

JOINT DECLARATION OF JUDGES TOMKA,
GREENWOOD, SEBUTINDE
AND JUDGE *AD HOC* DUGARD

Costs — Article 64 of the Statute of the Court — Provisional measures — Obligation of a State to comply with Order indicating provisional measures — Obligations imposed by 2011 Order violated by Nicaragua — Conduct of Nicaragua — Costs incurred by Costa Rica in seeking further Order in 2013 — Whether Court should have exercised discretion to order Nicaragua to pay Costa Rica’s costs of the 2013 request for provisional measures.

1. We regret that we are unable to agree with the decision of the majority of the Court to reject Costa Rica’s request that it be awarded the costs of having had to come to the Court in October 2013 for a second Order on provisional measures of protection. We have therefore voted against operative paragraph 5 (*c*) of the Judgment.

2. Article 64 of the Statute of the Court provides that “[u]nless otherwise decided by the Court, each party shall bear its own costs”. This provision is supplemented by Article 97 of the Rules of Court, which provides that “[i]f the Court, under Article 64 of the Statute, decides that all or part of a party’s costs shall be paid by the other party, it may make an order for the purpose of giving effect to that decision”.

We accept that, in the words of a leading work on the Court, Article 64 of the Statute “may be interpreted as implying the general rule that each party bears its own costs, and that only in exceptional circumstances will the Court decide otherwise” (see Shabtai Rosenne, *The Law and Practice of the International Court, 1920-2005*, Vol. III, 4th ed., 2006, p. 1281). In no case so far has the Court considered that such exceptional circumstances existed. Nevertheless, it is clear that the Statute gives the Court discretion in this matter and we consider it important that the Court exercises that discretion, when it is called upon to do so, after careful consideration of the particular circumstances of the case.

3. What, then, are the circumstances of the present case? In its Order on provisional measures of 8 March 2011, the first measure, indicated unanimously by the Court, was that “[e]ach Party shall refrain from sending to, or maintaining in the disputed territory, including the *caño*, any personnel, whether civilian, police or security” (*Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 27, para. 86 (1)). The “disputed territory” was

defined in paragraph 55 of that Order 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” (*I.C.J. Reports 2011 (I)*, p. 19, para. 55). The first provisional measure, therefore, could not have been clearer. Nicaragua was prohibited from “sending to, or maintaining in the disputed territory” any personnel, military or civilian, let alone from carrying out any works therein. The Court’s orders on provisional measures being binding (*LaGrand (Germany v. United States of America)*, *Judgment, I.C.J. Reports 2001*, p. 506, para. 109), Nicaragua had a legal obligation to comply with this measure. The Court also enjoined both Parties to “refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve” (*Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 27, para. 86 (3)).

4. On 13 September 2013, Costa Rica received evidence, in the form of satellite images, that two new *caños* had been dug in the disputed territory, that a dredger was operating in one of them and that a Nicaraguan military encampment had been established on the beach nearby. On 16 September, Costa Rica wrote to Nicaragua complaining of a violation of the provisional measures. According to counsel for Nicaragua, this letter prompted the President of Nicaragua to order an investigation into the state of affairs in the disputed territory. Nevertheless, on 18 September, the Nicaraguan Foreign Ministry replied to Costa Rica, stating that Nicaragua had authorized no works in the disputed territory (Costa Rica, Request for the Indication of New Provisional Measures, 24 September 2013, Attachment PM-5). As counsel for Nicaragua subsequently remarked, “[i]n 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” (CR 2013/25, p. 21). Costa Rica reacted to the Foreign Ministry’s letter by filing, on 24 September 2013, a new request for provisional measures. In the meantime, however, the investigation ordered by President Ortega had disclosed that two new *caños* had indeed been dug on the orders of Mr. Eden Pastora, who was described in a Nicaraguan document as the “Government Delegate for [the] Dredging Works” (see letter from Nicaragua to the Court, 11 October 2013, Ref. HOL-EMB-197, Ann. 8). On 21 September 2013, President Ortega gave instructions that Mr. Pastora was to cease all operations on the two new *caños* and to withdraw the dredger. These instructions were complied with. Nicaragua did not, however, inform either Costa Rica or the Court of this development, or take any steps to rectify the impression created by its letter of 18 September, until Thursday 10 October 2013. In the meantime, the Court had informed both Parties that it would hold hearings on the new Costa Rican request for provisional measures beginning on Monday 14 October 2013. So far as the military encampment was concerned, Nicaragua maintained that it was located on Nica-

raguan territory outside the disputed territory, specifically, on a beach just to the north of the disputed territory, and that Nicaragua was therefore under no obligation to withdraw (CR 2013/25, p. 29).

5. The Court has unanimously found (see Judgment, paras. 121-129 and para. 229 (3)) that this conduct amounted to a violation of the provisional measures ordered by the Court in March 2011. While Mr. Pastora may have exceeded his instructions, he was a senior official of the Republic of Nicaragua and his actions purported to be an exercise of his official authority. That they would have seemed as such to any observer was accepted by Nicaragua, which stated that those who saw him may have assumed he was authorized to be in the area; in the words of Nicaragua's counsel, "Mr. Pastora is a well-known figure in Nicaragua" and "[i]t would have been quite strange that a young lieutenant in charge of the nearby areas would question what Mr. Pastora was doing" (CR 2013/25, p. 16). It is beyond question that Mr. Pastora's actions were attributable to Nicaragua and engaged its responsibility for a breach of the obligations under the March 2011 provisional measures Order. Nicaragua quite rightly accepted that responsibility. Nevertheless, while Nicaragua's counsel described the breach as "unintentional" (CR 2015/7, p. 61), the senior position held by Mr. Pastora means that the breach cannot be so lightly put aside. There was nothing "unintentional" about the breach of the Court's Order; it was a deliberate action undertaken on the instructions of the senior government official entrusted by Nicaragua with responsibility for the dredging programme in the area immediately adjacent to the disputed territory.

6. As for the establishment of a military encampment, the Court found, in its 2013 Order, that — contrary to what Nicaragua said — that encampment was not on the sandbank but on land that formed part of the disputed territory (*Order of 22 November 2013, I.C.J. Reports 2013*, p. 365, para. 46). Nicaragua has never suggested that the presence of this encampment was unauthorized.

7. The Court is thus faced with two serious violations of the obligations imposed upon Nicaragua by the 2011 Order on provisional measures. The Court has made plain that Nicaragua must compensate Costa Rica for any damage caused by its violation of those obligations. Costa Rica will therefore be able to recover, for example, the costs of any remediation work which was necessary in order to deal with the two additional *caños*. The Court has, however, denied Costa Rica the chance of recovering from Nicaragua what may well be the largest expense it was obliged to incur, namely the costs of nearly a week of hearings before the Court. Those costs were a direct consequence of Nicaragua's breach of the obligations imposed by the 2011 Order. Moreover, even after it had ordered Mr. Pastora's withdrawal, Nicaragua could have taken steps which would have made the hearings in October 2013 unnecessary but it did not do so. Instead of notifying the Court and Costa Rica of its order

to Mr. Pastora on 21 September 2013, it said nothing until the eve of the hearings, leaving Costa Rica — and the Court — under the impression that it denied that there had been any activity in the disputed territory. When it did inform the Court and Costa Rica of its actions, Costa Rica suggested that the Parties agree [to] an Order which the Court would issue and thus save the cost of the hearing itself. Nicaragua refused. It is illogical for the Court to adopt a posture in which a party which has been the victim of a breach of provisional measures indicated by the Court is treated less favourably if it incurs expense in coming back to the Court to seek redress than if it takes unilateral action to remedy the damage caused by that breach.

8. We consider that these are exceptional circumstances which warrant an exercise by the Court of the power given to it by Article 64 of the Statute. It is true that the Court has never previously exercised that power but it has seldom been asked to do so and none of the cases in which costs have been requested by a party has been remotely comparable to the present one. The power to indicate provisional measures is of the utmost importance for the maintenance of the integrity of proceedings before the Court. The measures thus indicated are legally binding and their breach is an autonomous violation of legal obligations, entirely distinct from the merits of the case. The Court, and those States appearing before it, are entitled to assume that a State litigating in good faith will be scrupulous in complying with those measures. If its failure to do so necessitates a further hearing, it is only right that that State should bear the costs incurred.

9. It is therefore a matter for regret that the Court has dismissed Costa Rica's request for the costs incurred in obtaining the Order of 22 November 2013 and that it has done so without any discussion of the circumstances considered in this declaration. This was surely a case in which something more was called for than a Delphic pronouncement that "taking into account the overall circumstances of the case, an award of costs to Costa Rica . . . would not be appropriate" (Judgment, para. 144).

(Signed) Peter TOMKA.

(Signed) Christopher GREENWOOD.

(Signed) Julia SEBUTINDE.

(Signed) John DUGARD.