DECLARATION OF JUDGE *AD HOC* GUILLAUME

[Translation]

Status of the San Juan River — Treaty of 26 April 1858 — No applicable customary law of international rivers — Boundary fixed along the bank — Nicaragua's exclusive, full and undivided sovereignty.

Extent of Costa Rica's right of free navigation for commercial purposes — Effect of the passage of time on the interpretation of treaties — Joint intent of the Parties — Restrictive interpretation of the qualifications under the 1858 Treaty on Nicaragua's territorial sovereignty.

Boat operators the sole beneficiaries of the right of free navigation — Requirement that they be carrying out a commercial activity — Commercial or non-commercial nature of passengers' activity without effect on the rights of free navigation.

No right of riparians or governmental entities to navigate for non-commercial purposes.

Nicaragua's power to regulate — Right to condition entry into its territory on possession of a visa.

1. I subscribe to many of the conclusions reached by the Court. I wish however to make several remarks and to explain my disagreement with the decision on certain points.

The Applicable Law

2. The Court has considered that the dispute between Costa Rica and Nicaragua concerning navigational rights on the San Juan River must be settled solely on the basis of the Treaty entered into by the two States on 26 April 1858.

From this the Court has reasoned that there is no need to rule on the questions of whether the San Juan can be characterized as an "international river" under customary international law or whether there is a customary régime, either universal or regional in nature, applicable to navigation on "international rivers".

3. I am in full agreement with these findings but deem it appropriate to add that customary international law offers no definition of "international rivers" and no régime governing navigation on such rivers. Some are open by convention to navigation by merchant ships of all States and in some instances are administered by river commissions endowed with extensive powers. Others are open only to navigation by vessels of the riparian States with or without river commissions having been set up. Lastly, others are not open to international navigation and remain entirely under the sovereignty of the riparian States. Further, in respect of matters such as upkeep works on the river, fishing, policing navigation,

environmental protection, dam-building and irrigation, the statuses of these rivers vary greatly.

The treaty position in this respect is different in Latin America and Europe. As pointed out by the Chilean jurist Alejandro Alvarez at the Barcelona Conference:

> "On the American continent, the principle of free navigation on rivers has not developed in the same way [as in Europe or Africa]; while it has been accepted there, that has not been by way of extension of the European principle but as a concession voluntarily granted by the riparian States in *inter partes* agreements or legislative acts." *[Translation by the Registry.]*[1]

Accordingly, Professor Caflisch in his course at the Academy of International Law noted that there was no "customary principle" in Latin America laying down freedom of navigation and concluded that on that continent "there is no freedom of navigation in the absence of a unilateral concession or a treaty provision"[2]. Latin American States, he added, "continue to make free navigation conditional on the legislation of riparian States and on treaties entered into by them"[3].

The same conclusions follow from an examination of the few conventions concluded in that part of the world, be it in regard to the status of the Amazon, the Paraná or the Río de la Plata[4].

Nicaragua's Sovereignty over the San Juan River

4. As explained by the Court, the crux of the dispute between the Parties concerns the interpretation of Article VI of the Treaty of Limits of 15 April 1858. In its Spanish version, the only authoritative one, the article reads as follows:

> "La República de Nicaragua tendrá exclusivamente el dominio y sumo imperio sobre las aguas del río de San Juan desde su salida del Lago, hasta su desembocadura en el Atlántico; pero la República de Costa Rica tendrá en dichas aguas los derechos perpetuos de libre

[1] Quoted by L. Caflisch, "Règles générales du droit des cours d'eau internationaux", *Collected Courses of the Hague Academy of International Law*, 1989, Vol. 219, p. 117. See also the arbitral award in the *Faber* Case, United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. X, p. 466.

[2] L. Caflisch, *op. cit.*, p. 125 *[translation by the Registry]*.

[3] L. Caflisch, *op. cit.*, p. 123 *[translation by the Registry]*.

[4] In respect of: the Amazon, see the Treaty concluded at Brasilia on 3 July 1978 by Bolivia, Brazil, Colombia, Ecuador, Guyana, Peru, Suriname and Venezuela; the Paraná, see the 1979 Agreement between Argentina, Brazil and Paraguay; the Río de la Plata, see the Treaty concluded at Montevideo by Argentina and Uruguay on 19 November 1973.

navegación, desde la expresada desembocadura hasta tres millas inglesas antes de llegar al Castillo Viejo, con objetos de comercio, ya sea con Nicaragua ó al interior de Costa Rica por los ríos de San Carlos ó Sarapiquí, ó cualquiera otra vía procedente de la parte que en la ribera del San Juan se establece corresponder á esta República. Las embarcaciones de uno ú otro país podrán indistintamente atracar en las riberas del río, en la parte en que la navegación es común, sin cobrarse ninguna clase de impuestos, á no ser que se establezcan de acuerdo entre ambos Gobiernos."

5. Thus, Article VI grants Nicaragua, and it alone, full and undivided sovereignty over the San Juan River. The river lies entirely in Nicaraguan territory from Lake Nicaragua to a point 3 miles downstream of Castillo Viejo. From there it forms the boundary between the two States, but nevertheless remains in Nicaraguan territory. In this area the boundary is fixed along the Costa Rican bank. This is the case all the way to the river's mouth in the Atlantic. The bay of San Juan del Norte, at the mouth of the river, is however common to the two republics (Article 4 of the Treaty).

The 1858 Treaty thus uses neither the median line nor the thalweg of the San Juan to set the boundary, which it fixes as the southern bank of the river.

6. It bears noting that, contrary to what one might expect, arrangements of this type are not uncommon; specifically, they are to be found in many old treaties, the most famous of which being the Treaty of Erzeroum of 1847, granting Persia access to the Shatt-al-Arab while awarding sovereignty over it to the Ottoman Empire[5].

Many such treaties are still in force, such as those between:

— Switzerland and France in respect of the Foron, the Morge, the Eau Noire, the Barberine and the Doubs[6];

[5] Under this Treaty, the Ottoman Empire held sovereignty over the Shatt-al-Arab itself and Persia held sovereignty over the "left bank" of the Shatt-al-Arab. Art. 2, para. 8, of the Treaty added that Persian vessels would have the right freely to navigate on the Shatt-al-Arab. The same solution was for the most part adopted in the 1937 Treaty between Iran and Iraq. Further, this latter treaty extended freedom of navigation to merchant vessels of all States. However, in 1969 Iran repudiated the 1937 Treaty. A new agreement was reached in 1975, fixing the thalweg as the boundary while maintaining freedom of navigation. Iraq "abrogated" this agreement in 1980 but then agreed in 1990 to return to the 1975 arrangement. (See "River Boundaries, Legal Aspects of the Shatt-al-Arab Frontier", *International and Comparative Law Quarterly*, April 1960, p. 207; D. Momtaz, "Le statut juridique du Chatt-al-Arab dans sa perspective historique", in *Actualités juridiques et politiques en Asie. Etudes à la mémoire de Tran Van Minh*, 1988, p. 59).

[6] Agreement of 20 June 1780 between France and the Prince Bishop of Basel (Parry, *Consolidated Treaty Series (CTS)*, Vol. 47, 1778-1781, p. 331); Treaty of 16 March 1816 (*CTS*, Vol. 65, p. 447); Convention between France and Switzerland of 10 June 1891 (*CTS*, Vol. 175, p. 169). See Rousseau, *Droit international public*, Vol. III, para. 212.

— the Gambia and Senegal in respect of the San Pedro and the Tendo[7];
— Senegal and Mauritania in respect of the Senegal River[8];
— Liberia and Côte d'Ivoire in respect of a number of rivers[9];
— Malaysia and Indonesia in respect of the Odong[10];
— Afghanistan and Pakistan in respect of the Kabul and Kolossai Rivers[11];
— Guatemala and Honduras in respect of the Tinto River[12].

Federal States have also opted for fixing boundaries along river banks. This is so in Switzerland between the cantons of Zurich and Schaffhausen along a segment of the Rhine[13] and between the cantons of Berne and Aargau along the Rothbach[14]. The same holds true in the United States, where the border between Virginia and the District of Columbia is fixed on the Virginia bank[15]. Analogous solutions were obtained between Alabama and Georgia and between Vermont and New Hampshire[16]. This is to say that the 1858 Treaty is not an isolated example and should be interpreted with this in mind.

Costa Rica's Right of Free Navigation

7. After thus recognizing Nicaragua's sovereignty over the San Juan River, the 1858 Treaty grants Costa Rica certain rights of navigation on the part of the river bordering Costa Rican territory. These are perpetual rights "de libre navegación con objetos de comercio".

8. The record contains lengthy argument by the Parties over the meaning of "con objetos" and "comercio" as used in Article VI.

I fully share the Court's interpretation of the phrase "con objetos". In the context this covers navigation for commercial purposes, not only the transport of goods.

Tougher questions are raised by "comercio". Nicaragua has main-

[7] Procès-verbal between Britain and France of 9 June 1891 (Ian Brownlie, *African Boundaries*, p. 219).
[8] Decree of 8 December 1933 (*JOAOF*, 1934, p. 69), cited by Ian Brownlie, (*op. cit.*, p. 433).
[9] Declaration by France and Liberia of 13 January 1911 (*CTS*, Vol. 213, p. 213), confirmed after the independence of Côte d'Ivoire in 1961 (I. Brownlie, *op. cit.*, p. 369).
[10] Treaty of 29 March 1928 (League of Nations, *Treaty Series (LNTS)*, Vol. 108, p. 33).
[11] Treaty of 22 November 1921 (League of Nations, *Treaty Series (LNTS)*, Vol. 14, p. 67).
[12] Arbitral Award of 23 January 1933 (United Nations, *RIAA*, Vol. II, p. 1365).
[13] Treaty of 11 January 1901, Art. 5, cited by Schultess, *Das Internationale Wasserrecht*, Zurich, 1916, p. 10.
[14] *Ibid.*, p. 8, Note 8.
[15] *Virginia* v. *District of Columbia*, 283 US 348.
[16] See *Alabama* v. *Georgia*, 23 Howard 505-515 (1859); *Vermont* v. *New Hampshire* (United States Supreme Court, 19 May 1933, 289 US 593-603).

tained that in 1858 this term necessarily meant trade in goods and did not cover services, including the transport of persons generally or tourists specifically. In its view, this narrow meaning must prevail. Costa Rica has argued to the contrary, that the carriage of passengers, tourists in particular, was a commercial activity even in 1858, and *a fortiori* remains one today.

9. The question of the effect of the passage of time on treaty interpretation has been the subject of spirited debate in the literature between proponents of "contemporaneous" (also called "fixed reference") interpretation and advocates of "evolutionary" (also called "mobile reference") interpretation. Thus, within the International Law Commission "there was support for the principle of contemporaneity as well as the evolutive approach"[17], but a consensus seems to have emerged to the effect that the problem should be resolved through the application of ordinary methods of treaty interpretation[18]. The discussion from this viewpoint did however continue on the question of whether Article 31, paragraph 3 *(c)*, of the Vienna Convention referred to "rules in force when the treaty was adopted or could be extended to also cover subsequent treaties"[19].

The subject also gave rise to lively discussion within the Institut de droit international at Wiesbaden in 1975. Among other things, the Institut considered the role to be played in the interpretation or application of a treaty by "the international legal system in effect when [the] treaty is interpreted or applied" *[translation by the Registry]*[20]. Compromise wording was ultimately adopted on this point, but the Institut nevertheless also upheld the principle that:

> "Wherever a provision of a treaty refers to a legal or other concept without defining it, it is appropriate to have recourse to the usual methods of interpretation in order to determine whether the concept concerned is to be interpreted as understood at the time when the provision was drawn up or as understood at the time of its application."[21]

10. While not always easy to decipher, the case law would appear to support this approach.

It consistently proclaims "the primary necessity of interpreting an

[17] Report of the International Law Commission, 2005, p. 220.
[18] *Ibid.*, 2006, p. 414.
[19] *Ibid.*, 2005, p. 220.
[20] In the deliberations of the Institut see the statements by Mr. Sorensen (pp. 343 and 354), Sir Gerald Fitzmaurice (pp. 347 and 357) and Mr. Yasseen (p. 349). See also the votes cast (p. 370).
[21] Resolution of the Institut de droit international, session of Wiesbaden, 11 August 1975, on the "Intertemporal Problem in Public International Law", *Annuaire de l'Institut*, 1975, Vol. 56, p. 536, para. 4. *[English translation by the Institut de droit international.]*

instrument in accordance with the intentions of the parties at the time of its conclusion"[22].

But, proceeding on that basis, it sometimes favours contemporaneous interpretation and sometimes evolutionary interpretation.

11. The following examples fall into the first category:

(a) in 1952 the Court interpreted "dispute" so as to give it the meaning it had when the treaties of 1787 and 1836 were concluded by the United States and Morocco for the purpose of protecting their nationals[23];

(b) the same was true for the term "water-parting" in the *Laguna del desierto* arbitration[24];

(c) in the *Kasikili/Sedudu Island (Botswana/Namibia)* case, the Court considered that, taking into account the time when the 1890 Treaty had been concluded by Great Britain and Germany, the terms "centre of the main channel" of the Chobe and "thalweg" of the Chobe should be regarded as equivalent[25];

(d) in its award of 13 April 2002, the arbitral tribunal asked to delimit the border between Eritrea and Ethiopia considered that it should interpret the treaties to be applied "by reference to the circumstances prevailing when the treaty was concluded. This involves giving expressions (including names) used in the treaty the meaning that they would have possessed at that time"[26];

(e) in identifying the "mouth" of the Ebeji in Lake Chad, the Court concluded that, "[i]n order to interpret this expression", it "must seek to ascertain the intention of the parties at the time"[27].

12. On the other hand, the evolutionary interpretation approach was taken in the following instances:

(a) in the previously cited Advisory Opinion on South West Africa, the Court said that it was bound to take into account

> "the fact that the concepts embodied in Article 22 of the Covenant [of the League of Nations] — 'the strenuous conditions of the modern world' and 'the well-being and development' of the peoples

[22] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 31, para. 53.

[23] *Rights of Nationals of the United States of America in Morocco (France* v. *United States of America), Judgment, I.C.J. Reports 1952*, p. 189.

[24] Case concerning a boundary dispute between Argentina and Chile concerning the delimitation of the frontier line between boundary post 62 and Mount Fitzroy, 21 October 1994 (United Nations, *RIAA*, Vol. XXII, p. 43, para. 130).

[25] *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999 (II)*, p. 1062, para. 25.

[26] Arbitral decision of 13 April 2002 regarding delimitation of the border between Eritrea and Ethiopia (United Nations, *RIAA*, Vol. XXV, p. 110, para. 3.5).

[27] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 346, para. 59.

concerned — were not static, but were by definition evolutionary, as also, therefore, was the concept of the 'sacred trust'"[28];

(b) in the *Aegean Sea Continental Shelf* case, the Court pointed out that the 1928 General Act of Arbitration had been designed "to be of the most general kind and of continuing duration". It added: "it hardly seems conceivable that in such a convention terms like 'domestic jurisdiction' and 'territorial status' were intended to have a fixed content regardless of the subsequent evolution of international law"[29];

(c) in the case concerning *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, the Court observed that Articles 15, 19 and 20 of the 1977 Treaty between Hungary and Slovakia were made up of "evolving provisions" concerning environmental protection and that, as a result, emerging norms in the area could be "incorporated in the [Parties'] Joint Contractual Plan"[30];

(d) in the arbitral award of 24 May 2005 in the "Iron Rhine" arbitration an evolutionary interpretation was also given to the 1839 Treaty between Belgium and the Netherlands so as to ensure the effective application of the text in light of its object and purpose[31].

13. Finally, elements of both contemporaneous interpretation and evolutionary interpretation are found in the approach taken in the arbitral award of 31 July 1989 in the case between Guinea-Bissau and Senegal. The award first makes clear that the 1960 Agreement between France and Portugal to be applied in the case "must be interpreted in light of the law in effect at the date of its conclusion". From that it is reasoned that the Agreement does not delimit "maritime areas not in existence at that date, be they called exclusive economic zones, fishing zones or otherwise". But the award adds that the concept of the "continental shelf" did exist at the time "and that it was already possible in 1959 that its limit could be moved seawards". The arbitral tribunal then infers that this was a "dynamic concept" and, accordingly, that the 1960 Agreement determines the position in respect of the disputed continental shelf as it was to be defined subsequently by the Montego Bay Convention[32].

14. As in the cases thus analysed, the task in the present instance is

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[28] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 31, para. 53.

[29] *Aegean Sea Continental Shelf (Greece* v. *Turkey), Judgment, I.C.J. Reports 1978*, p. 32, para. 77.

[30] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, pp. 67-68, para. 112.

[31] Arbitral Award of 24 May 2005 (United Nations, *RIAA*, Vol. XXVII, pp. 72-74, paras. 79-81).

[32] Arbitral Award of 31 July 1989 (Guinea-Bissau *v.* Senegal) (United Nations, *RIAA*, Vol. XX, pp. 151 and 152, para. 85 *[translations by the Registry]*).

therefore to ascertain the Parties' joint intention in 1858, as expressed in the treaty then concluded. The Court has taken that approach and rightly so.

15. Yet a real difficulty arises with that approach. In most cases parties to a treaty do not explicitly state in it whether they intend to fix for all time the meaning of the terms employed or whether they wish to allow the meaning to evolve. As a result, recourse must be had to presumptions.

The Court has considered in the present case that where the parties use

> "generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is 'of continuing duration', the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning" (Judgment, paragraph 66).

The Court applied this presumption in the *Aegean Sea Continental Shelf* case[33] in interpreting the term "territorial status" but rejected it in construing "dispute" in the case concerning *Rights of Nationals of the United States of America in Morocco*[34].

Should it have applied the presumption here: That is doubtful and it may be asked whether the Court should not have had recourse to other presumptions.

Firstly, as President Bedjaoui noted in his separate opinion in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*:

> "The intentions of the parties are presumed to have been influenced by *the law in force at the time the Treaty was concluded*, the law which they were supposed to know, and not by future law, as yet unknown. As Ambassador Mustapha Kamil Yasseen . . . put it, only international law existing when the Treaty was concluded 'could influence the intention of the Contracting States . . ., as the law which did not yet exist at that time could not logically have any influence on this intention'."[35]

Further, in the present case, Article VI confers full and undivided sovereignty over the river exclusively on Nicaragua. A single limitation is

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[33] *Aegean Sea Continental Shelf (Greece* v. *Turkey), Judgment, I.C.J. Reports 1978*, p. 32, para. 77.

[34] *Rights of Nationals of the United States of America in Morocco (France* v. *United States of America), Judgment, I.C.J. Reports 1952*, p. 189.

[35] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, pp. 121-122, para. 7 (ii); emphasis original. M. K. Yasseen, "L'interprétation des traités d'après la Convention de Vienne sur le droit des traits", *Collected Courses of the Hague Academy of International Law*, 1976, Vol. 151, p. 64.

imposed on this sovereignty: Costa Rica's right of free navigation for commercial purposes. The limitation is introduced by the word "pero" (but), which clearly indicates that this is an exception to the exclusive sovereignty awarded earlier on to Nicaragua.

As the Court has pointed out, exceptions or "limitations of the sovereignty of a State over its territory are not to be presumed" (Judgment, para. 48). In my view, by operation of this presumption and of the language itself of the Treaty, the limitation imposed on Nicaragua's territorial sovereignty must be given a restrictive interpretation, as the Permanent Court held in a comparable case, that of the *S.S. "Wimbledon"*, in respect of navigation on the Kiel Canal. The Court observed in that case that no one disputed the German State's sovereignty over the Kiel Canal; it added that the Treaty of Versailles entailed an "important limitation of the exercise of the sovereign rights" of Germany and found that "[t]his fact constitutes a sufficient reason for the restrictive interpretation, in case of doubt, of the clause which produces such a limitation"[36].

16. Is it to be concluded that navigation for the purposes of commerce covers only the transport of goods, not people: That is far from certain. From the most ancient times, the purpose of river transport has been to move both people and goods from one place to another. The San Juan River and Lake Nicaragua were in fact used in the mid-nineteenth century to save emigrants on the way from the east coast of the United States to California from having to circumnavigate South America. Moreover, the inter-ocean canal then being planned to run through Nicaragua was intended for use in transporting both people and goods[37]. Already in the nineteenth century boatmen offered this service in exchange for payment. Thus, my inclination in the end is to think that the drafters of the 1858 Treaty intended to cover the transport for profit of passengers as well as of goods when they referred to navigation for commercial purposes.

Does such transport today extend to the conveyance of tourists: putting the question is tantamount to asking why tourists should be distinguished from other passengers. Obviously, no such distinction should be made in respect of individual tourists taking a boat to get from one place to another. If the transport is provided in exchange for payment to the boat operator, the vessel is navigating for commercial purposes.

The last category is that of tourists taking a cruise arranged by a tour operator. Here, the boatman is paid by the intermediary, not by the passenger. But the boat operator's activity remains one of navigating from

[36] *S.S. "Wimbledon", Judgments, 1923, P.C.I.J., Series A, No. 1*, p. 24.

[37] See Art. XXXIII of the 1859 Treaty between France and Nicaragua and Art. XXVI of the 1860 Treaty between Great Britain and Nicaragua.

one point to another and, here as well, it is carried out for commercial purposes. Thus, the individuals concerned are entitled to the benefit of the freedom of navigation enjoyed by Costa Rica under Article VI. The practice accords with this, as shown by the Memorandum of Understanding of 5 June 1994 between the two States' Ministers of Tourism and by the growth in tourist cruise traffic on the San Juan in recent years.

Thus, I concur on this point in the Court's conclusions but for reasons different from those underlying its decision.

17. I also subscribe to the Court's conclusions to the effect that navigation for non-profit purposes does not fall within the scope of Article VI. This is the case for the carriage of passengers free of charge (Judgment., para. 73, last subparagraph) and for pleasure boating (*ibid*., para. 80). The same would apply to casino boats, hotel boats and boats used for radio or television broadcasting, whether or not they were moored to the bank or were mobile (*ibid*., para. 75).

Further, as the Court has stated, navigation by vessels used in the performance of governmental activities or to provide public services which are not commercial in nature is not covered by Article VI (*ibid*., para. 71). Consequently, police vessels (*ibid.*, para. 83), including those used in re-supplying police posts, and vessels involved in teaching, public health and environmental protection activities are excluded, as these are manifestly not profit-making activities.

18. There are however two points on which I take issue with the Judgment.

The first concerns the gratuitous transport of goods by a boat operator other than the merchant owning the goods. The Court admits that such a boat operator is not engaged in a commercial activity but considers this to be navigation for commercial purposes since the goods are intended for sale.

While, as a practical matter, this situation is unlikely to arise, I believe it incumbent upon me to express my view that these conclusions are founded on mistaken premises. Article VI of the Treaty does not grant Costa Rica freedom of commerce but a right to navigate freely for commercial purposes. The benefit of that right accrues to Costa Rican vessels navigating on the San Juan River, not to the goods or persons they carry[38]. Navigation by boat operators who are not themselves merchants may be considered to be for commercial purposes only if carried out in exchange for compensation.

[38] Thus, the Permanent Court of International Justice explained in the *Oscar Chinn* case that freedom of navigation, "[a]ccording to the conception universally accepted ... comprises freedom of movement for vessels" and the freedom of those vessels to transport goods and passengers (*Oscar Chinn, Judgment, 1934, P.C.I.J., Series A/B, No. 63*, p. 83).

19. The Court has further decided that "the inhabitants of the Costa Rican bank of the San Juan River have the right to navigate on the river between the riparian communities for the purposes of the essential needs of everyday life which require expeditious transportation" (Judgment, para. 156, subpara. 1 *(f)*). It has reasoned from this that Costa Rica is entitled to navigate on the river with official vessels

> "used solely, in specific situations, to provide essential services for the inhabitants of the riparian areas where expeditious transportation is a condition for meeting the inhabitants' requirements" (*ibid.*, para. 156, subpara. 1 *(g)*).

It is "[i]n view of the great difficulty of travelling inland" (*ibid.*, para. 78) that the Court has arrived at this conclusion benefitting some 450 individuals. I am just as sensitive as the Court to the humanitarian considerations at the root of this decision. But I cannot but observe that there is no legal basis for it. The Court itself has acknowledged that this decision finds no support in Article VI of the Treaty (*ibid.*, para. 75). The Court would appear to have decided against basing this conclusion on a custom *contra legem*, one which moreover has not been established. It has stated that it could not have been the intention of the authors of the Treaty to deny this right to the inhabitants of the Costa Rican bank of the river. Citing the object and purpose of the Treaty as well, the Court has considered that the right in question can be inferred from the Treaty as a whole and, specifically, from its Preamble and the manner in which the boundary is fixed in Article II (*ibid.*, para. 79).

This reasoning strikes me as extremely weak. Granted, the Preamble of the 1858 Treaty does proclaim the will of the parties to

> "celebrar un tratado de límites entre ambas Repúblicas, que ponga término á las diferencias que han retardado la mejor y mas perfecta inteligencia y armonía que deben reinar entre ellas, para su común seguridad y engrandecimiento".

To this end, and desirous of improving their relations, the Parties concluded a treaty having a sole object: to establish the boundaries between them. According to the title itself, the 1858 Treaty is a treaty of limits. In the area under consideration in the present case, Article II of the Treaty fixes the boundary along the right bank of the river and grants Costa Rica a right of free navigation solely for the purposes of commerce (*ibid.*, para. 61). The joint intention of the authors as reflected in the language of the Treaty provides no basis for arriving at a decision directly in conflict with that language and for upholding a right on Costa Rica's part to navigate for non-commercial purposes in Nicaraguan territory.

The Court is probably aware of the weakness of its reasoning, for it has carefully distinguished between the perpetual rights of free navigation established in Article VI and the rights of navigation it has felt justified in creating for the benefit of certain riparians in the present circumstances. Furthermore, in the operative part of its Judgment it has

imposed especially stringent limitations on the latter rights, in particular in regard to official vessels.

It nevertheless remains the case that this outcome stands directly in contradiction to the language itself of the Treaty. The very most that could have been said was that it was possible to infer from the Preamble of the Treaty and from general principles of international law that the two States were under an obligation to negotiate to resolve the problems now created for the riparian population by the difficulty of overland communication.

Regulation of Navigation by Nicaragua

20. It is recognized in the Judgment that Nicaragua has the power to regulate Costa Rica's exercise of the right of free navigation it holds under the 1858 Treaty. In exercising that power, Nicaragua may not render impossible Costa Rica's exercise of the right of free navigation or substantially impede it (Judgment, para. 87). Nicaragua must notify Costa Rica of any regulations in this connection, once adopted, but is under no obligation to give notice to Costa Rica or consult it before adopting them (*ibid*., para. 97). On all of these points, I concur fully in the conclusions reached by the Court.

Like the Court, I too consider that Nicaragua has the right to require Costa Rican vessels and their passengers to stop at the first and last Nicaraguan posts on their route along the river. I also concur with the Court on the subjects of the purchase of tourist cards, the issuance of departure clearance certificates, timetabling and the display of flags.

Lastly, as does the Court, I think that Nicaragua is entitled to require boat operators navigating on the river and their passengers to show a passport or identity document.

21. On the other hand, I am sorry to have to part ways with the Court on the question of visas.

The Judgment notes that the issuance of visas entails discretion. From this, it is reasoned that Nicaragua may not impose an obligation to obtain a visa on boat operators and those they carry. According to the Court, if the visa were to be denied, freedom of navigation would be hindered (*ibid*., para. 115).

This reasoning calls for two comments. First, as already made clear, the sole beneficiaries of the right of free navigation for commercial purposes on the San Juan River are Costa Rican vessels and their operators. No such right vests in the persons transported on the vessels. As a result, Nicaragua may, in any case, require these individuals to obtain a visa.

Secondly, the right to impose conditions on aliens' entry into national territory is one of the most firmly established prerogatives of sovereignty.

In fact, it is so recognized in the Judgment when it upholds Nicaragua's right, after ascertaining the identity of those wishing to enter the San Juan, to refuse entry to some of those individuals for reasons of law enforcement or environmental protection. The Judgment adds that this analysis may also hold in cases of emergency (para. 118).

Nicaragua is thus entitled in these situations to refuse some persons entry into its territory. It could even give Costa Rica a list of names beforehand of those whose presence on the river was deemed undesirable by Nicaragua for the reasons described by the Court.

This decision is not without its strong points, but it would probably have been simpler to uphold Nicaragua's right to require visas for entry onto the river. The Court could moreover have pointed out that, as in the case of the other applicable rules, Nicaragua, in applying the visa regulations, must not render impossible or substantially impede Costa Rica's exercise of its right of free navigation (*ibid.*, para. 87). So as to ensure this outcome, Nicaragua could have established appropriate procedures (e.g., long-term visas or on-the-spot issuance of visas). I regret that the Court proceeded otherwise.

22. In regard to subsistence fishing, the Court has found that the existence has been established of a custom of fishing from the bank but not from vessels, whether moored or navigating on the river.

In my view the admissibility of Costa Rica's submissions on this point is highly questionable and the custom invoked uncertain [39]. I did however support the decision in this regard given the special circumstances described by the Court in its Judgment, which cannot carry precedential weight in this regard.

23. In sum, the Judgment upholds many of Costa Rica's submissions on the scope and extent of its right of free navigation on the San Juan River. It also recognizes Nicaragua's broad regulatory powers. While I am not in complete agreement with it, I can only express the hope that it will enable the two countries to overcome their past difficulties in respect of the river.

(Signed) Gilbert GUILLAUME.

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[39] See *Asylum (Colombia/Peru), Judgment, I.C.J. Reports 1950*, pp. 276-277; *Right of Passage over Indian Territory (Portugal* v. *India), Merits, Judgment, I.C.J. Reports 1960*, p. 39; *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 44.