SEPARATE OPINION OF JUDGE CANÇADO TRINDADE

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I. *Prolegomena*

1. I have voted in favour of the adoption by the International Court of Justice (ICJ) of the present Judgment (of 2 February 2018) in the case of *Certain Activities Carried Out by Nicaragua in the Border Area, Compensation Owed by the Republic of Nicaragua to the Republic of Costa Rica (Costa Rica* v. *Nicaragua)*, whereby the ICJ has taken the proper course in respect of the determination of the compensation due. Having supported the decision the Court has just taken in the *cas d'espèce* in this respect, yet there are points related to the matter dealt with, which are not addressed in the present Judgment.

2. The Court's reasoning is, to my mind, far too strict, this being the first case ever in which it is called upon to pronounce on reparations for environmental damages. Its outlook should have been much wider, encompassing also the consideration of restoration measures, and distinct forms of reparation, complementary to compensation. Yet, in all its reasoning, the Court focused essentially on compensation, as if it would suffice to adjudicate the *cas d'espèce* on reparations for environmental damages. This is not how I behold the whole matter at issue.

3. There are indeed yet other points to consider, to which I attribute special relevance, that have been overlooked in the present Judgment. The Court should have taken another step forward in the present domain of reparations, as it did in its previous Judgment on reparations (of 19 June 2012) in the case of *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo)*. In both cases, reparations are in my view to be considered within the framework of international regimes of protection: in the *Ahmadou Sadio Diallo* case, human rights protection, and in the present case, environmental protection.

4. I feel thus obliged to dwell upon those related points, so as to single them out and to leave on the records the foundations of my personal position thereon. Accordingly, I deem it fit to append to the ICJ's present Judgment my reflections contained in the present separate opinion, wherein I focus on such points, in the conceptual framework of reparations for damages. I do so in the zealous and faithful exercise of the international judicial function, seeking ultimately the goal of the *realization of justice*, ineluctably linked, as I perceive it, to the settlement of disputes.

5. Such points are: *(a)* the principle *neminem laedere* and the duty of reparation for damages; *(b)* the indissoluble whole of breach and prompt reparation; *(c)* a fundamental, rather than "secondary", obligation of reparation; *(d)* reparations in the perennial legacy of the thinking of the "founding fathers" of the law of nations; *(e)* reparation in all its forms (compensation and others); *(f)* reparation for environmental damages, the intertemporal dimension, and *obligations of doing* in regimes of pro-

tection; and *(g)* the centrality of *restitutio* and the insufficiencies of compensation.

6. In logical sequence, the remaining points are: *(h)* the incidence of considerations of equity and jurisprudential cross-fertilization; *(i)* environmental damages and the necessity and importance of restoration; and *(j)* reparation beyond simply compensation: the need for non-pecuniary reparations. The path will then be paved for the presentation of my final considerations, followed by an epilogue containing a recapitulation of all the points I have addressed in my present separate opinion.

II. The Principle *Neminem Laedere* and the Duty of Reparation for Damages

7. In the present Judgment on *Compensation Owed by Nicaragua to Costa Rica*, in its considerations of legal principle, the ICJ refers to the *jurisprudence constante* — going back to the times of the Permanent Court of International Justice (PCIJ), as from its celebrated dictum in the *Chorzów Factory* case (1927), up to the ICJ's *consideranda* in the *Ahmadou Sadio Diallo* case (2010-2012), to the effect that in principle reparation must cease all consequences of the unlawful act and re-establish the situation which existed prior to the occurrence of the breach; this is, the Court characterizes, a well-established principle of international law (para. 29).

8. The Court acknowledges that recourse is to be made first to *restitutio in integrum*, and, when it is not possible, one then turns to compensation (*ibid.*, para. 31). From then onwards, the ICJ focuses on compensation for environmental damage, as well as for costs and expenses consequently incurred. There are, in my view, additional elements to be taken into account within the conceptual framework of the fundamental duty of reparation.

9. May I start my own examination of the aforementioned related points (paras. 5-6, *supra*), that I have identified and selected, such as the historical beginning of the whole matter at issue. The conception of damages — ensuing from wrongfulness — and the prompt reaction of the legal system at issue requiring reparation (restitution and compensation), goes back historically to antiquity and, as well known, later on, to Roman law, as laid down in Justinian's *Digest* (530-533 AD). One finds therein, in starting to address *"de justitia et de jure"*, the statement of the precepts of law *"honeste vivere, alterum non laedere, suum cuique tribuere"*[1].

[1] For example, "to live honestly, not to cause damage to anyone, to give everyone his due" (Book I, title I, para. 3), F. P. S. Justinianus, *Institutas [do Imperador Justiniano]* [533] (transl. J. Cretella Jr. and A. Cretella), 2nd rev. ed., São Paulo, Edit. Revista dos Tribunais, 2005, p. 21; [F. P. S. Justinianus] *Digesto de Justiniano — Liber Primus* (transl. H. M. F. Madeira), 5th rev. ed., São Paulo, Edit. Revista dos Tribunais, 2010, p. 24; and in *The Institutes of Justinian* [533] (transl. J. B. Moyle), 5th ed., Oxford, OUP/Clarendon Press, 1955 [reprint], p. 3.

10. In effect, the basic principle of *neminem laedere*, as it came to be known, found expression much further back in time, in even more ancient civilizations[2]. After all, the contents of Justinian's *Digest* had been excerpted from far more ancient works. The conception of the duty of reparation, with such profound historical roots, was to mark presence, not surprisingly, ten centuries later, in the origins themselves of the law of nations (sixteenth century onwards, cf. Section V, *infra*).

11. The natural law general principle of *neminem laedere* inspired the conceptualization of the duty of reparation for damages (resulting from breaches of international law), so as to safeguard the integrity of the legal order itself, remedying the wrong done. The duty of reparation (in all its forms) was upheld, from the start, as the indispensable complement of the breach of international law: the two complement each other, forming an *indissoluble whole*.

III. The Indissoluble Whole of Breach and Prompt Reparation

12. Reparation comes indeed together with the breach, so as to cease all the effects of this latter, and to secure respect for the legal order. The original breach is ineluctably linked to prompt compliance with the duty of reparation. I have already sustained this position on earlier occasions within this Court (as in, e.g., my dissenting opinion in the case of *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)*, Judgment of 3 February 2012).

13. Later on, in my declaration appended to the Court's Order of 1 July 2015 in the case of *Armed Activities on the Territory of the Congo Congo (Democratic Republic of the Congo* v. *Uganda)*, I reiterated that breach and prompt reparation, forming, as they do, an indissoluble whole, are not separated in time. Any breach is to be promptly followed by the corresponding reparation, so as to secure the integrity of the international legal order itself. Reparation cannot be delayed or postponed.

14. As cases concerning environmental damage show, the indissoluble whole formed by breach and reparation has a temporal dimension, which cannot be overlooked. In my perception, it calls upon looking at the past, present and future altogether. The search for *restitutio in integrum* calls for looking at the present and the past, as much as it calls for looking at the present and the future. As to the past and the present, if the breach

[2] Such as, for example, the Mesopotamian ones, as illustrated by relevant provisions in the Code of Hammurabi (circa 1750 BC) and in the Assyrian Code (circa 1350 BC). On the presence of the attention to the duty of reparation (including restitution and satisfaction), for example, in the Code of Hammurabi, cf.: *Código de Hammurabi* (transl. F. Lara Peinado), 4th ed. (reprint), Madrid, Tecnos, 2012, pp. 18-19, 21, 23, 25 and 34-35; paras. 79-87, 100, 125 and 178-179.

has not been complemented by the corresponding reparation, there is then a *continuing situation* in violation of international law.

15. As to the present and the future, the reparation is intended to cease all the effects of the environmental damage, cumulatively in time. It may occur that the damage is irreparable, rendering *restitutio in integrum* impossible, and then compensation applies. In any case, responsibility for environmental damage and reparation cannot, in my view, make abstraction of the intertemporal dimension (cf. Section VII, *infra*). After all, environmental damage has a longstanding dimension.

IV. Duty of Reparation: A Fundamental, rather than "Secondary", Obligation

16. As the breach and the prompt compliance with the duty of reparation form an indissoluble whole, accordingly, this duty is, in my perception, truly *fundamental*, rather than simply "secondary", as commonly assumed in a superficial way. Already in the previous case on reparations decided by this Court, that of *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012 (I)* (p. 324) I pointed this out in my separate opinion: the duty of reparation is truly *fundamental*, of the utmost importance, as it is "an imperative of justice" (*ibid.*, p. 383, para. 97).

17. Even if the effects of the damage caused are longstanding — as it happens in the occurrence (like in the *cas d'espèce*) of environmental damage — compliance with such duty cannot be postponed or delayed. As I further pondered in my separate opinion in the aforementioned *Ahmadou Sadio Diallo* case, the full *reparatio* (from the Latin *reparare*, "to dispose again"), instead of "erasing" the breaches perpetrated, more precisely *ceases* all its effects, thus "at least avoiding the aggravation of the harm already done, besides restoring the integrity of the legal order" broken by those breaches (*ibid.*, p. 362, para. 39). And, furthermore, I warned:

> "One has to be aware that it has become commonplace in legal circles — as is the conventional wisdom of the legal profession — to repeat that the duty of reparation, conforming a 'secondary obligation', comes after the breach of international law. This is not my conception; when everyone seems to be thinking alike, no one is actually thinking at all. In my own conception, breach and reparation go together, conforming an indissoluble whole: the latter is the indispensable consequence or complement of the former. The duty of reparation is a *fundamental* obligation (. . .). The indissoluble whole that

violation and reparation conform admits no disruption (. . .) so as to evade the indispensable consequence of the international breaches incurred into: the reparations due (. . .)" (*I.C.J. Reports 2012 (I)*, p. 362, para. 40.)

18. Reparations, in my understanding, are to be properly appreciated within the conceptual framework of *restorative justice*, where they appear inter-related in all their forms (cf. Section IX, *infra*). In the international adjudication of inter-State cases before the Hague Court, there is a certain inclination to concentrate in particular on compensation, and to avoid focusing on other forms of reparation (besides *restitutio in integrum*, satisfaction, rehabilitation and guarantee of non-repetition), so as to avoid raising susceptibilities of States *inter se*.

19. I do not see much point in this approach, as an international tribunal should not be concerned with inter-State susceptibilies, but rather and only with the sound administration of justice, so as to achieve the realization of justice at international level, including in inter-State cases. As to the *cas d'espèce*, distinctly from what the ICJ states in the present Judgment on *Compensation Owed by the Republic of Nicaragua to Republic of Costa Rica* (para. 31), I sustain that reparations — including compensation — *can and do have an exemplary character*. And exemplary reparations gain in importance within regimes of protection (of human beings and of the environment) and in face of environmental damages, as in the *cas d'espèce*.

V. Reparations in the Thinking of the "Founding Fathers" of the Law of Nations: Their Perennial Legacy

20. In the law of nations, reparation is necessary to the preservation of the international legal order: reparation in effect responds to a true international need, in conformity with the *recta ratio*[3]. This latter marked presence in the jusnaturalist thinking of the "founding fathers" of international law. In effect, I have recalled the legacy of their thinking, — comprising the duty of reparation, — in my separate opinion, respectively in two ICJ decisions in cases pertaining to reparations, lodged with the Court by two African States, Guinea and Democratic Republic of the Congo.

21. Thus, in my separate opinion (paras. 14-21 and 86-87) in the *Ahmadou Sadio Diallo* case (*Compensation, Judgment, I.C.J. Reports 2012 (I)*, pp. 352-355 and p. 380), I deemed it fit to recall that the rationale of repara-

[3] On the *recta ratio* in the law of nations, cf. A. A. Cançado Trindade, *International Law for Humankind — Towards a New* Jus Gentium, 2nd rev. ed., Leiden/The Hague, Nijhoff/Hague Academy of International Law, 2013, pp. 11-14, 141 and 143-144; A. A. Cançado Trindade, *A Humanização do Direito Internacional*, 2nd rev. ed., Belo Horizonte/Brazil, Edit. Del Rey, 2015, pp. 3-27, 101-111, 122 and 647-665.

tion was already dwelt upon in the writings of the "founding fathers" of the law of nations, namely: the insights of F. de Vitoria, B. de Las Casas and A. Gentili in the sixteenth century; followed subsequently by those of F. Suárez, H. Grotius, and S. Pufendorf in the seventeenth century; and by those of C. van Bynkershoek and C. Wolff in the eighteenth century.

22. More recently, in my separate opinion (paras. 11-16) in the case of *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Order of 6 December 2016, I.C.J. Reports 2016 (II)* (pp. 1139-1142), I have again addressed the legacy of the "founding fathers" of international law as to reparations for damages. In effect, very early in the sixteenth century, F. de Vitoria examined the duty of *restitutio* in conformity with the *recta ratio* (his celebrated second *Relectio — De Indis*, 1538-1539, as well as his lesser known writing *De Restitutione*, 1534-1535).

23. F. de Vitoria's lesson *De Restitutione* ensued from his comments on the masterpiece of Thomas Aquinas in the thirteenth century (the *Summa Theologica*, — written between 1265 and 1274, — *secunda secundae*). It should not pass unnoticed that the duty of reparation found expression first in theology, and then moved into law (as shown in the lessons of the "founding fathers" of the law of nations/*droit des gens*); and it was not the only example to this effect.

24. Still over the sixteenth century, other pioneering authors studied the matter: for example, the duty of *restitutio* and reparation for damages was asserted by B. de Las Casas (*Brevísima Relación de la Destrucción de las Indias*, 1552, and *De Regia Potestate*, 1571), as well as by J. Roa Dávila (*De Regnorum Iustitia*, 1591). And F. Pérez focused on the duty of compensation, in the light of natural law thinking (*Apontamentos Prévios ao Tema da Restituição*, 1588).

25. Already in the sixteenth century, both F. de Vitoria and B. de Las Casas addressed *restitutio* together with satisfaction (as another form of reparation). They were aware that another form of reparation needed to be considered, as there were damages which were irreparable, thus rendering *restitutio* impossible. Yet, the ideal, for F. de Vitoria, was restitution, which should always be sought first; only when it was not possible, would one resort to other forms of reparation, like satisfaction, or else compensation (or indemnization *ad arbitrium boni viri*)[4].

[4] As a pool of universities in the Iberian Peninsula (Portugal and Spain) have recently undertaken, for one decade (ending in 2015), a project of further research on their own historical archives, new and unknown texts of early authors of the sixteenth century have then been found and brought to the fore for the first time; cf. P. Calafate and R. E. Mandado Gutiérrez (eds.), *Escola Ibérica da Paz / Escuela Ibérica de la Paz* (preface by A. A. Cançado Trindade), Santander, Edit. University of Cantabria, 2014, pp. 25-409. That project is currently being followed by a new one (to extend between 2016 to 2019), this time focusing in particular on restitution, examined in manuscripts also of the sixteenth century in the same Iberian Peninsula, likewise unknown to date.

26. Still in the sixteenth century, restitution was addressed by J. de la Peña (*De Bello contra Insulanos*, 1560-1561), and restitution and compensation also by A. de São Domingos (*De Restitutione*, 1574). At that time (sixteenth century), reparations were further addressed by A. Gentili (*De Jure Belli Libri Tres*, 1588-1589). Subsequently, early in the seventeenth century, J. Zapata y Sandoval wrote on the obligation of restitution (*De Justitia Distributiva et Acceptione Personarum ei Opposita Disceptatio*, 1609).

27. Later on, during the seventeenth century, H. Grotius examined reparation for damages also keeping in mind the dictates of *recta ratio* (*De Jure Belli ac Pacis*, 1625). Much later in the seventeenth century S. Pufendorf stressed the relevance of *restitutio* (*On the Duty of Man and Citizen according to Natural Law*, 1673). Others followed, in the examination of the duty of reparation in the eighteenth century, such as C. Wolff (*Principes du droit de la nature et des gens*, 1758).

28. The wisdom of the thinking of the "founding fathers" of law of nations *(droit des gens)* has rendered its legacy perennial, endowed with topicality even in our days, in this second decade of the twenty-first century. In my perception, the lessons extracted from their jusnaturalist thinking have helped to shape the attention devoted to principles (like those resting in the foundations of the duty of reparation) by Latin American legal doctrine, with its influential contribution to the progressive development of international law[5].

VI. Reparation in all Its Forms (Compensation and Others)

29. In my aforementioned recent separate opinion (paras. 11-16) in the case of *Armed Activities on the Territory of the Congo* (*Order of 6 December 2016, I.C.J. Reports 2016 (II)*, pp. 1139-1142), I have retaken the thinking of the "founding fathers" of the law of nations with attention turned to the *forms of reparation*. Their lessons, as to reparation (*restitutio* and other forms) are part of their perennial legacy; as from the sixteenth century to date, it is in jusnaturalist thinking that, over the centuries, prompt reparation has been properly pursued.

30. In another aforementioned case decided by the ICJ, that of *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo) (Compensation, Judgment, I.C.J. Reports 2012 (I))*, I also dwelt upon, in my separate opinion*, inter alia*, the distinct forms of reparation (*ibid.*, pp. 366-367, paras. 50-51, p. 368, para. 54, p. 378, para. 80, p. 379, para. 83 and p. 381, para. 90), namely: *restitutio in integrum*, satisfaction,

[5] Cf. A. A. Cançado Trindade, "The Contribution of Latin American Legal Doctrine to the Progressive Development of International Law", 376 *Recueil des cours de l'Académie de droit international de La Haye* (2014), pp. 19-92.

compensation, rehabilitation and guarantee of non-repetition of acts or omissions in breach of international law. I addressed them altogether, as I do in the present separate opinion in the *cas d'espèce*.

31. Compensation is — may I here reiterate — only one of the forms of reparation. There is no reason to overlook other forms of reparation. In the circumstances of a given case, they may prove to be the most appropriate one. Yet, in the present Judgment, the ICJ only briefly interrelates satisfaction and compensation (Judgment, para. 27), as well as restitution and compensation (*ibid.*, para. 31). It could or should have elaborated further on reparation in all its forms.

32. On the basis of my own experience, I think that, depending on the circumstances of a case, other forms of reparations may be even more appropriate and important than compensation. Given forms of reparation can more clearly be approached within the framework of *restorative justice* (cf. Sections IX-X, *infra*), which has much advanced in the last decades. Reparations for moral damages, for example, call for forms of reparation other than the pecuniary one (compensation), with the incidence of considerations of equity. In the case of reparation for environmental harm, one is to resort to such considerations of equity (cf. Sections VIII-IX, *infra*).

33. In my understanding, an appropriate consideration of the fundamental duty of reparation cannot limit itself to only one of its forms, namely, that of compensation. One may be tempted to argue that, as in the present case, the arguments advanced by the contending Parties before the Court focused only on compensation, the Court should limit itself to pronounce only on it. I am not at all convinced by such an outlook.

34. In fact, the arguments of both Costa Rica (in its Memorial) and of Nicaragua (in its Counter-Memorial) focused only on compensation. But that, in my view, does not entail that the ICJ — which is not an international arbitral tribunal — should focus exclusively on compensation. In order to *say what the Law is (juris dictio)* as to the fundamental duty of reparation, the Court cannot restrict itself only to compensation, even if the contending parties address only this latter. The Court can surely go beyond the contentions of the parties, so as to provide the solid foundations of its own decision, and persuade them that justice has been done.

35. It is true that *restitutio* is the modality of reparation *par excellence*; furthermore, it is related not only to compensation, and this latter cannot make abstraction of, or prescind from, the other forms of reparation. It is reasonable that *restitutio* should be sought first, as it amounts to a return to the pre-existing situation *(statu quo ante)*, before the occurrence of the breach. And nothing hinders *restitutio* being accompanied by one or more forms of reparation.

36. Moreover, in my understanding, contrary to conventional wisdom, *there is no hierarchy* between them: they intermingle among each other,

and the form of reparation to be ordered by the international tribunal concerned will be the one most suitable to remedy the situation at issue, and this will depend on the circumstances of each case. As they do not exclude each other, distinct but complementary forms of reparation may be ordered by the international tribunal concomitantly.

37. There are several examples of this, in the experience of Latin American countries with international adjudication, in the case law of the Inter-American Court of Human Rights (IACtHR)[6], for example. Within this latter, more than one and a half decades ago, by the turn of the century, in my separate opinion in the case of the *"Street Children" (Villagrán Morales and Others)* v. *Guatemala* (reparations, judgment of 26 May 2001), I deemed it fit to warn against "the risks of *reducing* the wide range of reparations" to compensation or pecuniary reparation only; one should also keep in mind, besides *restitutio in integrum* and compensation, distinct *forms* of reparation, such as satisfaction, rehabilitation, and guarantee of non-repetition of the wrongful acts (para. 28).

VII. Reparation for Environmental Damages, the Intertemporal Dimension, and *Obligations of Doing* in Regimes of Protection

38. In the same separate opinion in the *"Street Children"* case, I further outlined the principle of *neminem laedere*, and the duty of reparation attentive to the passing of time (para. 27). I then stressed the need to consider reparation in all its forms, without limiting its determination only to the pecuniary or monetary form (paras. 29-30)[7]. The intertemporal dimension (already addressed, in Section III, *supra*) marked its presence in the case of the *Moiwana Community* v. *Suriname* (merits); in the separate opinion that I appended to the IACtHR's judgment (of 15 June 2005), I proposed, in the circumstances of the case, to go beyond moral damage, given the configuration, in my perception, of the "spiritual damage" (paras. 71-81).

39. I then dwelt upon the determination of this newly conceived type of damage, as related to reparation:

> "Moral damages have developed in legal science under a strong influence of the theory of civil responsibility, which, in turn, was constructed in the light, above all, of the fundamental principle of the

[6] For an account and assessment, cf. A. A. Cançado Trindade, *El Ejercicio de la Función Judicial Internacional — Memorias de la Corte Interamericana de Derechos Humanos*, 4th rev. ed., Belo Horizonte/Brazil, Edit. Del Rey, 2017, pp. 359-386.

[7] On another occasion, in my separate opinion in the case of *Cantoral Benavides* v. *Peru* (reparations, judgment of 3 December 2001), once again I drew attention to the scope and forms of the duty of reparation (paras. 2-13).

neminem laedere, or *alterum non laedere*. This basic conception was transposed from domestic into international law, encompassing the idea of a reaction of the international legal order to harmful acts (or omissions) (. . .).

The determination of moral damages ensuing therefrom (explained by the Roman law notion of *id. quod interest*) has, in legal practice (national and international), taken usually the form of 'quantifications' of the damages. (. . .)

In historical perspective, the whole doctrinal discussion on moral damages was marked by the sterile opposition between those who admitted the possibility of reparation of moral damages (e.g., Calamandrei, Carnelutti, Ripert, Mazeaud and Mazeaud, Aubry and Rau, and others) and those who denied it (e.g., Savigny, Massin, Pedrazzi, Esmein, and others); the point that [what] they all missed, in their endless quarrels about the *pretium doloris*, was that reparation did not, and does not, limit itself to pecuniary reparation, to indemnification. Their whole polemics was conditioned by the theory of civil responsibility.

Hence the undue emphasis on pecuniary reparations, feeding that long-lasting doctrinal discussion. This has led, in domestic legal systems, to reductionisms, which paved the way to distorted 'industries of reparations', emptied of true human values. (. . .) There appears to be no sense at all in attempting to resuscitate the doctrinal differences as to the *pretium doloris*

. . . . . .

Unlike moral damages, in my view the *spiritual damage* is not susceptible of 'quantifications', and can only be repaired, and redress be secured, by means of obligations of doing *(obligaciones de hacer)*, in the form of satisfaction (. . .)." (Paras. 73-77.)

40. On another occasion, in my separate opinion in the *Gutiérrez Soler* v. *Colombia* case (merits, Judgment 12 September 2005), I pondered that *restitutio in integrum* is the modality of reparation *par excellence*; I further warned that there are circumstances in which the simple quantification of damages in pecuniary terms (for compensation) is insufficient, thus calling for the preservation of other forms of reparation, such as satisfaction (paras. 5-6), in pursuance of *obligations of doing*, bearing in mind the intertemporal dimension (para. 10).

41. *Obligations of doing* assume particular importance in the consideration of reparations within the framework of *regimes of protection*, such as those of the protection of the environment and the protection of the rights of the human person. Interrelated developments in those two regimes of protection[8] have much contributed to the evolution of contemporary pub-

[8] For an assessment, cf. A. A. Cançado Trindade, "Human Rights and the Environment", *Human Rights: New Dimensions and Challenges* (ed. J. Symonides), UNESCO/ Dartmouth, Paris/Aldershot, 1998, pp. 117-153; [Various Authors], *Derechos Humanos,*

lic international law as a whole, including in respect of reparations in particular. Obligations of doing are essential to restoration.

VIII. The Centrality of *Restitutio* and the Insufficiencies of Compensation

42. Even though the ICJ devotes almost the whole of the present Judgment to pecuniary reparation (compensation), this latter does not meet the central issue or essence of the *cas d'espèce*, namely: how to remedy an environmental damage, to cease the effects of the wrong done, and to return to the situation that existed before the occurrence of the damage? Compensation is insufficient to this effect.

43. The priority to be aimed at is restitution. Compensation is to be resorted to, in particular, when the wrong done cannot be remedied, if *restitutio in integrum* cannot be achieved. And, then, compensation can come together with other forms of reparation (including the non-pecuniary ones); all depends on the circumstances of the case at issue, keeping in mind the necessity of restoration. Restorative justice encompasses reparations in all their forms (cf. *supra*), and one is to keep them all in mind.

44. In this connection, may it here be recalled that, on earlier occasions, such as in its Judgment (of 20 April 2010) in the case of *Pulp Mills on the River Uruguay*, opposing two South American States (Argentina and Uruguay), the ICJ pondered that, when the harm caused by a wrongful act has not been remedied by *restitutio*, the State responsible for it is obliged to provide compensation or satisfaction (para. 273).

45. Over a decade earlier, the Institut de droit international, for its part, in its resolution on "Responsibility and Liability under International Law for Environmental Damage", — adopted in the 1997 Strasbourg session, — sustained "a broad concept of reparation" for environmental damages, "including cessation of the activity concerned, restitution, compensation and, if necessary, satisfaction". It further stated that compensation here "should include amounts covering both economic loss and the costs of environmental reinstatement and rehabilitation" (Art. 24)[9].

46. The resolution then warned that there were environmental damages which were "irreparable or unquantifiable" damages, requiring other

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Desarrollo Sustentable y Medio Ambiente / Human Rights, Sustainable Development and the Environment / Direitos Humanos, Desenvolvimento Sustentável e Meio Ambiente (ed. A. A. Cançado Trindade), 2nd ed., San José C.R./Brasília, IIDH/BID, 1995, pp. 1-414.

[9] *Annuaire de l'Institut de droit international* (Session de Strasbourg, 1997), Vol. 67, Book II, pp. 507 and 509.

measures for reparation, including equitable considerations and "intergenerational equity" (Art. 25)[10]. The adoption of the resolution was preceded by a long preparatory work[11], during which the point, *inter alia*, of "exemplary or punitive damages" was much discussed[12], from the start in relation to "a broader framework of reparation" and to "the role of collective reparation", amidst equitable considerations[13].

IX. The Incidence of Considerations of Equity and Jurisprudential Cross-Fertilization

47. In the present Judgment on *Compensation Owed by the Republic of Nicaragua to the Republic of Costa Rica*, the ICJ has not gone as far as it did in its previous Judgment on reparations in the case of *Ahmadou Sadio Diallo* (2012), when it was far more assertive as to considerations of equity (*I.C.J. Reports 2012 (I)*, pp. 334-335, para. 24, p. 337, para. 33 and p. 338, para. 36), and as to jurisprudential cross-fertilization (p. 331, para. 13, p. 333, para. 18, pp. 334-335, para. 24, p. 337, para. 33, pp. 339-340, para. 40, p. 342, para. 49 and pp. 343-344, para. 56). In the *cas d'espèce*, the Court could and should have been as forward-looking as it was in the *Ahmadou Sadio Diallo* case. The fact that in the present Judgment the ICJ finds itself bound to deal only with compensation because it so ordered in its previous Judgment of 2015 as to the merits, is to me a double misgiving.

48. In its aforementioned Judgment of 2015, the Court ordered *compensation* (*dispositif*, resolutory point 5 *(a)* and *(b)*), and also addressed — it should not pass unnoticed — satisfaction (*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. 717, para. 139 and pp. 738-739, para. 224). In the present Judgment, the Court only briefly recalls this (para. 27); yet, it could and should have addressed compensation also in its relationship with all other forms of reparation. In comparison with its previous Judgment on reparations in the aforementioned case of *Ahmadou Sadio Diallo* (2012), the Court, in the present Judgment, only briefly refers to considerations of equity (para. 35), and considerably reduces its attention to jurisprudential cross-fertilization.

[10] *Annuaire de l'Institut de droit international* (Session de Strasbourg, 1997), Vol. 67, Book II, p. 509.

[11] Cf. *ibid.*, pp. 234, 238, 247, 251-252, 356-357, 359-360, 367, 370-371, 439, 442, 449, 452-453, 499, and 506-509.

[12] Cf. *ibid.*, pp. 391-392.

[13] Cf. *ibid.*, I, pp. 326-327, 335-339, 351 and 354.

49. As to this latter, the ICJ clearly stated, in its Judgment on reparations (of 19 June 2012) in the *Ahmadou Sadio Diallo* case (2012), that

> "the award of post-judgment interest is consistent with the practice of other international courts and tribunals (see, for example, *The M/V 'Saiga'* (No. 2) (*Saint Vincent and Grenadines* v. *Guinea*, judgment of 1 July 1999), ITLOS, para. 175; *Bámaca Velásquez* v. *Guatemala*, judgment of 22 February 2002 (reparations and costs), IACtHR, Series C, No. 91, para. 103; *Papamichalopoulos and Others* v. *Greece (Article 50)*, application No. 33808/02, judgment of 31 October 1995 (reparations), ECHR, Series A, No. 330-B, para. 39; *Lordos and Others* v. *Turkey*, application No. 15973/90, judgment of 10 January 2012 (just satisfaction), ECHR, para. 76 and *dispositif*, para. 1 *(b)*)" (*Compensation, Judgment, I.C.J. Reports 2012 (I)*, p. 344, para. 56).

50. In the present Judgment, the ICJ seems obsessed with compensation only, losing sight of this latter's close relationship with other forms of reparation. Its view of reparations is largely and unduly focused on, or limited to, compensation, pecuniary reparation only. This latter is, however, insufficient in case of breaches with aggravating circumstances; in my understanding, when addressing environmental damages we should widen our horizon for the purpose of determining reparations.

51. May it here be recalled that, for its part, the IACtHR, in its judgment on reparations (of 22 February 2002) in the case of *Bámaca Velásquez* v. *Guatemala*, after pointing out that even the determination of pecuniary reparation is done "in terms of equity", moved on to other forms of non-pecuniary reparations in terms of some *obligations of doing* (paras. 56, 60, 73, 78 and 81-85). Significantly, in the *dispositif* of its ground-breaking judgment in the case of *Bámaca Velásquez*, the IACtHR ordered, *first*, four non-pecuniary reparations in the form of obligations of doing (resolutory points 1-4), and only *afterwards* pecuniary (monetary) reparations (resolutory points 5-7).

52. Considerations of equity cannot be minimized (as positivists in vain try to do), as they assist the international tribunal concerned to adjust norms and rules to the circumstances of the concrete cases, and to adjudicate matters *ex aequo et bono*[14]. International tribunals, especially those operating within the framework of international regimes of protection, do not hesitate to make recourse to considerations of equity[15]. It so happens that the ICJ itself may be called upon to decide on matters

[14] A. A. Cançado Trindade, *Princípios do Direito Internacional Contemporâneo*, 2nd rev. ed., Brasília, FUNAG, 2017, pp. 96-99.

[15] Cf., e.g., IACtHR, case of *Cantoral Benavides* v. *Peru* (reparations, judgment of 3 December 2001), paras. 80 and 87; the IACtHR, once again, in the *dispositif* ordered pecuniary as well as non-pecuniary reparations in the form of *obligations of doing* (resolutory points 1-3, and 4-9, respectively).

pertaining to such regimes of protection, as the present case and the previous case of *Ahmadou Sadio Diallo* show, in respect of the duty of reparation.

X. Environmental Damages and the Necessity and Importance of Restoration

53. Compensation, in sum, is not self-sufficient; it is interrelated with other forms of reparation, and to *restoration* at large (cf. also Section XI, *infra*). The amounts of compensation awarded by the ICJ in the present Judgment (paras. 86-87, 106, 131 and 146), are directly related, to a greater or lesser extent, to restoration. In face of environmental damage, this is a point which cannot pass unnoticed; it is to be singled out, in respect of each of the amounts of compensation ordered by the Court. Only by means of restorative measures will the damaged environment be made to return, to the extent possible, to the pre-existing situation (*restitutio* by remedying works).

54. In a case of environmental damages like the present one, opposing Costa Rica to Nicaragua, full reparations can only be attained, in my understanding, within the framework of restorative justice. Full reparations require consideration not only of pecuniary compensation, but also — as I have already pointed out (cf. *supra*) — of other forms of reparation, starting with *restitutio*, as well as satisfaction, rehabilitation, and guarantees of non-repetition of the damages caused.

55. Any compensation awarded for environmental damage is to be used for restoration. The forms of reparation in a situation of the kind would further encompass apologies, quite proper mainly in regimes of protection (cf. Section VII, *supra*). In any case, environmental damages, in my perception, call first for *restitutio in integrum*; compensation comes afterwards, limited to material harm only, and aimed at restoration.

56. In the *cas d'espèce*, restorative justice is to be achieved, undoing the environmental harm caused by the excavation of the *caños* (2010-2011 and 2013). In its Memorial, Costa Rica specifies that the environmental harm for which it was requesting compensation related to the "quantifiable" material damage in consequence of Nicaragua's excavation of the first *caño* in 2010-2011 and another (eastern) *caño* in 2013 (paras. 2.2 and 3.44 *(a)*)[16].

[16] Costa Rica's Memorial refers to the dredging — accepted by Nicaragua — of three *caños* (one between October 2010 and March 2011, and the second and third in 2013 (para. 3.6).

57. The Court, in its previous Judgment (on the merits)[17] of 16 December 2015, after holding that the excavation of the three *caños* by Nicaragua amounted to breaches of international law (also under its Order on provisional measures of 8 March 2011) (resolutory points 2 and 3), determined Nicaragua's obligation of compensation to Costa Rica (resolutory point 5). The Court stated that its declaration of the finding of those breaches provided "adequate satisfaction" for them (in particular for the non-material injury) (para. 139).

58. In the present Judgment (in relation to *Certain Activities Carried Out by Nicaragua in the Border Area*), the ICJ focuses in particular on compensation only. The Court refers to environmental damage in respect specifically of the first *caño* (2010-2011) and the eastern *caño* (of 2013) (Judgment, paras. 51-52 and 55-56), in relation to the valuation of the felled trees. Yet, remediation of such damage calls for going beyond compensation only, so as to consider, to that effect, restoration measures.

XI. Restoration beyond Simply Compensation: The Need for Non-Pecuniary Reparations

59. In my understanding, mere pecuniary compensation, the only one that the legal profession is used to claiming, without much reflection, cannot at all prescind from endeavours of restoration, so as to achieve a proper remediation of environmental damage. In my own conception, reparations in their distinct forms should better be addressed altogether, and thus awarded, keeping in mind the necessity and importance of restoration.

60. Furthermore, in the light of the 1992 Rio de Janeiro Declaration on Environment and Development, human beings and the environment come together, one cannot make abstraction of one or the other; after all, human life and health are in harmony with the natural environment (Principle 1)[18] (cf. *infra*). After all, environmental harms concern popula-

[17] In the merged cases of *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)*; the present Judgment on compensation relates to the former case.

[18] For an early study of this necessary anthropocentric outlook, cf. A. A. Cançado Trindade, *Direitos Humanos e Meio-Ambiente: Paralelo dos Sistemas de Proteção Internacional*, Porto Alegre/Brazil, S.A. Fabris Ed., 1993, pp. 1-351; cf., subsequently, A. A. Cançado Trindade, "Правата на човека и околната среда" ["Human Rights and the Environment"], *Правата на човека: нови измерения и предизвикателства* [*Human Rights: New Dimensions and Challenges*], Bourgas/Bulgaria, Bourgas Free University, 2000, pp. 126-161 (Bulgarian edition); and cf., more recently, e.g., A. A. Cançado Trindade, "A Proteção

tions, and the protections of human beings and their environment are interrelated.

61. In the present Judgment on *Compensation Owed by Nicaragua to Costa Rica*, the ICJ refers *in passim* to restoration (paras. 42-43, 53, 72 and 87). When it does so, it intermingles restoration with indemnification for impairment or loss of environmental goods and services[19]; and it links restoration to payment for environmental damage[20]. Only once the Court refers to "restoration measures" themselves[21], but without further elaborating on them.

62. In any case, in the *cas d'espèce* far greater attention is devoted by the ICJ, along the present Judgment, to indemnification for impairment or loss of environmental goods and services, in connection with compensation. The Court's view of "restoration" is thus too strict; it should in my view be much larger. Restoration of the damaged environment certainly deserves greater attention, well beyond monetary compensation. *Restorative justice* beholds reparations in all forms, among which rehabilitation and satisfaction.

63. On successive occasions in this Court I have stressed the imperative of the realization of justice. In my separate opinion in the case of the *Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, Merits, Judgment of 20 July 2012), for example, I deemed it fit to ponder that the realization of justice is essential to the rehabilitation of the victimized (*I.C.J. Reports 2012 (II)*, p. 533, para. 118, pp. 554-555, paras. 171-172 and p. 557, para. 181) and to the guarantee of non-repetition of the breaches (*ibid.*, pp. 534-535, para. 120). And I added that there are traces of restorative justice in the presence of the attention, from ancient to modern legal and cultural traditions, to the duty of reparation, in all its forms (not only compensation).

64. The roots of restorative justice are ancient, and I do not consider it as necessarily linked to reconciliation (a trend which only arose in the last three decades, in a given factual context) (*ibid.*, p. 555, para. 172 and p. 557, para. 180). The pioneering determination, by the ICJ, in the aforementioned Judgment of 2012 in the case of the *Obligation to Prosecute or Extradite*, of the application of the principle of *universal jurisdiction*, in

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de Grupos Vulneráveis na Confluência do Direito Internacional dos Direitos Humanos e do Direito Ambiental International", *Evaluación Medioambiental, Participación y Protección del Medio Ambiente* (ed. G. Aguilar Cavallo), Santiago de Chile, Librotecnia, 2013, pp. 267-277.

[19] In paragraph 53 [Judgment], the Court refers, in an appropriate sequence, to "restoration of the damaged environment", and then to indemnification for "impairment or loss of environmental goods and services"; yet in paragraph 42 it refers, in reverse and improper sequence, to "indemnification for the impairment or loss of environmental goods and services", and then to "payment for the restoration of the damaged environment".

[20] Judgment, para. 87.

[21] *Ibid.*, para. 43.

my understanding has a bearing on restorative justice (the realization of justice itself).

65. In effect, the *realization of justice*, seeking to cease the effects of the harmful acts, can be seen in itself as a form of reparation, when securing satisfaction to those victimized. Restorative justice is considerably important: even if *restitutio in integrum* is not attainable, other forms of reparation such as rehabilitation and satisfaction are to be pursued so as to achieve restoration. Rehabilitation and satisfaction are forms of non-pecuniary reparation, requiring *obligations of doing* (cf. Section VII, *supra*) to the effect of restoration. To them one can add the guarantee of non-repetition of the breaches.

XII. Final Considerations

66. May I now turn to my final considerations. Reparations, their rationale, and all their forms, have been reckoned and elaborated as from the general principle of *neminem laedere*, in the light of jusnaturalist thinking. They are nowadays deeply rooted in the more lucid international legal thinking. The forms of reparation are distinct components of the duty to remedy promptly the wrong done, so as to cease its effects. Breach and reparation thus form an indissoluble whole.

67. The examination of reparation for environmental harm, as I have already pointed out, cannot prescind from considerations of equity (para. 32, *supra*). In its present Judgment on *Compensation Owed by the Republic of Nicaragua to the Republic of Costa Rica*, the ICJ, though referring briefly to equity (para. 35) and reasonableness (para. 142), appears too much concerned with quantification of environmental damages and of costs and expenses consequently incurred (with direct proof of causality).

68. To my mind, one cannot reasonably ascribe so much weight to *onus probandi incumbit actori* (in respect of costs and expenses) as related to reparation for environmental damage. After all, can environmental damage be precisely assessed and quantified only in financial or pecuniary terms? Not at all. In case of environmental damage, one should first look at *restitutio*. And considerations of equity have an incidence in the context of environmental harm.

69. The priority search for *restitutio* seeks to return to the *statu quo ante*, i.e., to return to the situation pre-existing before the occurrence of the harm. Compensation can only come afterwards, to be assessed and determined on the basis of equitable considerations. This is even more so in respect of environmental damage, such as the one before the ICJ in the factual context of the *cas d'espèce*, the full reparation of which is unattainable by compensation only.

70. To address reparation for environmental harm only from the angle of financial compensation is wholly unsatisfactory. One has to bear in mind the intrinsic value of the environment for the populations, and the harm done to it cannot be remedied only by the quantification of financial compensation. Take, for example, the question of reparation in respect of the damage done to wetlands. The 1971 Ramsar Convention on Wetlands of International Importance Especially as Waterfowl Habitat, e.g., warns from the start that the loss of wetlands "would be irreparable", and draws attention to the interdependence of human beings and their environment. It is necessary here to go beyond the strict inter-State outlook, and to keep in mind the populations of the countries concerned.

71. In other circumstances also, when faced with a large collectivity of victims, the ICJ cannot consider compensation only. Compensation (for environmental damage, and for costs and expenses consequently incurred) is just one aspect [or element] of the matter. After all, environmental harm affects also the populations concerned (the human collectivities which States represent)[22], and full reparation cannot lose sight of that.

72. Environmental harm further affects the *right of living*. Human life and surrounding nature are sources of pessimism and optimism, in face of the mystery of existence and the possibility of destruction. This is expressed in the poems of the thoughtful Central American writer (born in Nicaragua), Ruben Darío (1867-1916). In 1905, beholding the trees, in addressing fatality he pondered with pessimism:

> "Dichoso el árbol que es apenas sensitivo,
> y más la piedra dura, porque ésta ya no siente,
> pues no hay dolor más grande que el dolor de ser vivo,
> ni mayor pesadumbre que la vida consciente."[23]

73. Yet, hope never vanishes; Ruben Darío's poems disclose a blend of melancholy and joy. Again beholding the trees in a beautiful

[22] Cf., in this respect, e.g., Julio Barbosa (special rapporteur), UN International Law Commission: Eleventh Report on International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law (ILC forty-seventh session,1995), *Yearbook of the International Law Commission* (1995)-II, p. 56, para. 20.

[23] Ruben Darío, "Lo Fatal" [1905], in: Ruben Darío, *Poesías Completas*, 11th ed., Madrid, Aguilar, 1968, p. 688; and Ruben Darío, *Poesía — Libros Poéticos Completos*, 1st ed., Mexico/Buenos Aires, Fondo de Cultura Económica, 1952, p. 305:

> "Happy is the tree, which is scarcely sensitive,
> and still happier is the hard stone, as it feels nothing,
> there is no greater pain as that of being alive,
> nor greater burden than that of conscious life." *[My own translation.]*

environment, two years later he further expressed, this time with optimism:

> "Oh pinos, oh hermanos en tierra y ambiente,
> yo os amo! Sois dulces, sois buenos, sois graves.
> Diríase un árbol que piensa y que siente,
> mimado de auroras, poetas y aves."[24]

74. In sum, the *right of living* brings to the fore the necessity and the importance of *restoration* (cf. *supra*), — by means of reparation in all its forms (as already pointed out — cf. *supra*), starting with the consideration of *restitutio*. For the examination of this latter, — may I reiterate, — considerations of equity are much needed. In relation to the factual context of the *cas d'espèce*, the ICJ — as I have already indicated (para. 61, *supra*) — refers briefly to restoration in the present Judgment, but without extracting all consequences therefrom.

75. Restoration of a damaged environment to its original condition may be complicated by the fact that environmental damage is often irreversible, as recognized in the aforementioned 1992 Rio de Janeiro Declaration on Environment and Development (Principle 15)[25], while addressing liability and compensation for such damage (Principle 13). The 1992 Rio Declaration further stresses the need to give special priority to addressing environmental vulnerability (Principle 6). It further underlines the need to secure healthy human life in harmony with nature (Principle 1).

76. Still in the nineties, the interrelationship between environmental protection and the *right of living* did not escape the attention of the ICJ itself. In its Advisory Opinion of 8 July 1996 on the *Threat or Use of Nuclear Weapons*, it pondered that "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn" (*I.C.J. Reports 1996 (I)*, p. 241, para. 29). Yet, even if thus acknowledging the overarching importance of the environment to the welfare of human beings as a collective whole, in its reasoning it did not go beyond the inter-State outlook that it is used to (as shown, in the *dispositif*, by resolutory point 2E).

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[24] Ruben Darío, "La Canción de los Pinos" [1907], in Ruben Darío, *Poesía — Libros Poéticos Completos*, and *op. cit. supra* note 23, p. 335:

> "Oh pine trees, oh brothers on land and in the environment,
> I love you all! You are sweet, are good, are sombre.
> One would say you are a tree which thinks and feels,
> pampered by sunrises, poets and birds." *[My own translation.]*

[25] For a recent reassessment of Principle 15 of the 1992 Rio de Janeiro Declaration on Environment and Development, cf. A. A. Cançado Trindade, "Principle 15: Precaution", *The Rio Declaration on Environment and Development — A Commentary* (ed. J. E. Viñuales), Oxford University Press, 2015, pp. 403-428.

77. Two decades later, given the Court's finding that it had no jurisdiction in the three cases on *Obligations concerning Nuclear Disarmament* (lodged with it by the Marshall Islands), for alleged non-existence — in its view — of a dispute between the parties (Judgments of 5 October 2016), I appended three lengthy dissenting opinions thereto, wherein I sustained the need of a people-centred approach (*I.C.J. Reports 2016 (I)* and *(II)*, paras. 153-171 and 319), and relate the potential harm at issue to the fundamental right to life (*ibid.*, paras. 172-185); moreover, I discarded the strict and surpassed inter-State outlook (*ibid.*, paras. 190, 319 and 323), keeping in mind the claimant's attention to potential damages to human health and the environment together (*ibid.*, paras. 175-177)[26].

78. As to the present ICJ Judgment, I have sought, in this separate opinion appended thereto, to identify the lessons which, in my perception, can be extracted from the present Judgment, in the wider framework of restoration, with all its requirements and implications. I have also sought to demonstrate the need to proceed, as to the duty of full reparation, to considerations of equity (cf. *supra*).

79. The Court dwelt herein only on compensation, but even this latter is to be understood in its relationship with restoration. Thus, two monetary sums ordered by the ICJ in the present Judgment[27] are related to compensation for environmental damages in addition to restorative measures necessary, in respect of the wetland, to return it, to the extent possible, to the overall pre-harm condition. Thus, Costa Rica could use such monetary sums to plant trees and other plants, seeking to restore biodiversity, and increase the future provision of such services as gas regulation, air quality and raw materials, besides other restorative measures.

80. The other monetary sum ordered in the present Judgment[28] is granted as compensation for the restoration (remedial measure) already undertaken, i.e., the construction of the dyke (and monitoring overflights) enabling natural recovery in the area affected by the environmental damages. In sum, reparation is to be kept in mind in all its forms (compensation and others), so as to achieve restoration, with the remediation of the environmental harms.

81. Monetary compensation clearly has its limitations. It needs to be coupled with restoration measures, so as to minimize the damages, — even if *restitutio* is not wholly attainable. Restoring the harmed environment can repair the damages as much as possible. Restoration,

[26] The numbering of paragraphs, here referred to, corresponds to their numbering in one of the three cases at issue, namely, the one opposing the Marshall Islands to the United Kingdom; yet, the same considerations are found in my three dissenting opinions in the three aforementioned cases.

[27] Cf. paras. 86-87, and *dispositif*, resolutory point 1 *(a)* and *(b)*.

[28] Cf. paras. 142-143 and 145-146, and *dispositif*, resolutory point 2.

furthermore, opens ways for rehabilitation, and points towards the guarantee of non-repetition of the harmful occurrences. Reparation is to be contemplated and pursued in all its forms.

82. Last but not least, may I conclude in drawing attention to the fact that, unfortunately, lessons from the past have simply not been learned yet. Since the birth of the law of nations *(droit des gens)* in the sixteenth century *(supra)* to date, the duty of reparation has been studied (cf. Section V, *supra*). Yet, in contemporary international law, in this second decade of the twenty-first century, the application of that duty seems to be still in its infancy. Monetary or pecuniary quantification of environmental damage *per se* does not provide full reparation, in the wider framework of restoration. There remains nowadays a long way to go, in the endeavours towards the progressive development of international law in the domain of reparations.

XIII. Epilogue: A Recapitulation

83. From all the preceding considerations, it is crystal clear that my own reasoning goes well beyond that of the Court in the present Judgment on *Compensation Owed by Nicaragua to Costa Rica*. This being so, I deem it fit, at this stage, for the sake of clarity, to recapitulate all the points I have addressed herein, in my present separate opinion, keeping in mind that this is the first case in which the ICJ has been called upon to pronounce on reparations for environmental damages.

84. *Primus*: According to a well-established principle of international law, reparation must cease all consequences of the unlawful act and re-establish the situation which existed prior to the occurrence of the breach. *Secundus*: Recourse is to be made, first, to *restitutio in integrum*, and, when restitution is not possible, one then turns to compensation. *Tertius*: The conception of the duty of reparation for damages has deep-rooted historical origins, going back to antiquity and Roman law; it was inspired by the natural law general principle of *neminem laedere*.

85. *Quartus*: The breach causing harm promptly generates the duty of reparation; breach and prompt reparation form an indissoluble whole. *Quintus*: Responsibility for environmental damage and reparation cannot make abstraction of the temporal dimension; after all, responsibility for environmental damage has an inescapable longstanding dimension. *Sextus*: The duty of prompt reparation is a fundamental, rather than "secondary", obligation: it is an imperative of justice.

86. *Septimus*: Reparations are to be properly appreciated within the conceptual framework of *restorative justice*. *Octavus*: Exemplary reparations exist and gain in importance within regimes of protection and in face of environmental damages. *Nonus*: In the law of nations, reparation is necessary to the preservation of the international legal order, thus responding to a true international need, in conformity with the *recta*

ratio; this latter, and the rationale of reparation, were already dwelt upon in the writings of the "founding fathers" of the law of nations (sixteenth century onwards).

87. *Decimus*: Such writings also turned to the *forms* of reparation (namely, *restitutio in integrum*, satisfaction, compensation, rehabilitation and guarantee of non-repetition of acts or omissions in breach of international law). All these points are part of their perennial legacy on prompt reparation, in the line of jusnaturalist thinking. *Undecimus*: Depending on the circumstances of the case, forms of reparation other than compensation may be even more appropriate and important, within the framework of *restorative justice*.

88. *Duodecimus*: In order to *say what the Law is (juris dictio)* as to the fundamental duty of reparation, the Court cannot restrict itself only to compensation, even if the contending parties address only this latter. *Tertius decimus*: *Restitutio in integrum* is the modality of reparation *par excellence*, the first one to be sought. All forms of reparation *(supra)* complement each other. *Quartus decimus*: There are circumstances in which the simple quantification of damages (for compensation) is insufficient, calling thus for other forms of reparation.

89. *Quintus decimus*: *Obligations of doing* — which are essential to restoration — assume particular importance in the consideration of reparations within the framework of *regimes of protection* (such as that of the environment). *Sextus decimus*: Restorative justice encompasses reparations in all forms (starting with *restitutio*), to be duly kept in mind. Compensation is not self-sufficient; it is interrelated with other forms of reparation, and to *restoration* at large. *Septimus decimus*: Only by means of restorative measures will the damaged environment be made to return, to the extent possible, to the pre-existing situation (remediation).

90. *Duodevicesimus*: In the case of reparations (in all its forms) for environmental harm, one is to resort to *considerations of equity*, which cannot be minimized (as juspositivists in vain try to do); such considerations assist international tribunals to adjudicate matters *ex aequo et bono*. *Undevicesimus*: Greater attention is to be given to *jurisprudential cross-fertilization*, in particular to the relevant case law of the IACtHR and the ECHR on reparations in their distinct forms. International tribunals, especially those operating within the framework of international regimes of protection, do not hesitate to make recourse to considerations of equity (mainly the IACtHR).

91. *Vicesimus*: Full reparations, in a case of the kind of the present one, can only be attained within the framework of restorative justice. *Vicesimus primus*: Environmental harms also concern populations; one is to address environmental vulnerability, in seeking to secure human health

(1992 Rio de Janeiro Declaration on Environment and Development), the *right of living*. *Vicesimus secundus*: The *realization of justice* can be seen in itself as a form of reparation, when securing satisfaction to those victimized.

92. *Vicesimus tertius*: Environmental damages cannot be precisely assessed and quantified only in financial or pecuniary terms; full reparation is not attainable by compensation only. *Vicesimus quartus*: Attention is to be kept on the importance of restoration measures, beyond monetary compensation (e.g., planting trees to restore biodiversity), so as to achieve the remediation of the environmental harms. *Vicesimus quintus*: Restoration of the harmed environment can repair the damages as much as possible. Restoration measures can, with the passing of time, cease the consequences of the environmental damages.

93. *Vicesimus sextus*: The duty of reparation has been studied since the birth of the law of nations *(supra)*, but lessons from the past have simply not been learned yet. At present, the application of that duty in contemporary international law seems to be still in its infancy. *Vicesimus septimus*: Monetary compensation *per se* does not provide full reparation. There thus remains a long way to go, so as to ensure, within the wider framework of restoration, the progressive development of international law in the domain of reparations.

(Signed) Antônio Augusto CANÇADO TRINDADE.