n'ait pas répondu immédiatement à la note du ministre costa-ricien des affaires étrangères du 17 septembre, mais ait mené — immédiatement — une enquête, témoigne de sa bonne foi : le président et les plus hautes autorités de l'armée nationale n'envisageaient pas que l'ordonnance de 2011 ait pu être violée en dépit du caractère obligatoire des mesures indiquées, que le Nicaragua ne remet nullement en cause.

22. Quant à savoir si le Nicaragua est responsable pour les actes *ultra vires* de M. Pastora¹⁰⁹, c'est possible si je me réfère aux excellents articles de la CDI sur la responsabilité des Etats, mais ce n'est pas le problème qui est posé aujourd'hui à la Cour. Sauf sous un angle particulier : en invoquant l'article 7 de ces articles, le Costa Rica admet implicitement que les autorités nicaraguayennes supérieures n'étaient pas au courant des agissements de M. Pastora ; tel est le cas en effet — mais, dès lors, comment nos contradicteurs peuvent-ils invoquer la mauvaise foi du Nicaragua ? Responsable, peut-être, mais pas fautif ou coupable en tout cas, malgré les anathèmes lancés par le professeur Crawford !

[Fin de la projection n° 3.]

3. L'inutilité de la réaffirmation des mesures indiquées en 2011

[Projection n° 4 : Tableau comparatif des mesures demandées par le Costa Rica et indiquées par la Cour en 2011.]

23. Monsieur le président, il n'est pas sans intérêt de mettre en parallèle les mesures que la Cour a indiquées par son ordonnance du 8 mars 2011 avec celles faisant l'objet de la demande du Costa Rica du 24 septembre dernier. C'est mon troisième point. Le tableau qui est projeté en ce moment et que vous trouverez sous l'onglet n° 18 de vos dossiers illustre cette comparaison.

24. Dans sa demande en indication de mesures conservatoires, le Costa Rica précise :

«For the avoidance of doubt, this is not a request for modification of the Court's Order on provisional measures of 8 March 2011. It is an independent request based on

¹⁰⁸ Voir notamment CR 2013/24, p. 24, par. 25 (Ugalde) et p. 40, par. 18-20 et p. 44, par. 30 (Crawford).

¹⁰⁹ CR 2003/24, p. 24-25, par. 25 (Ugalde) et p. 42-43, par. 24-28 et p. 44, par. 30 (Crawford).

new facts. This Request concerns two distinct and new artificial channels, or *caños*... [T]hese two new artificial *caños* are located in the «disputed area» which is the subject of the Court's Order of 8 March 2011.»¹¹⁰

25. Même si les travaux non autorisés menés par M. Pastora avaient pu causer un dommage — ce qui, je l'ai rappelé, n'est pas le cas — on voit mal en quoi l'indication des deux premières mesures demandées par le Costa Rica pourrait ajouter à la première mesure conservatoire indiquée par la Cour en 2011 : «Chaque Partie s'abstiendra d'envoyer ou de maintenir sur le territoire litigieux, y compris le *caño*, des agents, qu'ils soient civils, de police ou de sécurité.»¹¹¹ Il ne s'agit ni d'une modification de cette mesure, ni, contrairement à ce que prétend la Partie costa-ricienne¹¹², d'une nouvelle mesure, mais tout simplement de sa reprise : la mesure indiquée en 2011 — que le Nicaragua ne conteste aucunement — couvrait — et couvre — tout «le territoire litigieux», y compris bien sûr, celui sur lequel les travaux contestés par le Costa Rica et désapprouvés par le Nicaragua ont eu lieu¹¹³. Cela est clair et l'on voit mal en quoi «les circonstances, telles qu'elles se présentent actuellement» exigeraient «une indication plus spécifique de mesures»¹¹⁴ : la Cour s'y est refusée en 1993 dans l'affaire du *Génocide*, il serait assez surprenant qu'elle l'accepte dans notre espèce — je vais y revenir dans un instant.

26. Certes, dans l'affaire du *Génocide*, votre haute juridiction a jugé utile de «réaffirmer» des mesures conservatoires qu'elle avait déjà indiquées dans une ordonnance précédente¹¹⁵. Elle avait constaté que la situation qui prévalait alors exigeait «non pas l'indication de mesures conservatoires *s'ajoutant* à celles qui [avaient] été indiquées par [son] ordonnance [précédente...], mais la mise en œuvre immédiate et effective de ces mesures»¹¹⁶. Je suis sûr que vous m'accorderez, Mesdames et Messieurs les juges, que les circonstances n'étaient pas comparables :

¹¹⁰ Demande en indication de mesures conservatoires, par. 4.

¹¹¹ *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua), mesures conservatoires, ordonnance du 8 mars 2001, C.I.J. Recueil 2011 (I), p. 27, par. 86, point 1 du dispositif.*

¹¹² Demande en indication de mesures conservatoires, par. 4.

¹¹³ CR 2013/24, p. 18, par. 5 et p. 24, par. 23 (Ugalde).

¹¹⁴ *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Yougoslavie (Serbie et Monténégro)), mesures conservatoires, ordonnance du 13 septembre 1993, C.I.J. Recueil 1993, p. 347, par. 46.*

¹¹⁵ *Ibid.*, p. 349-350, par. 61.

¹¹⁶ *Ibid.*, p. 349, par. 59 (les italiques sont de nous).

il existait alors «un risque grave que des actes de génocide soient commis»¹¹⁷, crime dont la Cour a rappelé qu'il «bouleverse la conscience humaine, inflige de grandes pertes à l'humanité ... et est contraire à la loi morale ainsi qu'à l'esprit et aux fins des Nations Unies»¹¹⁸. Je me permets de penser qu'à côté de cette tragédie humaine, les circonstances de notre affaire sont assez dérisoires et que, pour fâcheuse qu'elle soit, la «bavure» dont vous a saisis le Costa Rica ne justifie pas la réaffirmation solennelle de mesures auxquelles le Nicaragua a confirmé son attachement.

27. La troisième mesure demandée par le Costa Rica pose des problèmes un peu particuliers à cet égard. Si on la confronte à la deuxième mesure indiquée par la Cour dans son ordonnance de 2011, qui était déjà fortement déséquilibrée en faveur de l'Etat requérant, elle en apparaît comme, disons ... une version allégée. En la formulant, le Costa Rica vous demande en fait de lui donner un blanc-seing pour entreprendre des travaux de «remédiation» dans les zones entourant ce qu'il appelle les alentours (*the surrounding areas*) des deux *caños*. Je ne reviens pas sur le fait qu'en l'absence de tout risque de préjudice irréparable, cette demande n'a pas lieu d'être. Mais je relève en outre que la Partie costa-ricienne voudrait que vous purgiez votre décision de 2011 de tous les garde-fous dont vous aviez entouré la possibilité que vous reconnaissiez au Costa Rica d'

«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» ;

Et il est expressément prévu que, pour ce faire,

«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».

28. La veille de l'expédition du 18 septembre, le Costa Rica a informé le Nicaragua de son intention, mais il s'est bien gardé de «rechercher avec ce dernier des solutions communes» comme il en avait l'obligation — ce qui aurait sans doute permis d'éviter que nous nous retrouvions ici aujourd'hui pour discuter de mesures qui sont déjà acquises sur le terrain.

¹¹⁷ *Ibid.*, p. 347, par. 49 ; voir aussi *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Yougoslavie (Serbie et Monténégro))*, mesures conservatoires, ordonnance du 8 avril 1993, C.I.J. Recueil 1993, p. 22, par. 45.

¹¹⁸ *Ibid.*, p. 348, par. 51.

29. En tout cas, il ne fait pas de doute que le Costa Rica tente de se saisir du regrettable épisode lié aux initiatives malheureuses de M. Pastora pour s'émanciper de toute contrainte :

- plus de mention de la limitation de l'envoi à des agents *civils* ; apparemment, l'Etat demandeur ne serait pas mécontent d'y envoyer des éléments de ce qui lui tient lieu d'armée ;
- alors que l'ordonnance de 2011 utilise l'expression «dans la stricte mesure où» (*only in so far as it is necessary*), la formule que le Costa Rica voudrait vous voir retenir est plus permissive «to the extent necessary» ; et surtout
- la Partie costa-ricienne vous demande de l'exonérer de tout contrôle, qu'il s'agisse de la consultation du secrétariat de la convention de Ramsar au sujet de ces activités, de l'information préalable du Nicaragua ou de l'obligation de rechercher avec ce dernier des solutions communes.

Le Nicaragua, Monsieur le président, réaffirme son engagement à respecter les mesures conservatoires indiquées en 2011 ; il souhaiterait que le Costa Rica fasse de même.

30. Au surplus, si vous deviez donner satisfaction au Costa Rica à cet égard, vous préjugeriez le fond de l'affaire car la demande costa-ricienne

«ne peut être considérée comme visant l'indication de mesures conservatoires, mais comme tendant à obtenir un jugement provisionnel adjugeant une partie des conclusions de la susdite requête ; ... par conséquent, la demande dont il s'agit ne rentre pas dans les termes des dispositions du Statut et du Règlement invoquées dans la demande»¹¹⁹.

Cette citation, tirée de l'ordonnance de la Cour permanente sur les mesures conservatoires dans l'affaire de l'*Usine de Chorzów*, s'applique en tous points à notre affaire : en formulant ses demandes — tout particulièrement la troisième — le Costa Rica tente de faire reconnaître par la Cour que le territoire sur lequel se sont déroulés les faits litigieux est sien. Or la haute juridiction ne saurait préjuger le fond de l'affaire au stade des mesures conservatoires¹²⁰.

¹¹⁹ *Usine de Chorzów*, ordonnance du 21 novembre 1927, C.P.J.I. série A n° 12, p. 10.

¹²⁰ *Différend frontalier (Burkina Faso/République du Mali), mesures conservatoires, ordonnance du 10 janvier 1986, C.I.J. Recueil 1986, p. 11, par. 29.*

¹²⁰ *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), mesures conservatoires, ordonnance du 10 mai 1984, p. 182, par. 31 ; Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria), mesures conservatoires, ordonnance du 15 mars 1996, C.I.J. Recueil 1996 (I), p. 22, par. 40.*

4. L'ineffectivité des mesures demandées par le Costa Rica et la menace sur l'intégrité de la fonction judiciaire de la Cour

31. J'en viens à mon quatrième et dernier point, Monsieur le président : l'inéluctable ineffectivité des mesures demandées par le Costa Rica. De deux choses l'une en effet : ou bien le Costa Rica se borne à prier la Cour de réaffirmer les mesures de 2011 — et c'est un coup d'épée dans l'eau : le Nicaragua ne conteste nullement que ces mesures soient toujours en vigueur et continuent à s'appliquer aux deux Parties — ou bien il s'agit de mesures nouvelles et, comme je l'ai montré, les conditions pour les indiquer ne sont pas remplies. Au surplus, les initiatives prises par le président de la République du Nicaragua aussitôt qu'il a été informé de la situation, rendent non seulement superflue l'adoption de mesures nouvelles mais font qu'elles ne pourraient avoir aucun effet concret.

32. Cette situation résulte de la conjonction des deux éléments dont je viens de parler :

- premièrement, on peut comprendre que le Costa Rica n'ait pas vu d'un bon œil les initiatives de M. Pastora et même qu'il ait pu y voir des décisions officielles du Nicaragua ; mais une telle confusion n'est plus possible aujourd'hui : aussitôt informé, le Gouvernement nicaraguayen a pris les mesures nécessaires pour faire cesser ces agissements illégaux et contraires à l'ordonnance du 8 mars 2011 ; et
- deuxièmement, cette décision répond en tous points aux souhaits avoués du Costa Rica ; et c'est pour cela que, par les lettres des 10 et 11 octobre derniers qu'il a adressées au greffier de la Cour, l'agent du Nicaragua a renouvelé l'engagement de son pays de s'y conformer pleinement :

«As indicated by the internal correspondence I am attaching to this letter, upon learning of Mr. Pastora's public statements about his activities in the area of the mouth of the river, President Daniel Ortega immediately requested that the Executive President of the National Port Authority, which is responsible, *inter alia*, for dredging activities in the River, promptly investigate the situation and report back to him. After receiving the report from the National Port Authority the following day, President Ortega issued an instruction that required Mr. Pastora to withdraw himself, his crew and his equipment from the disputed area, and that prohibited the entry into the area by any government official or employee, as well as by any private contractor engaged by the government. President Ortega then ordered the Army of Nicaragua to increase its vigilance along the River to assure that there would be no unauthorized entry into the disputed area by any such persons, and that the Court's Order of 8 March 2011 would be scrupulously complied with. Nicaragua has confirmed that President Ortega's instruction and order, both of which were issued before Costa Rica

filed its Request for the Indication of Provisional Measures — were fully complied with.»¹²¹

33. Je vois mal, Monsieur le président, ce que de nouvelles mesures que la Cour viendrait à indiquer pourraient ajouter à ces dispositions et quelle garantie supplémentaire en résulterait. Comme l'a écrit l'agent du Nicaragua, «Costa Rica's Request is, in a word, moot»¹²².

34. Or, vous ne pouvez, Mesdames et Messieurs de la Cour, que refuser de faire suite à une telle demande :

«La fonction de la Cour est de dire le droit, mais elle ne peut rendre des arrêts qu'à l'occasion de cas concrets dans lesquels il existe, au moment du jugement, un litige réel impliquant un conflit d'intérêts juridiques entre les parties. L'arrêt de la Cour doit avoir des conséquences pratiques en ce sens qu'il doit pouvoir affecter les droits ou obligations juridiques existants des parties, dissipant ainsi toute incertitude dans leurs relations juridiques. En l'espèce, aucun arrêt rendu au fond ne pourrait répondre à ces conditions essentielles de la fonction judiciaire — c'est ce que vous avez dit en 1963 dans l'affaire du *Cameroun Septentrional*».¹²³

Ce qui vaut pour les arrêts vaut tout autant pour les ordonnances en indication de mesures conservatoires. «[L]a Cour ne peut exercer sa compétence contentieuse que s'il existe réellement un différend entre les parties.»¹²⁴ Lorsqu'une demande est — ou est devenue — sans objet, «toute décision judiciaire [devient] sans objet»¹²⁵. Tel est le cas de la décision que le Costa Rica vous invite à prendre.

35. ~~Monsieur le président, je vous prie de bien vouloir m'excuser de m'être adressé à vous dans une posture un peu inhabituelle. Je suis très reconnaissant au Greffe de ses bons soins et à la Cour de sa compréhension.~~ Monsieur le président, Mesdames et Messieurs de la Cour, ceci clôt le premier tour des plaidoiries du Nicaragua que, au nom de toute notre équipe, je vous remercie très vivement d'avoir écoutées avec votre patience et votre bienveillance habituelles.

¹²¹ Lettre en date du 11 octobre 2013 adressée à la Cour internationale de Justice par le Nicaragua.

¹²² Lettre en date du 10 octobre 2013 adressée à la Cour internationale de Justice par le Nicaragua (réf. HOL-EMB-193).

¹²³ *Cameroun septentrional (Cameroun c. Royaume-Uni), exceptions préliminaires, arrêt, C.I.J. Recueil 1963*, p. 33-34.

¹²⁴ *Essais nucléaires (Nouvelle-Zélande c. France), arrêt, C.I.J. Recueil 1974*, p. 477, par. 60. Voir également *Essais nucléaires (Australie c. France), arrêt, C.I.J. Recueil 1974*, p. 271, par. 57.

¹²⁵ *Cameroun septentrional (Cameroun c. Royaume-Uni), exceptions préliminaires, arrêt, C.I.J. Recueil 1963*, p. 38 ; également cité dans les affaires des *Essais nucléaires* (voir note précédente).

Le PRESIDENT : Merci, Monsieur Pellet. Ceci met fin au premier tour des observations orales du Nicaragua. La Cour se réunira demain matin à 10 heures pour entendre le second tour des observations du Costa Rica. La séance est levée.

La séance est levée à 13 heures.
