Navigational Rights on the San Juan River: A Commentary on the *Costa Rica v. Nicaragua* Case

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1. Introduction

The *Costa Rica/Nicaragua* case concerns a dispute with regard to navigational and related rights of Costa Rica on the San Juan River.[1] This river runs approximately 205 km from Lake Nicaragua to the Caribbean Sea, and part of the border between Costa Rica and Nicaragua runs long the right bank of the San Juan River.[2] The section at issue in this dispute is the part of the river which runs from a point three English miles below a Nicaragua's town, Castillo Viejo, to the mouth of the river at the Caribbean Sea.[3]

Costa Rica and Nicaragua had both been under the rule of Spain, and they achieved their independence in 1821.[4] After the war between Costa Rica and Nicaragua, the two countries concluded a Treaty of Limits on 26 April 1858 (hereafter the '1858 Treaty' or 'the Treaty'). The 1858 Treaty fixed the course of the boundary between Costa Rica and Nicaragua from the Pacific Ocean to the Caribbean Sea. At the same time, Article VI of the Treaty affirmed Costa Rica's navigational rights 'con objectos de comercio' on the lower course of the San Juan River. Later, the validity of the 1858 Treaty was challenged by Nicaragua, and the Parties submitted the question to arbitration by the President of the United States. In his Award rendered on 22 March 1888, President Cleveland declared that the 1858 Treaty was valid; and that under Article VI of the Treaty, Costa Rica could navigate such vessels of the Revenue Service as may be connected to navigation 'for the purposes of commerce' on the San Juan River, although Costa Rica did not have the right of navigation with warships.[5]

In the 1980s, various incidents commenced with regard to the navigational régime of the San Juan River because Nicaragua introduced certain restrictions on navigation on the river. On

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[1] Case Concerning the Dispute regarding Navigational and Related Rights (Costa Rica *v.* Nicaragua). The text of the Judgment is available at the homepage of the ICJ <http://www.icj-cij.org>. The analysis of this contribution relies on the electronic version of the Judgment. The page numbers quoted in this contribution are the numbers of the electronic text.
[2] Judgment, ICJ Reports 2009, p. 15, paras. 15-16.
[3] This section is some 140 km long. *Id.*, p. 20, para. 30.
[4] *Id.*, p. 15, para. 17.
[5] *Id.*, p. 18, paras. 19-20.

30 July 1998, the Nicaraguan Minister of Defence and the Costa Rican Minister of Public Security signed the Cuadra-Lizano Joint Communiqué. This document allowed for Costa Rican armed police vessels to navigate on the river to re-supply their boundary posts on the Costa Rican side under certain conditions. On 11 August 1998, however, Nicaragua declared that this Communiqué was null and void. Costa Rica did not accept this unilateral declaration. Thus, disputes between the Parties persisted with regard to the navigational régime on the San Juan River.[6]

On 29 September 2005, Costa Rica instituted proceedings against Nicaragua before the International Court of Justice (hereafter the ICJ or the Court) with regard to a dispute concerning navigational and related rights of Costa Rica on the San Juan River.[7] Costa Rica founded the jurisdiction of the Court on Article 36 (2) of the Statute of the ICJ, the 2002 Tovar-Caldera Agreement, and Article 31 of the 'Pact of Bogotá'.[8] Nicaragua did not object to the Court's jurisdiction to entertain the case.[9] As the Court included on the Bench no judge of the nationality of either of the disputing Parties, Costa Rica chose Mr. Antônio Cançando Trindade and Nicaragua Mr. Gilbert Guillaume as judges *ad hoc*. While Mr. Cançando Trindade was subsequently elected as a Member of the ICJ, Costa Rica did not choose a new judge *ad hoc*.[10] Against this background, this contribution seeks to succinctly overview the *Costa Rica/Nicaragua* Judgment of 2009.

2. The Extent of Costa Rica's Right of Free Navigation on the San Juan River

2.1. The meaning and scope of the phrase 'libre navegación … con objetos de comercio'

Principal issues in the *Costa Rica/Nicaragua* dispute concern the extent of Costa Rica's perpetual right of free navigation on the San Juan River and Nicaragua's power to regulate navigation by Costa Rica. The Court commenced its examination with an analysis of the navigational right of Costa Rica on the San Juan River. According to the Court, the 1858 Treaty is sufficient to settle the question of the extent of Costa Rica's right of free navigation.[11] The main provision which provides Costa Rica's perpetual right of free navigation is Article VI of the 1858 Treaty. In this regard, a key issue relates to the interpretation of the phrase, 'libre navegación …con objetos de comercio,' in Article VI. The Parties considerably disagree over the meaning and scope of this phrase. [12] According to Nicaragua, the freedom of navigation set out in Article VI relates only to the transport of goods intended to be sold in a commercial exchange.[13] However, Costa Rica argued that the freedom of navigation encompasses not only the transport of goods but also the transport of

[6] *Id.*, p. 19, paras. 24-26.
[7] *Id.*, pp. 19-20, paras. 27-28.
[8] *Id.*, p. 7, para. 1.
[9] *Id.*, p. 20, para. 28.
[10] *Id.*, p. 7, para. 4.
[11] *Id.*, p. 21, para. 36.
[12] *Id.*, p. 23, para. 42.
[13] *Id.*, p. 24, para. 45; *See* also Counter-Memorial of Nicaragua, Vol. I, 29 May 2007, pp. 154-164, paras. 4.1.16-4.1.45; Rejoinder of Nicaragua, Vol. I, 15 July 2008, pp. 99-157, paras. 3.1-3.99; presentation by Mr. Antonio Remiro Brotóns, CR 2009/4, pp. 35-49, para. 1-53 and CR 2009/7, pp. 15-20, paras. 7-30.

passengers, including tourists.[14] In response to this question, the Court examined the term 'con objetos' and 'commerce'. respectively.

First, concerning the meaning of the phrase 'con objetos', the Court considered that Nicaragua's narrow interpretation, which defines this phrase as 'with goods' or 'with articles', cannot be upheld mainly because such interpretation renders meaningless the entire sentence in which the phrase appears in Article VI. By contrast, Costa Rica's interpretation of the phrase allows the entire sentence to be given coherent meaning. Thus the Court upheld the interpretation of Costa Rica in this particular matter.[15]

Second, with regard to the meaning of the word 'commerce', the Court supported neither the broad interpretation advocated by Costa Rica nor the narrow one put forward by Nicaragua. In this regard, the Court was of the view that the term 'comercio' must be understood to have the meaning it bears on each occasion on which the Treaty is to be applied (i.e. on a case by case basis); and that the present meaning, not the meaning in the mid-nineteenth century, must be accepted for purposes of applying the Treaty. Accordingly, the Court found that the right of free navigation in question applies to the transport of persons as well as of goods, because the activity of transporting persons can nowadays be commercial in nature.[16]

2.2. Private navigation

On the basis of the above consideration, the Court examined the types of activities covered by the right of free navigation belonging to Costa Rica. Concerning private navigation, the Court was of the view that the right of free navigation set out in Article VI covers two types of navigation: (i) the navigation of vessels carrying goods intended for commercial transactions; and (ii) that of vessels carrying passengers who pay a price other than a token price in exchange for the service thus provided. In the second instance, the fact that the vessel's owner receives payment for this activity is critical. [17]

In this regard, a question arose as to whether the navigation of vessels belonging to the inhabitants of the villages on the Costa Rican bank of the river in order to meet the basic requirements of everyday life was protected by the right of free navigation when carried out free of charge. In light of the historical background to the conclusion of the 1858 Treaty and of the Treaty's object and purpose as defined by the Preamble and Article I, the Court took the view that the parties must be presumed to have intended to preserve for the Costa Ricans living on that bank a minimal right of navigation for the purposes of continuing to live a normal life in the villages along the river. Thus, the Court held that such a right can be

[14] Judgment, ICJ Reports 2009, p. 24, para. 45. *See* also Memorial of Costa Rica, Vol. 1, 29 August 2009, pp. 53-72, paras. 4.17-4.72; Reply of Costa Rica, Vol. 1, 15 January 2008, pp. 55-70, paras. 3.39-3.78; presentation by Mr. Marcelo Kohen, Counsel of Costa Rica, CR 2009/2, pp. 47-69, paras. 1-75 and CR 2009/6, pp. 19-36, paras. 1-61.
[15] Judgment, ICJ Reports 2009, pp. 25-27, paras. 50-56.
[16] *Id.*, pp. 27-31, paras. 57-71.
[17] *Id.*, pp. 31-32, para. 73.

inferred from the provisions of the Treaty as a whole, in particular, the manner in which the boundary is fixed.[18]

In conclusion, the Court unanimously found that: Costa Rica has the right of free navigation on the San Juan River for purposes of commerce; the right of navigation for purposes of commerce enjoyed by Costa Rica includes the transport of passengers; and the right of navigation for purposes of commerce enjoyed by Costa Rica includes the transport of tourists. Further, the Court found, by thirteen votes to one, that the inhabitants of the Costa Rican bank of the San Juan River have the right to navigate on the river between the riparian communities for the purposes of the essential needs of everyday life which require expeditious transportation.[19]

2.3. The navigational right of official vessels

In the Court's view, it was not convinced that a right for Costa Rica to sail official vessels could be inferred from Article VI. Further, Costa Rica failed to prove its assertion that river transport is the only means to supply its police posts located along the river bank or to carry out the relief of the personnel stationed in them. Thus the Court unanimously found that Costa Rica does not have the right of navigation on the San Juan River with vessels carrying out police functions. It also found that Costa Rica does not have the right of navigation on the San Juan River for the purposes of the exchange of personnel of the police border posts along the right bank of the river and of the re-supply of these posts, with official equipment, including service arms and ammunition.[20]

On the other hand, for the same reasons given in paragraphs 78 and 79 of its Judgment, the Court upheld the navigational right of certain Costa Rican official vessels which are used solely for the purpose of providing the population along the river with the necessities of daily life. According to the Court, this right is inferred from the provisions of the 1858 Treaty as a whole, in particular from the fixing of the boundary along the river bank.[21] Hence the Court, by twelve votes to two, held that Costa Rica has the right of navigation on the San Juan River with official vessels, but only those used solely to provide essential services for the inhabitants of the riparian areas where expeditious transportation is a condition for meeting the inhabitants' requirements.[22]

3. Nicaragua's Regulatory Power Concerning Navigation

3.1. General consideration

The Court held that Nicaragua has the power to regulate the exercise by Costa Rica of its right to freedom of navigation under the 1858 Treaty. However, that power is not unlimited and a regulation in the present case is to have the following characteristics: (1) non-

[18] *Id.*, pp. 32-33, paras. 74-79.
[19] *Id.*, pp. 52-53, para. 156 (1) (a) (b) (c) and (f).
[20] *Id.*, p. 54, para. 156 (1) (h) and (i).
[21] *Id.*, pp. 33-34, paras. 80-84.
[22] *Id.*, p. 54, para. 156 (1) (g).

impediment of the right of free navigation, (2) conformity with the terms of the 1858 Treaty, (3) legitimate purposes, (4) non-discrimination, and (5) reasonableness.[23]
The Court then addressed the question of whether Nicaragua has a legal obligation to notify Costa Rica of the measures to regulate navigation on the river. The 1858 Treaty lacks any specific provision in this matter. Considering three factors together, *i.e.*, the 1956 Fournier-Sevilla Agreement, practical necessities of navigation, and the nature of regulation, the Court concluded that Nicaragua is under an obligation to notify Costa Rica of the regulations concerning the navigational regime on the San Juan River. However it stated that that obligation does not extend to notice or consultation prior to the adoption by Nicaragua of such regulations.[24]

3.2. The lawfulness of the specific measures of Nicaragua

The next issue that needs to be examined concerns the lawfulness of Nicaragua's measures, which has been disputed by Costa Rica. As will be seen below, although the ICJ admitted the lawfulness of the requirements relating to identity documents, departure clearance certificates, timetabling, and flags, the Court ruled that Nicaragua's requirements of visas, tourist cards and charges are at variance with its obligation under the 1858 Treaty.

3.2.1. Lawful measures of Nicaragua

First, with regard to the requirement to stop and identification, Nicaragua, as a sovereign state, has the right to know the identity of those entering its territory and to know that they have left, and, thus, the requirement of having a passport was legitimate. To that extent, the Court held that the Nicaraguan requirement to stop vessels on entering and leaving the river is lawful. However, the Court did not support any legal justification for a general requirement that vessels continuing along the San Juan River stop at any intermediate point.[25] Thus the Court found, unanimously, that Nicaragua has the right to require Costa Rican vessels and their passengers to stop at the first and last Nicaraguan post on their route along the San Juan River; and that Nicaragua has the right to require persons travelling on the San Juan River to carry a passport or an identity document.[26]

Second, the Court ruled that the purposes invoked by Nicaragua requiring certificates, namely for navigational safety, environmental protection and criminal law enforcement, are legitimate ones. In the Court's view, this requirement does not appear to have imposed any significant impediment on the exercise of Costa Rica's freedom of navigation.[27] Thus the Court found, unanimously, that Nicaragua has the right to issue departure clearance certificates to Costa Rican vessels exercising Costa Rica's right of free navigation but does not have the right to request the payment of a charge for the issuance of such certificates.[28]

[23] *Id.*, p. 35, para. 87.
[24] *Id.*, pp. 36-38, paras. 91-97.
[25] *Id.*, pp. 39-40, paras. 103-107.
[26] *Id.*, p. 54, para. 156 (2) (a) and (b).
[27] *Id.*, pp. 40-41, paras. 108-110.
[28] *Id.*, p. 54, para. 156 (2) (c).

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Third, according to the 2001 Action Plan of the Army of Nicaragua for issuance of a Departure Clearance Certificate, Nicaragua suspended navigation over the San Juan River between 5.00 pm and 5.00 am for purposes of protecting human life and safe navigation. In this regard, the Court was of the view that the limited interference with Costa Rica's freedom of navigation, namely Nicaragua's time regulation, does not amount to an unlawful impediment to that freedom considering the purposes of the regulation.[29] Hence the Court found, unanimously, that Nicaragua has the right to impose timetables for navigation on vessels navigating on the San Juan River.[30]

Fourth, respecting the requirement of flying Nicaragua's flag, the Court considered that Nicaragua may, in the exercise of its sovereign powers, require Costa Rican vessels navigating on the river to fly its flag. According to the Court, this requirement cannot be considered as an impediment to the exercise of the freedom of navigation of Costa Rican vessels under the 1858 Treaty. In fact, the Court found no evidence that Costa Rican vessels had been prevented from navigation on the San Juan River because of Nicaragua's flag requirement.[31] Thus the Court found, unanimously, that Nicaragua has the right to require Costa Rican vessels fitted with masts or turrets to display the Nicaraguan flag.[32]

3.2.2. Unlawful measures of Nicaragua

The legality of a visa requirement by Nicaragua is a debatable issue in the *Costa Rica/Nicaragua* dispute. Concerning this matter, the Court took the view that an imposition of the visa requirement denies that benefit, and consequently, is a breach of the 1858 Treaty right. The Court also ruled that Nicaragua may not require persons travelling on Costa Rican vessels exercising Costa Rica's freedom of navigation on the river to purchase a tourist card because this is inconsistent with the right of freedom of navigation.[33] Hence the Court found, by nine votes to five, that persons travelling on the San Juan River on board Costa Rican vessels exercising Costa Rica's right of free navigation are not required to obtain Nicaraguan visas; and that Nicaragua is not acting in accordance with its obligations under the 1858 Treaty when it requires persons travelling on the San Juan River on board Costa Rican vessels exercising Costa Rica's right of free navigation to obtain Nicaraguan visas.[34] Further, the Court found unanimously, that persons travelling on the San Juan River on board Costa Rican vessels exercising Costa Rica's right of free navigation are not required to purchase Nicaraguan tourist cards; and that Nicaragua is not acting in accordance with its obligation under the 1858 Treaty when it requires those persons to purchase Nicaraguan tourist cards.[35]

Concerning charges or fees on Costa Rican vessels required by Nicaragua, the Court ruled that as Nicaragua has no legal power to require the issuing of visa and tourist cards, no charge or fee may be required.[36] Further, the Court took the view that the charge for the departure

[29] *Id.*, pp. 45-46, paras. 125-129.
[30] *Id.*, p. 54, para. 156 (2) (d).
[31] *Id.*, pp. 46-47, paras. 130-132.
[32] *Id.*, p. 54, para. 156 (2) (e).
[33] *Id.*, pp. 41-43, paras. 111-119.
[34] *Id.*, p. 53, para. 156 (1) (d) and p. 55, para. 156 (4) (a).
[35] *Id.*, p. 53, para. 156 (1) (e) and p. 55, para. 156 (4) (b).
[36] *Id.*, p. 43, para. 120.

clearance certificate for Costa Rican vessels exercising freedom of navigation on the river is unlawful.[37] Hence the Court found, unanimously, that Nicaragua is not acting in accordance with the 1858 Treaty when it requires the operators of vessels exercising Costa Rica's right of free navigation to pay charges for departure clearance certificates. [38]

4. Subsistence Fishing

Costa Rica requested the Court to declare that Nicaragua has the obligation to permit riparians of the Costa Rican bank to fish in the river for subsistence purposes. According to Costa Rica, subsistence fishing is a customary right.[39]

Although the Parties agreed that the practice of subsistence fishing is long established, they disagree on whether the practice has become binding on Nicaragua as a matter of customary right. In this regard, the Court highlighted that the failure of Nicaragua to deny the existence of a right arising from the practice is particularly significant. Thus the Court found, by thirteen votes to one, that fishing by the inhabitants of the Costa Rican bank of the San Juan River for subsistence purposes from that bank is to be respected by Nicaragua as a customary right.[40] That right would be subject to any Nicaraguan regulatory measures relating to fishing adopted particularly for the protection of resources and the environment. The customary right does not extend to fishing from vessels on the river.[41] Finally, the Court unanimously rejected all other submissions presented by Costa Rica and Nicaragua.[42]

5. Some Comments on the *Costa Rica/Nicaragua* Judgment

Considering that the number of cases before the ICJ is still limited in the context of use and management of fresh waters, the *Costa Rica/Nicaragua* Judgment will provide an important precedent in this field. While detailed examination of each and every issue of this Judgment is beyond the scope of this contribution, three issues in particular must be highlighted.

A first issue concerns the lawfulness of Nicaragua's power to request visas. Five members of the Court objected to the majority opinion on this matter. For example, Judge Sepúlveda-Amor argued that the reasoning of the Court did not provide any hard facts which could endorse the argument that Nicaragua's requirement to obtain visas would prevent free navigation on the San Juan River.[43] In this regard, the Court itself recognized that: 'The power of a State to issue or refuse visas is a practical expression of the prerogative which each State has to control entry by non-nationals into its territory'.[44] With respect, the Court

[37] *Id.*, p. 45, paras. 123-124.
[38] *Id.*, p. 55, para. 156 (4) (c).
[39] Memorial of Costa Rica, *supra* note 14, pp. 89-90, paras. 4.124-4.128; Reply of Costa Rica, *supra* note 14, pp. 81-85, paras. 3.109-3.121.
[40] Judgment, ICJ Reports 2009, p. 54, para. 156 (3).
[41] *Id.*, p. 49, paras. 141-144.
[42] *Id.*, p. 55, para. 156 (5).
[43] Separate Opinion of Judge Sepúlveda-Amor, *id.*, pp. 2-3, paras. 8-16. *See* also Separate Opinion of Judge Skotnikov, *id.*, pp. 3-4, paras. 15-18; Declaration of Judge *ad hoc* Guillaume, *id.*, pp. 10-11, para. 21.
[44] Judgment, *id.*, p. 42, para. 113. *See* also presentation by Mr. Paul Reichler, Counsel of Nicaragua, CR 2009/7, pp. 44-46, paras. 18-21.

should have explained in more detail in its Judgment why the requirement to obtain a visa from Nicaragua would hinder the freedom of navigation.[45]

A second issue relates to the identification of local custom with regard to subsistence fishing. As we had seen, the Court concluded that Costa Rica has a customary right to subsistence fishing. Nonetheless, the legal basis of local or bilateral custom on this subject would seem to leave some room for discussion.[46] In this regard, it must be recalled that the ICJ, in the *Asylum* case, stated that:

> The Party which relies on a custom of this kind [local custom] must prove that this custom is established in such a manner that it has become binding on the other Party. The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State.[47]

Following the *dictum* of the *Asylum* case, a question that needs to be addressed in the *Costa Rica/Nicaragua* case is whether there is 'constant and uniform usage practised by the States' with respect to Costa Rica's right to subsistence fishing. In this regard, the Court stated that:

> [T]he practice, by its very nature, especially given the remoteness of the area and the small, thinly spread population, is not likely to be documented in any formal way in any official record.[48]

This passage appears to suggest that there is no documented practice which could prove the existence of a customary right to subsistence fishing. It is also debatable that the practice of a local community of Costa Rican riparians can be equated with the practice of Costa Rica as a State.[49] Hence there appears to be scope to reconsider the question whether 'constant and uniform usage practised by *the States*' exists in this matter.[50]

Third, special attention must be paid to the evolutive interpretation of the 1858 Treaty. In this regard, the Court's view bears quoting:

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[45] On this issue, *see* Memorial of Costa Rica, *supra* note 14, pp. 108-112, paras. 5.54-5.67; Reply of Costa Rica, *supra* note 14, pp. 159-162, paras. 4.12-4.18; presentation by Mr. Lucius Caflisch, Counsel of Costa Rica, CR 2009/6, p. 48-49, paras. 37-40.

[46] The possibility of a bilateral custom was accepted by the ICJ in the *Right of Passage* case. ICJ Reports 1960, p. 39. Generally on this issue, *see* H. Thirlway, *The Law and Procedure of the International Court of Justice 1960-1989 Part Two*, 61 BYIL 1, pp. 102-104 (1990); by the same writer, International Customary Law and Codification, pp. 135-143 (1972).

[47] Asylum Case (Colombia *v.* Peru), Judgment, ICJ Reports 1950, p. 276.

[48] Judgment, ICJ Reports 2009, p. 49, para. 141.

[49] Separate Opinion of Judge Sepúlveda-Amor, *id.*, p. 5, para. 26. Concerning the scope of the State practice in customary law making, *see* Thirlway, *supra* note 46 (International Customary Law and Codification) pp. 57-60; M. Akehurst, *Custom as a Source of International Law*, 47 BYIL 1, pp. 1-11 (1974-1975).

[50] Separate Opinion of Judge Sepúlveda-Amor, ICJ Reports 2009, p. 5, para. 28. *See* also Declaration of Judge *ad hoc* Guillaume, *id.*, p. 11, para. 22.

> [W]here the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is 'of continuing duration', the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning.[51]

In the Court's view, this is the case in respect of the term 'comercio' as used in Article VI of the 1858 Treaty.[52] In so doing, the Court interpreted this provision in an evolutive manner. In this respect, it must be noted that the Court's interpretation relies on 'the Parties' common intention at the time the treaty was concluded'.[53]

As a good illustration in this matter, the Court referred to the *Aegean Sea Continental Shelf* Judgment.[54] In this case, the Court interpreted the expression 'the territorial status' used in Greece's reservation to the General Act of 1928 in an evolutive manner owing to a generic nature of the concept of territorial status and continuing duration of the General Act.[55]Although the *Aegean Sea Continental Shelf* Judgment concerns the interpretation of a reservation to a treaty, the Court considered that its reasoning in that case can be fully transposable for purposes of interpreting the terms of a treaty themselves.[56] In relation to this, it is also notable that under the 1858 Treaty, the Court admitted Nicaragua's responsibilities concerning the environmental protection of the San Juan River because the interests which are to be protected through regulation was changed with the passage of time.[57] Overall it would seem that the ICJ, in the *Costa Rica/Nicaragua* case, flexibly took time elements into account in the interpretation of the 1858 Treaty.

The antithesis between stability and change is a fundamental issue of law, and the law of treaties is no exception. Here a question arises how it is possible to take account of a time element in the interpretation of a specific treaty in order to adapt treaty provisions to a new situation. In this respect, evolutive or dynamic treaty interpretation merits particular attention. [58] In fact, the method of evolutive interpretation has been adopted by international courts

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[51] Judgment, *id.*, p. 30, para. 66. *See* also p. 29, para. 64. *See* also presentation by Mr. Kohen, CR 2009/6, p. 35, para. 58.

[52] Judgment, *id.*, p. 30, para. 67. On the other hand, Nicaragua opposed the application of evolutive interpretation to the 1858 Treaty. *See* in particular, presentation by Mr. Alain Pellet, CR 2009/4, pp. 49-55, paras. 3-12 and CR 2009/7, pp. 28-29, paras. 22-23.

[53] Judgment, ICJ Reports 2009, p. 29, para. 64. However, Judge Skotnikov objected to the majority opinion in this particular matter. Separate Opinion of Judge Skotnikov, *id.*, p. 1, para. 5.

[54] Judgment, *id.*, pp. 29-30, para. 65. *See* also presentation by Mr. Kohen, CR 2009/6, p. 35, para. 58.

[55] ICJ Reports 1978, p. 32, para. 77. With regard to the evolutive interpretation of Greece's reservation in the *Aegean Sea Continental Shelf* case, *see* T. O. Elias, *The Doctrine of Intertemporal Law*, 74 AJIL 285, pp. 296-302 (1980).

[56] Judgment, ICJ Reports 2009, p. 30, para. 66.

[57] *Id.*, p. 36, para. 89; p. 39, para. 104. The environmental protection of rivers is increasingly important. Generally on this subject, *see* for instance, L. Caflisch, *Règles Générales du droit des cours d'eau internationaux*, 219 RCADI 9, pp. 163-185 (1989-VII); O. Mclntyre, Environmental Protection of International Watercourses under International Law (2007); S. C. McCaffrey, The Law of International Watercourses, pp. 446-462 (2007).

[58] On this issue, *see* M. Fitzmaurice, *Dynamic (Evolutive) Interpretation of Treaties: Part I*, 21 Hague Yearbook of International Law 101 (2008).

particularly in relation to constituent instruments of international organisations[59] and the European Convention on Human Rights.[60]

On the other hand, some advocate the application of the principle of contemporaneity to the interpretation of treaties. According to this principle, the terms of a treaty must be interpreted according to the meaning which they possessed at the date when the treaty was originally concluded.[61] It is argued that the principle of contemporaneity is a particular application of the doctrine of inter-temporal law.[62] It is common knowledge that Judge Huber, in the 1928 *Island of Palmas* case, formulated this doctrine as follows: 'a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled'.[63] However, it must be noted that Judge Huber went on to state that:

> As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called intertemporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by *the evolution of law*.[64]

In so stating, Judge Huber took an evolutive element into account in the inter-temporal law doctrine. Thus, this doctrine would seem to be based on a view of international law as a dynamic legal system.[65] The inter-linkage between the doctrine of inter-temporal law and the evolutive treaty interpretation will require further consideration.[66] In any case, it appears that the *Costa Rica/Nicaragua* Judgment will provide an interesting example for discussion with regard to the evolutive interpretation of treaties in the future.

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[59] On this issue, *see* in particular, T. Sato, Evolving Constitutions of International Organizations: A Critical Analysis of the Interpretative Framework of the Constituent Instruments of International Organisations (1996).
[60] *See* for instance, R. Bernhardt, *Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights*, 42 GYIL 11 (2000); G. Letsas, A Theory of Interpretation of the European Convention on Human Rights, pp. 58-79 (2007); Fitzmaurice, *supra* note 58, pp. 121-153.
[61] Sir Gerald Fitzmaurice, The Law and Procedure of the International Court of Justice, p. 346 and 359 (1993).
[62] *Id.*, pp. 359-361. Concerning this doctrine, *see* for instance, Elias, *supra* note 55, pp. 285-307; N. Okuwaki, *Evolutionary Process of International Norms and the Control of Time Factors in Legal Positivism*, (in Japanese) 22 Yearbook of World Law 70 (2003). With regard to time elements in treaty interpretation, *see* in particular, R. Gardiner, Treaty Interpretation, pp. 250-298 (2008).
[63] Island of Palmas case (Netherlands, U.S.A.), United Nations, 2 Reports of International Arbitral Awards 845.
[64] Emphasis added. *Id.*
[65] Elias, *supra* note 55, p. 291.
[66] *See* for instance, Fitzmaurice, *supra* note 58, 102-113.