DECLARATION OF VICE-PRESIDENT YUSUF

Territorial integrity — Territorial sovereignty — Parties' claims of violation of territorial integrity not adequately addressed — Inviolability of boundaries as a basic element of territorial integrity — Inviolability not conditional on the use or threat of force — Territorial integrity breached by incursions — Lack of emphasis on territorial integrity inconsistent with Court's case law.

1. While I agree with the decision of the Court and have voted for all the operative paragraphs, I feel obliged to address briefly in this declaration some issues which the Court did not, in my opinion, deal adequately with in the reasoning of the Judgment, particularly as regards the principle of respect for the territorial integrity of States which was invoked by both Parties in their final submissions to the Court (see Judgment, para. 49).

2. The Court deals with certain aspects of these submissions in paragraphs 91 to 93 and concludes that "[s]overeignty over the disputed territory . . . belongs to Costa Rica" (*ibid.*, para. 92) and that, as a consequence, the various activities carried out by Nicaragua in the disputed territory "were in breach of Costa Rica's territorial sovereignty" (*ibid.*, para. 93). In a situation where both Parties have clearly invoked the principle of respect for the territorial integrity of States, and the obligations arising therefrom, I find the reasoning of the Court to be rather inadequate and too economical.

3. Generally speaking, it is my view that the reasoning of the Court should not only be explicit, but should amply elaborate on the rules and principles of international law which are in contention in a dispute submitted to it, particularly when such principles or rules are of fundamental importance not only for the parties but also for the international community as a whole. As the principal judicial organ of the United Nations, the function of the Court is not only to "decide in accordance with international law such disputes as are submitted to it", but also, in the exercise of such judicial functions, to contribute to the elucidation, interpretation and development of the rules and principles of international law. To this end, the Court must engage in a considered elaboration of such principles as they apply in a factual context to the case before it.

4. Both Costa Rica and Nicaragua refer in their final submissions to the "obligation to respect the sovereignty and territorial integrity" of the other (*ibid.*, para. 49); while the Court both in its conclusions and in the second operative paragraph of its decision refers to the "violation of the

territorial sovereignty of Costa Rica". I believe that the Parties chose to refer specifically to "territorial integrity" to denote an intrusion by the other Party of a portion of territory, albeit small, which each of them claimed to be its own. By taking the approach it has, the Court has failed to engage with the Parties' claims of violations of territorial integrity due to incursions or other measures of force. The inviolability of boundaries is indeed a basic element of the broader principle of territorial integrity and the Court should have squarely confronted this issue in the present Judgment.

5. As clearly stipulated in Article 21 of the Charter of the Organization of American States: "The territory of a State is inviolable. It may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly, on any grounds whatever." The Court regrettably decided not to comment upon or pronounce itself on the legal consequences of this fundamental rule in light of its factual findings in this case.

6. The United Nations Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States (General Assembly resolution 2625 (XXV)), which the Court considers to be declarative of customary international law, sheds more light on the concept of inviolability and suggests that violations of territorial integrity are prohibited independently of considerations of the use of force. In other words, a State might violate the customary rule on territorial inviolability without breaching the prohibition on the use of force.

7. The first principle of the declaration provides that "States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State or in any manner inconsistent with the purposes of the United Nations". The eighth subparagraph of the first principle provides that the "organizing or encouraging the organization of irregular forces or armed bands including mercenaries, for incursion into the territory of another State" is prohibited.

8. Whilst the other subparagraphs of the first principle link the legality of the action to the use or threat of use of force[1], the eighth paragraph does not. This suggests that the organization of irregular forces or armed bands for incursion into the territory of another State breaches the territorial inviolability of that State, whether or not those forces actually use

[1] For example, the first subparagraph provides that:

> "Every State has the duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. Such a threat or use of force constitutes a violation of international law and the Charter of the United Nations and shall never be employed as a means of settling international issues."

or threaten to use force. It must *a fortiori* be the case that sending armed forces, even though small in number, onto the territory of another State breaches territorial inviolability, whether or not those forces use or threaten to use force.

9. Moreover, under paragraph *(d)* of the sixth principle, "the sovereign equality of States", the declaration states that: "[t]he territorial integrity and political independence of the State are inviolable". Unlike the first principle, this provision does not generally link the inviolability of territory to the use or threat of use of force. Instead, the territorial inviolability of the State flows directly from the sovereignty of a State. This reflects the approach taken in the Helsinki Declaration of the CSCE, which also recognizes the territorial integrity of States as inviolable, whether or not such violation stems from the use of force:

> "The participating States will respect the territorial integrity of each of the participating States.
>
> Accordingly, they will refrain from any action inconsistent with the purposes and principles of the Charter of the United Nations against the territorial integrity, political independence or the unity of any participating State, *and in particular* from any such action constituting a threat or use of force." (Helsinki Declaration, Sec. *(a)* (IV); emphasis added.)

10. The Court in its case law has described the principle of territorial integrity as "an essential foundation of international relations" (*Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 35) and as "an important part of the international legal order" (*Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II)*, p. 437, para. 80). The Court has also previously clearly stated that the principle "is enshrined in the Charter of the United Nations, in particular in Article 2, paragraph 4" *(ibid.)*, as well as in customary international law (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 424, para. 73). The failure to recognize as much, and not only to reiterate it, but to emphasize it, is, in my view, manifestly inconsistent with the Court's previous case law.

(Signed) Abdulqawi A. YUSUF.