SEPARATE OPINION OF JUDGE *AD HOC* DUGARD

Broad agreement with dispositif *of the Order — Troubled by Court's order in paragraph 1 of* dispositif *that both Parties should vacate the disputed territory — Examination of concept of plausible right — Requirement of plausible right on part of Applicant involves some consideration of merits — Boundary treaty, arbitral award and maps provide evidence of Applicant's plausible right to sovereignty over disputed territory — Respect for territorial integrity of State by other States a norm of* jus cogens *— Principle of respect for stability of boundaries related to respect for territorial integrity — Provisional measures in case involving violation of territorial integrity should vindicate position of invaded State — Restoration of* status quo ante *appropriate — Nature of disputed territory does not warrant different conclusion — Even-handed order in paragraph 1 of* dispositif *requiring both Parties to refrain from maintaining civilian, police or security personnel in disputed territory unfair to Applicant — This Order lends unwarranted legitimacy to Respondent's claim — Paragraph 2 of* dispositif *recognizes claim of Applicant to disputed territory — Allows Applicant to take measures to protect environment in disputed territory — Vote for Order in its entirety premised on acknowledgment of Applicant's stronger claim to the disputed territory in paragraph 2 of* dispositif.

1. I have voted in favour of the provisional measures ordered by the Court in this case. Although the Court has indicated that both Costa Rica and Nicaragua should refrain from sending their civilian, police or security personnel into the disputed territory of the Isla Portillos, it has recognized that Costa Rica has a stronger claim to the territory by indicating that it bears responsibility for the protection of the environment of the territory and that it may dispatch its civilian personnel to the territory for this purpose. In effect, this restores the *status quo ante* as before Nicaragua dispatched military personnel and environmental workers into the territory in October 2010, Costa Rica mainly viewed the Isla Portillos as an important environmental site for which it bears responsibility under the Ramsar Convention on Wetlands of International Importance especially as Waterfowl Habitat of 1971. Its primary concern therefore was for the protection of the environment of the territory. That Costa Rica's main activities in the Isla Portillos relate to environmental protection should not obscure the fact that Costa Rica claims full territorial sovereignty over the territory. The issue of territorial title was not before the Court on account of the cardinal rule governing the award of provisional measures that the merits of the dispute — which in this instance relate to territorial title over the territory — are to be deci-

ded at the merits phase only. While I fully accept this important principle, a question which troubles me is whether in circumstances in which an applicant State for provisional measures demonstrates a strong prima facie case for territorial title, the Court should adopt an even-handed approach to the territorial claims by ordering both parties out of the disputed territory — as it has done in the present case — or whether it should give greater recognition to the applicant's claim by ordering a return to the *status quo ante*. This is the subject of the present opinion.

A. Plausible Right

2. The Court has indicated in its Order that the applicant in a request for provisional measures should satisfy the Court that the rights it asserts are "at least plausible" (Order, para. 53). The "plausibility test" is a new feature of the Court's jurisprudence on provisional measures and owes its origin to the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)* (*Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 151, para. 57). Prior to this decision the Court refrained from adopting a clear position on this subject as it was unwilling to do anything that might appear to prejudge the merits of a case[1]. Nevertheless, a number of decisions of the Court indicate its support for the view that the applicant State was required to show that it had some prospect of success on the merits of the case or that it had established the existence of the right it sought to have protected on a prima facie basis[2]. Thus in the case concerning *Passage through the Great Belt (Finland* v. *Denmark)* (*Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*, p. 12), the Court replied to Denmark's argument that Finland had failed to show that "a prima facie case exists" that "the existence of a right of Finland of passage through the Great Belt is not challenged" and that the dispute between the Parties was over the "nature and extent of that right" (*ibid.*, p. 17, paras. 21-23). Lord Collins was right therefore to ask in his lectures before the Hague Academy of International Law in 1992, "Is there a case in which interim measures have been granted in which there was not at least a prima facie case on the

[1] J. G. Merrills, "Interim Measures of Protection in the Recent Jurisprudence of the International Court of Justice", 44 *International and Comparative Law Quarterly*, 1995, p. 90 at p. 114; S. Rosenne, *Provisional Measures in International Law*, 2005, p. 72.

[2] See the cases cited in the separate opinion of Judge Shahabuddeen in *Passage through the Great Belt (Finland* v. *Denmark), Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*, p. 30. See also A. Zimmermann, C. Tomuschat and K. Oellers-Frahm, *The Statute of the International Court of Justice*, 2006, p. 938.

merits?"[3]. In general, it seems that the Court preferred to give implicit rather than express approval to the need for the applicant State to establish the prima facie existence of the right that it sought to protect[4].

3. In practice it is impossible for the Court to avoid some consideration of the merits in a request for provisional measures. It is insufficient for the applicant State merely to assert its right[5]. It must, in addition, show, on a prima facie basis, that this right exists or that it is, in the new language of the Court, a "plausible right". Inevitably this requires some consideration of the merits of the case. As Judge Abraham declared in the case concerning *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*:

> "[T]he Court must be satisfied that the arguments are sufficiently serious on the merits — failing which it cannot impede the exercise by the respondent to the request for provisional measures of its right to act as it sees fit, within the limits set by international law." (*Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006*, p. 141, para. 10.)

4. The need for the applicant State to prove, albeit only on a prima facie basis, that it has a right that has some prospect of being successfully asserted at the merits phase of the proceedings has become much clearer since the Judgment of 27 June 2001 in the case of *LaGrand (Germany* v. *United States of America)* (*Judgment, I.C.J. Reports 2001*, p. 466), in which the Court held that an order for provisional measures is legally binding. It would be unjust to subject a respondent State to a legally binding order for provisional measures if the applicant State had merely asserted a right, without showing on a prima facie basis that it had some prospect of succeeding on the merits.

5. Opinions will differ as to whether the test of "plausible right" is an appropriate and accurate formulation of what the applicant State must prove. In his separate opinion in the case concerning *Passage through the Great Belt*, Judge Shahabuddeen spoke of "a prima facie test, or of a test as to whether there is a serious issue to be tried, or of a test as to whether there is possible danger to a possible right", as formulations acceptable "for purposes of international litigation" (*Provisional Measures, Order of*

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[3] "Provisional and Protective Measures in International Litigation", *Collected Courses of the Hague Academy of International Law*, Vol. 234, 1992, p. 228.

[4] Separate opinion of Judge Bennouna in the case concerning *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006*, p. 143, para. 5 and p. 146, para. 14.

[5] Separate opinion of Judge Shahabuddeen in the case concerning *Passage through the Great Belt (Finland* v. *Denmark), Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*, p. 30; separate opinion of Judge Abraham in the case concerning *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006*, p. 138, para. 6.

29 July 1991, I.C.J. Reports 1991, p. 36). Another test suggested is that the case be at least arguable on the merits[6]. Any one of these formulations would probably have satisfactorily conveyed the standard of proof required. So does the test of "plausibility", provided that plausible is understood as meaning "reasonable or probable" (*New Oxford Dictionary* (1998)) or "believable and appearing likely to be true" (*Encarta World Dictionary* (1999)). (The word "plausible" does in English, but not in French, have a secondary meaning of an argument that is specious or intended to deceive.)

B. Plausibility of Costa Rica's Right

6. Much of the evidence in the proceedings in the present case concerned Costa Rica's claim to sovereignty over the disputed territory and the infringement by Nicaragua of its environmental rights in the territory. Of course, this evidence was necessary to establish irreparable prejudice on the part of Costa Rica for the purpose of an order for provisional measures, but at the same time the evidence in support of Costa Rica's claim to territorial title was fully canvassed. Conversely, Nicaragua also led evidence of its claim to territorial title. In fact, most of the evidence related to the Parties' competing claims to sovereignty over the disputed territory, with the Applicant seeking to show that it had a strong case on the merits, if not a conclusive one, and the Respondent seeking to challenge this claim. In the course of its argument, Costa Rica asserted the plausibility of its right to territorial title and Nicaragua attempted to refute the existence of such right. Both Parties appeared to accept that this could not be done without an investigation of matters pertaining to the merits, although Nicaragua did caution the Court against trespassing on the merits of the case.

7. Costa Rica claimed that its rights to territorial integrity and the protection of its environment had been violated by Nicaragua's incursion into the Isla Portillos. These rights are inseparable as this is not a case in which the environment has been damaged by acts occurring outside Costa Rica's territory. Essentially therefore the right asserted by Costa Rica pertained to its territorial integrity.

8. The evidence established convincingly that Costa Rica's right to sovereignty and territorial integrity over the Isla Portillos was plausible.

9. The 1858 Treaty of Limits establishing the boundary between Costa Rica and Nicaragua provides that the boundary line shall commence "in the mouth of the River San Juan de Nicaragua; and shall continue,

[6] M. Mendelson "Interim Measures of Protection in Cases of Contested Jurisdiction", 46 *British Year Book of International Law*, 1972-1973, p. 317.

always following the right bank of the said river" (Article II). In 1897 the First Alexander Award interpreted this treaty to mean that the boundary follows the waters edge around Harbor Head Lagoon until it reaches the San Juan River by "the first channel met" and continues "up this channel", and then up the San Juan River as directed in the Treaty of 1858. The First Alexander Award was accompanied by a hand-drawn sketch which indicates that the "first channel met" is the San Juan River proper and makes it clear that the boundary line described by the Treaty of 1858 and the First Alexander Award allocates the Isla Portillos to Costa Rica. Moreover when the First Alexander Award was published by John Basset Moore in *History and Digest of the International Arbitration to which the United States Has Been a Party*, Vol. V (1898), it included a map of the area which confirms that the Isla Portillos falls within the territory of Costa Rica. Maps may not provide conclusive evidence of a boundary but they do still stand "as a statement of geographical fact" especially when the State adversely affected has itself produced and disseminated such maps (*Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2008*, p. 95, para. 271). It is therefore of significance that maps dating from the time of the Alexander Awards to the present time support Costa Rica's claim. These maps include Nicaraguan maps, maps produced by both Costa Rica and Nicaragua in their 2009 dispute before the Court (*Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua)*), and maps produced by the United States and international agencies. Finally, Nicaragua accepted the border as claimed by Costa Rica for over 100 years. It was only after Costa Rica initiated proceedings before the Court and complained about Nicaragua's incursion into the Isla Portillos to the Organization of American States that Nicaragua claimed sovereignty over the territory.

10. Nicaragua sought to substantiate its claim to sovereignty over the Isla Portillos by arguing that the "first channel met" in the Harbor Head Lagoon, referred to in the First Alexander Award, was no longer the San Juan River but a small stream or *caño* which had opened up recently; and that Alexander had himself contemplated in his Second Award that the boundary would change as the terrain underwent physical changes. This argument is unsupported by the law or the facts. First, it is extremely difficult to reconcile the argument with the Treaty of 1858 or the First Alexander Award which clearly indicate the natural course of the San Juan River as the boundary. Secondly, there was no evidence that the terrain had changed substantially since the Alexander Awards. Thirdly, maps and satellite photographs failed to provide clear evidence of the existence of the *caño* before Nicaragua's environmental cleaning operation in October 2010 which had opened up the *caño*.

11. Both Parties claimed to have exercised some governmental authority over the inhabited wetland of the Isla Portillos. Competing *effectivités* over the territory is clearly a matter for determination on the merits.
12. In these circumstances, the Court finds that Costa Rica has a plausible right to sovereignty over the Isla Portillos and that it was not called upon to rule on the plausibility of Nicaragua's claim to sovereignty (Order, para. 58).

C. Territorial Integrity and Provisional Measures

13. Before addressing the question of the appropriate order in the present case it is necessary to consider the question whether special considerations apply to such an order in cases involving the invasion of the territorial integrity of a State.
14. Respect for territorial integrity is a fundamental principle of the international legal order. It is a principle enshrined in Article 2 (4) of the Charter of the United Nations, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (General Assembly, resolution 2625 (XXV) of 24 October 1970), and a host of international instruments and resolutions. As Judge Koroma stated in his dissenting opinion in the Advisory Opinion on *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*: "This principle entails an obligation to respect the definition, *delineation* and territorial integrity of an existing State." (*I.C.J. Reports 2010 (II)*, p. 475, para. 21; emphasis added.)

15. The prohibition on the use of force in international relations is accepted as a peremptory norm, a norm of *jus cogens*[7]. This prohibition is directly related to the principle of respect for territorial integrity, as demonstrated by Article 2 (4) of the Charter of the United Nations which prohibits the "threat or use of force against the territorial integrity . . . of any State". In these circumstances, it is difficult to resist the conclusion that respect for the territorial integrity of a State *by other States*[8] is a norm of *jus cogens*.

16. Related to respect for territorial integrity is the principle of respect for boundaries, particularly boundaries demarcated by treaty and confirmed by arbitral award. As the Court stated in the case concerning *Temple of Preah Vihear (Cambodia* v. *Thailand)*: "In general, when two countries

[7] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 100, para. 190.
[8] In its Advisory Opinion on *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* of 22 July 2010, the Court found that the principle of territorial integrity is "confined to the sphere of relations between States", (*I.C.J. Reports 2010 (II)*, p. 437, para. 80).

establish a frontier between them, one of the primary objects is to achieve stability and finality." (*Merits, Judgment, I.C.J. Reports 1962*, p. 34.)

17. Incursions across borders, that is, violations of territorial integrity, bring with them not only a risk of irreparable prejudice to the State whose border has been violated, but also risk of loss of life arising from the likelihood of armed confrontations between the forces of the invader and the invaded[9]. This consideration led the Court in the present case to conclude that the likelihood that Nicaragua might send troops into the disputed territory created a risk of irreparable prejudice to Costa Rica (Order, para. 75).

18. For the above reasons, special considerations apply to a request for provisional measures in a case involving the violation of the territorial integrity of a State that has proved a "plausible right" to such territory. Such considerations should not only result in a finding of irreparable prejudice but also in an order that fully vindicates the position of the invaded State by directing that the invading State withdraw its military forces pending the hearing on the merits.

D. The Nature of the Territory and Provisional Measures

19. In its Order (para. 77), the Court finds that "given the nature of the disputed territory" both Parties should refrain from sending to, or maintaining, in the disputed territory, any personnel, whether civilian, police or security, until the Court has decided the dispute on the merits. Whether the "nature of the disputed territory" warrants an even-handed order that treats both parties alike, instead of one directing the invading State alone to withdraw, is questionable.

20. If, hypothetically, the State of Utopia invaded the State of Arcadia, a densely populated State, and sought to establish a military presence in an Arcadian city, and, if Arcadia could show that it had a highly plausible title to its territory, which had hitherto been unchallenged, it is surely unlikely that the Court would make an order for provisional measures calling on both parties to withdraw their forces from the disputed city. Instead, it is more likely that the Court would order Utopia, the invader and recent challenger or Arcadia's territorial title, to withdraw pending a decision on the merits of the dispute. Here a direction to both parties to withdraw their forces would result in an administrative vacuum and cause chaos in the disputed city.

[9] See S. Rosenne, *The Law and Practice of the International Court, 1920-2005*, Vol. III, *Procedure*, 2006, p. 1410.

21. It seems, according to the reasoning of the Court, that the situation is different when the disputed territory is an uninhabited wetland, where the absence of law enforcement officers from both applicant and respondent States will not have adverse consequences for the population of the applicant State. But is this necessarily a fair and just solution? Courts have held that a State may not be required to display the same degree of *effectivité* over an uninhabited and uninhabitable territory for the purpose of establishing title to territory[10], but there is no reason why such a territory, once it has been shown that a State has a plausible right to the territory, should not be administered by that State in the same way as an inhabited part of the State's territory. Considerations of respect for territorial integrity apply as much to uninhabited territory as they do to inhabited territory as a State's sovereignty extends over both the inhabited and uninhabited parts of its territory. There is no more justification for an order for the withdrawal of forces from both parties in such a case than there is in the hypothetical case depicted in paragraph 20.

E. Conclusion

22. The Court has adopted a highly even-handed approach in the first paragraph of its *dispositif* in an effort to avoid making any pre-judgment of the merits of the case. Both Parties are ordered to refrain from sending to, or maintaining in the disputed area any personnel, whether civilian, police or security. But even-handedness can be taken too far. In this case Costa Rica has shown convincingly that it has a plausible right to sovereignty over the disputed territory and that Nicaragua's conduct creates an imminent risk of irreparable prejudice to the territory (Order, para. 75). Moreover, without prejudging Nicaragua's claim to sovereignty over the disputed territory, it should be stressed that its claim was first raised only after the initiation of the present proceedings and Costa Rica's complaint to the Organization of American States. In these circumstances, justice requires that Nicaragua alone should have been ordered to "refrain from sending to, or maintaining in the disputed territory, including the *caño*, any personnel, whether civilian, police or military". In other words, the first paragraph of the *dispositif* should have sought to restore the *status quo ante*, the situation as it existed before Nicaragua's incursion into the Isla Portillos.

23. A serious objection to the even-handedness displayed by the Court in its Order is that by directing both Parties to keep out of the disputed territory it inevitably will be perceived as giving credibility or legitimacy

[10] *Island of Palmas*, United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. II, p. 840; *Legal Status of Eastern Greenland, Judgment, 1933, P.C.I.J., Series A/B, No. 53*, p. 46; "Clipperton Island", 26 *American Journal of International Law*, 1932, p. 394.

to Nicaragua's claim, despite the weakness of the claim (on the evidence before the Court) and the late raising of the claim. There is a danger that the Court's Order may encourage a State with territorial ambitions to invade its neighbour, occupy coveted territory, raise a claim to territorial title in the face of the Court, and then hope to gain legitimacy for its claim by an even-handed order for provisional measures of the kind rendered by the Court in this case. In short, it is a dangerous precedent.

24. The second paragraph of the *dispositif* recognizes that Costa Rica has a stronger claim to the disputed territory as it permits Costa Rica to take measures to protect the environment of the disputed territory and to dispatch civilian personnel to the territory for this purpose. In discharging its responsibility for the protection of the environment of the disputed territory, including the *caño*, Costa Rica is required to consult with the Secretariat of the Ramsar Convention, give prior notice to Nicaragua of its actions and use its best endeavour to find common solutions with Nicaragua in respect of its actions. In the final resort, however, the responsibility for the protection of the environment of the Isla Portillos, including the *caño*, lies with Costa Rica which has demonstrated a plausible right to territorial sovereignty over the territory.

25. Despite my misgivings about the first paragraph of the *dispositif*, I have voted in favour of the Order in its entirety because the second paragraph of the *dispositif* recognizes Costa Rica's claim to the disputed territory and ensures that Costa Rica will be able to discharge its responsibility for the protection of the environment of the Isla Portillos.

26. Paragraph three of the *dispositif* is also important as it requires each Party to refrain from any action which might aggravate the dispute. It is my earnest hope that both Parties will scrupulously comply with this direction.

(Signed) John DUGARD.