

DECLARATION OF JUDGE SKOTNIKOV

1. I fully support the Court's decision directing both parties to "refrain from sending to, or maintaining in the disputed territory, including the *caño*, any personnel, whether civilian, police or security" (Order, operative clause (1)).

2. However, I am unable to concur in the second provisional measure indicated by the Court, which reads as follows:

"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." (Order, operative clause (2).)

3. First of all, I think that two conditions, well established by the jurisprudence of the Court, namely the existence of a risk of irreparable harm to the rights in dispute and urgency, have not been met in this instance. The Court has come to the conclusion that those conditions have been fulfilled in respect of the first provisional measure (see Order, paragraphs 75-77). However, the Order contains no assessment whatsoever as to whether those conditions have been met in respect of the second provisional measure. The Order refers only to hypothetical prejudice to the environment (see Order, paragraph 80).

4. I am also of the view that the majority voting in favour of the second provisional measure has treated the Court's duty not to prejudge the outcome of the merits of the case rather lightly.

Moreover, this provisional measure may contribute to aggravating or extending the dispute.

5. The following reason is given for allowing Costa Rica to dispatch civilian personnel charged with protecting the environment to the disputed territory, including the *caño*:

"the disputed territory is . . . situated in the 'Humedal Caribe Noreste' wetland, in respect of which Costa Rica bears obligations under the Ramsar Convention" (Order, paragraph 80)

and, therefore,

"pending delivery of the Judgment on the merits, Costa Rica must be in a position to avoid irreparable prejudice being caused to the part of that wetland where that territory is situated" (*ibid.*).

6. It is certainly true that Costa Rica bears obligations under the Ramsar Convention in respect of "Humedal Caribe Noreste". However, the question as to whether those obligations extend to the disputed territory, including the *caño*, can only be answered at the merits stage. The Court correctly states that "the rights at issue in these proceedings derive from the sovereignty" which both Parties claim in respect of the disputed area (Order, paragraph 56). The same is obviously true of the obligations of the Parties, including those under the Ramsar Convention.

7. The Court has decided that Nicaragua must cease the replanting of the trees in the disputed territory and must not send inspectors to periodically monitor the reforestation process and any changes which might occur in the region, including the Harbor Head lagoon, because “this situation creates an imminent risk of irreparable prejudice to Costa Rica’s claimed title to sovereignty over the said territory and to the rights deriving therefrom” (Order, paragraph 75). However, the presence in the disputed territory of Costa Rica’s personnel charged with protecting the environment can only be equally prejudicial to Nicaragua’s claimed title to sovereignty over that territory.

8. The Court has stated that “the title to sovereignty claimed by Costa Rica over [the disputed territory] is plausible” (Order, paragraph 58), that “the Court is not called upon [for the purposes of considering a request for the indication of provisional measures] to rule on the plausibility of the title to sovereignty over the disputed territory advanced by Nicaragua” (*ibid.*), and that “the provisional measures it may indicate would not prejudice any title” (*ibid.*).

9. It follows that the plausibility of the rights claimed by Costa Rica cannot provide any basis for putting the Applicant in a more favourable position than Nicaragua. This, unfortunately, appears to be the result of the second provisional measure.

10. Costa Rica’s activities which the Court is allowing in the disputed territory by indicating the second provisional measure are to be carried out by Costa Rica’s civilian personnel “in so far as it is necessary to avoid irreparable prejudice being caused to the part of the wetland where that territory is situated” (Order, operative clause (2)). Actions which may be taken by Costa Rica under the above provision potentially go well beyond the reforestation and monitoring contemplated by Nicaragua. I well understand that this was not the majority’s intention in voting in favour of operative clause (2) but, unfortunately, this does create a risk of aggravating and extending the dispute before the Court and making it more difficult to resolve. In giving its reasons for indicating the first provisional measure, the Court also notes that Nicaragua’s activities in the disputed territory give rise “to a real and present risk of incidents liable to cause irremediable harm in the form of bodily injury or death” (Order, paragraph 75). The majority should have been aware that activities undertaken by Costa Rica in accordance with the second provisional measure may pose the same danger.

11. Let me note that it has not been shown, or even argued by the Parties, that any presence of either Costa Rica’s or Nicaragua’s personnel in the tiny disputed territory, including the *caño*, is necessary in order to avoid irreparable prejudice being caused to the part of the wetland where this territory is situated. It is clear from the case file that no personnel were present in the disputed territory before Nicaragua embarked on its *caño* operation in October 2010.

Costa Rica itself did not request the Court to indicate a provisional measure allowing it to send personnel to the disputed territory (see Order, paragraph 75). The second provisional measure is indicated purely on the Court’s initiative (see Order, paragraph 76).

12. In my view, the Court should have dealt with the issue of protection of the environment in exactly the same way as it dealt with the issue concerning the prevention of criminal activity in the disputed territory. It noted in the reasoning in the Order that

“in the absence of any police or security forces of either Party, each Party has the responsibility to monitor that territory from the territory over which it unquestionably holds sovereignty, i.e., in Costa Rica’s case, the part of Isla Portillos lying east of the

right bank of the *caño*, excluding the *caño*; and, in Nicaragua's case, the San Juan river and Harbor Head lagoon, excluding the *caño*; and . . . it shall be for the Parties' police or security forces to co-operate with each other in a spirit of good neighbourliness, in particular to combat any criminal activity which may develop in the disputed territory" (Order, paragraph 78).

13. A similar call by the Court on the Parties to co-operate in a spirit of good neighbourliness in protecting the environment of the area would have been well justified given that this is a shared and inseparable wetland comprising the "Humedal Caribe Noreste" and the "Refugio de Vida Silvestre Río San Juan" (see Order, paragraph 79). The Court indeed

"remind[ed] the Parties that, under Article 5 of the Ramsar Convention:

‘The Contracting Parties shall consult with each other about implementing obligations arising from the Convention especially in the case of a wetland extending over the territories of more than one Contracting Party or where a water system is shared by Contracting Parties. They shall at the same time endeavour to coordinate and support present and future policies and regulations concerning the conservation of wetlands and their flora and fauna.’" (Order, paragraph 79.)

That is what the Parties are under an obligation to do irrespective of their competing claims to a small disputed territory situated in the area protected under the Ramsar Convention.

(Signed) Leonid SKOTNIKOV.
