

## DECLARATION OF JUDGE GEVORGIAN

*Land boundary in the northern part of Isla Portillos — 1858 Treaty of Limits — Punta de Castilla as the starting-point of the boundary — Cleveland and Alexander Awards — the Court-appointed experts referred to the “remnants” of a former channel — Stability and finality of boundaries — Nicaragua’s military camp — No need for a finding of breach of sovereignty — The area was disputed territory — Maritime delimitation in the Caribbean Sea — The “Alexander Point” as starting-point of the maritime boundary — Nicaragua’s entitlement to a territorial sea in Harbor Head Lagoon.*

1. I have voted against two findings of the Court concerning the land boundary: first, that “the Republic of Costa Rica has sovereignty over the whole northern part of Isla Portillos, including its coast, up to the mouth of the San Juan River” (Judgment, paragraph 2 of the *dispositif*); second, that “by establishing and maintaining a military camp on Costa Rican territory, the Republic of Nicaragua has violated the sovereignty of the Republic of Costa Rica” (Judgment, paragraph 3 of the *dispositif*). In this declaration, I shall explain the reasons of my vote and comment on certain aspects of the Court’s delimitation of the maritime boundary in the Caribbean Sea.

## I. LAND BOUNDARY

2. When General Alexander initiated the demarcation of the boundary between Costa Rica and Nicaragua in 1897, he took Punta de Castilla (not the San Juan River mouth or some other point) as a reference. His first Award was particularly telling in this regard. Therein he explained in great detail the reasons why the drafters of the Treaty of Limits between Costa Rica and Nicaragua of 15 July 1858 (hereinafter “the 1858 Treaty of Limits”) and President Cleveland had chosen Punta de Castilla (a point of “no importance, political or commercial”) as starting-point of the boundary<sup>1</sup>. In his view, “the makers of the treaty intended to designate the mainland on the east of the harbor” in order to keep all the geomorphological features situated between such mainland and Punta Arenas under Nicaraguan sovereignty<sup>2</sup>. As he explained, it was “*impos-*

<sup>1</sup> First Award under the Convention between Costa Rica and Nicaragua of 8 April 1896 for the demarcation of the boundary between the two Republics, United Nation, *Reports of International Arbitral Awards (RIAA)*, Vol. XXVIII, p. 217.

<sup>2</sup> *Ibid.*, p. 219.

sible to conceive that Nicaragua had conceded this extensive and important territory to Costa Rica”<sup>3</sup>.

3. At the time, the area had undergone important geomorphological changes in relation to the situation that existed in 1858. As General Alexander observed, “[t]he exact spot which was the extremity of the headland of Punta de Castillo [*sic*] April 15, 1858, has long been swept over by the Caribbean Sea”<sup>4</sup>. Moreover, the area had long ceased to have the economic prominence it once had. But despite these changes, General Alexander fixed the starting-point of the boundary at the point that best corresponded to the geographical characteristics of Punta de Castilla as defined in the 1858 Treaty of Limits. Such a point was “the headland of to-day, or the northwestern extremity . . . on the east side of Harbor Head Lagoon”<sup>5</sup>. He then defined the direction of the boundary by reference to the “first channel met”, which was a continuous line of water connecting Harbor Head Lagoon with “the river proper”<sup>6</sup>. Finally, anticipating possible geomorphological changes, he expressed the view that the land boundary was to follow the fluctuations of the river in accordance with the relevant rules of international law<sup>7</sup>.

4. In my opinion, General Alexander’s approach remains valid today. Despite the continuous geomorphological changes, Punta de Castilla remains of prime importance as starting-point of the boundary by virtue of Article II of the 1858 Treaty of Limits, as interpreted in the Cleveland and Alexander Awards. Indeed, General Alexander’s demarcation line can still be identified in the current geography of the area.

In support of the opposite conclusion — that the geomorphological changes occurred in the area render Punta de Castilla and General Alexander’s line irrelevant — the Judgment heavily relies on two factual findings made by the Court-appointed experts: first, that “[o]ff the coastline, there are no features above water even at low tide”; second, that west of Harbor Head Lagoon “the coast is made up of a broad sandy beach with

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<sup>3</sup> First Award under the Convention between Costa Rica and Nicaragua of 8 April 1896 for the demarcation of the boundary between the two Republics, United Nation, *Reports of International Arbitral Awards (RIAA)*, Vol. XXVIII; emphasis added.

<sup>4</sup> *Ibid.*, p. 220.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

<sup>7</sup> See General Alexander’s second and third Awards for the demarcation of the boundary between Costa Rica and Nicaragua (1897-1898). See also the 1888 Award of the President of the United States in regard to the validity of the Treaty of Limits between Costa Rica and Nicaragua (“Cleveland Award”). Both referred to certain “principles” or “rules” of international law as governing the possible fluctuations of the San Juan River (see respectively *RIAA*, Vol. XXVIII, pp. 208-211 [Cleveland Award], pp. 223-225 [second Alexander Award] and pp. 227-230 [third Alexander Award]).

discontinuous and coast-parallel enclosed lagoons in the backshore”<sup>8</sup>. However, the Judgment avoids mentioning the experts’ identification of a series of “discontinuous coast-parallel lagoons” which are “essentially *remnants* of the channel-like water gap that used to exist in recent times between Isla Portillos and the spit of Los Portillos/Harbor Head Lagoon”<sup>9</sup>. Such a finding is in my view significant since, on the record before the Court, it is possible to observe that during the past century the channel mentioned by the experts was not swallowed by the sea, but rather continued to exist while moving southwards as a consequence of coastal recession<sup>10</sup>. It follows that the “remnants” identified by the experts have their origin in General Alexander’s “first channel met”. It is therefore possible to identify his line in the current geomorphological situation. The Court should have aimed to take the “stability and finality” of this boundary into consideration<sup>11</sup>.

5. This conclusion is supported by two other important considerations. First, in the proceedings before the Court, Costa Rica has not rejected Nicaragua’s sovereignty for decades over the channel connecting the lagoon with the river mouth, despite not being anymore an outlet for commerce in the sense of Article VI of the 1858 Treaty of Limits<sup>12</sup>. This shows the continuous importance of General Alexander’s line throughout the years despite the geomorphological changes in the area. Second, if one were to follow the Applicant’s logic, Harbor Head Lagoon would have been Costa Rican. Instead, in 2015, the Court assumed the Parties’ positions when it excluded the lagoon from the definition of the “disputed

<sup>8</sup> See paragraph 71 of the present Judgment.

<sup>9</sup> Report of the Court-Appointed Experts, CRNIC-CRNIP 2017/18, 1 May 2018, para. 106 and fig. 26 (emphasis added) and Question Put to the Experts by Judge Tomka: Answer of the Court-Appointed Experts, CRNIC-CRNIP 2017/29, 15 June 2017.

<sup>10</sup> See in particular the aerial photographs taken in 1960, 1961 and 1981 (CMN, pp. 30, 41 and 42) and the 1966 map of the US Corps of Engineers (CMN, p. 39). See also the topographic sheets respectively made by Costa Rica’s Instituto Geológico Nacional and Nicaragua’s INETER in 1970 and 1988 (Report of the Court-Appointed Experts, p. 27, fig. 26).

<sup>11</sup> *Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment, I.C.J. Reports 1962*, p. 34. See also General Alexander’s third Award, *RIAA*, Vol. XXVIII, p. 228.

<sup>12</sup> See CR 2017/8, p. 34, para. 42 (Kohen): “[i]t does not assist Nicaragua to refer to Costa Rican maps based on aerial photography of the 1960s when there was some channel, and when the argument that it seeks to make *at least had some factual basis*”; emphasis added.

According to Article VI of the 1858 Treaty,

“[t]he Republic of Nicaragua shall have exclusive *dominium* and *imperium* over the waters of the San Juan River from its origin in the lake to its mouth at the Atlantic Ocean; the Republic of Costa Rica shall however have a perpetual right of free navigation on the said waters between the mouth of the river and a point located three English miles below Castillo Viejo”.

area” — for this reason, despite having voted against paragraph 2 of the *dispositif*, I am in full agreement with the last phrase thereof, which attributes sovereignty over Harbor Head Lagoon to Nicaragua.

6. Accordingly, it is my view that not only the lagoon, but also the beach of northern Isla Portillos, should have been declared under Nicaraguan sovereignty in accordance with Article I of the 1858 Treaty of Limits.

## II. MILITARY CAMP

7. I am also unable to concur with the Court’s finding according to which Nicaragua’s military camp has violated Costa Rica’s sovereignty. In the Court’s Judgment in *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* (hereinafter “the 2015 Judgment”), the Court maintained the definition of the disputed territory (introduced in its Order on provisional measures of 8 March 2011) as “the area of wetland of some 3 square kilometres between the right bank of the disputed *caño*, the right bank of the San Juan River up to its mouth at the Caribbean Sea and the Harbor Head Lagoon”<sup>13</sup>. But at the same time, it excluded from this definition “the stretch of coast abutting the Caribbean Sea which lies between the Harbor Head Lagoon . . . and the mouth of the San Juan River”. One of the reasons for doing so was that the Parties had not “provide[d] detailed information concerning the coast”<sup>14</sup>.

This shows, as the present Judgment explains, that

“no decision was taken by the Court in its 2015 Judgment on the question of sovereignty concerning the coast of the northern part of Isla Portillos, since this question had been expressly excluded . . . it is not possible for the issue of sovereignty over that part of the coast to be *res judicata*. Therefore, the Court cannot declare inadmissible Nicaragua’s claim concerning sovereignty over that stretch of coast of Isla Portillos.”<sup>15</sup>

In sum, the territory at stake was disputed territory<sup>16</sup>.

<sup>13</sup> *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)*, Judgment, *I.C.J. Reports 2015 (II)*, p. 697, para. 69 (quoting from *I.C.J. Reports 2011 (I)*, p. 19, para. 55).

<sup>14</sup> *Ibid.*, p. 697, para. 70.

<sup>15</sup> See paragraph 69 of the present Judgment.

<sup>16</sup> This is confirmed by the fast-changing geomorphological conditions of the area, which is characterized by the presence of temporary channels connecting Harbor Head Lagoon with the Caribbean Sea (Report of the Court-Appointed Experts, p. 29, fig. 29).

8. In my declaration on the 2015 Judgment, I already addressed the problems arising from the Court's ruling on sovereignty over the disputed area. I expressed my disagreement with the Court's decision to declare "Costa Rica's sovereignty over an area whose limits are far from being clear" and pointed out that such a decision may be "the source of future disagreement between the Parties"<sup>17</sup>. In my opinion, these views apply *a fortiori* in the present case. A ruling on sovereignty, together with an order to remove Nicaragua's camp from Costa Rica's territory, would have been sufficient relief for the Applicant. Such a decision would have been closer to the realities on the ground, as only on 2 February 2018 (that is, the date of delivery of the present Judgment) has Costa Rica's sovereignty over the territory where Nicaragua's camp was located been established<sup>18</sup>. It would also have been in line with the Court's Judgment in *Cameroon v. Nigeria*, in which the Court ruled (in relation to the presence of Nigerian forces in a disputed territory) that "by the very fact of the present Judgment and of the evacuation of the Cameroonian territory occupied by Nigeria", the injury suffered by Cameroon had been addressed<sup>19</sup>.

### III. MARITIME BOUNDARY IN THE CARIBBEAN SEA

9. I am in broad agreement with the maritime boundary in the Caribbean Sea as delimited by the Court. However, in line with my previous reasoning on the starting-point of the land boundary, I am inclined to consider that the starting-point of the maritime boundary should have been situated at the so-called "Alexander Point" (that is, the point at which General Alexander fixed the starting-point of the land boundary). Such a solution would have fully respected the 1858 Treaty of Limits and the Cleveland and Alexander Awards. However, since, in practical terms, the starting-point identified in the present Judgment does not significantly move the course of the would-be boundary line<sup>20</sup>, I have voted in favour of paragraph 4 of the *dispositif*.

<sup>17</sup> *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)*, Judgment, I.C.J. Reports 2015 (II), declaration of Judge Gevorgian, pp. 831-832, paras. 4 and 6.

<sup>18</sup> I am aware of the Court's statement in *Frontier Dispute* that the effect of any judicial decision rendered in a territorial dispute is "a clarification . . . of a given legal situation with declaratory effect from the date of the legal title upheld by the court" (*Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, I.C.J. Reports 1986, p. 563, para. 17). However, this finding should not be taken to its ultimate consequences. In reaching the opposite conclusion, the Court has given full effect to the legal fiction of retroactivity.

<sup>19</sup> *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, I.C.J. Reports 2002, p. 452, para. 319.

<sup>20</sup> See sketch-map No. 5.

Some other aspects of the case could also have been addressed differently. In particular, I consider that, as territory under its sovereignty, Nicaragua's Harbor Head Lagoon generated an entitlement to a territorial sea to Nicaragua. The Court instead concludes that the "instability" of the sandbar separating the lagoon from the Caribbean Sea and its situation as a "small enclave within Costa Rica's territory" justified the opposite conclusion<sup>21</sup>. Leaving aside the problems arising within this reasoning, it appears unjustified not to compensate Nicaragua for its loss of territory in the maritime area generated by the sandbar in front of the lagoon.

10. Other relevant questions concern the practical differences between the methods employed to delimit the territorial sea and the economic exclusive zone and continental shelf, the legal effects of the 1977 Treaty on Delimitation of Marine and Submarine Areas and Maritime Cooperation between Costa Rica and Colombia (not yet ratified, but strictly applied by Costa Rica for more than forty years), the legal effects of the 1980 bilateral treaty concluded between Panama and Costa Rica (referred to by Costa Rica, but never registered in accordance with Article 102, paragraph 1, of the United Nations Charter) and the limited use in international jurisprudence of radial projections in the determination of relevant areas. Certainly, these are important issues which the Court could have addressed in more detail. However, overall, I consider that the Judgment strikes a fair balance between the respective entitlements of the two Parties in the Caribbean Sea and the Pacific Ocean.

*(Signed)* Kirill GEVORGIAN.

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<sup>21</sup> See paragraph 105 of the present Judgment.