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Summary
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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)

Summary of the Judgment of 16 December 2015

Procedural background (paras. 1-52)

The Court begins by recalling that, on 18 November 2010, the Republic of Costa Rica (hereinafter "Costa Rica") instituted proceedings against the Republic of Nicaragua (hereinafter "Nicaragua") in the case concerning Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) (hereinafter the "Costa Rica v. Nicaragua case"). In its Application, Costa Rica alleged in particular that Nicaragua had invaded and occupied Costa Rican territory, and dug a channel thereon; it also reproached Nicaragua with conducting works (notably dredging of the San Juan River) in violation of its international obligations. The Court further states that, on the same day, Costa Rica filed a request for provisional measures, as a result of which, by an Order of 8 March 2011 (hereinafter "the Order of 8 March 2011"), the Court indicated certain provisional measures addressed to both Parties.

The Court goes on to recall that, by an Application filed in the Registry on 22 December 2011, Nicaragua instituted proceedings against Costa Rica in a dispute concerning Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica) (hereinafter the "Nicaragua v. Costa Rica case"). In that Application, Nicaragua stated that the case related to "violations of Nicaraguan sovereignty and major environmental damages on its territory", contending, in particular, that Costa Rica was carrying out major road construction works in the border area between the two countries along the San Juan River, in violation of several international obligations and with grave environmental consequences.

The Court explains that, by two separate Orders dated 17 April 2013, it joined the proceedings in the Costa Rica v. Nicaragua and Nicaragua v. Costa Rica cases. It adds that, by an Order of 22 November 2013 rendered in the Costa Rica v. Nicaragua case, it reaffirmed the provisional measures indicated on 8 March 2011 and indicated new provisional measures addressed to both Parties.

Finally, the Court recalls that public hearings were held in the joined cases from 14 April 2015 to 1 May 2015, where both Parties' experts were heard.

I. JURISDICTION OF THE COURT (PARAS. 54-55)

The Court notes that both Costa Rica and Nicaragua invoke, as bases of jurisdiction, Article XXXI of the Pact of Bogotá and the declarations by which they recognized the compulsory jurisdiction of the Court under paragraphs 2 and 5 of Article 36 of the Statute, and that neither Party has contested the Court's jurisdiction to entertain the other Party's claims. The Court finds that it has jurisdiction over both cases.

II. GEOGRAPHICAL AND HISTORICAL CONTEXT AND ORIGIN OF THE DISPUTES (PARAS. 56-64)

The Court first recalls the geographical context to the two cases. It explains in this regard that the San Juan River runs approximately 205 km from Lake Nicaragua to the Caribbean Sea. At a point known as "Delta Colorado" (or "Delta Costa Rica"), the San Juan River divides into two branches: the Lower San Juan, which is the northerly of these two branches and flows into the Caribbean Sea about 30 km downstream from the delta; and the Colorado River, the southerly and larger of the two branches, which runs entirely within Costa Rica, reaching the Caribbean Sea at Barra de Colorado, about 20 km south-east of the mouth of the Lower San Juan. The area situated between the Colorado River and the Lower San Juan is broadly referred to as Isla Calero (approximately 150 sq km). Within that area, there is a smaller region known to Costa Rica as Isla Portillos and to Nicaragua as Harbor Head (approximately 17 sq km); it is located north of the former Taura River. In the north of Isla Portillos is a lagoon, called Laguna Los Portillos by Costa Rica and Harbor Head Lagoon by Nicaragua. This lagoon is at present separated from the Caribbean Sea by a sandbar (see attached sketch-map No. 1). The area includes two wetlands of international importance: the Humedal Caribe Noreste (Northeast Caribbean Wetland) and the Refugio de Vida Silvestre Río San Juan (San Juan River Wildlife Refuge).

The Court then describes the historical context to the present disputes between the Parties. It observes in this regard that, following hostilities between the two States in 1857, the Governments of Costa Rica and Nicaragua concluded in 1858 a Treaty of Limits (hereinafter the "1858 Treaty"), which fixed the course of the boundary between the two countries from the Pacific Ocean to the Caribbean Sea. While establishing Nicaragua's dominium and imperium over the waters of the San Juan River, at the same time it affirmed Costa Rica's right of free navigation on the river for the purposes of commerce. Following challenges by Nicaragua on various occasions to the validity of this Treaty, Costa Rica and Nicaragua signed another instrument on 24 December 1886, whereby the two States agreed to submit the question of the validity of the 1858 Treaty, as well as various other points of "doubtful interpretation", to the President of the United States, Grover Cleveland, for arbitration.

The Court notes that, in the Award handed down by him in 1888, President Cleveland, inter alia, confirmed the validity of the Treaty, and that, subsequent to that decision, in 1896 Costa Rica and Nicaragua agreed to establish two national Demarcation Commissions, which were to include an engineer, who "shall have broad powers to decide whatever kind of differences may arise in the course of any operations and his ruling shall be final". United States General Edward Porter Alexander was so appointed. During the demarcation process (which began in 1897 and was concluded in 1900), General Alexander rendered five awards, the first three of which are of particular relevance to the Costa Rica v. Nicaragua case.

The Court further explains that, starting in the 1980s, disagreements arose between Costa Rica and Nicaragua concerning the precise scope of Costa Rica's rights of navigation under the 1858 Treaty. This dispute led Costa Rica, on 29 September 2005, to file an Application with the Court instituting proceedings against Nicaragua. On 13 July 2009 the Court rendered its Judgment, inter alia, clarifying Costa Rica's navigational rights and the extent of Nicaragua's power to regulate navigation on the San Juan River.

The Court then comes to the origin of the two disputes, indicating that, on 18 October 2010, Nicaragua started dredging the San Juan River in order to improve its navigability, while also carrying out works in the northern part of Isla Portillos. The Court notes that Costa Rica contends that Nicaragua had artificially created a channel (both Parties refer to such channels as "caños") on Costa Rican territory, in Isla Portillos between the San Juan River and Laguna Los Portillos/Harbor Head Lagoon, whereas Nicaragua argues that it was only clearing an existing caño on Nicaraguan territory. The Court further notes that Nicaragua also sent some military units and other personnel to that area.

The Court then explains that, in December 2010, Costa Rica started works for the construction of Route 1856 Juan Rafael Mora Porras (hereinafter the "road"), which runs in Costa Rican territory along part of its border with Nicaragua, and has a planned length of 159.7 km, extending from Los Chiles in the west to a point just beyond "Delta Colorado" in the east. For 108.2 km, the road follows the course of the San Juan River (see attached sketch-map No. 2). Finally, the Court notes that, on 21 February 2011, Costa Rica adopted an Executive Decree declaring a state of emergency in the border area, which Costa Rica maintains exempted it from the obligation to conduct an environmental impact assessment before constructing the road.

III. Issues in the Costa Rica v. Nicaragua case (paras. 65-144)

A. Sovereignty over the disputed territory and alleged breaches thereof (paras. 65-99)

The Court observes that, since it is uncontested that Nicaragua conducted certain activities in the disputed territory, it is necessary, in order to establish whether there was a breach of Costa Rica's territorial sovereignty, to determine which State has sovereignty over that territory. The Court recalls that the "disputed territory" was defined by the Court in its Order of 8 March 2011 on provisional measures as "the northern part of Isla Portillos, that is to say, the area of wetland of some 3 square kilometres between the right bank of the disputed caño [dredged by Nicaragua in 2010], the right bank of the San Juan River up to its mouth at the Caribbean Sea and the Harbor Head Lagoon". The Court points out that this definition does not specifically refer to the stretch of coast abutting the Caribbean Sea which lies between the Harbor Head Lagoon (which lagoon both Parties agree is Nicaraguan) and the mouth of the San Juan River, adding that, since neither Party has requested the Court to define the boundary more precisely with regard to this coast, the Court itself will accordingly refrain from doing so.

In order to settle the question of which of the two Parties has sovereignty over the disputed territory, the Court examines the relevant provisions and passages relied on by the Parties in the 1858 Treaty, the Cleveland Award and the Alexander Awards. The Court considers that these lead to the conclusion that Article II of the 1858 Treaty, which places the boundary on the "right bank of the . . . river", must be interpreted in the context of Article VI, which provides that "the Republic of Costa Rica shall . . . have a perpetual right of free navigation on the . . . waters [of the river] between [its] mouth . . . and a point located three English miles below Castillo Viejo". As General Alexander observed in demarcating the boundary, the 1858 Treaty regards the river, "in average condition of water", as an "outlet of commerce". In the view of the Court, Articles II and VI, taken together, provide that the right bank of a channel of the river forms the boundary on the assumption that this channel is a navigable "outlet of commerce". Thus, Costa Rica's rights of navigation are linked with sovereignty over the right bank, which has clearly been attributed to Costa Rica as far as the mouth of the river.

The Court notes Nicaragua's argument that, as a result of natural modifications in the geographical configuration of the disputed territory, the "first channel" to which General Alexander referred in his first Award is now a channel connecting the river, at a point south of the Harbor Head Lagoon, with the southern tip of that lagoon, and that this is the caño that it dredged

in 2010 only to improve its navigability. Costa Rica disputes this, contending that the caño is an artificial one. The Court then proceeds to examine the evidentiary materials submitted by the Parties. It finds that the satellite and aerial images relied on by Nicaragua are insufficient to prove that a natural channel linked the San Juan River with the Harbor Head Lagoon following the same course as the caño that it dredged. The Court further observes that the affidavits of Nicaraguan State officials, which were prepared after the institution of proceedings by Costa Rica, provide little support for Nicaragua's contention. Regarding the maps submitted by the Parties, the Court finds that, while these tend on the whole to give support to Costa Rica's position, their significance is limited, given that they are all small-scale maps which are not focused on the details of the disputed territory. Finally, as regards effectivités, the Court, noting that these are in any event of limited significance, points out that they cannot affect the title to sovereignty resulting from the 1858 Treaty and the Cleveland and Alexander Awards.

The Court further notes that the existence over a significant span of time of a navigable caño in the location claimed by Nicaragua is put into question by some of the evidence, in particular the fact that in the bed of the channel there were trees of considerable size and age which had been cleared by Nicaragua in 2010. Furthermore, the fact that, as the Parties' experts agree, the caño dredged in 2010 no longer connected the river with the lagoon by mid-summer 2011 casts doubt on the existence over a number of years of a navigable channel following the same course before Nicaragua carried out its dredging activities. This caño could hardly have been the navigable outlet of commerce referred to above.

The Court therefore concludes that the right bank of the caño which Nicaragua dredged in 2010 is not part of the boundary between Costa Rica and Nicaragua, and that the territory under Costa Rica's sovereignty extends to the right bank of the Lower San Juan River as far as its mouth in the Caribbean Sea. Sovereignty over the disputed territory thus belongs to Costa Rica.

The Court recalls that it is not contested that Nicaragua has carried out various activities in the disputed territory since 2010, including excavating three caños and establishing a military presence in parts of that territory. These activities were in breach of Costa Rica's territorial sovereignty. Nicaragua is responsible for these breaches and consequently incurs the obligation to make reparation for the damage caused by its unlawful activities (see below, Section E).

The Court then considers Costa Rica's submission that, "by occupying and claiming Costa Rican territory", Nicaragua also committed other breaches of its obligations, including in particular its obligation "not to use the San Juan River to carry out hostile acts" under Article IX of the 1858 Treaty. The Court, however, takes the view that no evidence of hostilities in the San Juan River has been provided, and accordingly rejects Costa Rica's submission on this point.

Costa Rica further asks the Court to find a breach by Nicaragua of "the prohibition of the threat or use of force under Article 2 (4) of the Charter of the United Nations and Article 22 of the Charter of the Organization of American States". The Court observes that the relevant conduct of Nicaragua has already been addressed in the context of its examination of the violation of Costa Rica's territorial sovereignty. The Court notes, however, that the fact that Nicaragua considered that its activities were taking place on its own territory does not exclude the possibility of characterizing them as an unlawful use of force. This raises the issue of their compatibility with both the United Nations Charter and the Charter of the Organization of American States. Nonetheless, in the circumstances, given that the unlawful character of these activities has already been established, the Court is of the view that it need not dwell any further on this submission.

Finally, Costa Rica requests the Court to find that Nicaragua made the territory of Costa Rica "the object, even temporarily, of military occupation, contrary to Article 21 of the Charter of the Organization of American States". The Court considers that, having already established that the

presence of military personnel of Nicaragua in the disputed territory was unlawful because it violated Costa Rica's territorial sovereignty, it does not need to ascertain whether this conduct of Nicaragua constitutes a military occupation in breach of Article 21 of the Charter of the Organization of American States.

B. Alleged violations of international environmental law (paras. 100-120)

The Court then turns to Costa Rica's allegations concerning violations by Nicaragua of its obligations under international environmental law in connection with its dredging activities to improve the navigability of the Lower San Juan River.

1. Procedural obligations (paras. 101-112)

The Court begins by examining Costa Rica's allegations regarding Nicaragua's violation of procedural obligations.

(a) The alleged breach of the obligation to carry out an environmental impact assessment (paras. 101-105)

The Court starts by addressing Costa Rica's contention that Nicaragua breached its obligation to conduct an environmental impact assessment.

After recalling its conclusion in the case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), namely that "it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource" (I.C.J. Reports 2010 (I), p. 83, para. 204), the Court explains that, even though that statement referred to industrial activities, the underlying principle applies generally to proposed activities which may have a significant adverse impact in a transboundary context. Thus, to fulfil its obligation to exercise due diligence in preventing significant transboundary environmental harm, a State must, before embarking on an activity having the potential adversely to affect the environment of another State, ascertain if there is a risk of significant transboundary harm, which would trigger the requirement to carry out an environmental impact assessment.

The Court recalls that determination of the content of the environmental impact assessment should be made in light of the specific circumstances of each case. If the environmental impact assessment confirms that there is a risk of significant transboundary harm, the State planning to undertake the activity is required, in conformity with its due diligence obligation, to notify and consult in good faith with the potentially affected State, where that is necessary to determine the appropriate measures to prevent or mitigate that risk.

The Court notes that, in the present case, the principal risk cited by Costa Rica was the potential adverse impact of those dredging activities on the flow of the Colorado River, which could also adversely affect Costa Rica's wetland.

Having examined the evidence in the case file, including the reports submitted and testimony given by experts called by both Parties, the Court finds that the dredging programme planned in 2006 was not such as to give rise to a risk of significant transboundary harm, either with respect to the flow of the Colorado River or to Costa Rica's wetland. In light of the absence of risk of significant transboundary harm, Nicaragua was not required to carry out an environmental impact assessment.

(b) <u>The alleged breach of an obligation to notify and consult</u> (paras. 106-111)

The Court then turns to Costa Rica's allegation that Nicaragua has breached an obligation to notify and consult with it, both under general international law and pursuant to a number of instruments, namely the 1858 Treaty, the Convention on Wetlands of International Importance especially as Waterfowl Habitat, signed at Ramsar on 2 February 1971 (hereinafter the "Ramsar Convention"), and the Convention for the Conservation of Biodiversity and Protection of Priority Wildlife Areas in Central America.

The Court observes that, contrary to what Nicaragua contends, the fact that the 1858 Treaty may contain limited obligations concerning notification or consultation in specific situations does not exclude any other procedural obligations with regard to transboundary harm which may exist in treaty or customary international law. In any event, the Court finds that, since Nicaragua was not under an international obligation to carry out an environmental impact assessment in light of the absence of risk of significant transboundary harm, it was not required to notify, or consult with, Costa Rica.

As regards the Ramsar Convention, the Court notes that, although Article 3, paragraph 2, contains an obligation to notify, that obligation is limited to notifying the Ramsar Secretariat of changes or likely changes in the "ecological character of any wetland" in the territory of the notifying State. In the present case, the Court considers that the evidence before it does not indicate that Nicaragua's dredging programme has brought about any changes in the ecological character of the wetland, or that it is likely to do so unless it were to be expanded. Thus the Court finds that no obligation to inform the Ramsar Secretariat arose for Nicaragua. Regarding Article 5 of that same instrument, the Court observes that, while this provision contains a general obligation to consult "about implementing obligations arising from the Convention", it does not create an obligation on Nicaragua to consult with Costa Rica concerning a particular project that it is undertaking, in this case the dredging of the Lower San Juan River. In light of the above, Nicaragua was not required under the Ramsar Convention to notify, or consult with, Costa Rica prior to commencing its dredging project.

Finally, as to the Convention for the Conservation of Biodiversity and Protection of Priority Wildlife Areas in Central America, the Court sees no need to take its enquiry further, as neither of the two provisions invoked by Costa Rica contains a binding obligation to notify or consult.

(c) <u>Conclusion</u> (para. 112)

The Court concludes that it has not been established that Nicaragua breached any procedural obligations owed to Costa Rica under treaties or the customary international law of the environment. The Court takes note of Nicaragua's commitment, made in the course of the oral proceedings, to carry out a new environmental impact study before any substantial expansion of its current dredging programme. The Court further notes that Nicaragua stated that such a study would include an assessment of the risk of transboundary harm, and that it would notify, and consult with, Costa Rica as part of that process.

2. Substantive obligations concerning transboundary harm (paras. 113-120)

The Court, having already found that Nicaragua is responsible for the harm caused by its activities in breach of Costa Rica's territorial sovereignty, proceeds to examine whether Nicaragua is responsible for any transboundary harm allegedly caused by its dredging activities which have taken place in areas under Nicaragua's territorial sovereignty, in the Lower San Juan River and on its left bank.

The Court begins by examining the relevant applicable law. It considers that it would be necessary for it to address the question of the relationship between the 1858 Treaty as interpreted by the Cleveland Award and the current rule of customary international law with regard to transboundary harm only if Costa Rica were to prove that the dredging programme in the Lower San Juan River had produced harm to Costa Rica's territory.

However, in the Court's view Costa Rica has not provided any convincing evidence that sediments dredged from the river were deposited on its right bank. Nor has it proved that the dredging programme caused harm to its wetland, or has had a significant effect upon the Colorado River.

The Court therefore concludes that the available evidence does not show that Nicaragua breached its obligations by engaging in dredging activities in the Lower San Juan River.

C. Compliance with provisional measures (paras. 121-129)

The Court recalls that, in its Order on provisional measures of 8 March 2011, it indicated that "[e]ach Party shall refrain from sending to, or maintaining in the disputed territory, including the caño, any personnel, whether civilian, police or security", and also required each Party to "refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve". On the basis of facts that have become uncontested, the Court finds that Nicaragua breached its obligations under the Order of 8 March 2011 by excavating two caños and establishing a military presence in the disputed territory. On the other hand, it finds that there has been no breach of its provisional measures Order of 22 November 2013.

The Court thus concludes that Nicaragua acted in breach of its obligations under the 2011 Order by excavating the second and third caños and by establishing a military presence in the disputed territory. The Court observes that this finding is independent of its previous conclusion (see Section A) that the same conduct also constitutes a violation of the territorial sovereignty of Costa Rica.

D. Rights of navigation (paras. 130-136)

The Court recalls that, in its final submissions, Costa Rica also claims that Nicaragua has breached "Costa Rica's perpetual rights of free navigation on the San Juan in accordance with the 1858 Treaty of Limits, the 1888 Cleveland Award and the Court's Judgment of 13 July 2009".

Nicaragua contests the admissibility of this submission, which it considers not covered by the Application and as having an object unconnected with that of the "main dispute". The Court observes, however, that paragraph 41 (f) of Costa Rica's Application requests the Court to adjudge and declare that, "by its conduct, Nicaragua has breached . . . the obligation not to prohibit the navigation on the San Juan River by Costa Rican nationals". Although Costa Rica's submission could have been understood as related to the "dredging and canalization activities being carried out by Nicaragua on the San Juan River", to which the same paragraph of the Application also referred, the wording of the submission did not contain any restriction to that effect. The Court accordingly considers that Costa Rica's final submission concerning rights of navigation is admissible.

Costa Rica includes among the alleged breaches of its rights of navigation the enactment by Nicaragua of an October 2009 Decree, concerning navigation on the San Juan River. The Court observes that, while it is clear that the decree should be consistent with Article VI of the 1858 Treaty as interpreted by itself, none of the instances of interference with Costa Rica's rights of navigation specifically alleged by Costa Rica relates to the application of this Decree. The Court therefore takes the view that it is not called upon to examine this decree.

The Court further notes Costa Rica's allegations regarding five incidents where it claims breaches of its navigational rights took place. The Court finds that Nicaragua failed to provide a convincing justification with regard to Article VI of the 1858 Treaty for the conduct of its authorities in two of these incidents, which concerned navigation by inhabitants of the Costa Rican bank of the San Juan River. The Court accordingly considers that the two incidents show that Nicaragua breached Costa Rica's rights of navigation on the San Juan River under the 1858 Treaty. It adds that, given this finding, it is unnecessary for it to examine the other incidents invoked by Costa Rica.

E. Reparation (paras. 137-144)

Finally, the Court addresses the issue of reparations. It notes in this regard that, in view of the conclusions reached by it in Sections B and D, Costa Rica's requests concerning the repeal of the 2009 Decree on navigation and the cessation of dredging cannot be granted. The Court considers that its declaration that Nicaragua breached the territorial sovereignty of Costa Rica by excavating three <u>caños</u> and establishing a military presence in the disputed territory provides adequate satisfaction for the non-material injury suffered on this account. The same applies to the declaration on the breach of the obligations under the Court's Order of 8 March 2011 on provisional measures. Lastly, the finding regarding the breach of Costa Rica's rights of navigation in the circumstances described in Section D provides adequate satisfaction for that breach.

As to Costa Rica's request for "appropriate assurances and guarantees of non-repetition", the Court considers that, although Nicaragua failed to comply with its obligations under the 2011 Order, account must also be taken of the fact that Nicaragua subsequently complied with those set out in the Order of 22 November 2013. The Court accordingly takes the view that Nicaragua will have the same attitude with regard to the legal situation resulting from the present Judgment, in particular in view of the fact that the question of territorial sovereignty over the disputed territory has now been resolved.

The Court finds that Costa Rica is entitled to receive compensation for the material damage caused by those breaches of obligations by Nicaragua that have been ascertained by the Court. It states that the relevant material damage and the amount of compensation may be assessed by the Court only in separate proceedings. The Court is of the opinion that the Parties should engage in negotiation in order to reach an agreement on these issues. However, if they fail to reach such an agreement within 12 months of the date of the present Judgment, the Court will, at the request of either Party, determine the amount of compensation on the basis of further written pleadings limited to this issue.

Finally, while noting that the breach by Nicaragua of its obligations under the 2011 Order necessitated Costa Rica engaging in new proceedings on provisional measures, the Court finds that, taking into account the overall circumstances of the case, an award of costs to Costa Rica, as the latter requested, would not be appropriate.

IV. ISSUES IN THE <u>NICARAGUA</u> V. <u>COSTA RICA</u> CASE (PARAS. 145-228)

The Court recalls at the outset that the Application filed by Nicaragua on 22 December 2011 concerns the alleged breach by Costa Rica of both procedural and substantive obligations in connection with the construction of the road along the San Juan River.

A. The alleged breach of procedural obligations (paras. 146-173)

The Court begins by considering the alleged breach of procedural obligations.

1. The alleged breach of the obligation to carry out an environmental impact assessment (paras. 146-162)

The Court turns first to Nicaragua's claim that Costa Rica breached its obligation under general international law to assess the environmental impact of the construction of the road before commencing it, particularly in view of the road's length and location.

The Court recalls that a State's obligation to exercise due diligence in preventing significant transboundary harm requires that State to ascertain whether there is a risk of significant transboundary harm prior to undertaking an activity having the potential adversely to affect the environment of another State. If that is the case, the State concerned must conduct an environmental impact assessment. The obligation in question rests on the State pursuing the activity. Accordingly, in the present case, it fell on Costa Rica, not on Nicaragua, to assess the existence of a risk of significant transboundary harm prior to the construction of the road, on the basis of an objective evaluation of all the relevant circumstances.

The Court notes that, in the oral proceedings, counsel for Costa Rica stated that a preliminary assessment of the risk posed by the road project had been undertaken when the decision to build the road was made. The Court observes that to conduct a preliminary assessment of the risk posed by an activity is one of the ways in which a State can ascertain whether the proposed activity carries a risk of significant transboundary harm. It considers, however, that Costa Rica has not adduced any evidence that it actually carried out such a preliminary assessment.

The Court points out that, in evaluating whether, as of the end of 2010, the construction of the road posed a risk of significant transboundary harm, it will have regard to the nature and magnitude of the project and the context in which it was to be carried out. Given that the scale of the road project was substantial, and given the planned location of the road along the San Juan River and the geographic conditions of the river basin where the road was to be situated (and in particular because it would pass through a wetland of international importance in Costa Rican territory and be located in close proximity to another protected wetland situated in Nicaraguan territory), the Court finds that the construction of the road by Costa Rica carried a risk of significant transboundary harm. Therefore, the threshold for triggering the obligation to evaluate the environmental impact of the road project was met.

The Court then turns to the question of whether Costa Rica was exempted from its obligation to evaluate the environmental impact of the road project because of an emergency. First, the Court recalls its holding that "it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case", having regard to various factors (Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010 (I), p. 83, para. 205). The Court observes that this reference to domestic law does not relate to the question of whether an environmental impact assessment should be undertaken. Thus, the fact that there may be an emergency exemption under Costa Rican law does not affect Costa Rica's obligation under international law to carry out an environmental impact assessment.

Secondly, independently of the question whether or not an emergency could exempt a State from its obligation under international law to carry out an environmental impact assessment, or defer the execution of this obligation until the emergency has ceased, the Court considers that, in the circumstances of this case, Costa Rica has not shown the existence of an emergency that justified constructing the road without undertaking an environmental impact assessment.

Given this finding, the Court does not need to decide whether there is an emergency exemption from the obligation to carry out an environmental impact assessment in cases where there is a risk of significant transboundary harm.

It follows that Costa Rica was under an obligation to conduct an environmental impact assessment prior to commencement of the construction works.

Turning next to the question of whether Costa Rica complied with its obligation to carry out an environmental impact assessment, the Court notes that Costa Rica produced several studies, including an Environmental Management Plan for the road in April 2012, an Environmental Diagnostic Assessment in November 2013, and a follow-up study thereto in January 2015. These studies assessed the adverse effects that had already been caused by the construction of the road on the environment and suggested steps to prevent or reduce them.

The Court recalls that, in its Judgment in the Pulp Mills case, it held that the obligation to carry out an environmental impact assessment is a continuous one, and that monitoring of the project's effects on the environment shall be undertaken, where necessary, throughout the life of the project (I.C.J. Reports 2010 (I), pp. 83-84, para. 205). Nevertheless, the obligation to conduct an environmental impact assessment requires an ex ante evaluation of the risk of significant transboundary harm, and thus "an environmental impact assessment must be conducted prior to the implementation of a project" (ibid., p. 83, para. 205). In the present case, Costa Rica was under an obligation to carry out such an assessment prior to commencing the construction of the road, to ensure that the design and execution of the project would minimize the risk of significant transboundary harm. In contrast, Costa Rica's Environmental Diagnostic Assessment and its other studies were post hoc assessments of the environmental impact of the stretches of the road that had already been built. These studies did not evaluate the risk of future harm. The Court notes moreover that the Environmental Diagnostic Assessment was carried out approximately three years into the road's construction.

For the foregoing reasons, the Court concludes that Costa Rica has not complied with its obligation under general international law to carry out an environmental impact assessment concerning the construction of the road.

2. The alleged breach of Article 14 of the Convention on Biological Diversity (paras. 163-164)

In respect of Nicaragua's submission that Costa Rica was required to carry out an environmental impact assessment by Article 14 of the Convention on Biological Diversity, the Court considers that the provision at issue does not create an obligation to carry out an environmental impact assessment before undertaking an activity that may have significant adverse effects on biological diversity. Therefore, it has not been established that Costa Rica breached Article 14 of the Convention on Biological Diversity by failing to conduct an environmental impact assessment for its road project.

3. The alleged breach of an obligation to notify and consult (paras. 165-172)

The Court then turns to Nicaragua's contention that Costa Rica breached its obligation to notify, and consult with, Nicaragua in relation to the construction works. Nicaragua founds the existence of such obligation on three grounds, namely, customary international law, the 1858 Treaty, and the Ramsar Convention.

The Court first of all reiterates its conclusion that, if the environmental impact assessment confirms that there is a risk of significant transboundary harm, a State planning an activity that carries such a risk is required, in order to fulfil its obligation to exercise due diligence in preventing significant transboundary harm, to notify, and consult with, the potentially affected State in good faith, where that is necessary to determine the appropriate measures to prevent or mitigate that risk. It notes, however, that the duty to notify and consult does not call for examination by the Court in the present case, since it has established that Costa Rica has not complied with its obligation under general international law to perform an environmental impact assessment prior to the construction of the road.

As regards the 1858 Treaty, the Court recalls its finding in the 2009 Judgment that Nicaragua's obligation to notify Costa Rica under the said Treaty arises, amongst other factors, by virtue of Costa Rica's rights of navigation on the river, which is part of Nicaragua's territory. In contrast, the 1858 Treaty does not grant Nicaragua any rights on Costa Rica's territory, where the road is located. Therefore, no obligation to notify Nicaragua with respect to measures undertaken on Costa Rica's territory arises. The Court concludes that the 1858 Treaty did not impose on Costa Rica an obligation to notify Nicaragua of the construction of the road.

Regarding the Ramsar Convention, the Court is of the view that Nicaragua has not shown that, by constructing the road, Costa Rica has changed or was likely to change the ecological character of the wetland situated in its territory. Moreover, contrary to Nicaragua's contention, on 28 February 2012 Costa Rica notified the Ramsar Secretariat about the stretch of the road that passes through the Humedal Caribe Noreste. Therefore, the Court concludes that Nicaragua has not shown that Costa Rica breached Article 3, paragraph 2, of the Ramsar Convention. As regards Article 5 of the Convention, the Court finds that this provision creates no obligation for Costa Rica to consult with Nicaragua concerning a particular project it is undertaking, in this case the construction of the road.

In conclusion, the Court finds that Costa Rica failed to comply with its obligation to evaluate the environmental impact of the construction of the road. Costa Rica remains under an obligation to prepare an appropriate environmental impact assessment for any further works on the road or in the area adjoining the San Juan River, should they carry a risk of significant transboundary harm. Costa Rica accepts that it is under such an obligation. There is no reason to suppose that it will not take note of the reasoning and conclusions in this Judgment as it conducts any future development in the area, including further construction works on the road. The Court also notes Nicaragua's commitment, made in the course of the oral proceedings, that it will co-operate with Costa Rica in assessing the impact of such works on the river. In this connection, the Court considers that, if the circumstances so require, Costa Rica will have to consult in good faith with Nicaragua, which is sovereign over the San Juan River, to determine the appropriate measures to prevent significant transboundary harm or minimize the risk thereof.

B. Alleged breaches of substantive obligations (paras. 174-223)

The Court then turns to the examination of the alleged violations by Costa Rica of its substantive obligations under customary international law and the applicable international conventions.

1. The alleged breach of the obligation not to cause significant transboundary harm to Nicaragua (paras. 177-217)

(a) The contribution of sediment from the road to the river (paras. 181-186)

Regarding the contribution of sediment from the road to the river, the Court notes that it is not contested that sediment eroded from the road is delivered to the river. As regards the total volume of sediment contributed by the road, the Court observes that the evidence before it is based on modelling and estimates by experts appointed by the Parties. The Court further observes that there is considerable disagreement amongst the experts on key data such as the areas subject to erosion and the appropriate erosion rates, which led them to reach different conclusions as to the total amount of sediment contributed by the road. Seeing no need to go into a detailed examination of the scientific and technical validity of the different estimates put forward by the Parties' experts, the Court simply notes that the amount of sediment in the river due to the construction of the road represents at most 2 per cent of the river's total load, according to Costa Rica's calculations based on the figures provided by Nicaragua's experts and uncontested by the latter.

(b) Whether the road-derived sediment caused significant harm to Nicaragua (paras. 187-216)

The Court points out that the core question it must decide is whether the construction of the road by Costa Rica has caused significant harm to Nicaragua. The Court begins its analysis by considering whether the fact that the total amount of sediment in the river was increased as a result of the construction of the road, in and of itself, caused significant harm to Nicaragua.

(i) Alleged harm caused by increased sediment concentrations in the river (paras. 188-196)

In the Court's view, Nicaragua's submission that any detrimental impact on the river that is susceptible of being measured constitutes significant harm is unfounded. Sediment is naturally present in the river in large quantities, and Nicaragua has not shown that the river's sediment levels are such that additional sediment eroded from the road passes a sort of critical level in terms of its detrimental effects. Moreover, the Court finds that, contrary to Nicaragua's submissions, the present case does not concern a situation where sediment contributed by the road exceeds maximum allowable limits, which have not been determined for the San Juan River. Thus, the Court is not convinced by Nicaragua's argument that the absolute quantity of sediment in the river due to the construction of the road caused significant harm per se.

The Court therefore proceeds to consider the relative impact of the road-derived sediment on the current overall sediment load of the San Juan River. On the basis of the evidence before it, and taking into account the estimates provided by the experts of the amount of sediment in the river due to the construction of the road and of the total sediment load of the San Juan River, the Court observes that the road is contributing at most 2 per cent of the river's total load. It considers that significant harm cannot be inferred therefrom, particularly taking into account the high natural variability in the river's sediment loads. In any event, in the Court's view, the only measurements that are before it do not support Nicaragua's claim that sediment eroded from the road has had a significant impact on sediment concentrations in the river.

The Court concludes that Nicaragua has not established that the fact that sediment concentrations in the river increased as a result of the construction of the road in and of itself caused significant transboundary harm.

(ii) Alleged harm to the river's morphology, to navigation and to Nicaragua's dredging programme (paras. 197-207)

The Court then examines whether the sediment contributed by the road caused any other significant harm. It begins by considering whether the increased sediment has had an adverse impact on the morphology of the river, navigation and Nicaragua's dredging programme.

The Court notes that Nicaragua has produced no direct evidence of changes in the morphology of the Lower San Juan or of a deterioration of its navigability since the construction of the road began. It further considers that the expert evidence before it establishes that the accumulation of sediment is a long-standing natural feature of the Lower San Juan, and that sediment delivery along the San Juan is not a linear process. The road-derived sediment is one of a number of factors that may have an impact on the aggradation of the Lower San Juan. The Court therefore considers that the evidence adduced by Nicaragua does not prove that any morphological changes in the Lower San Juan have been caused by the construction of the road in particular.

As to Nicaragua's claim that the construction of the road has had a significant adverse impact on its dredging burden, the Court notes that Nicaragua has adduced no evidence of an increase in its dredging activities due to the construction of the road. The Court observes that there is no evidence that sediment due to the construction of the road is more likely to settle on the

riverbed than sediment from other sources. Thus, sediment coming from the road would correspond to at most 2 per cent of the sediment dredged by Nicaragua in the Lower San Juan. The Court is therefore not convinced that the road-derived sediment led to a significant increase in the bed level of the Lower San Juan or in Nicaragua's dredging burden.

Finally, the Court turns to Nicaragua's claim that the sediment deltas along the Costa Rican bank of the river have caused significant harm to the river's morphology and to navigation. In the Court's view, the photographic evidence adduced by Nicaragua indicates that there are deltas on the Costa Rican bank of the river to which the construction of the road is contributing sediment. Nonetheless, it considers that Nicaragua has not presented sufficient evidence to prove that these deltas, which only occupy the edge of the river's channel on the Costa Rican bank, have had a significant adverse impact on the channel's morphology or on navigation.

For the foregoing reasons, the Court concludes that Nicaragua has not shown that sediment contributed by the road has caused significant harm to the morphology and navigability of the San Juan River and the Lower San Juan, nor that such sediment significantly increased Nicaragua's dredging burden.

(iii) Alleged harm to water quality and the aquatic ecosystem (paras. 208-213)

The Court then considers Nicaragua's contention concerning harm to water quality and the aquatic ecosystem. It is of the view, however, that the Environmental Diagnostic Assessment and the expert report relied upon by Nicaragua do not substantiate the claim that the construction of the road caused significant harm to the river's ecosystem and water quality.

(iv) Other alleged harm (paras. 214-216)

Lastly, the Court turns to Nicaragua's argument that the construction of the road has had an adverse impact on the health of the communities along the river, which is dependent upon the health of the river itself.

It finds, however, that Nicaragua did not substantiate its contentions regarding harm to tourism and health. The Court further observes that Nicaragua's arguments concerning the risk of toxic spills into the river and of further development of the Costa Rican bank of the river are speculative and fail to show any harm. Therefore, these arguments fail.

(c) Conclusion (para. 217)

In light of the above, the Court concludes that Nicaragua has not proved that the construction of the road caused it significant transboundary harm. Therefore, Nicaragua's claim that Costa Rica breached its substantive obligations under customary international law concerning transboundary harm must be dismissed.

2. Alleged breaches of treaty obligations (paras. 218-220)

The Court notes that Nicaragua further argues that Costa Rica violated substantive obligations contained in several universal and regional instruments, namely the Ramsar Convention, the 1990 Agreement over the Border Protected Areas between Nicaragua and Costa Rica, the Convention on Biological Diversity, the Convention for the Conservation of Biodiversity and Protection of Priority Wildlife Areas in Central America, the Central American Convention for the Protection of the Environment, the Tegucigalpa Protocol to the Charter of the Organization of Central American States, and the Regional Agreement on the Transboundary Movement of Hazardous Wastes.

The Court notes that both Nicaragua and Costa Rica are parties to the instruments invoked by Nicaragua. Irrespective of the question of the binding character of some of the provisions at issue, the Court observes that, in relation to these instruments, Nicaragua simply makes assertions about Costa Rica's alleged violations and does not explain how the "objectives" of the instruments or provisions invoked would have been breached, especially in the absence of proof of significant harm to the environment. The Court therefore considers that Nicaragua failed to show that Costa Rica infringed the above-mentioned instruments.

3. The obligation to respect Nicaragua's territorial integrity and sovereignty over the San Juan River (paras. 221-223)

As to Nicaragua's claim that the deltas created by sediment eroded from the road are "physical invasions, incursions by Costa Rica into Nicaragua's sovereign territory . . . through the agency of sediment" and that their presence constitutes "trespass" into Nicaragua's territory, the Court considers that, whether or not sediment deltas are created as a consequence of the construction of the road, Nicaragua's theory to support its claim of a violation of its territorial integrity via sediment is unconvincing. There is no evidence that Costa Rica exercised any authority on Nicaragua's territory or carried out any activity therein. Moreover, for the reasons already expressed above, Nicaragua has not shown that the construction of the road impaired its right of navigation on the San Juan River. Therefore, Nicaragua's claim concerning the violation of its territorial integrity and sovereignty must be dismissed.

C. Reparation (paras. 224-228)

With respect to reparation, the Court's declaration that Costa Rica violated its obligation to conduct an environmental impact assessment is the appropriate measure of satisfaction for Nicaragua.

The Court rejects all of Nicaragua's other submissions. To conclude, it notes that Costa Rica has begun mitigation works in order to reduce the adverse effects of the construction of the road on the environment. It expects that Costa Rica will continue to pursue these efforts in keeping with its due diligence obligation to monitor the effects of the project on the environment. The Court further reiterates the value of ongoing co-operation between the Parties in the performance of their respective obligations in connection with the San Juan River.

OPERATIVE PART (PARA. 229)

THE COURT,

(1) By fourteen votes to two,

Finds that Costa Rica has sovereignty over the "disputed territory", as defined by the Court in paragraphs 69-70 of the present Judgment;

IN FAVOUR: President Abraham; Vice-President Yusuf; Judges Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Robinson; Judge ad hoc Dugard;

AGAINST: Judge Gevorgian; Judge ad hoc Guillaume;

(2) Unanimously,

Finds that, by excavating three caños and establishing a military presence on Costa Rican territory, Nicaragua has violated the territorial sovereignty of Costa Rica;

(3) Unanimously,

Finds that, by excavating two caños in 2013 and establishing a military presence in the disputed territory, Nicaragua has breached the obligations incumbent upon it under the Order indicating provisional measures issued by the Court on 8 March 2011;

(4) Unanimously,

Finds that, for the reasons given in paragraphs 135-136 of the present Judgment, Nicaragua has breached Costa Rica's rights of navigation on the San Juan River pursuant to the 1858 Treaty of Limits;

(5)

(a) Unanimously,

Finds that Nicaragua has the obligation to compensate Costa Rica for material damages caused by Nicaragua's unlawful activities on Costa Rican territory;

(b) Unanimously,

Decides that, failing agreement between the Parties on this matter within 12 months from the date of this Judgment, the question of compensation due to Costa Rica will, at the request of one of the Parties, be settled by the Court, and reserves for this purpose the subsequent procedure in the case concerning Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua);

(c) By twelve votes to four,

Rejects Costa Rica's request that Nicaragua be ordered to pay costs incurred in the proceedings;

IN FAVOUR: President Abraham; Vice-President Yusuf; Judges Owada, Bennouna, Cançado Trindade, Xue, Donoghue, Gaja, Bhandari, Robinson, Gevorgian; Judge ad hoc Guillaume;

AGAINST: Judges Tomka, Greenwood, Sebutinde; Judge ad hoc Dugard;

(6) Unanimously,

Finds that Costa Rica has violated its obligation under general international law by failing to carry out an environmental impact assessment concerning the construction of Route 1856;

(7) By thirteen votes to three,

Rejects all other submissions made by the Parties.

IN FAVOUR: President Abraham; Vice-President Yusuf; Judges Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Gevorgian; Judge ad hoc Guillaume;

AGAINST: Judges Bhandari, Robinson; Judge ad hoc Dugard.

Vice-President YUSUF appends a declaration to the Judgment of the Court; Judge OWADA appends a separate opinion to the Judgment of the Court; Judges TOMKA, GREENWOOD, SEBUTINDE and Judge ad hoc DUGARD append a joint declaration to the Judgment of the Court; Judge CANÇADO TRINDADE appends a separate opinion to the Judgment of the Court; Judge DONOGHUE appends a separate opinion to the Judgment of the Court; Judge BHANDARI

appends a separate opinion to the Judgment of the Court; Judge ROBINSON appends a separate opinion to the Judgment of the Court; Judge GEVORGIAN appends a declaration to the Judgment of the Court; Judge ad hoc GUILLAUME appends a declaration to the Judgment of the Court; Judge ad hoc DUGARD appends a separate opinion to the Judgment of the Court.

Declaration of Vice-President Yusuf

Whilst agreeing with the operative clauses of the Judgment, Judge Yusuf notes that both Parties claimed that their territorial integrity had been breached by the actions of the other. The reasoning of the Court, in his view, inadequately addresses these submissions.

The inviolability of borders is a fundamental part of territorial integrity. An intrusion onto the territory of a State, however small, breaches the territorial inviolability of a State, which is enshrined in the Charter of the Organization of American States, the Charter of the United Nations, and in customary international law. Violation of this principle is not necessarily linked to a breach of the use or threat of force by the intruding party, as is evident from the United Nations Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States.

Moreover, in its previous case law, the Court has emphasized the pivotal role that respect for territorial integrity plays in the international community. By failing to reiterate and emphasize the importance of this principle, the present Judgment is inconsistent with the Court's previous case law.

Separate opinion of Judge Owada

Although Judge Owada voted in favour of the conclusions reached by the Court in the operative part of the Judgment, in his separate opinion, he wishes to elaborate his view on those aspects of the reasoning of the Court which he finds have not been developed with sufficient clarity in the Judgment.

I. THE ISSUE OF SOVEREIGNTY OVER THE DISPUTED TERRITORY

Judge Owada observes that the Court has rightly concluded that the legal instruments relevant for determining sovereignty over the "disputed territory" should be the 1858 Treaty, the Cleveland Award of 1888 and the Alexander Award of 1897 (Judgment, paragraph 76). However, Judge Owada finds that the Judgment has not been sufficiently articulate on the logical sequence that exists between these legal instruments. In Judge Owada's view, what is decisive for the purpose of determining sovereignty over the disputed territory is first and foremost the interpretation of the relevant legal instruments in light of their assigned roles and purposes in their contexts.

Judge Owada proceeds by emphasizing that under these circumstances the task for the Court has not and cannot have been to identify the geographical location of "the first channel met" or to follow the line described in the first Alexander Award in 1897. Judge Owada takes the position that the resolution by the Court of the question of territorial sovereignty over the disputed territory is to be based on the same legal sources and the same legal reasoning that General Alexander applied in implementing the Cleveland Award of 1888 which provided the authoritative and binding interpretation and determination of the boundary prescribed by the 1858 Treaty.

Judge Owada notes that General Alexander was trying, in his first Award, faithfully to follow the prescription of Article II of the 1858 Treaty. As Judge Owada further observes and discusses in detail, the unequivocal outcome that the Court has reached in the present Judgment on the question of sovereignty over the disputed territory is confirmed by the application of the underlying reasoning of the first and third Alexander Awards to the present-day geographical situation of the disputed area.

Judge Owada recalls that the Parties in the present case have provided the Court with a number of arguments and have produced a range of supporting evidentiary materials, all relating to the question of whether or not any navigable channels might have traversed or currently traverse the disputed territory. Judge Owada concurs with the Court's evaluation of this evidence while emphasizing his own conclusion that the totality of such evidence amounts in fact to very little that is material or conclusive for determining the question of territorial sovereignty over the disputed territory.

II. LEGAL CONSEQUENCES OF THE COURT'S FINDING RELATING TO SOVEREIGNTY OVER THE DISPUTED TERRITORY

Judge Owada begins this part of his separate opinion by distinguishing the situation involved in the present dispute from the situation of a classical territorial dispute that is typically brought before the International Court of Justice following attempts by the parties to come to a peaceful settlement. Judge Owada points out that in the present case, as is implied in the language of the Judgment itself, the territorial dispute has been caused primarily through unilateral action taken in the form of a physical incursion by one State into the territory of another State that had been primarily held for many years by the latter State.

In Judge Owada's view, given this undisputable fact, it would have been appropriate for the Court to have treated the acts by Nicaragua in question as a straightforward case of the commission of an internationally wrongful act which could arguably amount to an act constituting an unlawful use of force under Article 2 (4) of the United Nations Charter. Judge Owada notes that while he has concurred with the Court's conclusions on this matter, it would have been more appropriate for the Court to have gone further by declaring that these internationally wrongful acts by Nicaraguan authorities constituted an unlawful use of force under Article 2 (4) of the United Nations Charter.

Judge Owada further observes that the Judgment's reference in this context to the Cameroon v. Nigeria case seems inappropriate and could be quite misleading. According to Judge Owada, that case should clearly be distinguished from the present situation, inasmuch as the Cameroon v. Nigeria case had not been caused by an action of one Party to alter the existing status quo through unilateral means.

III. THE NATURE OF THE REQUIREMENT TO CONDUCT AN ENVIRONMENTAL IMPACT ASSESSMENT

Judge Owada begins this part of his separate opinion by observing that in the process of carrying out the obligation to act in due diligence under international environmental law, the requirement of conducting an environmental impact assessment becomes a key element for determining whether certain activities may cause significant transboundary harm. Judge Owada recalls that in this context both Parties referred approvingly to the dictum from the Court's Judgment in the case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), where the Court had referred to the environmental impact assessment as "a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law" (I.C.J. Reports 2010 (I), p. 83, para. 204).

Judge Owada observes that this dictum of the Court should be placed in contrast with the finding of the International Tribunal for the Law of the Sea in its 2011 Advisory Opinion on the Responsibilities and obligations of States with respect to activities in the Area that an environmental impact assessment as such is a "general obligation under customary international law" (ITLOS Reports 2011, para. 145). Judge Owada finds that, by comparison, the reasoning of this Court in its Judgment in the Pulp Mills case appears to take a more nuanced approach to this requirement. In Judge Owada's view, the Court in its Judgment in the Pulp Mills case had

emphasized the importance of the environmental impact assessment in the context of the process of carrying out the obligation of due diligence, which is a holistic process. Judge Owada observes that conducting an environmental impact assessment is one important constituent element of the process that emanates from the international obligation of States to act in due diligence to avoid or mitigate significant transboundary harm, rather than a separate and independent obligation standing on its own under general international law.

In Judge Owada's view, this balanced approach has been maintained in the present Judgment and is reflected in the part of the Judgment dealing with the "requirement to carry out an environmental impact assessment" (Judgment, paragraph 104). Judge Owada recalls that the Court's conclusion in the Judgment's operative part (paragraph 229 (6)) is based on this reasoning. Finally, Judge Owada emphasizes that the environmental impact assessment, which is essentially of a technical nature, is one possible means to achieve the ultimate legal objective that is binding upon States acting in the environmental field — an obligation to act with due diligence in order to prevent significant transboundary harm in the light of the assessed risks involved.

Joint declaration of Judges Tomka, Greenwood and Sebutinde and Judge ad hoc Dugard

Judges Tomka, Greenwood and Sebutinde and Judge ad hoc Dugard consider that the Court should have ordered Nicaragua to pay the costs which Costa Rica incurred in obtaining a second order on provisional measures in 2013. They recall that Article 64 of the Statute of the Court, together with Article 97 of the Rules of Court, gives the Court the discretion to award costs. They observe that the costs incurred by Costa Rica were a consequence of serious violations by Nicaragua of its obligations under the Court's 2011 Order on provisional measures. They note that Nicaragua could have taken action that would have rendered hearings in October 2013 unnecessary, but failed to do so. Costa Rica was therefore compelled to incur costs in seeking the further order on provisional measures. Although Costa Rica will be able to recover compensation for damage resulting from Nicaragua's breach of the 2011 Order, it will be unable to recover the expense of nearly a week of hearings. Judges Tomka, Greenwood and Sebutinde and Judge ad hoc Dugard consider that it is illogical for a State faced with a breach of provisional measures to be treated less favourably if it seeks redress before the Court than if it undertakes unilateral remediation measures. They take the view that, while the power to award costs under Article 64 has never before been used, the exceptional circumstances of this case warrant the Court exercising that power and awarding costs to Costa Rica.

Separate opinion of Judge Cançado Trindade

1. In his Separate Opinion, composed of twelve parts, Judge Cançado Trindade observes at first that, although he aligned with the majority in the present Judgment of the International Court of Justice (ICJ), of 16.12.2015, in the two joined cases of Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica versus Nicaragua) and of the Construction of a Road in Costa Rica along the San Juan River (Nicaragua versus Costa Rica), he finds that there are certain points ensuing therefrom which, though not dwelt upon at depth by the Court in its reasoning, are in his view endowed with importance, related as they are to the proper exercise of the international judicial function. He feels thus obliged to dwell upon them, in the present Separate Opinion, nourishing the hope that it may be useful for the handling of this matter by the ICJ in future cases.

2. Judge Cançado Trindade begins by singling out (part I) the points he has in mind, namely: a) the manifestations of the preventive dimension in contemporary international law; b) the evolution and conformation of the autonomous legal regime of Provisional Measures of Protection; c) provisional measures and the enlargement of the scope of protection; d) the breach of Provisional Measures of Protection as an autonomous breach, engaging State responsibility by

itself; e) the ICJ's determination of breaches of obligations under Provisional Measures of Protection. Next, he presents his reflections, in the form of a plea, for the prompt determination of breaches of Provisional Measures of Protection.

3. Judge Cançado Trindade then proceeds to examine the following points, namely: a) supervision of compliance with Provisional Measures of Protection; b) breach of provisional measures and reparation for damages; c) due diligence, and the interrelatedness between the principle of prevention and the precautionary principle; d) the path towards the progressive development of Provisional Measures of Protection. The way is then paved for the presentation, in an epilogue, of a recapitulation of his conclusions on the aforementioned points.

4. As to the first of the above points, namely, the manifestations of the preventive dimension in contemporary international law (part II), Judge Cançado Trindade observes that the present two joined cases of Certain Activities Carried out by Nicaragua in the Border Area and of the Construction of a Road in Costa Rica along the San Juan River bring to the fore the relevance of that preventive dimension, as reflected in the present Judgment, in the finding and legal consequences of breaches of Provisional Measures of Protection (in the Certain Activities case), as well as in the acknowledgment of the obligation to conduct an environmental impact assessment (EIA) (in the Construction of a Road case as well). This preventive dimension grows in importance in the framework of regimes of protection (such as those, e.g., of the human person, and of the environment). Moreover, it brings us particularly close to general principles of law (para. 4).

5. Such preventive dimension stands out clearly in the succession of the Court's Orders of Provisional Measures of Protection of 08.03.2011, 16.07.2013 and 22.11.2013, and has been addressed by the contending parties in the course of the proceedings (written and oral phases) before the Court (also at the merits stage). The Court has duly considered the submissions of the parties, and has found that the respondent State incurred (in the Certain Activities case) into a breach of the obligations under its Order of Provisional Measures of Protection of 08.03.2011, by the excavation of two caños in 2013 and the establishment of a military presence in the disputed territory (paras. 127 and 129, and resolutory point n. 3 of the dispositif).

6. Judge Cançado Trindade recalls that, already for some time, he has been drawing the Court's attention to the autonomous legal regime of Provisional Measures of Protection, in the way he conceives, and has been conceptualizing, along the years, such autonomous legal regime, in successive Dissenting and Individual Opinions in this Court (part III). The present Judgment of the ICJ in the two joined cases of Certain Activities and of the Construction of a Road is yet another occasion, and a proper one, to dwell further upon it. To start with, that legal regime can be better appreciated if we consider provisional measures in their historical evolution. May I recall that, in their origins, in domestic procedural law doctrine of over a century ago, provisional measures were considered, and evolved, in order to safeguard the effectiveness of the jurisdictional function itself (para. 7).

7. They thus emerged, in the domestic legal systems, — he proceeds, — in the form of a precautionary legal action (mesure conservatoire / acción cautelar / ação cautelar), aiming at guaranteeing, not directly subjective rights per se, but rather the jurisdictional process itself. They "had not yet freed themselves from a certain juridical formalism, conveying the impression of taking the legal process as an end in itself, rather than as a means for the realization of justice" (para. 8). With their transposition into international legal procedure, and the increasing recourse to them within the framework of domains of protection (e.g., of the human person or of the

environment), they came to be increasingly resorted to, in face of the most diverse circumstances disclosing the probability or imminence of an irreparable damage, to be prevented or avoided. This had the effect, in his perception, of enlarging the scope of international jurisdiction, and of refining their conceptualization (para. 9).

8. With their considerable expansion along the last three decades, it became clear to the contending parties that they were to abstain from any action which might aggravate the dispute pendente lite, or may have a prejudicial effect on the compliance with the subsequent judgment as to the merits. Their rationale stood out clearer, turning to the protection of rights, of the equality of arms (égalité des armes), and not only of the legal process itself. They

> "have freed themselves from the juridical formalism of the procedural doctrine of over a century ago, and have, in my perception, come closer to reaching their plenitude. They have become endowed with a character, more than precautionary, truly tutelary. When their basic requisites, — of gravity and urgency, and the needed prevention of irreparable harm, — are met, they have been ordered, in the light of the needs of protection, and have thus conformed a true jurisdictional guarantee of a preventive character" (para. 10).

9. An international tribunal such as the ICJ has the inherent power or faculté to determine the scope of the provisional measures that it decides to order, and this comes to reinforce the preventive dimension, proper of those measures (paras. 11, 36 and 62). Such inherent power is exercised in order to secure the sound administration of justice (la bonne administration de la justice) (paras. 12 and 63). The autonomous legal regime of provisional measures encompasses, in Judge Cançado Trindade's conception (also explained in his own previous Dissenting and Separate Opinions in the ICJ — paras. 14-16 and 21-23), their juridical nature, the rights and obligations at issue, their legal effects, and the duty of compliance with them (para. 13).

10. Provisional measures have expanded, and have in practice enlarged the scope of protection (part IV — paras. 17-18). To Judge Cançado Trindade, it is "not casual" that they came to be conceived as precautionary measures (mesures provisoires / medidas cautelares), prevention and precaution underlying them all. And he adds:

> "Precaution, in effect, takes prevention further, in face of the uncertainty of risks, so as to avoid irreparable damages. And here, again, in the domain of Provisional Measures of Protection, the relationship between international law and time becomes manifest. The inter-temporal dimension is here ineluctable, overcoming the constraints of legal positivism. International law endeavours to be anticipatory in the regulation of social facts, so as to avoid irreparable harm; Provisional Measures of Protection expand the protection they pursue, as a true international jurisdictional guarantee of a preventive character" (para. 19).

11. Judge Cançado Trindade then turns to the breach of Provisional Measures of Protection, which he regards as an autonomous breach, engaging State responsibility by itself (part V), and additional to the breach which comes, or may come, later to be determined as to the merits of the case at issue (para. 24). Accordingly, the breach of a provisional measure can, in his understanding, be promptly determined, with its legal consequences, without any need to wait for the conclusion of the proceedings as to the merits (para. 25).

12. Judge Cançado Trindade then reviews the ICJ case-law on the determination of breaches of obligations under Provisional Measures of Protection (part VI), when the Court has done so at the end of the proceedings as to the merits of the corresponding cases, namely, besides the present Judgment, the previous Judgments of the ICJ as to the merits in the three cases of LaGrand (2001), of Armed Activities on the Territory of the Congo (2005), and of the Bosnian Genocide (2007). In the earlier case of the Hostages in Tehran (United States versus Iran, Judgment of 24.05.1980), the ICJ did not expressly assert that the Order of Provisional Measures of 15.12.1979 had been breached.

13. It found such breach (of its Order of Provisional Measures of 03.03.1999) in the LaGrand case (Germany versus United States, Judgment of 27.06.2001), but without drawing any consequences from the conduct in breach of its provisional measures. Four years later, in its Judgment of 19.12.2005 in the case concerning Armed Activities on the Territory of the Congo (D.R. Congo versus Uganda), the ICJ, turning to its Order of Provisional Measures (of 01.07.2000) adopted half a decade earlier, — concerning breaches of International Human Rights Law and International Humanitarian Law, — found that the respondent State had not complied with it, and reiterated its finding in resolutory point n. 7 of the dispositif.

14. Another case of determination by the ICJ of a breach of its Orders of Provisional Measures of Protection was that of the Application of the Convention against Genocide (Bosnia and Herzegovina versus Serbia and Montenegro): the Court held so in its Judgment of 26.02.2007, while the Orders of Provisional Measures had been adopted 14 years earlier, on 08.04.1993 and 13.09.1993, aiming at ceasing the atrocities that were already being perpetrated. Two years after the first Order (of 08.04.1993), the U.N. safe-area of Srebrenica collapsed, and the mass-killings of July 1995 in Srebrenica occurred, in a flagrant breach of the provisional measures ordered by the ICJ (paras. 30-31).

15. In the meantime, the proceedings in the case before the ICJ prolonged in time: as to preliminary objections until 1996; as to counter-claims until 1997, and again until 2001; and as to the merits until 2007. The manifest breaches of the ICJ's Orders of Provisional Measures of Protection of 1993 passed for a long time without determination, and without any legal consequences. It took 14 years for the Court to determine, in its Judgment on the merits (2007), the breach of its Provisional Measures of Protection in the cas d'espèce. In Judge Cançado Trindade's understanding,

> "there was no need to wait such a long time to determine the breach of such measures; on the contrary, they should have been promptly determined by the ICJ, with all its legal consequences. This tragic case shows that we are still in the infancy of the development of the legal regime of provisional measures of protection in contemporary international law. A proper understanding of the autonomous legal regime of those measures may foster their development at conceptual level" (para. 33).

16. In his following reflections as a plea for the prompt determination of breaches of Provisional Measures of Protection (part VII), Judge Cançado Trindade ponders at first that, in the cas d'espèce (Certain Activities case), the breaches of provisional measures have been determined by the Court within a reasonably short lapse of time, — unlike in the case of Armed Activities on the Territory of the Congo (half a decade later) and in the Bosnian Genocide case (almost one and a half decade later). In the cas d'espèce, the damages caused by the breaches of provisional measures have not been irreparable, — unlike in the LaGrand case, — and "with their determination by the Court in the present Judgment their effects can be made to cease" (para. 34).

17. In effect, in his understanding, "the determination of a breach of a provisional measure of protection is not — should not be — conditioned by the completion of subsequent proceedings as to the merits of the case at issue" (para. 35). The legal effects of a breach of a provisional measure of protection should, in his view, "be promptly determined, with all its legal consequences. In this way, its anticipatory rationale would be better served". In his view, "there is no room for raising here alleged difficulties as to evidence", as for the ordering of provisional measures of protection, and the determination of non-compliance with them, "it suffices to rely on prima facie evidence (commencement de preuve)" (para. 35).

18. Furthermore, the rights that one seeks to protect under provisional measures "are not necessarily the same as those vindicated on the merits", as shown in the case of the Temple of Préah Vihéar. Likewise, "the obligations (of prevention) are new or additional ones, in relation to those ensuing from the judgment on the merits" (para. 36). The fact that, in its practice, the ICJ has only indicated provisional measures at the request of a State party, in his view "does not mean that it cannot order such measures sponte sua, ex officio" (para. 37). The ICJ Statute endows the Court with the power to do so, if it considers that circumstances so require (Article 41 (1)).

19. And the Rules of Court provide that, irrespective of a request by a party, the Court may indicate provisional measures that, in its view, "are in whole or in part other than those requested" (Article 75 (2)). This happened in the case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Order of 15.03.1996), and the case concerning Armed Activities on the Territory of the Congo (D.R. Congo versus Uganda, Order of 01.07.2000). Judge Cançado Trindade adds that

> "The Court, thus, is not conditioned by what a party, or the parties, request(s), nor — in my view — even by the existence of the request itself. Here, in the realm of Provisional Measures of Protection, once again the constraints of voluntarist legal positivism are, in my view, overcome. The Court is not limited to what the contending parties want (in the terms they express their wish), or so request. The Court is not an arbitral tribunal, it stands above the will of the contending parties. This is an important point that I have been making on successive occasions within the ICJ, in its work of international adjudication" (para 39).

20. He next points out that there have, in effect, lately been cases lodged with the Court, where it has been called upon "to reason beyond the inter-State dimension, not being limited by the contentions or interests of the litigating States", as pointed out in his Separate Opinion (paras. 227-228) in the case of A.S. Diallo (Guinea versus D.R. Congo, Judgment (merits) of 30.11.2010), and in his Dissenting Opinion in the case of Questions Relating to the Obligation to Prosecute or Extradite (Belgium versus Senegal, Order (provisional measures) of 28.05.2009), as well as in his Dissenting Opinion in the case concerning the Application of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD — Georgia versus Russian Federation, Judgment (preliminary objections) of 01.04.2011) (paras. 40-41). Judge Cançado Trindade then warns that the Court

> "is not an arbitral tribunal, it stands above the will of the contending parties. It is not conditioned by requests or professed intentions of the contending parties. It has an inherent power or faculté to proceed promptly to the determination of a breach of provisional measures, in the interests of the sound administration of justice. And recta ratio guides the sound administration of justice (la bonne administration de la justice). Recta ratio stands above the will. It guides international adjudication and secures its contribution to the rule of law (prééminence du droit) at international level.

The Court is entirely free to order the provisional measures that it considers necessary, so as to prevent the aggravation of the dispute or the occurrence of irreparable harm, even if the measures it decides to order are quite different from those requested by the contending parties" (paras. 42-43).

21. Judge Cançado Trindade then concludes, on this particular issue, that the ICJ may, after examining the circumstances of the cas d'espèce, proceed to order, sponte sua, provisional measures of protection. It may do so motu proprio, thus avoiding the aggravation of a situation. This determination ex officio of the occurrence of a breach of an Order of Provisional Measures of Protection is keeping in mind the preventive dimension in contemporary international law, thus avoiding further irreparable harm. In his understanding, "the Court does not have to wait until the completion of the proceedings as to the merits, especially if such proceedings are unreasonably prolonged, as, e.g., in the case of the Bosnian Genocide" (para. 44).

22. Judge Cançado Trindade then turns to the issue of the supervision of compliance with Provisional Measures of Protection (part VIII). The fact that the ICJ has, so far, very seldom proceeded to the determination of a breach of provisional measures in the subsequent proceedings as to the merits of the respective cases, in his view does not mean that it cannot do so promptly, by means of another Order of Provisional Measures. The Court, — he proceeds, — has monitoring powers as to compliance with provisional measures. If any unforeseeable circumstance may arise, the ICJ is "endowed with inherent powers or facultés to take the decision that ensures compliance with the provisional measures it has ordered, and thus the safeguard of the rights at stake" (para. 45). This enhances the preventive dimension of provisional measures, as well as the rule of law (prééminence du droit) at international level (para. 46).

23. The following point examined by Judge Cançado Trindade is that of the breach of provisional measures and reparation for damages (in its distinct forms) (part IX), — a point which has not passed unperceived in the present Judgment of the ICJ in the two joined cases of Certain Activities and of the Construction of a Road: the Court has addressed reparations in the two joined cases, — in particular its declaration (in the Certain Activities case) of a breach of provisional measures as an "adequate satisfaction" to the applicant, without the need to award costs. (In the joined case of Construction of a Road, its declaration of breach of the obligation to conduct an environmental impact assessment has likewise provided adequate satisfaction to the applicant).

24. The grant of this form of reparation (satisfaction) in the two joined cases is necessary and reassuring. Judge Cançado Trindade adds that, the fact that the ICJ did not establish a breach of provisional measures nor did it indicate new provisional measures already in its Order of 16.07.2013 (as it should, for the reasons explained in his Dissenting Opinion appended thereto), and only did so in its subsequent Order of 22.11.2013, gives weight to its decision not to award costs. After all, — he proceeds, — "the prolongation of the proceedings (as to provisional measures) was due to the hesitation of the Court itself. Accordingly, the relevant issue here is, thus, reparation (rather than costs of hearings) for breach of Provisional Measures of Protection" (para. 50).

25. In effect, "breach and duty of reparation come together"; as he pointed out in his Separate Opinion in the A.S. Diallo case (Guinea versus D.R. Congo, reparations, Judgment of 19.06.2012), "the duty of reparation has deep historical roots, going back to the origins of the law of nations, and marking presence in the legacy of the 'founding fathers' of our discipline" (para. 51). The duty of reparation, — Judge Cançado Trindade adds, — is "widely acknowledged as one of general or customary international law", as "the prompt and indispensable complement of

an international wrongful act, so as to cease all the consequences ensuing therefrom, and to secure respect for the international legal order". Breach and duty of reparation "form an indissoluble whole" (para. 51). And he concludes, on this particular issue, that

> "The interrelationship between breach and duty of reparation marks presence also in the realm of the autonomous legal regime of Provisional Measures of Protection. A breach of a provisional measure promptly generates the duty to provide reparation for it. It is important, for provisional measures to achieve their plenitude (within their legal regime), to remain attentive to reparations — in their distinct forms — for their breach. Reparations (to a greater extent than costs) for the autonomous breach of Provisional Measures of Protection are a key element for the consolidation of the autonomous legal regime of Provisional Measures of Protection" (para. 52).

26. Judge Cançado Trindade then draws attention to due diligence, and the interrelatedness between the principle of prevention and the precautionary principle (part X). These are elements which marked presence in the Judgment the ICJ has just adopted, in the two joined cases of Certain Activities Carried out by Nicaragua in the Border Area and of the Construction of a Road in Costa Rica along the San Juan River, just as they did in an earlier Latin American case, that of the Pulp Mills on the River Uruguay (2010), opposing Argentina to Uruguay (paras. 53-54): "while the principle of prevention assumes that risks can be objectively assessed so as to avoid damage, the precautionary principle assesses risks in face of uncertainties, taking into account the vulnerability of human beings and the environment, and the possibility of irreversible harm" (para. 55).

27. He then ponders that, "[u]nlike the positivist belief in the certainties of scientific knowledge", the precautionary principle "is geared to the duty of due diligence, in face of scientific uncertainties; precaution is thus, nowadays, more than ever, needed". It is "not surprising that some environmental law Conventions give expression to both the principle of prevention and the precautionary principle, acknowledging the link between them, providing the foundation of the duty to conduct an environmental impact assessment", — as upheld by the ICJ in the joined case of the Construction of a Road (para. 56). In the present Judgment, — he continues, — the Court, addressing the requirement of due diligence in order to prevent significant transboundary environmental harm. It focused on the undertaking of an environmental impact assessment "in the wider realm of general international law" (para. 57).

28. Judge Cançado Trindade then endeavours to detect the path towards the progressive development of provisional measures of protection (part XI), which he regards as the main lesson to be learned from the adjudication of the cas d'espèce, the joined case of Certain Activities. The conformation of an autonomous legal regime of Provisional Measures of Protection, with all its elements and implications, is to be further developed. As he had already warned in his previous Dissenting Opinion in the ICJ's Order of 16.07.2013 in the present two joined cases of Certain Activities and of the Construction of a Road, wherein the Court decided not to indicate new provisional measures, nor to modify the provisional measures indicated in its previous Order of 08.03.2011, and he deems it fit here to reiterate:

> "My thesis, in sum, is that provisional measures, endowed with a conventional basis, — such as those of the ICJ (under Article 41 of the Statute), — are also endowed with autonomy, have a legal regime of their own, and non-compliance with them generates the responsibility of the State, entails legal consequences, without prejudice of the examination and resolution of the concrete cases as to the merits.

> (...) Provisional measures of protection generate obligations (of prevention) for the States concerned, which are distinct from the obligations which emanate from the Judgments of the Court as to the merits (and reparations) of the respective cases. This ensues from their autonomous legal regime, as I conceive it. There is, in my perception, pressing need nowadays to refine and to develop conceptually this autonomous legal regime (...).
>
> (...) [T]he matter before the Court calls for a more pro-active posture on its part, so as not only to settle the controversies filed with it, but also to tell what the Law is (juris dictio), and thus to contribute effectively to the avoidance or prevention of irreparable harm in situations of urgency, to the ultimate benefit of all subjects of international law, — States as well as groups of individuals, and simples particuliers. After all, the human person (living in harmony in her natural habitat) occupies a central place in the new jus gentium of our times" (cit. in para. 59).

29. Judge Cançado Trindade adds that the rights protected by Provisional Measures of Protection are not necessarily the same as those pertaining to the merits of the case at issue; and the obligations ensuing from Provisional Measures of Protection are distinct from, and additional to, the ones that may derive later from the Court's subsequent decision as to the merits (para. 61). In case of a breach of a provisional measure of protection, "the notion of victim of a harm emerges also in the framework of such provisional measures; irreparable damages can, by that breach, occur in the present context of prevention" (para. 61). This being so, the determination of such breach "does not need to wait for the conclusion of the proceedings as to the merits of the case at issue, particularly if such proceedings are unduly prolonged" (para. 63).

30. Furthermore, "the determination of their breach is not conditioned by the existence of a request to this effect by the State concerned"; the Court, — he concludes on the present point, — "is fully entitled to proceed promptly to the determination of their breach sponte sua, ex officio, in the interests of the sound administration of justice (la bonne administration de la justice)" (para. 64). The refinement of the autonomous legal regime of Provisional Measures of Protection (encompassing reparation in its distinct forms, and eventually costs) "can clarify further this domain of international law marked by prevention and the duty of due diligence, and can thus foster the progressive development of those measures in the contemporary law of nations, faithful to their preventive dimension, to the benefit of all the justiciables" (para. 66). In doing so, international case-law seems to be preceding legal doctrine (para. 66).

31. In the last part (XII) of his Separate Opinion, in presenting a recapitulation of all his arguments, Judge Cançado Trindade ponders that Provisional Measures of Protection provide, as just seen, "a fertile ground for reflection at the juridico-epistemological level. Time and law are here ineluctably together, as in other domains of international law" (para. 67). Provisional measures underline the preventive dimension, "growing in clarity, in contemporary international law". Provisional measures "have undergone a significant evolution, but there remains a long way to go for them to reach their plenitude" (para. 67).

Separate opinion of Judge Donoghue

Judge Donoghue considers that States have an obligation under customary international law to exercise due diligence in preventing significant transboundary environmental harm. This obligation of due diligence follows from the synthesis of basic principles of the international legal order, in particular, sovereign equality and territorial sovereignty. The measures that a State of origin must take to meet this due diligence obligation depend on the particular circumstances, and

can include environmental impact assessment, notification of potentially affected States and consultation with such States. However, Judge Donoghue does not consider that the Court is in a position to prescribe specific rules of customary international law regarding these three topics. As to notification and consultation, she also has misgivings about the precise formulation adopted by the Court.

Separate opinion of Judge Bhandari

In his separate opinion Judge Bhandari recalls that he has voted with the majority in finding that Costa Rica has violated international law by failing to produce an Environmental Impact Assessment (EIA) in relation to its comprehensive road project along the San Juan River. However, he laments the lack of clear guidelines concerning the requirements of an EIA under international law, and proceeds to recommend certain minimum requirements that, in his view, must be satisfied when conducting an EIA. He begins his analysis with an overview of modern trends and various bedrock principles in contemporary international environmental law, including: the principle of sustainable development; the principle of preventive action; global commons; the precautionary principle; the polluter pays principle; and the concept of transboundary harm. He then discusses how the requirement to conduct an EIA arises from these principles. The opinion further notes that at present the régime of international environmental law relating to the performance of EIAs is scattered throughout a patchwork of different international instruments, and ultimately fails to lay down certain minimum procedural and substantive requirements. By reference to the Espoo Convention and other authorities, Judge Bhandari endeavours to distil certain basic obligations relating to the conduct of an EIA that, he believes, ought to be incorporated into the canon of international environmental law. Finally, Judge Bhandari urges nations to come together to conclude an international treaty governing the minimum requirements of EIAs. Absent the creation of such a régime, he suggests that nations may wish to follow the suggestions contained in his opinion as "best practices" to be applied by nation States in discharging their duty to conduct a transboundary EIA.

Separate opinion of Judge Robinson

Judge Robinson's separate opinion explains the reasons for which he voted against the Court's rejection in paragraph 229 (7) of the Judgment of all other submissions made by the Parties. Judge Robinson is of the view that the Court should have explicitly determined Costa Rica's claim that Nicaragua breached Article 2 (4) of the United Nations Charter, rather than deciding, as the Judgment states, not to "dwell any further" on this submission "given that the unlawful character of these activities has already been established".

Article 2 (4) of the United Nations Charter prohibiting 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", is, in the Court's own words, "a cornerstone of the United Nations Charter". Given the foundational nature of the prohibition in the international legal order, as well as the role envisaged for the Court in upholding the Purposes of the United Nations Charter, the Court should play its part in strengthening respect for the prohibition on the use of force. In Judge Robinson's view, the Court should develop a practice of making an express and discrete finding on a claim that the prohibition of the use of force has been breached, unless it is of the opinion that the claim is patently unmeritorious or frivolous.

Judge Robinson interprets the "injury suffered by Costa Rica" discussed in paragraph 97, as incorporating <u>any potential</u> injury suffered by Costa Rica as a result of the breach of the use of force. He is unconvinced that it is possible to ensure that injury is remedied without an examination of the fact of and circumstances surrounding the potential breach. Judge Robinson is equally sceptical that, in the context of this case, reparation flowing from Nicaragua's breach of

territorial sovereignty may remedy any injury suffered as a result of breach of the prohibition of the use of force. The Court did not examine any equivalence between the two norms, which, in Judge Robinson's view, serve distinct functions and reflect overlapping but not identical concerns.

The Court's jurisprudence establishes that a State's actions must reach a certain threshold before they qualify as a an unlawful use of force. Assessing whether or not this threshold has been met requires an analysis of the gravity and the purpose of the allegedly unlawful measures. It is Judge Robinson's view that the evidence before the Court in this case shows that Nicaragua did breach the prohibition on the use of force.

Declaration of Judge Gevorgian

Judge Gevorgian explains in his declaration the reasons why he has voted against paragraph 1 of the dispositif, which provides that "Costa Rica has sovereignty over the 'disputed territory'". In his view, this finding of the Court — made in response to a claim brought by Costa Rica only when presenting its final submissions in the Certain Activities case — was not required in the circumstances of the case.

Judge Gevorgian shares the Court's refusal to delimit the course of the boundary in the "disputed territory" defined by the Court in its Orders for provisional measures rendered on 8 March 2011 and 22 November 2013. However, he finds problematic that the Court declares Costa Rica's sovereignty over an area whose limits are far from being clear. In Judge Gevorgian's opinion, the Court should have avoided such a finding for two main reasons.

First, the Parties did not address the issue of the precise location of the mouth of the river or of the boundary at the coast, as the majority rightly indicates in paragraph 70 of the Judgment. Therefore, Judge Gevorgian considers that the Court was not in a position to fully address Costa Rica's final submission.

Second, the geography of the disputed area — in which important geomorphological alterations have occurred in the last century — is highly unstable. Thus, according to Judge Gevorgian, the Court's conclusion on sovereignty over the disputed territory may become the source of future disagreement between the Parties.

Declaration of Judge ad hoc Guillaume

Judge ad hoc Guillaume agrees with a number of the findings reached by the Court. He has, however, expressed his disagreement on a point in the case concerning Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua). He notes that this case originally related solely to those activities, and that all Costa Rica was seeking was judgment against Nicaragua for having violated its sovereignty over the northern part of Isla Portillos. It was only at the close of the oral proceedings that, for the first time, Costa Rica asked the Court to find that it had sovereignty over the disputed territory. The Court has so decided, while failing to determine in full the limits of that territory.

Judge ad hoc Guillaume recalls that, according to the Court's jurisprudence, the subject-matter of a dispute is defined by the claims submitted in the application, as is provided in Article 40 of the Statute. Additional claims are admissible only if they fall within the scope of that subject-matter. The sole exception to that rule is if the new claims were implicit in the application, or arose directly out of the question which was the subject-matter of the application (Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II), p. 656, citing Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992, p. 267).

Judge ad hoc Guillaume points out that Costa Rica's new claims have transformed a case concerning State responsibility into a territorial dispute. He takes the view that this is not possible, and accordingly concludes that the new claims were out of time and therefore inadmissible. For this reason, he voted against point 1 of the operative clause.

Judge ad hoc Guillaume has also clarified his thinking on a number of other points. As regards freedom of navigation on the San Juan River, he observes that Costa Rica cited five incidents which had allegedly infringed that freedom. Judge ad hoc Guillaume notes that the Court accepted only two of these as proven. He believes that two incidents over a period of several years, regrettable though they may be, cannot be regarded as indicative of Nicaragua's overall conduct.

In the second case, that concerning the Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judge ad hoc Guillaume notes that this road was not only constructed without a prior environmental impact assessment, but had caused real harm to Nicaragua. However, Judge ad hoc Guillaume notes that Nicaragua failed to show that such harm was "significant". Since this jurisprudential threshold had not been reached, Judge ad hoc Guillaume finds that Costa Rica's responsibility has not been engaged.

Separate opinion of Judge ad hoc Dugard

The obligation to conduct an environmental impact assessment in respect of an activity that poses a risk of significant transboundary harm featured prominently in both Certain Activities and Construction of a Road. The Court chose to describe this obligation as one of "general international law", but a scrutiny of this term suggests that it is almost synonymous with "customary international law". The obligation to conduct an environmental impact assessment is an obligation independent from the duty of due diligence, which is the standard of conduct required of a State when carrying out such an assessment. Although it has been suggested that the environmental impact assessment obligation has no content, an analysis of the Court's decision established the presence of certain rules inherent in such an obligation.

The Court, relying on the principles it had expounded in respect of the content of the environmental impact assessment obligation, rightly found that Costa Rica had breached its obligation to conduct an environmental impact assessment by failing to conduct such an assessment when it embarked on the construction of a road along the San Juan River. The circumstances showed clearly that the road posed a risk of significant harm to Nicaragua's environment.

The Court's handling of the complaint of Costa Rica that Nicaragua had failed to conduct an adequate environmental impact assessment when it planned its programme to improve the navigability of the San Juan River by dredging was less satisfactory. I therefore dissented on this issue.

Without examining the factual situation pertaining to Nicaragua's dredging programme when it was planned in 2006 and the risk it posed to Costa Rica's wetland, the Court tersely declared that the reports submitted to the Court and the testimony of witnesses called by both Parties led it to conclude that Nicaragua's dredging programme planned in 2006 was not such as to give rise to a risk of significant transboundary harm. A close examination of the most relevant reports and the testimony of witnesses led me to conclude that they did not substantiate the Court's factual finding. In my opinion the evidence showed that the dredging of the San Juan posed a risk to Costa Rica's wetland protected by the Ramsar Convention. The evidence of one of Nicaragua's own witnesses that the fact that an activity that took place in the vicinity of a wetland protected by the Ramsar Convention was sufficient reason alone to require an environmental impact assessment was particularly compelling and seems to have been ignored by the Court. A further objection to the Court's handling of this issue is that it failed to apply the principles that it had followed in dealing with Nicaragua's complaint against Costa Rica's building of the road. There was a clear

contradiction between the reasoning it applied in the two cases. Finally, an analysis of the provisions of the Ramsar Convention suggested that Nicaragua was obliged to conduct an environmental impact assessment in this case.

Undoubtedly the road Costa Rica built along the San Juan River posed a greater risk of environmental harm to the river than did Nicaragua's dredging programme to Costa Rica's wetland. This was, however, no justification for the faulty fact-finding and contradictory reasoning of the Court.

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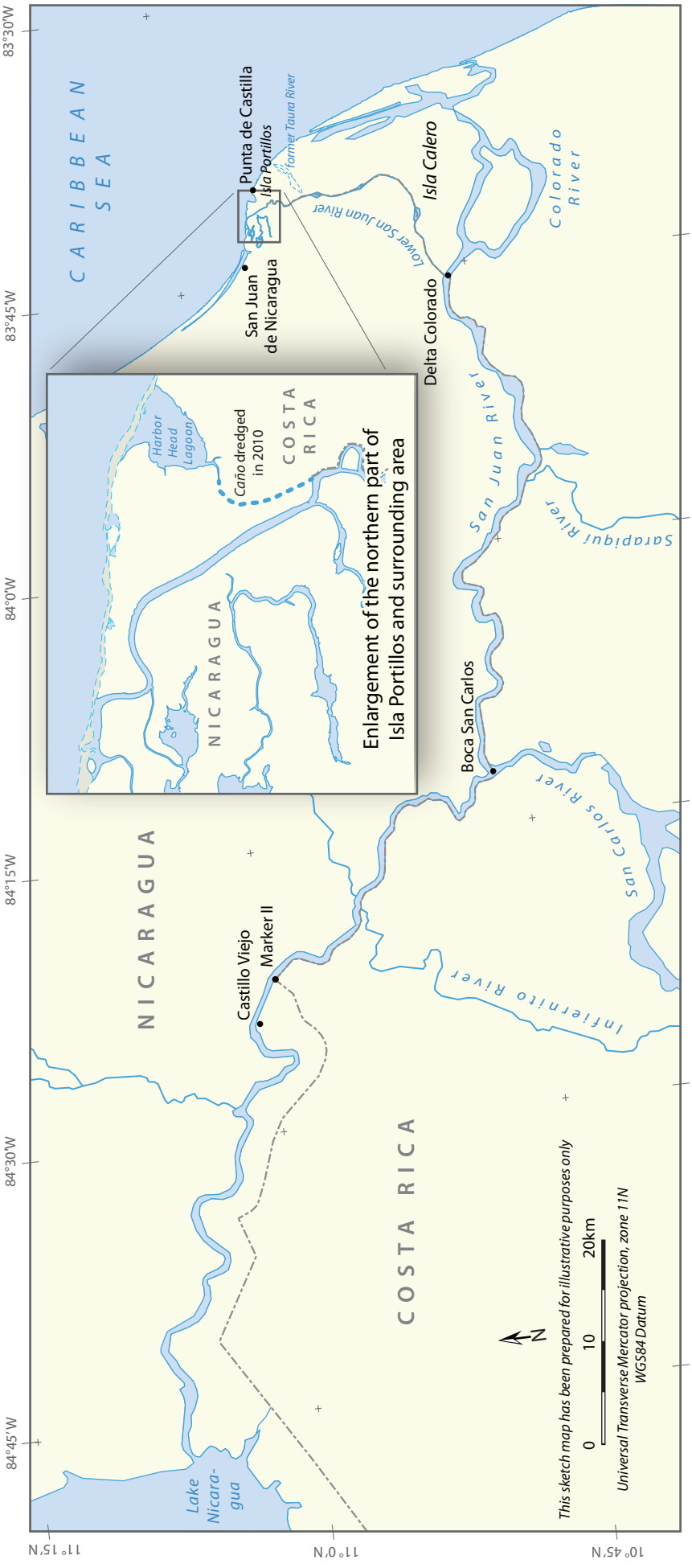
Sketch-map No. 1: Geographical context



Sketch-map No. 2:
Route 1856 Juan Rafael Mora Porras