COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

CERTAINES ACTIVITÉS MENÉES PAR LE NICARAGUA DANS LA RÉGION FRONTALIÈRE

(COSTA RICA c. NICARAGUA)

ET

CONSTRUCTION D'UNE ROUTE AU COSTA RICA LE LONG DU FLEUVE SAN JUAN

(NICARAGUA c. COSTA RICA)

ARRÊT DU 16 DÉCEMBRE 2015

2015

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CERTAIN ACTIVITIES CARRIED OUT BY NICARAGUA IN THE BORDER AREA

(COSTA RICA *v.* NICARAGUA)

AND

CONSTRUCTION OF A ROAD IN COSTA RICA ALONG THE SAN JUAN RIVER

(NICARAGUA *v.* COSTA RICA)

JUDGMENT OF 16 DECEMBER 2015

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* *

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* *

Issues in the Costa Rica *v.* Nicaragua *case.*
Sovereignty over the disputed territory — Definition of "disputed territory" — Description of boundary in 1858 Treaty, Cleveland and Alexander Awards — Articles II and VI of 1858 Treaty to be read together — Sovereignty over right bank of San Juan River as far as its mouth attributed to Costa Rica — Reference to "first channel met" in first Alexander Award — Satellite and aerial images

insufficient to prove caño *existed prior to dredging in 2010 — Affidavits of Nicaraguan State officials also insufficient — Significance of map evidence and* effectivités *limited —* Effectivités *cannot affect title to sovereignty resulting from 1858 Treaty and Cleveland and Alexander Awards — Existence of* caño *prior to 2010 contradicted by other evidence — Nicaragua's claim would prevent Costa Rica from enjoying territorial sovereignty over the right bank of the San Juan as far as its mouth — Right bank of the* caño *not part of the boundary — Sovereignty over disputed territory belongs to Costa Rica.*

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*

Alleged violations of international environmental law.

Procedural obligations — Obligation to conduct environmental impact assessment concerning activities that risk causing significant transboundary harm — Content of environmental impact assessment depends on specific circumstances — If assessment confirms risk of significant transboundary harm, State planning the activity is required, in conformity with due diligence obligation, to notify and consult with potentially affected State, where necessary to determine appropriate measures to prevent or mitigate risk — Nicaragua's dredging programme did not give rise to risk of significant transboundary harm — Nicaragua not required to carry out transboundary environmental impact assessment — No obligation under general international law to notify and consult since no risk of significant transboundary harm — No conventional obligation to notify and consult in present case — Court concludes that no procedural obligations breached by Nicaragua.

Substantive obligations — Specific obligations concerning San Juan River in 1858 Treaty as interpreted by Cleveland Award — Customary law obligation to exercise due diligence to avoid causing significant transboundary harm — No need to discuss relationship between these obligations because no harm established — No proof that dredging of Lower San Juan harmed Costa Rican wetland — Not shown that dredging programme caused significant reduction in flow of Colorado River — Any diversion of water due to dredging did not seriously impair navigation on Colorado River or otherwise cause harm to Costa Rica — Court concludes that no substantive obligations breached by Nicaragua.

*

Compliance with provisional measures — Nicaragua breached its obligations under Order of 8 March 2011 by excavating two caños *and establishing a military presence in disputed territory in 2013 — Breach of obligations under Court's Order of 22 November 2013 not established.*

*

Rights of navigation — Claim is admissible — Article VI of the 1858 Treaty — Court's Judgment in Dispute regarding Navigational and Related Rights *— No need for the Court to interpret Nicaraguan Decree No. 079-2009 — Five instances of violations of navigational rights raised by Costa Rica — Two of the five instances examined — Court concludes Nicaragua breached Costa Rica's navigational rights pursuant to the 1858 Treaty — Not necessary for Court to consider the other incidents invoked by Costa Rica.*

*

Reparation — Requests to order repeal of Decree No. 079-2009 and cessation of dredging activities cannot be granted — Declaration of breach provides adequate satisfaction for non-material injury suffered — No need for guarantees of non-repetition — Costa Rica entitled to compensation for material damage — Parties should engage in negotiation on amount of compensation — Failing agreement within 12 months, Court will determine amount at request of one of the Parties — Award of costs under Article 64 of the Statute not appropriate.

* *

Issues in the Nicaragua *v.* Costa Rica *case.*

Procedural obligations.

Alleged breach of obligation to carry out environmental impact assessment — Due diligence obligation requires State to ascertain whether a proposed activity entails risk of significant transboundary harm — Environmental impact assessment required when risk is present — No evidence that Costa Rica determined whether environmental impact assessment was necessary prior to constructing the road — Large scale of road project — Proximity to San Juan River on Nicaraguan territory — Risk of erosion due to deforestation — Possibility of natural disasters in area — Presence of two wetlands of international importance in area — Construction of road carried a risk of significant transboundary harm — No emergency justifying immediate construction of road — Court need not decide whether there is, in international law, an emergency exemption from obligation to carry out environmental impact assessment — Costa Rica under obligation to conduct environmental impact assessment — Obligation requires ex ante *evaluation of risk of significant transboundary harm — Environmental Diagnostic Assessment and other studies by Costa Rica were* post hoc *assessments — Costa Rica has not complied with obligation to carry out environmental impact assessment.*

Alleged breach of Article 14 of Convention on Biological Diversity — No violation established.

Alleged breach of obligation to notify and consult — General international law duty to notify and consult does not call for examination because Costa Rica has not carried out environmental impact assessment — 1858 Treaty did not impose obligation on Costa Rica to notify Nicaragua of construction of road — No procedural obligations arose under Ramsar Convention.

*

Substantive obligations.

Alleged breach of obligation to exercise due diligence to prevent causing significant transboundary harm — Modelling and estimates by experts suggest sediment due to construction of road amounts to at most 2 per cent of San Juan River's total load — Actual measurements provided to Court do not indicate that road significantly impacted sediment levels in river — Increase in sediment levels as a result of construction of road did not in and of itself cause significant transboundary harm — No significant harm to river's morphology, to navigation or to Nicaragua's dredging programme established — No proof of significant harm to river's ecosystem or water quality — Arguments concerning other alleged harm fail.

Alleged breaches of treaty obligations — No violation established.

Claim concerning violation of territorial integrity and sovereignty — No violation established.

*

Reparation — Declaration of wrongful conduct in respect of obligation to conduct environmental impact assessment is the appropriate measure of satisfaction — No grounds to order Costa Rica to cease continuing wrongful acts — Restitution and compensation not appropriate remedies in absence of significant harm — No need to appoint expert or committee to evaluate harm — Nicaragua's request to order Costa Rica not to undertake future development without an environmental impact assessment dismissed.

JUDGMENT

Present: *President* ABRAHAM; *Vice-President* YUSUF; *Judges* OWADA, TOMKA, BENNOUNA, CANÇADO TRINDADE, GREENWOOD, XUE, DONOGHUE, GAJA, SEBUTINDE, BHANDARI, ROBINSON, GEVORGIAN; *Judges* ad hoc GUILLAUME, DUGARD; *Registrar* COUVREUR.

In the case concerning *Certain Activities Carried Out by Nicaragua in the Border Area*, and in the joined case (see paragraph 19 below) concerning *Construction of a Road in Costa Rica along the San Juan River*,

between

the Republic of Costa Rica,

represented by

H.E. Mr. Manuel A. González Sanz, Minister for Foreign Affairs and Worship of Costa Rica;

H.E. Mr. Edgar Ugalde Alvarez, Ambassador on Special Mission,

as Agent;

H.E. Mr. Sergio Ugalde, Ambassador of Costa Rica to the Kingdom of the Netherlands, member of the Permanent Court of Arbitration,

as Co-Agent, Counsel and Advocate;

Mr. Marcelo Kohen, Professor of International Law at the Graduate Institute of International and Development Studies, Geneva, member of the Institut de droit international,
Mr. Samuel Wordsworth, Q.C., member of the English Bar, member of the Paris Bar, Essex Court Chambers,
Mr. Arnoldo Brenes, Senior Adviser to the Ministry of Foreign Affairs and Worship of Costa Rica, member of the Costa Rican Bar,
Ms Kate Parlett, Solicitor admitted in Queensland, Australia, and in England and Wales,
Ms Katherine Del Mar, member of the English Bar, 4 New Square, Lincoln's Inn,

as Counsel and Advocates;

Mr. Simon Olleson, member of the English Bar, 13 Old Square Chambers,

as Counsel;

Mr. Ricardo Otárola, Adviser to the Ministry of Foreign Affairs and Worship of Costa Rica,
Ms Shara Duncan, Adviser to the Ministry of Foreign Affairs and Worship of Costa Rica,
Mr. Gustavo Campos, Minister Counsellor and Consul General of Costa Rica to the Kingdom of the Netherlands,
Mr. Rafael Sáenz, Minister Counsellor at the Costa Rican Embassy in the Kingdom of the Netherlands,
Ms Ana Patricia Villalobos, Official at the Ministry of Foreign Affairs and Worship of Costa Rica,

as Assistant Counsel;

Ms Elisa Rivero, Administrative Assistant at the Ministry of Foreign Affairs and Worship of Costa Rica,

as Assistant,

and

the Republic of Nicaragua,

represented by

H.E. Mr. Carlos José Argüello Gómez, Ambassador of Nicaragua to the Kingdom of the Netherlands,

as Agent and Counsel;

Mr. Stephen C. McCaffrey, Professor of International Law at the University of the Pacific, McGeorge School of Law, Sacramento, former member and former Chair of the International Law Commission,
Mr. Alain Pellet, Professor at the University Paris Ouest, Nanterre-La Défense, former member and former Chair of the International Law Commission, member of the Institut de droit international,
Mr. Paul S. Reichler, Attorney-at-Law, Foley Hoag LLP, member of the Bars of the United States Supreme Court and the District of Columbia,
Mr. Andrew B. Loewenstein, Attorney-at-Law, Foley Hoag LLP, member of the Bar of the Commonwealth of Massachusetts,

as Counsel and Advocates;

Mr. César Vega Masís, Deputy Minister for Foreign Affairs, Director of Juridical Affairs, Sovereignty and Territory, Ministry of Foreign Affairs of Nicaragua,
Mr. Walner Molina Pérez, Juridical Adviser, Ministry of Foreign Affairs of Nicaragua,
Mr. Julio César Saborio, Juridical Adviser, Ministry of Foreign Affairs of Nicaragua,

as Counsel;

Mr. Edgardo Sobenes Obregon, Counsellor, Embassy of Nicaragua in the Kingdom of the Netherlands,
Ms Claudia Loza Obregon, First Secretary, Embassy of Nicaragua in the Kingdom of the Netherlands,
Mr. Benjamin Samson, Researcher, Centre de droit international de Nanterre (CEDIN), University of Paris Ouest, Nanterre-La Défense,
Ms Cicely O. Parseghian, Attorney-at-Law, Foley Hoag LLP, member of the Bar of the Commonwealth of Massachusetts,
Mr. Benjamin K. Guthrie, Attorney-at-Law, Foley Hoag LLP, member of the Bar of the Commonwealth of Massachusetts,
Mr. Ofilio J. Mayorga, Attorney-at-Law, Foley Hoag LLP, member of the Bars of the Republic of Nicaragua and New York,

as Assistant Counsel;

Mr. Danny K. Hagans, Principal Earth Scientist at Pacific Watershed Associates, Inc.,
Mr. Robin Cleverly, Geographical and Technical Consultant,
Ms Blanca P. Ríos Touma, Ph.D., Assistant Professor at Universidad Tecnológica Indoamérica in Quito, Ecuador,
Mr. Scott P. Walls, Master of Landscape Architecture — Environmental Planning, Sole Proprietor and Fluvial Geomorphologist at Scott Walls Consulting, Ecohydrologist at cbec ecoengineering, Inc., and Chief Financial Officer and Project Manager at International Watershed Partners,

Ms Victoria Leader, Geographical and Technical Consultant,

as Scientific Advisers and Experts,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. By an Application filed in the Registry of the Court 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 referred to as the "*Costa Rica* v. *Nicaragua* case"). In that Application, Costa Rica alleges in particular that Nicaragua invaded and occupied Costa Rican territory, and that it dug a channel thereon; it further reproaches Nicaragua with conducting works (notably dredging of the San Juan River) in violation of its international obligations.

2. In its Application, Costa Rica invokes as a basis of the jurisdiction of the Court Article XXXI of the American Treaty on Pacific Settlement adopted at Bogotá on 30 April 1948 (hereinafter the "Pact of Bogotá"). In addition, Costa Rica seeks to found the jurisdiction of the Court on the declaration it made on 20 February 1973 under Article 36, paragraph 2, of the Statute, as well as on the declaration which Nicaragua made on 24 September 1929 (and amended on 23 October 2001) under Article 36 of the Statute of the Permanent Court of International Justice and which is deemed, pursuant to Article 36, paragraph 5, of the Statute of the present Court, for the period which it still has to run, to be acceptance of the compulsory jurisdiction of this Court.

3. On 18 November 2010, having filed its Application, Costa Rica also submitted a request for the indication of provisional measures, pursuant to Article 41 of the Statute and Articles 73, 74 and 75 of the Rules of Court.

4. In accordance with Article 40, paragraph 2, of the Statute, the Registrar communicated a signed copy of the Application forthwith to the Government of Nicaragua; and, under paragraph 3 of that Article, all States entitled to appear before the Court were notified of the filing of the Application.

5. Pursuant to the instructions of the Court under Article 43 of the Rules of Court, the Registrar addressed to States parties to the Convention on Wetlands of International Importance especially as Waterfowl Habitat, signed at Ramsar on 2 February 1971 (hereinafter the "Ramsar Convention"), the notification provided for in Article 63, paragraph 1, of the Statute.

6. Since the Court included no judge of the nationality of the Parties upon the Bench, each of them, in exercise of the right conferred by Article 31, paragraph 3, of the Statute, chose a judge *ad hoc* in the case. Costa Rica chose Mr. John Dugard and Nicaragua chose Mr. Gilbert Guillaume.

7. By an Order of 8 March 2011 (hereinafter the "Order of 8 March 2011"), the Court, having heard the Parties, indicated provisional measures addressed to both Parties. The Court also directed each Party to inform it about compliance with the provisional measures. By various communications, the Parties each notified the Court of the measures they had taken with reference to the aforementioned Order and made observations on the compliance by the other Party with the said Order.

8. By an Order of 5 April 2011, the Court fixed 5 December 2011 and 6 August 2012 as the respective time-limits for the filing in the case of a Memo-

rial by Costa Rica and a Counter-Memorial by Nicaragua. The Memorial and the Counter-Memorial were filed within the time-limits thus prescribed.

9. By an Application filed in the Registry on 22 December 2011, Nicaragua instituted proceedings against Costa Rica in the case concerning *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)* (hereinafter referred to as 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.

10. In its Application, Nicaragua invokes Article XXXI of the Pact of Bogotá as a basis for the jurisdiction of the Court. In addition, Nicaragua seeks to found the jurisdiction of the Court on the aforementioned declarations accepting the jurisdiction of the Court (see paragraph 2 above).

11. In accordance with Article 40, paragraph 2, of the Statute, the Registrar communicated a signed copy of the Application forthwith to the Government of Costa Rica; and, under paragraph 3 of that Article, all States entitled to appear before the Court were notified of the filing of the Application.

12. Pursuant to the instructions of the Court under Article 43 of its Rules, the Registrar addressed the notifications provided for in Article 63, paragraph 1, of the Statute, to States parties to the Ramsar Convention, to the 1992 Convention on Biological Diversity and to the 1992 Convention for the Conservation of the Biodiversity and Protection of Priority Wilderness Areas in Central America.

13. Since the Court included no judge of the nationality of the Parties upon the Bench, each of them, in exercise of the right conferred by Article 31, paragraph 3, of the Statute, chose a judge *ad hoc* in the case. Nicaragua chose Mr. Gilbert Guillaume and Costa Rica chose Mr. Bruno Simma.

14. By an Order of 23 January 2012, the Court fixed 19 December 2012 and 19 December 2013 as the respective time-limits for the filing of a Memorial by Nicaragua and a Counter-Memorial by Costa Rica. The Memorial and the Counter-Memorial were filed within the time-limits thus prescribed.

15. In the Counter-Memorial it filed in the *Costa Rica* v. *Nicaragua* case on 6 August 2012, Nicaragua submitted four counter-claims. In its first counter-claim, it requested the Court to declare that "Costa Rica bears responsibility to Nicaragua" for "the impairment and possible destruction of navigation on the San Juan River caused by the construction of [the] road". In its second counter-claim, it asked the Court to declare that it "has become the sole sovereign over the area formerly occupied by the Bay of San Juan del Norte". In its third counter-claim, it requested the Court to find that "Nicaragua has a right to free navigation on the Colorado . . . until the conditions of navigability existing at the time the 1858 Treaty [of Limits] was concluded are re-established". Finally, in its fourth counter-claim, Nicaragua alleged that Costa Rica violated the provisional measures indicated by the Court in its Order of 8 March 2011.

16. At a meeting held by the President with the representatives of the Parties on 19 September 2012, the Parties agreed not to request the Court's authorization to file a Reply and a Rejoinder in the *Costa Rica* v. *Nicaragua* case. At the

same meeting, the Co-Agent of Costa Rica raised certain objections to the admissibility of the first three counter-claims contained in the Counter-Memorial of Nicaragua. He confirmed these objections in a letter of the same day.

By letters dated 28 September 2012, the Registrar informed the Parties that the Court had fixed 30 November 2012 and 30 January 2013 as the respective time-limits for the filing of written observations by Costa Rica and Nicaragua on the admissibility of the latter's first three counter-claims. Both Parties filed their observations within the time-limits thus prescribed.

17. By letters dated 19 December 2012, which accompanied its Memorial in the *Nicaragua* v. *Costa Rica* case, Nicaragua requested the Court to "decide *proprio motu* whether the circumstances of the case require[d] the indication of provisional measures" and to consider whether there was a need to join the proceedings in the *Nicaragua* v. *Costa Rica* and *Costa Rica* v. *Nicaragua* cases.

By a letter dated 15 January 2013, the Registrar, acting on the instructions of the President, asked Costa Rica to inform the Court, by 18 February 2013 at the latest, of its views on both questions. Costa Rica communicated its views within the time-limit thus prescribed.

18. By letters dated 11 March 2013, the Registrar informed the Parties that the Court was of the view that the circumstances of the *Nicaragua* v. *Costa Rica* case, as they presented themselves to it at that time, were not such as to require the exercise of its power under Article 75 of the Rules of Court to indicate provisional measures *proprio motu*.

19. By two separate Orders dated 17 April 2013, the Court joined the proceedings in the *Costa Rica* v. *Nicaragua* and *Nicaragua* v. *Costa Rica* cases.

20. By a communication of the same date, Mr. Simma, who had been chosen by Costa Rica to sit as judge *ad hoc* in the *Nicaragua* v. *Costa Rica* case, informed the Court of his decision to resign from his functions, following the above-mentioned joinder of proceedings. Thereafter, Judges Guillaume and Dugard sat as judges *ad hoc* in the joined cases (see paragraphs 6 and 13 above).

21. By an Order of 18 April 2013, the Court ruled on the admissibility of Nicaragua's counter-claims in the *Costa Rica* v. *Nicaragua* case. It concluded that there was no need for it to adjudicate on the admissibility of Nicaragua's first counter-claim as such. It found the second and third counter-claims inadmissible as such. The Court also found that there was no need for it to entertain the fourth counter-claim as such, and that the Parties might take up any question relating to the implementation of the provisional measures indicated by the Court in its Order of 8 March 2011 in the further course of the proceedings.

22. On 23 May 2013, Costa Rica, with reference to Article 41 of the Statute and Article 76 of the Rules of Court, filed with the Registry a request for the modification of the Order indicating provisional measures made on 8 March 2011. In its written observations thereon, dated 14 June 2013, Nicaragua asked the Court to reject Costa Rica's request, while in its turn requesting the Court to otherwise modify the Order of 8 March 2011 on the basis of Article 76 of the Rules of Court. Costa Rica communicated to the Court its written observations on Nicaragua's request on 20 June 2013.

23. By an Order of 16 July 2013, the Court found that "the circumstances, as they now present themselves to the Court, are not such as to require the exercise of its power to modify the measures indicated in the Order of 8 March 2011". The Court however reaffirmed the said provisional measures.

24. On 24 September 2013, Costa Rica, with reference to Article 41 of the Statute and Articles 73, 74 and 75 of the Rules of Court, filed with the Registry a request for the indication of new provisional measures in the *Costa Rica* v. *Nicaragua* case.

25. On 11 October 2013, Nicaragua filed with the Registry a request for the indication of provisional measures in the *Nicaragua* v. *Costa Rica* case. Nicaragua suggested that its request be heard concurrently with Costa Rica's request for the indication of new provisional measures in the *Costa Rica* v. *Nicaragua* case, at a single set of oral proceedings. By letter of 14 October 2013, Costa Rica objected to Nicaragua's suggestion. By letters dated 14 October 2013, the Registrar informed the Parties that the Court had decided that it would consider the two requests separately.

26. By an Order of 22 November 2013 rendered in the *Costa Rica* v. *Nicaragua* case, the Court, having heard the Parties, reaffirmed the provisional measures indicated in its Order of 8 March 2011 and indicated new provisional measures addressed to both Parties. The Court also directed each Party to inform it, at three-month intervals, as to compliance with the provisional measures. By various communications, each of the Parties notified the Court of the measures they had taken with reference to the aforementioned Order and made observations on the compliance by the other Party with the said Order.

27. By an Order of 13 December 2013 rendered in the *Nicaragua* v. *Costa Rica* case, the Court, after hearing the Parties, found "that the circumstances, as they now present themselves to the Court, are not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures".

28. At a meeting held by the President with the representatives of the Parties on 22 January 2014, Nicaragua requested the Court to authorize a second round of written pleadings in the *Nicaragua* v. *Costa Rica* case, while Costa Rica objected. By an Order of 3 February 2014, the Court authorized the submission of a Reply by Nicaragua and a Rejoinder by Costa Rica, and fixed 4 August 2014 and 2 February 2015 as the respective time-limits for the filing of those pleadings. The Reply of Nicaragua and the Rejoinder of Costa Rica were duly filed within the time-limits so prescribed.

29. By letters dated 2 April 2014, the Registrar informed the Parties that the Court, in accordance with Article 54, paragraph 1, of the Rules of Court, had fixed 3 March 2015 as the date for the opening of the oral proceedings in the joined cases.

30. In a letter dated 4 August 2014, which accompanied its Reply in the *Nicaragua* v. *Costa Rica* case, Nicaragua suggested that the Court appoint "a neutral expert on the basis of Articles 66 and 67 of the Rules". By letter of 14 August 2014, Costa Rica indicated that it was of the view "that there [was] no basis for the Court to exercise its power to appoint an expert as requested by Nicaragua".

31. By a letter dated 15 October 2014, Nicaragua requested that the opening of the oral proceedings in the joined cases be postponed until May 2015. On the basis that Costa Rica had stated, in its letter of 14 August 2014 referred to in the previous paragraph, that the evidence submitted by the Parties "w[ould] be sup-

plemented and completed" in Costa Rica's Rejoinder in the *Nicaragua* v. *Costa Rica* case, Nicaragua expressed the view that it would be "inadequate and inequitable for [it] to have less than one month to analyze and respond to Costa Rica's new scientific information and expert reports". By letter of 20 October 2014, Costa Rica opposed this request, arguing in particular that any delay in the Court hearing and adjudging the *Costa Rica* v. *Nicaragua* case would prejudice Costa Rica, that Nicaragua had sufficient time to analyse the Rejoinder and formulate its response before the commencement of the hearings, and that Nicaragua's request was belated. By letters dated 17 November 2014, the Registrar informed the Parties that the Court had decided to postpone the date for the opening of the oral proceedings in the joined cases until 14 April 2015.

32. By letters dated 5 December 2014, referring to the communications mentioned in paragraph 30 above, the Registrar informed the Parties that the Court would find it useful if, during the course of the hearings in the two cases, they could call the experts whose reports were annexed to the written pleadings, in particular Mr. Thorne and Mr. Kondolf. The Registrar also indicated that the Court would be grateful if, by 15 January 2015 at the latest, the Parties would make suggestions regarding the modalities of the examination of those experts. Such suggestions were received from Nicaragua within the time-limit indicated. By a letter dated 20 January 2015, Costa Rica commented on the suggestions of Nicaragua.

33. In a letter dated 2 February 2015, which accompanied its Rejoinder in the *Nicaragua* v. *Costa Rica* case, Costa Rica raised the possibility of a site visit to the "location of the Road". By a letter dated 10 February 2015, Nicaragua expressed its willingness to assist to the fullest possible extent in the organization "of such a visit at the location of the road and the San Juan de Nicaragua River". It also reiterated its proposal that the Court appoint an expert (see paragraph 30 above) to assess the construction of the road, and suggested that the expert be included in the Court's delegation for any site visit. By a letter dated 11 February 2015, Costa Rica commented on Nicaragua's letter of 10 February 2015, stating in particular that the appointment of an expert by the Court was unnecessary. By letters dated 25 February 2015, the Registrar informed the Parties that the Court had decided not to carry out a site visit.

34. By letters of the Registrar dated 4 February 2015, the Parties were informed that they should indicate to the Court, by 2 March 2015 at the latest, the names of the experts they intended to call, and communicate the other information required by Article 57 of the Rules of Court. The Parties were also instructed to provide the Court, by 16 March 2015 at the latest, with written statements of these experts (limited to a summary of the expert's own reports or to observations on other expert reports in the case file), and were informed that these would replace the examination-in-chief. In addition, the Court invited the Parties to come to an agreement as to the allocation of time for the cross-examination and re-examination of experts by 16 March 2015 at the latest.

By the same letters, the Registrar also notified the Parties of the following details regarding the procedure for examining the experts. After having made the solemn declaration required under Article 64 of the Rules of Court, the expert would be asked by the Party calling him to endorse his written statement. The other Party would then have an opportunity for cross-examination on the contents of the expert's written statement or his earlier reports. Re-examination would thereafter be limited to subjects raised in cross-examination. Finally, the judges would have an opportunity to put questions to the expert.

35. By letters dated 2 March 2015, the Parties indicated the names of the experts they wished to call at the hearings, and provided the other information concerning them required by Article 57 of the Rules of Court (see paragraph 34 above).

36. Under cover of a letter dated 3 March 2015, Costa Rica communicated to the Court a video which it wished to be included in the case file and presented at the hearings. By a letter dated 13 March 2015, Nicaragua stated that it had no objection to Costa Rica's request and presented certain comments on the utility of the video; it also announced that it would produce photographs in response. By letters dated 23 March 2015, the Registrar informed the Parties that the Court had decided to grant Costa Rica's request.

37. By letters dated 16 March 2015, the Parties communicated the written statements of the experts they intended to call at the hearings. Costa Rica also asked the Court to extend to 20 March 2015 the time-limit within which the Parties might transmit an agreement or their respective positions regarding the allocation of time for the cross-examination and re-examination of those experts, which was granted by the Court. However, since the Parties were unable to agree fully on this matter within the time-limit thus extended, the Registrar informed them, by letters of 23 March 2015, of the Court's decision in respect of the maximum time that could be allocated for the examinations. In this connection, the Parties were invited to indicate the order in which they wished to present their experts, and the precise amount of time they wished to reserve for the cross-examination of each of the experts called by the other Party, which they did by letters dated 30 March and 2 April 2015. By letters dated 10 April 2015, the Registrar communicated to the Parties the detailed schedule for the examination of the experts, as adopted by the Court.

38. By letters of 23 March 2015, the Registrar informed the Parties that, in relation to the *Nicaragua* v. *Costa Rica* case, the Court wished each of them to produce, by 10 April 2015 at the latest, a map showing the San Juan River and the road constructed by Costa Rica, and indicating the precise locations discussed in the key studies referred to in the written statements provided to the Court on 16 March 2015 (see paragraph 37 above). Under cover of letters dated 10 April 2015, Nicaragua and Costa Rica each provided the Court with printed and electronic versions of the maps they had prepared.

39. By a letter dated 23 March 2015, Nicaragua, as announced (see paragraph 36 above), communicated to the Court photographs that it wished to be included in the case file. By a letter dated 31 March 2015, Costa Rica informed the Court that it had no objection to Nicaragua's request. By letters dated 8 April 2015, the Registrar informed the Parties that the Court had decided to grant Nicaragua's request.

40. By a letter dated 13 April 2015, Costa Rica requested that Nicaragua file a copy of the report of Ramsar Advisory Mission No. 72 in relation to Nicaragua's *Refugio de Vida Silvestre Río San Juan* (San Juan River Wildlife Refuge). By a letter dated 16 April 2015, Nicaragua indicated that it was in possession only of a draft report, in Spanish, which it enclosed with its letter. Subsequently, under cover of a letter dated 24 April 2015, Nicaragua transmitted to the Court the comments it had submitted on 30 November 2011 on the draft report of the Ramsar Advisory Mission (original Spanish version and English translation of certain extracts), as well as the reply from the Ramsar Secretariat dated 19 December 2011 (original Spanish version only). The Parties later provided

the Court with English translations of the documents submitted in Spanish by Nicaragua.

41. By a letter dated 21 April 2015, the Registrar informed the Parties that the Court had decided to request, under Article 62 of its Rules, that Nicaragua produce the full text of two documents, excerpts of which were annexed to its Counter-Memorial in the *Costa Rica* v. *Nicaragua* case. By a letter dated 24 April 2015, Nicaragua communicated to the Court the full text of the original Spanish versions of the documents requested. Certified English translations were transmitted by Nicaragua under cover of a letter dated 15 May 2015.

42. By letter of 28 April 2015, Costa Rica asked for photographs to be included in the *Nicaragua* v. *Costa Rica* case file. In a letter dated 29 April 2015, Nicaragua stated that it objected to this request, which it considered had been made too late. By letters dated 29 April 2015, the Registrar informed the Parties that the Court had decided not to grant Costa Rica's request.

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43. In accordance with Article 53, paragraph 2, of the Rules of Court, after ascertaining the views of the Parties, the Court decided that copies of the pleadings and documents annexed would be made accessible to the public at the opening of the oral proceedings.

44. Public hearings were held in the joined cases from 14 April 2015 to 1 May 2015. Between 14 and 17 April 2015 and 28 and 29 April 2015, the hearings focused on the *Costa Rica* v. *Nicaragua* case, and between 20 and 24 April 2015 and 30 April and 1 May 2015 on the *Nicaragua* v. *Costa Rica* case. The Court heard the oral arguments and replies of:

In the *Costa Rica* v. *Nicaragua* case,

For Costa Rica: H.E. Mr. Edgar Ugalde Alvarez,
H.E. Mr. Sergio Ugalde,
Mr. Arnoldo Brenes,
Mr. Samuel Wordsworth,
Mr. Marcelo Kohen,
Ms Kate Parlett,
Ms Katherine Del Mar.

For Nicaragua: H.E. Mr. Carlos José Argüello Gómez,
Mr. Alain Pellet,
Mr. Paul S. Reichler,
Mr. Andrew B. Loewenstein,
Mr. Stephen C. McCaffrey.

In the *Nicaragua* v. *Costa Rica* case,

For Nicaragua: H.E. Mr. Carlos José Argüello Gómez,
Mr. Paul S. Reichler,
Mr. Andrew B. Loewenstein,
Mr. Stephen C. McCaffrey,
Mr. Alain Pellet.

For Costa Rica: H.E. Mr. Edgar Ugalde Alvarez,
Mr. Arnoldo Brenes,

Ms Katherine Del Mar,
Mr. Marcelo Kohen,
Mr. Samuel Wordsworth,
Ms Kate Parlett,
H.E. Mr. Sergio Ugalde.

45. In the *Costa Rica* v. *Nicaragua* case, Costa Rica called Mr. Thorne as an expert during the public hearing of 14 April 2015 (afternoon). Later, during the public hearing of 17 April 2015 (morning), Nicaragua called the following experts: Mr. van Rhee and Mr. Kondolf. In the *Nicaragua* v. *Costa Rica* case, Nicaragua called the following experts during the public hearings of 20 April 2015 (morning and afternoon): Mr. Weaver, Mr. Kondolf, Mr. Andrews and Mr. Sheate. Costa Rica called Mr. Cowx and Mr. Thorne as experts during the public hearing of 24 April 2015 (morning). A number of judges put questions to the experts, to which replies were given orally.

46. At the hearings, Members of the Court also put questions to the Parties, to which replies were given orally, in accordance with Article 61, paragraph 4, of the Rules of Court.

* *

47. In its Application filed in the *Costa Rica* v. *Nicaragua* case, Costa Rica made the following claims:

> "For these reasons, and reserving the right to supplement, amplify or amend the present Application, Costa Rica requests the Court to adjudge and declare that Nicaragua is in breach of its international obligations as referred to in paragraph 1 of this Application as regards the incursion into and occupation of Costa Rican territory, the serious damage inflicted to its protected rainforests and wetlands, and the damage intended to the Colorado River, wetlands and protected ecosystems, as well as the dredging and canalization activities being carried out by Nicaragua on the San Juan River.
>
> In particular the Court is requested to adjudge and declare that, by its conduct, Nicaragua has breached:
>
> *(a)* the territory of the Republic of Costa Rica, as agreed and delimited by the 1858 Treaty of Limits, the Cleveland Award and the first and second Alexander Awards;
> *(b)* the fundamental principles of territorial integrity and the prohibition of use of force under the Charter of the United Nations and the Charter of the Organization of American States;
> *(c)* the obligation imposed upon Nicaragua by Article IX of the 1858 Treaty of Limits not to use the San Juan River to carry out hostile acts;
> *(d)* the obligation not to damage Costa Rican territory;
> *(e)* the obligation not to artificially channel the San Juan River away from its natural watercourse without the consent of Costa Rica;
> *(f)* the obligation not to prohibit the navigation on the San Juan River by Costa Rican nationals;
> *(g)* the obligation not to dredge the San Juan River if this causes damage to Costa Rican territory (including the Colorado River), in accordance with the 1888 Cleveland Award;

(h) the obligations under the Ramsar Convention on Wetlands;

(i) the obligation not to aggravate and extend the dispute by adopting measures against Costa Rica, including the expansion of the invaded and occupied Costa Rican territory or by adopting any further measure or carrying out any further actions that would infringe Costa Rica's territorial integrity under international law."

Costa Rica also requested the Court to "determine the reparation which must be made by Nicaragua, in particular in relation to any measures of the kind referred to . . . above".

48. In the course of the written proceedings in the *Costa Rica* v. *Nicaragua* case, the following submissions were presented by the Parties:

On behalf of the Government of Costa Rica,

in the Memorial:

"For these reasons, and reserving the right to supplement, amplify or amend the present submissions:

1. Costa Rica requests the Court to adjudge and declare that, by its conduct, Nicaragua has breached:

(a) the obligation to respect the sovereignty and territorial integrity of the Republic of Costa Rica, within the boundaries delimited by the 1858 Treaty of Limits and further defined by the Demarcation Commission established by the Pacheco-Matus Convention, in particular by the first and second Alexander Awards;

(b) the prohibition of use of force under Article 2 (4) of the United Nations Charter and Articles 1, 19, 21 and 29 of the Charter of the Organization of American States;

(c) the obligation of Nicaragua under Article IX of the 1858 Treaty of Limits not to use the San Juan to carry out hostile acts;

(d) the rights of Costa Rican nationals to free navigation on the San Juan in accordance with the 1858 Treaty of Limits, the Cleveland Award and the Court's Judgment of 13 July 2009;

(e) the obligation not to dredge, divert or alter the course of the San Juan, or conduct any other works on the San Juan, if this causes damage to Costa Rican territory (including the Colorado River), its environment, or to Costa Rican rights in accordance with the Cleveland Award;

(f) the obligation to consult with Costa Rica about implementing obligations arising from the Ramsar Convention, in particular the obligation to co-ordinate future policies and regulations concerning the conservation of wetlands and their flora and fauna under Article 5 (1) of the Ramsar Convention; and

(g) the Court's Order for Provisional Measures of 8 March 2011;

and further to adjudge and declare that Nicaragua is:

(h) obliged to cease such breaches and to make reparation therefore.

2. The Court is requested to order, in consequence, that Nicaragua:

(a) withdraw any presence, including all troops and other personnel (whether civilian, police or security, or volunteers) from that part of Costa Rica known as Isla Portillos, on the right bank of the San Juan, and prevent any return there of any such persons;

(b) cease all dredging activities on the San Juan in the area between the point of bifurcation of the Colorado River and the San Juan and the outlet of the San Juan in the Caribbean Sea ('the area'), pending:

(i) an adequate environmental impact assessment;

(ii) notification to Costa Rica of further dredging plans for the area, not less than three months prior to the implementation of such plans;

(iii) due consideration of any comments of Costa Rica made within one month of notification;

(c) not engage in any dredging operations or other works in the area if and to the extent that these may cause significant harm to Costa Rican territory (including the Colorado River) or its environment, or to impair Costa Rica's rights under the Cleveland Award.

3. The Court is also requested to determine, in a separate phase, the reparation and satisfaction to be made by Nicaragua."

On behalf of the Government of Nicaragua,

in the Counter-Memorial:

"For the reasons given herein, the Republic of Nicaragua requests the Court to:

(1) *dismiss and reject* the requests and submissions of Costa Rica in her pleadings;

(2) *adjudge and declare* that:

(i) Nicaragua enjoys full sovereignty over the *caño* joining Harbor Head Lagoon with the San Juan River proper, the right bank of which constitutes the land boundary as established by the 1858 Treaty as interpreted by the Cleveland and Alexander Awards;

(ii) Costa Rica is under an obligation to respect the sovereignty and territorial integrity of Nicaragua, within the boundaries delimited by the 1858 Treaty of Limits as interpreted by the Cleveland and Alexander Awards;

(iii) Nicaragua is entitled, in accordance with the 1858 Treaty as interpreted by the subsequent arbitral awards, to execute works to improve navigation on the San Juan River as it deems suitable, and that these works include the dredging of the San Juan de Nicaragua River; and,

(iv) in so doing, Nicaragua is entitled as it deems suitable to re-establish the situation that existed at the time the 1858 Treaty was concluded;
(v) the only rights enjoyed by Costa Rica on the San Juan de Nicaragua River are those defined by said Treaty as interpreted by the Cleveland and Alexander Awards."

49. At the oral proceedings in the joined cases, the following submissions were presented by the Parties in the *Costa Rica* v. *Nicaragua* case:

On behalf of the Government of Costa Rica,

at the hearing of 28 April 2015:

"For the reasons set out in the written and oral pleadings, the Republic of Costa Rica requests the Court to:

(1) reject all Nicaraguan claims;
(2) adjudge and declare that:

(a) sovereignty over the 'disputed territory', as defined by the Court in its Orders of 8 March 2011 and 22 November 2013, belongs to the Republic of Costa Rica;
(b) by occupying and claiming Costa Rican territory, Nicaragua has breached:

(i) the obligation to respect the sovereignty and territorial integrity of the Republic of Costa Rica, within the boundaries delimited by the 1858 Treaty of Limits and further defined by the Demarcation Commission established by the Pacheco-Matus Convention, in particular by the first and second Alexander Awards;
(ii) 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;
(iii) the prohibition to make the territory of other States the object, even temporarily, of military occupation, contrary to Article 21 of the Charter of the Organization of American States; and
(iv) the obligation of Nicaragua under Article IX of the 1858 Treaty of Limits not to use the San Juan River to carry out hostile acts;

(c) by its further conduct, Nicaragua has breached:

(i) the obligation to respect Costa Rica's territory and environment, including its wetland of international importance under the Ramsar Convention 'Humedal Caribe Noreste', on Costa Rican territory;
(ii) 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;
(iii) the obligation to inform and consult with Costa Rica about any dredging, diversion or alteration of the course of the San Juan River, or any other works on the San Juan River that may cause damage to Costa Rican territory (including the Colorado River), its environment, or Costa Rican rights, in accordance with the 1888 Cleveland Award and relevant treaty and customary law;
(iv) the obligation to carry out an appropriate transboundary environ-

mental impact assessment, which takes account of all potential significant adverse impacts on Costa Rican territory;

(v) the obligation not to dredge, divert or alter the course of the San Juan River, or conduct any other works on the San Juan River, if this causes damage to Costa Rican territory (including the Colorado River), its environment, or to Costa Rican rights under the 1888 Cleveland Award;

(vi) the obligations arising from the Orders of the Court indicating provisional measures of 8 March 2011 and 22 November 2013;

(vii) the obligation to consult with Costa Rica on the implementation of obligations arising from the Ramsar Convention, in particular the obligation to co-ordinate future policies and regulations concerning the conservation of wetlands and their flora and fauna under Article 5 (1) of the Ramsar Convention; and

(viii) the agreement between the Parties, established in the exchange of notes dated 19 and 22 September 2014, concerning navigation on the San Juan River by Costa Rica to close the eastern *caño* constructed by Nicaragua in 2013;

(d) Nicaragua may not engage in any dredging operations or other works if and to the extent that these may cause damage to Costa Rican territory (including the Colorado River) or its environment, or which may impair Costa Rica's rights under the 1888 Cleveland Award, including its right not to have its territory occupied without its express consent;

(3) to order, in consequence, that Nicaragua must:

(a) repeal, by means of its own choosing, those provisions of the Decree No. 079-2009 and the Regulatory Norms annexed thereto of 1 October 2009 which are contrary to Costa Rica's right of free navigation under Article VI of the 1858 Treaty of Limits, the 1888 Cleveland Award, and the Court's Judgment of 13 July 2009;

(b) cease all dredging activities on the San Juan River in the vicinity of Delta Costa Rica and in the lower San Juan River, pending:

(i) an appropriate transboundary environmental impact assessment, which takes account of all potential significant adverse impacts on Costa Rican territory, carried out by Nicaragua and provided to Costa Rica;

(ii) formal written notification to Costa Rica of further dredging plans in the vicinity of Delta Costa Rica and in the lower San Juan River, not less than three months prior to the implementation of any such plans; and

(iii) due consideration of any comments made by Costa Rica upon receipt of said notification;

(c) make reparation in the form of compensation for the material damage caused to Costa Rica, including but not limited to:

(i) damage arising from the construction of artificial *caños* and destruction of trees and vegetation on the 'disputed territory';

(ii) the cost of the remediation measures carried out by Costa Rica in relation to those damages, including but not limited to those taken to close the eastern *caño* constructed by Nicaragua in 2013, pursuant to paragraph 59 (2) (E) of the Court's Order on provisional measures of 22 November 2013;

the amount of such compensation to be determined in a separate phase of these proceedings;

(d) provide satisfaction so to achieve full reparation of the injuries caused to Costa Rica in a manner to be determined by the Court;

(e) provide appropriate assurances and guarantees of non-repetition of Nicaragua's unlawful conduct, in such a form as the Court may order; and

(f) pay all of the costs and expenses incurred by Costa Rica in requesting and obtaining the Order on provisional measures of 22 November 2013, including, but not limited to, the fees and expenses of Costa Rica's counsel and experts, with interest, on a full indemnity basis."

On behalf of the Government of Nicaragua,

at the hearing of Wednesday 29 April 2015:

"In accordance with Article 60 of the Rules and the reasons given during the written and oral phase of the pleadings the Republic of Nicaragua respectfully requests the Court to:

(a) dismiss and reject the requests and submissions of the Republic of Costa Rica;

(b) adjudge and declare that:

(i) Nicaragua enjoys full sovereignty over the *caño* joining Harbor Head Lagoon with the San Juan River proper, the right bank of which constitutes the land boundary as established by the 1858 Treaty as interpreted by the Cleveland and Alexander Awards;

(ii) Costa Rica is under an obligation to respect the sovereignty and territorial integrity of Nicaragua, within the boundaries delimited by the 1858 Treaty of Limits as interpreted by the Cleveland and Alexander Awards;

(iii) Nicaragua is entitled, in accordance with the 1858 Treaty as interpreted by the subsequent arbitral awards, to execute works to improve navigation on the San Juan River as it deems suitable, and that these works include the dredging of the San Juan de Nicaragua River;

(iv) the only rights enjoyed by Costa Rica on the San Juan de Nicaragua River are those defined by said Treaty as interpreted by the Cleveland and Alexander Awards."

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50. In its Application filed in the *Nicaragua* v. *Costa Rica* case, Nicaragua made the following claims:

"On the basis of the foregoing statement of facts and law, Nicaragua, while reserving the right to supplement, amend or modify this Application, requests the Court to adjudge and declare that Costa Rica has breached:

(a) its obligation not to violate Nicaragua's territorial integrity as delimited by the 1858 Treaty of Limits, the Cleveland Award of 1888 and the five Awards of the Umpire E. P. Alexander of 30 September 1897, 20 December 1897, 22 March 1898, 26 July 1899 and 10 March 1900;

(b) its obligation not to damage Nicaraguan territory;

(c) its obligations under general international law and the relevant environmental conventions, including the Ramsar Convention on Wetlands, the Agreement over the Border Protected Areas between Nicaragua and Costa Rica (International System of Protected Areas for Peace [SI-A-PAZ] Agreement), the Convention on Biological Diversity and the Convention for the Conservation of the Biodiversity and Protection of the Main Wildlife Areas [Priority Wilderness Areas] in Central America.

Furthermore, Nicaragua requests the Court to adjudge and declare that Costa Rica must:

(a) restore the situation to the *status quo ante*;
(b) pay for all damages caused including the costs added to the dredging of the San Juan River;
(c) not undertake any future development in the area without an appropriate transboundary environmental impact assessment and that this assessment must be presented in a timely fashion to Nicaragua for its analysis and reaction.

Finally, Nicaragua requests the Court to adjudge and declare that Costa Rica must:

(a) cease all the constructions underway that affect or may affect the rights of Nicaragua;
(b) produce and present to Nicaragua an adequate environmental impact assessment with all the details of the works."

51. In the course of the written proceedings in the *Nicaragua* v. *Costa Rica* case, the following submissions were presented by the Parties:

On behalf of the Government of Nicaragua,

in the Memorial:

"1. For the reasons given herein, the Republic of Nicaragua requests the Court to adjudge and declare that, by its conduct, Costa Rica has breached:

(i) its obligation not to violate the integrity of Nicaragua's territory as delimited by the 1858 Treaty of Limits, the Cleveland Award of 1888 and the five Awards of the Umpire E. P. Alexander of 30 September 1897, 20 December 1897, 22 March 1898, 26 July 1899 and 10 March 1900;
(ii) its obligation not to damage Nicaraguan territory;

(iii) its obligations under general international law and the relevant environmental conventions, including the Ramsar Convention on Wetlands, the Agreement over the Border Protected Areas between Nicaragua and Costa Rica (International System of Protected Areas for Peace [SI-A-PAZ] Agreement), the Convention on Biological Diversity and the Convention for the Conservation of the Biodiversity and Protection of the Main Wildlife Sites [Priority Wilderness Areas] in Central America.

2. Furthermore, Nicaragua requests the Court to adjudge and declare that Costa Rica must:

(i) cease all the constructions underway that affects or may affect the rights of Nicaragua;
(ii) restore the situation to the *status quo ante*;
(iii) compensate for all damages caused including the costs added to the dredging of the San Juan de Nicaragua River, with the amount of the compensation to be determined in a subsequent phase of the case;

(iv) not to continue or undertake any future development in the area without an appropriate transboundary environmental impact assessment and that this assessment must be presented in a timely fashion to Nicaragua for its analysis and reaction.

3. The Republic of Nicaragua further requests the Court to adjudge and declare that:

(i) Nicaragua is entitled, in accordance with the 1858 Treaty as interpreted by the subsequent arbitral awards, to execute works to improve navigation on the San Juan River as it deems suitable, and that these works include the dredging of the San Juan de Nicaragua River to remove sedimentation and other barriers to navigation; and,
(ii) in so doing, Nicaragua is entitled to re-establish the conditions of navigation that existed at the time the 1858 Treaty was concluded;
(iii) that the violations of the 1858 Treaty and under many rules of international law by Costa Rica, allow Nicaragua to take appropriate countermeasures including the suspension of Costa Rica's right of navigation in the San Juan de Nicaragua River.

4. Finally, Nicaragua requests the Court to order Costa Rica to immediately take the emergency measures recommended by its own experts and further detailed in the Kondolf Report, in order to alleviate or mitigate the continuing damage being caused to the San Juan de Nicaragua River and the surrounding environment.

If Costa Rica does not of itself proceed to take these measures and the Court considers it cannot order that it be done without the full procedure contemplated in Articles 73 *et seq.* of the Rules of Court, the Republic of Nicaragua reserves its right to request provisional measures on the basis of Article 41 of the Statute and the pertinent procedures of Article 73 and ff. of the Rules of Court and to amend and modify these submissions in the light of the further pleadings in this case."

in the Reply:

"For the reasons given in its Memorial and in this Reply, the Republic of Nicaragua requests the Court to adjudge and declare that, by its conduct, the Republic of Costa Rica has breached:

(i) its obligation not to violate the integrity of Nicaragua's territory as delimited by the 1858 Treaty of Limits as interpreted by the Cleveland Award of 1888 and the five Awards of the Umpire E. P. Alexander of 30 September 1897, 20 December 1897, 22 March 1898, 26 July 1899, and 10 March 1900;

(ii) its obligation not to damage Nicaraguan territory;

(iii) its obligations under general international law and the relevant environmental conventions, including the Ramsar Convention on Wetlands, the Agreement over the Border Protected Areas between Nicaragua and Costa Rica (International System of Protected Areas for Peace [SI-A-PAZ] Agreement), the Convention on Biological Diversity and the Convention for the Conservation of the Biodiversity and Protection of the Main Wildlife Sites [Priority Wilderness Areas] in Central America.

2. Nicaragua also requests the Court to adjudge and declare that Costa Rica must:

(i) cease all its continuing internationally wrongful acts that affect or are likely to affect the rights of Nicaragua;

(ii) inasmuch as possible, restore the situation to the *status quo ante*, in full respect of Nicaragua's sovereignty over the San Juan de Nicaragua River, including by taking the emergency measures necessary to alleviate or mitigate the continuing harm being caused to the river and the surrounding environment;

(iii) compensate for all damages caused insofar as they are not made good by restitution, including the costs added to the dredging of the San Juan de Nicaragua River, with the amount of the compensation to be determined in a subsequent phase of the case.

3. Furthermore, Nicaragua requests the Court to adjudge and declare that Costa Rica must:

(i) not undertake any future development in the area without an appropriate transboundary environmental impact assessment and that this assessment must be presented in a timely fashion to Nicaragua for its analysis and reaction;

(ii) refrain from using Route 1856 to transport hazardous material as long as it has not given the guarantees that the road complies with the best construction practices and the highest regional and international standards of security for road traffic in similar situations.

4. The Republic of Nicaragua further requests the Court to adjudge and declare that Nicaragua is entitled:

(i) in accordance with the 1858 Treaty as interpreted by the subsequent arbitral awards, to execute works to improve navigation on the San

Juan River and that these works include the dredging of the San Juan de Nicaragua River to remove sedimentation and other barriers to navigation; and,

(ii) in so doing, to re-establish the conditions of navigation foreseen in the 1858 Treaty.

5. Finally, if the Court has not already appointed a neutral expert at the time when it adopts its Judgment, Nicaragua requests the Court to appoint such an expert who could advise the Parties in the implementation of the Judgment."

On behalf of the Government of Costa Rica,

in the Counter-Memorial:

"For these reasons, and reserving the right to supplement, amplify or amend the present submissions, Costa Rica requests the Court to dismiss all of Nicaragua's claims in this proceeding."

in the Rejoinder:

"For these reasons, and reserving the right to supplement, amplify or amend the present submissions, Costa Rica requests the Court to dismiss all of Nicaragua's claims in this proceeding."

52. At the oral proceedings in the joined cases, the following submissions were presented by the Parties in the *Nicaragua* v. *Costa Rica* case:

On behalf of the Government of Nicaragua,

at the hearing of 30 April 2015:

"1. In accordance with Article 60 of the Rules and the reasons given during the written and oral phase of the pleadings the Republic of Nicaragua respectfully requests the Court to adjudge and declare that, by its conduct, the Republic of Costa Rica has breached:

(i) its obligation not to violate the integrity of Nicaragua's territory as delimited by the 1858 Treaty of Limits as interpreted by the Cleveland Award of 1888 and the five Awards of the Umpire E. P. Alexander of 30 September 1897, 20 December 1897, 22 March 1898, 26 July 1899, and 10 March 1900;

(ii) its obligation not to damage Nicaraguan territory;

(iii) its obligations under general international law and the relevant environmental conventions, including the Ramsar Convention on Wetlands, the Agreement over the Border Protected Areas between Nicaragua and Costa Rica (International System of Protected Areas for Peace [SI-A-PAZ] Agreement), the Convention on Biological Diversity and the Convention for the Conservation of the Biodiversity and Protection of the Main Wildlife Sites in Central America.

2. Nicaragua also requests the Court to adjudge and declare that Costa Rica must:

(i) cease all its continuing internationally wrongful acts that affect or are likely to affect the rights of Nicaragua;

(ii) inasmuch as possible, restore the situation to the *status quo ante*, in full respect of Nicaragua's sovereignty over the San Juan de Nicaragua River, including by taking the emergency measures necessary to alleviate or mitigate the continuing harm being caused to the river and the surrounding environment;

(iii) compensate for all damages caused insofar as they are not made good by restitution, including the costs added to the dredging of the San Juan de Nicaragua River, with the amount of the compensation to be determined in a subsequent phase of the case.

3. Furthermore, Nicaragua requests the Court to adjudge and declare that Costa Rica must:

(i) not undertake any future development in the area without an appropriate transboundary environmental impact assessment and that this assessment must be presented in a timely fashion to Nicaragua for its analysis and reaction;

(ii) refrain from using Route 1856 to transport hazardous material as long as it has not given the guarantees that the road complies with the best construction practices and the highest regional and international standards of security for road traffic in similar situations.

4. The Republic of Nicaragua further requests the Court to adjudge and declare that Nicaragua is entitled:

(i) in accordance with the 1858 Treaty as interpreted by the subsequent arbitral awards, to execute works to improve navigation on the San Juan River and that these works include the dredging of the San Juan de Nicaragua River to remove sedimentation and other barriers to navigation."

On behalf of the Government of Costa Rica,

at the hearing of 1 May 2015: "For the reasons set out in the written and oral pleadings, Costa Rica requests the Court to dismiss all of Nicaragua's claims in this proceeding."

* * *

53. The Court will begin by dealing with the elements common to both cases. It will thus address, in a first part, the question of its jurisdiction, before recalling, in a second part, the geographical and historical context and the origin of the disputes.

The Court will then examine in turn, in two separate parts, the disputed issues in the *Costa Rica* v. *Nicaragua* case and in the *Nicaragua* v. *Costa Rica* case.

I. Jurisdiction of the Court

54. With regard to the *Costa Rica* v. *Nicaragua* case, the Court recalls that Costa Rica invokes, as bases of jurisdiction, Article XXXI of the Pact of Bogotá and the declarations by which the Parties have recognized

the compulsory jurisdiction of the Court under paragraphs 2 and 5 of Article 36 of the Statute (see paragraph 2 above). It notes that Nicaragua does not contest its jurisdiction to entertain Costa Rica's claims.

The Court finds that it has jurisdiction over the dispute.

55. With regard to the *Nicaragua* v. *Costa Rica* case, the Court notes that Nicaragua invokes, for its part, as bases of jurisdiction, Article XXXI of the Pact of Bogotá and the above-mentioned declarations of acceptance (see paragraph 2 above). It further observes that Costa Rica does not contest its jurisdiction to entertain Nicaragua's claims.

The Court finds that it has jurisdiction over the dispute.

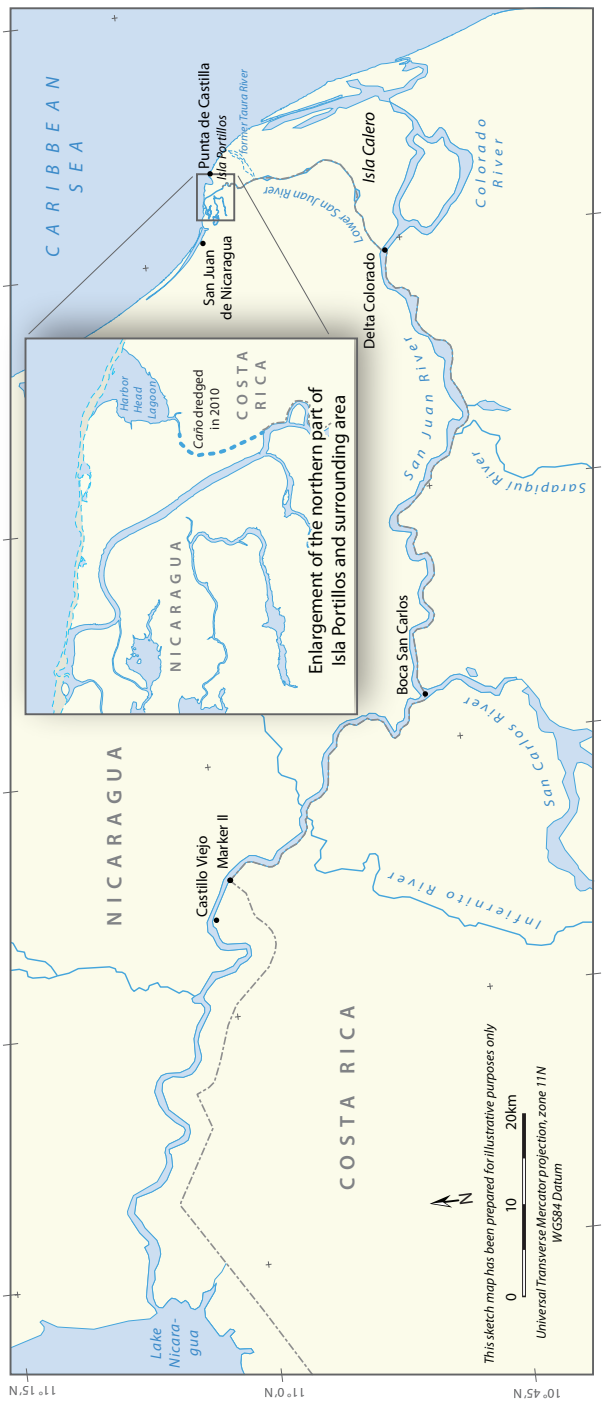
II. Geographical and Historical Context and Origin of the Disputes

56. 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 is the northerly of these two branches and flows into the Caribbean Sea about 30 km downstream from the delta, near the town of San Juan de Nicaragua, formerly known as San Juan del Norte or Greytown; the Colorado River is the southerly and larger of the two branches and 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 Parties are in agreement that the Colorado River currently receives approximately 90 per cent of the water of the San Juan River, with the remaining 10 per cent flowing into the Lower San Juan.

57. 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 sketch-map No. 1 p. 692).

58. Isla Calero is part of the *Humedal Caribe Noreste* (Northeast Caribbean Wetland) which was designated by Costa Rica in 1996 as a wetland of international importance under the Ramsar Convention. The area immediately adjacent to it — including the San Juan River itself and a strip of land 2 km in width abutting the river's left (Nicaraguan) bank — was designated by Nicaragua as a wetland of international importance under the Ramsar Convention in 2001 and is known as the *Refugio de Vida Silvestre Río San Juan* (San Juan River Wildlife Refuge).

Sketch-map No. 1:
Geographical context



59. The present disputes between the Parties are set within a historical context dating back to the 1850s. Following hostilities between the two States in 1857, the Governments of Costa Rica and Nicaragua signed on 15 April 1858 a Treaty of Limits, which was ratified by Costa Rica on 16 April 1858 and by Nicaragua on 26 April 1858 (hereinafter the "1858 Treaty"). The 1858 Treaty fixed the course of the boundary between Costa Rica and Nicaragua from the Pacific Ocean to the Caribbean Sea. According to Article II of the Treaty (quoted in paragraph 71 below), part of the boundary between the two States runs along the right (Costa Rican) bank of the San Juan River from a point three English miles below Castillo Viejo, a small town in Nicaragua, to "the end of Punta de Castilla, at the mouth of the San Juan" on the Caribbean coast. Article VI of the 1858 Treaty (quoted in paragraph 133 below) established Nicaragua's *dominium* and *imperium* over the waters of the river, but at the same time affirmed Costa Rica's right of free navigation on the river for the purposes of commerce.

60. Following challenges by Nicaragua on various occasions to the validity of the 1858 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 to the President of the United States, Grover Cleveland, for arbitration. In addition, the Parties agreed that, if the 1858 Treaty were found to be valid, President Cleveland should also decide "upon all the other points of doubtful interpretation which either of the parties may find in the treaty". On 22 June 1887, Nicaragua communicated to Costa Rica 11 points of doubtful interpretation, which were subsequently submitted to President Cleveland for resolution. The Cleveland Award of 1888 confirmed, in its paragraph 1, the validity of the 1858 Treaty and found, in its paragraph 3 (1), that the boundary line between the two States on the Atlantic side "begins at the extremity of Punta de Castilla at the mouth of the San Juan de Nicaragua River, as they both existed on the 15th day of April 1858". The Cleveland Award also settled the other points of doubtful interpretation submitted by Nicaragua, such as the conditions under which Nicaragua may carry out works of improvement on the San Juan River (para. 3 (6), quoted in paragraph 116 below), the conditions under which Costa Rica may prevent Nicaragua from diverting the waters of the San Juan (para. 3 (9), quoted in paragraph 116 below), and the requirement that Nicaragua not make any grants for the purpose of constructing a canal across its territory without first asking for the opinion of Costa Rica (para. 3 (10)) or, "where the construction of the canal will involve an injury to the natural rights of Costa Rica", obtaining its consent (para. 3 (11)).

61. Subsequent to the Cleveland Award, Costa Rica and Nicaragua agreed in 1896, under the Pacheco-Matus Convention on border demarcation, to establish two national Demarcation Commissions, each com-

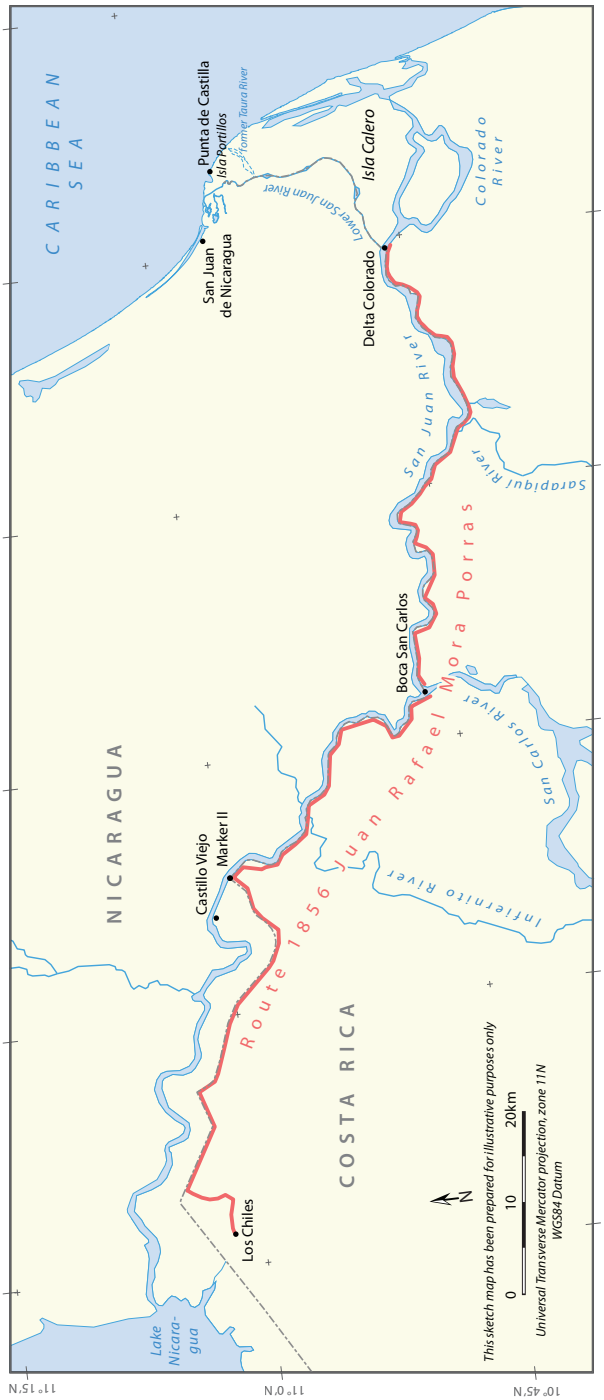
posed of two members (Art. I). The Pacheco-Matus Convention further provided that the Commissions would include an engineer, appointed by the President of the United States of America, who "shall have broad powers to decide whatever kind of differences may arise in the course of any operations and his ruling shall be final" (Art. II). 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 (see paragraphs 73-75 below).

62. Starting in the 1980s, some 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 to file an Application with the Court instituting proceedings against Nicaragua on 29 September 2005. The Court rendered its Judgment on 13 July 2009, which, *inter alia*, clarified Costa Rica's navigational rights and the extent of Nicaragua's power to regulate navigation on the San Juan River (*Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213).

63. On 18 October 2010, Nicaragua started dredging the San Juan River in order to improve its navigability. It also carried out works in the northern part of Isla Portillos (see sketch-map No. 1 p. 692). In this regard, Costa Rica contends that Nicaragua 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. Nicaragua also sent some military units and other personnel to that area. On 18 November 2010, Costa Rica filed its Application instituting proceedings in the *Costa Rica* v. *Nicaragua* case (see paragraph 1 above). Costa Rica also submitted a request for the indication of provisional measures under Article 41 of the Statute (see paragraph 3 above).

64. 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. The road 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, it follows the course of the San Juan River (see sketch-map No. 2 p. 695). 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. On 22 December 2011, Nicaragua filed its Application instituting proceedings in the *Nicaragua* v. *Costa Rica* case (see paragraph 9 above), claiming in particular that the construction of the road resulted in significant transboundary harm.

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



III. Issues in the *Costa Rica* v. *Nicaragua* Case

A. Sovereignty over the Disputed Territory and Alleged Breaches Thereof

65. Costa Rica submits that Nicaragua breached

> "the obligation to respect the sovereignty and territorial integrity of the Republic of Costa Rica, within the boundaries delimited by the 1858 Treaty of Limits and further defined by the Demarcation Commission established by the Pacheco-Matus Convention, in particular by the first and second Alexander Awards" (final submissions, para. 2 *(b)* (i)).

This claim is based on the premise that "[s]overeignty over the 'disputed territory', as defined by the Court in its Orders of 8 March 2011 and 22 November 2013, belongs to the Republic of Costa Rica" (*ibid.*, para. 2 *(a)*). In its final submissions Costa Rica requested the Court to make a finding also on the issue of sovereignty over the disputed territory.

66. Costa Rica alleges that Nicaragua violated its territorial sovereignty in the area of Isla Portillos in particular by excavating in 2010 a *caño* with the aim of connecting the San Juan River with the Harbor Head Lagoon and laying claim to Costa Rican territory. According to Costa Rica, this violation of sovereignty was exacerbated by Nicaragua's establishment of a military presence in the area and by its excavation in 2013 of two other *caños* located near the northern tip of Isla Portillos.

67. The Court notes that although the violations that allegedly took place in 2013 occurred after the Application was made, they concern facts which are of the same nature as those covered in the Application and which the Parties had the opportunity to discuss in their pleadings. These alleged violations may therefore be examined by the Court as part of the merits of the claim. They will later also be considered in relation to Nicaragua's compliance with the Court's Order on provisional measures of 8 March 2011.

68. Nicaragua does not contest that it dredged the three *caños*, but maintains that "Nicaragua enjoys full sovereignty over the *caño* joining Harbor Head Lagoon with the San Juan River proper, the right bank of which constitutes the land boundary as established by the 1858 Treaty as interpreted by the Cleveland and Alexander Awards" (final submissions, para. *(b)* (i)). Nicaragua further submits that "Costa Rica is under an obligation to respect the sovereignty and territorial integrity of Nicaragua, within the boundaries delimited by the 1858 Treaty of Limits as interpreted by the Cleveland and Alexander Awards" (*ibid.*, para. *(b)* (ii)).

69. 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 "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*, the right bank of the San Juan River up to its mouth at the Caribbean Sea and the Harbor Head Lagoon" (*I.C.J. Reports 2011 (I)*, p. 19, para. 55). The *caño* referred to is the one which was dredged by Nicaragua in 2010. Nicaragua did not contest this definition of the "disputed territory", while Costa Rica expressly endorsed it in its final submissions (para. 2 *(a)*). The Court will maintain the definition of "disputed territory" given in the 2011 Order. It recalls that its Order of 22 November 2013 indicating provisional measures specified that a Nicaraguan military encampment "located on the beach and close to the line of vegetation" near one of the *caños* dredged in 2013 was "situated in the disputed territory as defined by the Court in its Order of 8 March 2011" (*I.C.J. Reports 2013*, p. 365, para. 46).

70. The above definition of the "disputed territory" 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. In their oral arguments the Parties expressed different views on this issue. However, they did not address the question of the precise location of the mouth of the river nor did they provide detailed information concerning the coast. Neither Party requested the Court to define the boundary more precisely with regard to this coast. Accordingly, the Court will refrain from doing so.

71. In their claims over the disputed territory both Parties rely on the 1858 Treaty, the Cleveland Award and the Alexander Awards. According to Article II of the Treaty:

> "The dividing line between the two Republics, starting from the Northern Sea, shall begin at the end of Punta de Castilla, at the mouth of the San Juan de Nicaragua River, and shall run along the right bank of the said river up to a point three English miles distant from Castillo Viejo . . ." [In the Spanish original: *"La línea divisoria de las dos Repúblicas, partiendo del mar del Norte, comenzará en la extremidad de Punta de Castilla, en la desembocadura del río de San Juan de Nicaragua, y continuará marcándose con la márgen derecha del expresado río, hasta un punto distante del Castillo Viejo tres millas inglesas . . ."*]

72. In 1888 President Cleveland found in his Award that:

> "The boundary line between the Republics of Costa Rica and Nicaragua, on the Atlantic side, begins at the extremity of Punta de Castilla at the mouth of the San Juan de Nicaragua River, as they both existed on the 15th day of April 1858. The ownership of any accretion to said Punta de Castilla is to be governed by the laws applicable to

that subject." (United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. XXVIII, p. 209.)

73. When the Commissions on demarcation were established by the Pacheco-Matus Convention, one member, to be designated by the President of the United States of America, was given the power to "resolve any dispute between the Commissions of Costa Rica and Nicaragua arising from the operations" (see paragraph 61 above). According to this Convention, the said person "shall have broad powers to decide whatever kind of differences may arise in the course of any operations and his ruling shall be final" (Art. II, *RIAA*, Vol. XXVIII, p. 212). On this basis, General Alexander, who had been duly designated to this position, rendered five awards concerning the border. In his first Award he stated that the boundary line:

> "must follow the . . . branch . . . called the Lower San Juan, through its harbor and into the sea.
>
> The natural terminus of that line is the right-hand headland of the harbor mouth." (*Ibid.*, p. 217.)

He observed that:

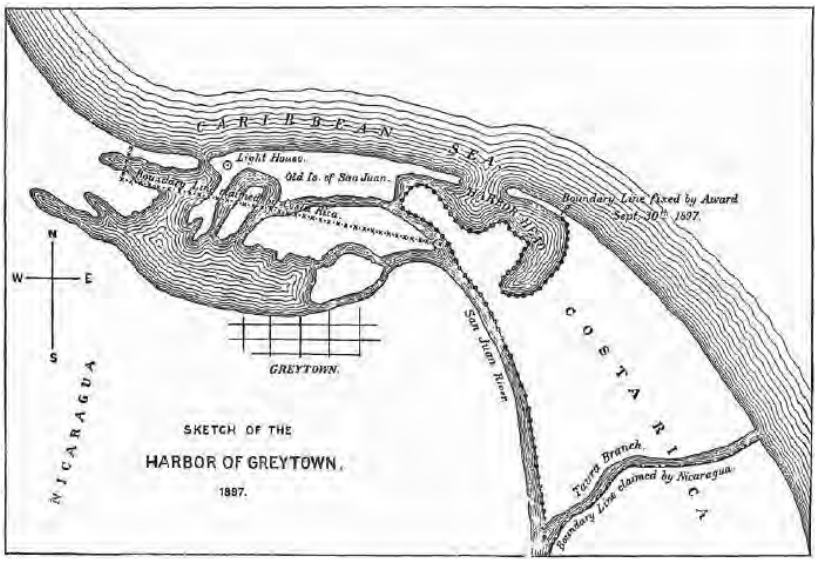
> "throughout the treaty the river is treated and regarded as an outlet of commerce. This implies that it is to be considered as in average condition of water, in which condition alone it is navigable." (*Ibid.*, pp. 218-219.)

He then defined the initial part of the boundary starting from the Caribbean Sea in the following terms:

> "The exact spot which was the extremity of the headland of Punta de Castillo [on] April 15, 1858, has long been swept over by the Caribbean Sea, and there is too little concurrence in the shore outline of the old maps to permit any certainty of statement of distance or exact direction to it from the present headland. It was somewhere to the north-eastward, and probably between 600 and 1,600 feet distant, but it can not now be certainly located. Under these circumstances it best fulfils the demands of the treaty and of President Cleveland's award to adopt what is practically the headland of today, or the north-western extremity of what seems to be the solid land, on the east side of Harbor Head Lagoon.
>
> I have accordingly made personal inspection of this ground, and declare the initial line of the boundary to run as follows, to wit:
>
> Its direction shall be due north-east and south-west, across the bank of sand, from the Caribbean Sea into the waters of Harbor Head Lagoon. It shall pass, at its nearest point, 300 feet on the north-west side from the small hut now standing in that vicinity. On reaching the waters of Harbor Head Lagoon the boundary line shall turn to the

left, or south-eastward, and shall follow the water's edge around the harbor until it reaches the river proper by the first channel met. Up this channel, and up the river proper, the line shall continue to ascend as directed in the treaty." (*RIAA*, Vol. XXVIII, p. 220.)

A sketch illustrating this initial part of the boundary in the geographic situation prevailing at the time was attached to this first Award (*ibid.*, p. 221). In that sketch, what the Arbitrator considered to be the "first channel" was the branch of the Lower San Juan River which was then flowing into the Harbor Head Lagoon (see sketch-map No. 3 below). The same boundary line was sketched with greater precision in the proceedings of the Commissions on demarcation.



74. The second Alexander Award envisaged the possibility that the banks of the San Juan River would "not only gradually expand or contract but that there [would] be wholesale changes in its channels". The Arbitrator observed that:

> "Today's boundary line must necessarily be affected in future by all these gradual or sudden changes. But the impact in each case can only be determined by the circumstances of the case itself, on a case-by-case basis in accordance with such principles of international law as may be applicable.
>
> The proposed measurement and demarcation of the boundary line will not have any effect on the application of those principles." (*RIAA*, Vol. XXVIII, p. 224.)

75. In his third Award, General Alexander noted that "borders delimited by waterways are likely to change when changes occur in the beds of such waterways. In other words, it is the riverbed that affects changes and not the water within, over or below its banks." (*RIAA*, Vol. XXVIII, p. 229.) He reached the following conclusion:

> "Let me sum up briefly and provide a clearer understanding of the entire question in accordance with the principles set out in my first award, to wit, that in the practical interpretation of the 1858 Treaty, the San Juan River must be considered a navigable river. I therefore rule that the exact dividing line between the jurisdictions of the two countries is the right bank of the river, with the water at ordinary stage and navigable by ships and general-purpose boats. At that stage, every portion of the waters of the river is under Nicaraguan jurisdiction. Every portion of land on the right bank is under Costa Rican jurisdiction." (*Ibid.*, p. 230.)

76. The Court considers that the 1858 Treaty and the awards by President Cleveland and General Alexander 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 (quoted in full at paragraph 133 below), 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" (see paragraph 73 above). 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.

77. Costa Rica contends that, while no channel of the San Juan River now flows into the Harbor Head Lagoon, there has been no significant shifting of the bed of the main channel of the Lower San Juan River since the Alexander Awards. Costa Rica maintains that the territory on the right bank of that channel as far as the river's mouth in the Caribbean Sea should be regarded as under Costa Rican sovereignty. According to Costa Rica, no importance should be given to what it considers to be an artificial *caño* which was excavated by Nicaragua in 2010 in order to connect the San Juan River with the Harbor Head Lagoon.

78. Nicaragua argues 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. The channel in question, according to Nicaragua, is the *caño* that it dredged in 2010 only to improve its navigability. Relying on the alleged existence of this *caño* over a number of years and contending that it now marks the boundary, Nicaragua claims sovereignty over the whole of the disputed territory.

79. According to Nicaragua, the existence of the *caño* before 2010 is confirmed by aerial and satellite imagery. In particular, Nicaragua alleges that a satellite picture dating from 1961 shows that a *caño* existed where Nicaragua was dredging in 2010.

80. Costa Rica points out that, especially by reason of the thick vegetation, aerial and satellite images of the disputed territory are not clear, including the satellite picture of 1961. Moreover, Costa Rica produces a satellite image dating from August 2010, which would rule out the existence of a channel in the period between the clearing of vegetation in the location of the *caño* and the dredging of the *caño*. In the oral proceedings, Nicaragua admitted that because of the tree canopy, only an inspection on the ground could provide certainty regarding the *caño*.

81. In the opinion of the Court, an inspection would hardly be useful for reconstructing the situation prevailing before 2010. The Court considers that, given the general lack of clarity of satellite and aerial images and the fact that the channels that may be identified on such images do not correspond to the location of the *caño* dredged in 2010, this evidence is 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 was dredged.

82. In order further to substantiate the view that the *caño* had existed for some time before it was dredged, Nicaragua also supplies three affidavits of Nicaraguan policemen or military agents who refer to a stream linking the San Juan River with the lagoon and assert that it was navigable for part of the year. Some affidavits of other agents mention streams in the area of the lagoon and describe them as navigable by boats to a certain extent, but do not specify their location.

83. The Court recalls that "[i]n determining the evidential weight of any statement by an individual, the Court necessarily takes into account its form and the circumstances in which it was made" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 78, para. 196). Affidavits will be treated "with caution", in particular those made by State officials for purposes of litigation (*ibid.*, pp. 78, paras. 196-197, referring to *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 731, para. 244). In the present case, the Court finds 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.

84. Nicaragua refers to a map produced in 1949 by the National Geographic Institute of Costa Rica which shows a *caño* in the location of the one dredged in 2010. It acknowledges, however, that the map in question describes the entire disputed territory as being under Costa Rican sovereignty. Nicaragua further invokes a map published in 1971 by the same Institute which shows a boundary close to the line claimed by Nicaragua. However, the Court notes that this evidence is contradicted by several official maps of Nicaragua, in particular a map of 1967 of the Directorate of Cartography and a map, dating from 2003, published by the Nicaraguan Institute of Territorial Studies (INETER, by its Spanish acronym), which depict the disputed area as being under Costa Rica's sovereignty.

85. As the Boundary Commission in the *Eritrea/Ethiopia* case stated, in a passage that was quoted with approval by the Court in the case concerning *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, a map "stands as a statement of geographical fact, especially when the State adversely affected has itself produced and disseminated it, even against its own interest" (*Judgment, I.C.J. Reports 2008*, p. 95, para. 271). In the present case, the evidence of maps published by the Parties on the whole gives support to Costa Rica's position, but their significance is limited, given that they are all small-scale maps which are not focused on the details of the disputed territory.

86. Both Parties invoke *effectivités* to corroborate their claims to territorial sovereignty. Costa Rica argues that it had exercised sovereignty over the disputed territory without being challenged by Nicaragua until 2010. Costa Rica recalls that it adopted legislation applying specifically to that area, that it issued permits or titles to use land in the same territory, and that Isla Portillos was included within the area it designated as a wetland of international importance under the Ramsar Convention *(Humedal Caribe Noreste)*. Costa Rica notes that, when Nicaragua registered its own wetland of international importance concerning the area *(Refugio de Vida Silvestre Río San Juan)*, it only included the Harbor Head Lagoon and did not encompass the disputed territory.

87. Nicaragua for its part contends that it acted as sovereign over the disputed territory. Relying on affidavits by State officials and two police reports, it asserts that at least since the late 1970s the Nicaraguan army, navy and police have all patrolled the area in and around Harbor Head Lagoon, including the *caños* connecting the lagoon with the San Juan River.

88. Costa Rica questions the value of the evidence adduced by Nicaragua to substantiate its claim of having exercised sovereign powers in the disputed territory.

Nicaragua argues that Costa Rica's claimed exercise of sovereignty was merely a limited "paper presence" in the disputed territory not supported by any actual conduct on the ground.

89. The *effectivités* invoked by the Parties, which the Court considers are in any event of limited significance, cannot affect the title to sovereignty resulting from the 1858 Treaty and the Cleveland and Alexander Awards.

90. The Court 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 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. Moreover, as was noted by Costa Rica's main expert, if the channel had been a distributary of the San Juan River, "sediment would have filled in, or at a minimum partially-filled, the southern part of the lagoon". 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 (see paragraph 76).

91. If Nicaragua's claim were accepted, Costa Rica would be prevented from enjoying territorial sovereignty over the right bank of the San Juan River as far as its mouth, contrary to what is stated in the 1858 Treaty and in the Cleveland Award. Moreover, according to Article VI of the 1858 Treaty (quoted below at paragraph 133), Costa Rica's rights of navigation are over the waters of the river, the right bank of which forms the boundary between the two countries. As the Court noted (see paragraph 76 above), these rights of navigation are linked with sovereignty over the right bank.

92. 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.

93. It is not contested that Nicaragua 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 Section E).

94. Costa Rica submits that "by occupying and claiming Costa Rican territory" Nicaragua also committed other breaches of its obligations.

95. Costa Rica's final submission 2 *(b)* (iv) asks the Court to adjudge and declare that Nicaragua breached its obligation "not to use the San

Juan River to carry out hostile acts" under Article IX of the 1858 Treaty. This provision reads as follows:

> "Under no circumstances, and even in [the] case that the Republics of Costa Rica and Nicaragua should unhappily find themselves in a state of war, neither of them shall be allowed to commit any act of hostility against the other, whether in the port of San Juan del Norte, or in the San Juan River, or the Lake of Nicaragua." [In the Spanish original: *"Por ningún motivo, ni en caso y estado de guerra, en que por desgracia llegasen á encontrarse las Repúblicas de Nicaragua y Costa Rica, les será permitido ejercer ningún acto de hostilidad entre ellas en el puerto de San Juan del Norte, ni en el río de este nombre y Lago de Nicaragua."*]

No evidence of hostilities in the San Juan River has been provided. Therefore the submission concerning the breach of Nicaragua's obligations under Article IX of the Treaty must be rejected.

96. In its final submission 2 *(b)* (ii), Costa Rica 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".

97. The relevant conduct of Nicaragua has already been addressed in the context of the Court's examination of the violation of Costa Rica's territorial sovereignty. 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. However, in the circumstances, given that the unlawful character of these activities has already been established, the Court need not dwell any further on this submission. As in the case concerning *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening)*, the Court finds that, "by the very fact of the present Judgment and of the evacuation" of the disputed territory, the injury suffered by Costa Rica "will in all events have been sufficiently addressed" (*Judgment, I.C.J. Reports 2002*, p. 452, para. 319).

98. In its final submission 2 *(b)* (iii), 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 first sentence of this provision stipulates: "The territory of a State is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly, on any grounds whatever."

In order to substantiate this claim, Costa Rica refers to the presence of military personnel of Nicaragua in the disputed territory.

99. The Court has already established that the presence of military personnel of Nicaragua in the disputed territory was unlawful because it violated Costa Rica's territorial sovereignty. The Court 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

100. The Court will now turn 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. Costa Rica's environmental claims can be grouped into two broad categories. First, according to Costa Rica, Nicaragua breached the procedural obligations to carry out an appropriate transboundary environmental impact assessment of its dredging works, and to notify, and consult with, Costa Rica regarding those works. Secondly, Costa Rica alleges that Nicaragua breached the substantive environmental obligation not to cause harm to Costa Rica's territory. The Court will consider Costa Rica's allegations in turn.

1. Procedural obligations

(a) *The alleged breach of the obligation to carry out an environmental impact assessment*

101. The Parties broadly agree on the existence in general international law of an obligation to conduct an environmental impact assessment concerning activities carried out within a State's jurisdiction that risk causing significant harm to other States, particularly in areas or regions of shared environmental conditions.

102. Costa Rica claims that Nicaragua has not complied with that obligation, and must do so in advance of any further dredging. It submits in particular that the analysis carried out in the Environmental Impact Study undertaken by Nicaragua in 2006 does not support the conclusion that the dredging project would cause no harm to the flow of the Colorado River. Moreover, according to Costa Rica, the Environmental Impact Study did not assess the impact of the dredging programme on the wetlands. Costa Rica maintains that the artificial changes to the morphology of the river resulting from Nicaragua's dredging activities risked causing an adverse impact on those wetlands. Costa Rica also argues that a document entitled "Report: Ramsar Advisory Mission No. 72", prepared in April 2011, confirms the existence of a risk of transboundary

harm, shows that Nicaragua's study did not contain an assessment of that risk, and concludes that such an assessment should have been undertaken prior to the implementation of the dredging programme.

103. Nicaragua contends for its part that its 2006 Environmental Impact Study and the related documentation fully addressed the potential transboundary impact of its dredging programme, including its effects on the environment of Costa Rica and the possible reduction in flow of the Colorado River. It points out that this study concluded that the programme posed no risk of significant transboundary harm and would actually have beneficial effects for the San Juan River and the surrounding area. As to the document entitled "Report: Ramsar Advisory Mission No. 72", Nicaragua argues that it was only a draft report, on which Nicaragua commented in a timely manner, but which the Ramsar Secretariat never finalized; accordingly, it should be given no weight. Furthermore, Nicaragua explains that the report's conclusion that there had been no analysis of the impact of the dredging programme on the hydrology of the area was incorrect, as Nicaragua pointed out in the comments it submitted to the Ramsar Secretariat.

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104. As the Court has had occasion to emphasize in its Judgment in the case concerning *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*:

> "the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory. It is 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States' (*Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 22). A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State." (*Judgment, I.C.J. Reports 2010 (I)*, pp. 55-56, para. 101.)

Furthermore, the Court concluded in that case 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" (*ibid.*, p. 83, para. 204). Although the Court's statement in the *Pulp Mills* case refers 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.

Determination of the content of the environmental impact assessment should be made in light of the specific circumstances of each case. As the Court held in the *Pulp Mills* case:

> "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 the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment" (*I.C.J. Reports 2010 (I)*, p. 83, para. 205).

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.

105. The Court notes that the risk to the wetlands alleged by Costa Rica refers to Nicaragua's dredging activities as a whole, including the dredging of the 2010 *caño*. The Court recalls that the dredging activities carried out in breach of Costa Rica's territorial sovereignty have been considered previously. Accordingly, the Court will confine its analysis to ascertaining whether Nicaragua's dredging activities in the Lower San Juan carried a risk of significant transboundary harm. 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. In 2006, Nicaragua conducted a study of the impact that the dredging programme would have on its own environment, which also stated that the programme would not have a significant impact on the flow of the Colorado River. This conclusion was later confirmed by both Parties' experts. 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) *The alleged breach of an obligation to notify and consult*

106. The Parties concur on the existence in general international law of an obligation to notify, and consult with, the potentially affected State in

respect of activities which carry a risk of significant transboundary harm. Costa Rica contends that, in addition to its obligations under general international law, Nicaragua was under a duty to notify and consult with it as a result of treaty obligations binding on the Parties. First, it asserts that Article 3, paragraph 2, and Article 5 of the Ramsar Convention provide for a duty to notify and consult. Secondly, it submits that Articles 13 *(g)* and 33 of the Convention for the Conservation of the Biodiversity and Protection of Priority Wilderness Areas in Central America establish an obligation to share information related to activities which may be particularly damaging to biological resources.

107. While not contesting the existence of an obligation to notify and consult under general international law, Nicaragua asserts that in the present case such obligation is limited by the 1858 Treaty, as interpreted by the Cleveland Award, which constitutes the *lex specialis* with respect to procedural obligations. For Nicaragua, since the 1858 Treaty contains no duty to notify or consult with respect to dredging or any other "works of improvement", any such duty in customary or treaty law does not apply to the facts of the case. In any event, Nicaragua asserts that a duty to notify and consult would not be triggered because both countries' studies have shown that Nicaragua's dredging programme posed no likelihood of significant transboundary harm. Nicaragua further argues that neither Article 3, paragraph 2, nor Article 5 of the Ramsar Convention is applicable to the facts of the case. With respect to the Convention for the Conservation of the Biodiversity and Protection of Priority Wilderness Areas in Central America, Nicaragua asserts that it does not set out an obligation to share information relating to activities which may be particularly damaging to biological resources; at most it encourages States to do so.

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108. The Court observes that 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 (see paragraph 105 above), it was not required to notify, or consult with, Costa Rica.

109. As to the alleged existence of an obligation to notify and consult in treaties binding on the Parties, the Court observes that both Costa Rica

and Nicaragua are parties to the Ramsar Convention and the Convention for the Conservation of the Biodiversity and Protection of Priority Wilderness Areas in Central America. The Court recalls that Article 3, paragraph 2, of the Ramsar Convention provides that:

> "Each Contracting Party shall arrange to be informed at the earliest possible time if the ecological character of any wetland in its territory and included in the List [of wetlands of international importance] has changed, is changing or is likely to change as the result of technological developments, pollution or other human interference. Information on such changes shall be passed without delay to the [Ramsar Secretariat]."

While this provision 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 evidence before the Court does not indicate that Nicaragua's dredging programme has brought about any changes in the ecological character of the wetland, or that it was 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.

110. The Court further recalls that Article 5 of the Ramsar Convention provides that:

> "The Contracting Parties shall consult with each other about implementing obligations arising from the Convention especially in the case of a wetland extending over the territories of more than one Contracting Party or where a water system is shared by Contracting Parties. They shall at the same time endeavour to co-ordinate and support present and future policies and regulations concerning the conservation of wetlands and their flora and fauna."

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.

111. As to the Convention for the Conservation of the Biodiversity and Protection of Priority Wilderness Areas in Central America, the Court sees no need to take its enquiry further, as neither of the two provi-

sions invoked by Costa Rica contains a binding obligation to notify or consult.

(c) *Conclusion*

112. In light of the above, 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

113. The Court has already found that Nicaragua is responsible for the harm caused by its activities in breach of Costa Rica's territorial sovereignty. What remains to be examined is 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.

114. Costa Rica submits that Nicaragua has breached "the obligation not to dredge, divert or alter the course of the San Juan River, or conduct any other works on the San Juan River, if this causes damage to Costa Rican territory (including the Colorado River), its environment, or to Costa Rican rights under the 1888 Cleveland Award" (final submissions, para. 2 *(c)* (v)). According to Costa Rica, the dredging programme executed by Nicaragua in the Lower San Juan River was in breach of Nicaragua's obligations under customary international law and caused harm to Costa Rican lands on the right bank of the river and to the Colorado River.

115. Nicaragua contends that the dredging programme has not caused any harm to Costa Rican territory including the Colorado River. It argues that the execution of the dredging programme has been beneficial to the dredged section of the Lower San Juan River and to the wetlands of international importance lying downstream. Moreover, Nicaragua maintains that, under a special rule stated in the Cleveland Award and applying to the San Juan River, even if damage to Costa Rica's territory resulted from the works to maintain and improve the river, the dredging activities would not be unlawful.

116. Both Parties referred to the passage in the Cleveland Award which reads as follows:

> "The Republic of Costa Rica cannot prevent the Republic of Nicaragua from executing at her own expense and within her own territory such works of improvement, *provided* such works of improvement do not result in the occupation or flooding or damage of Costa Rica territory, or in the destruction or serious impairment of the navigation of the said river or any of its branches at any point where Costa Rica is entitled to navigate the same. The Republic of Costa Rica has the right to demand indemnification for any places belonging to her on the right bank of the River San Juan which may be occupied without her consent, and for any lands on the same bank which may be flooded or damaged in any other way in consequence of works of improvement." (*RIAA*, Vol. XXVIII, p. 210, para. 3 (6); emphasis in the original.)

Both Parties also referred to the following passage in the same Award:

> "The Republic of Costa Rica can deny to the Republic of Nicaragua the right of deviating the waters of the River San Juan in case such deviation will result in the destruction or serious impairment of the navigation of the said river or any of its branches at any point where Costa Rica is entitled to navigate the same." (*Ibid.*, para. 3 (9).)

117. According to Nicaragua, the statements in the Cleveland Award quoted above should be understood as implying that Nicaragua is free to undertake any dredging activity, possibly even if it is harmful to Costa Rica. On the other hand, according to Costa Rica, Nicaragua would be under an obligation to pay compensation for any harm caused to Costa Rica, whether the harm was significant or not and whether Nicaragua was or was not diligent in ensuring that the environment of Costa Rica would not be affected; damage caused by "unforeseeable or uncontrollable events" related to dredging activities would also have to be compensated by Nicaragua. Costa Rica also argued that "all of Nicaragua's rights and obligations under the 1858 Treaty and the 1888 Award must be interpreted in the light of principles for the protection of the environment in force today" and that the Treaty and the Award do not "override the application of environmental obligations under general principles of law and under international treaties" requiring States not to cause significant transboundary harm.

118. As the Court restated in the *Pulp Mills* case, under customary international law, "[a] State is . . . obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State" (*I.C.J. Reports 2010 (I)*, p. 56, para. 101; see also

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I), pp. 241-242, para. 29).

In any event, it would be necessary for the Court 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 produced harm to Costa Rica's territory.

119. Costa Rica has not provided any convincing evidence that sediments dredged from the river were deposited on its right bank. Costa Rica has also not proved that the dredging programme caused harm to its wetland (see paragraph 109 above). With regard to Costa Rica's contention that "the dredging programme has had a significant effect upon the Colorado River", it has already been noted that the Parties agree that at the so-called "Delta Colorado" the Colorado River receives about 90 per cent of the waters flowing through the San Juan River (see paragraph 56 above). Nicaragua estimates that the diversion of water from the Colorado River due to the dredging of the Lower San Juan River affected less than 2 per cent of the waters flowing into the Colorado River. No higher figure has been suggested by Costa Rica. Its main expert observed that "there is no evidence that the dredging programme has significantly affected flows in the Río Colorado". Costa Rica did adduce evidence indicating a significant reduction in flow of the Colorado River between January 2011 and October 2014. However, the Court considers that a causal link between this reduction and Nicaragua's dredging programme has not been established. As Costa Rica admits, other factors may be relevant to the decrease in flow, most notably the relatively small amount of rainfall in the relevant period. In any event, the diversion of water due to the dredging of the Lower San Juan River is far from seriously impairing navigation on the Colorado River, as envisaged in paragraph 3 (9) of the Cleveland Award, or otherwise causing harm to Costa Rica.

120. 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

121. In its final submissions Costa Rica contends that Nicaragua has also breached its "obligations arising from the Orders of the Court indicating provisional measures of 8 March 2011 and 22 November 2013" (para. 2 *(c)* (vi)).

122. Nicaragua, for its part, raised certain issues about Costa Rica's compliance with some of the provisional measures adopted by the Court, but did not request the Court to make a finding on this matter.

123. In its Order on provisional measures of 8 March 2011 the Court 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"; the Court 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" (*I.C.J. Reports 2011 (I)*, p. 27, para. 86).

124. Costa Rica argued that the presence in the disputed territory of large groups of Nicaraguan civilians who were members of an environmental movement constituted a breach of the 2011 Order. Nicaragua denied this. In its Order of 16 July 2013, the Court specified that "the presence of organized groups of Nicaraguan nationals in the disputed area carrie[d] the risk of incidents which might aggravate the . . . dispute" (*I.C.J. Reports 2013*, p. 240, para. 37).

125. Costa Rica maintained and Nicaragua later acknowledged that the excavation of the second and third *caños* took place after the 2011 Order had been adopted, that this activity was attributable to Nicaragua and that moreover a military encampment had been installed on the disputed territory as defined by the Court. In the oral hearings Nicaragua also acknowledged that the excavation of the second and third *caños* represented an infringement of its obligations under the 2011 Order.

126. The Court already ascertained these facts in its Order of 22 November 2013 (*ibid.*, pp. 364-365, paras. 45-46). However, that statement was only instrumental in ensuring the protection of the rights of the Parties during the judicial proceedings. The judgment on the merits is the appropriate place for the Court to assess compliance with the provisional measures. Thus, contrary to what was argued by Nicaragua, a statement of the existence of a breach to be included in the present Judgment cannot be viewed as "redundant". Nor can it be said that any responsibility for the breach has ceased: what may have ceased is the breach, not the responsibility arising from the breach.

127. On the basis of the facts that have become uncontested, the Court accordingly 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.

128. The Court's Order of 22 November 2013 required the following measures from Nicaragua: to "refrain from any dredging and other activities in the disputed territory"; to "fill the trench on the beach north of the eastern *caño*"; to "cause the removal from the disputed territory of any personnel, whether civilian, police or security"; to "prevent any such personnel from entering the disputed territory"; and to "cause the removal from and prevent the entrance into the disputed territory of any private persons under its jurisdiction or control" (*ibid.*, p. 369, para. 59). No allegations of subsequent breaches of any of these obligations were made by Costa Rica, which only maintained that some of Nicaragua's activities after this Order were in breach of its obligation not to aggravate

the dispute, which had been stated in the 2011 Order. The Court does not find that a breach of this obligation has been demonstrated on the basis of the available evidence.

129. 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 the conclusion set out above (see Section A) that the same conduct also constitutes a violation of the territorial sovereignty of Costa Rica.

D. Rights of Navigation

130. 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" (final submissions, para. 2 *(c)* (ii)).

131. 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". Costa Rica points out that it had already requested in its Application (para. 41 *(f)*) that the Court 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".

132. The Court observes that, 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 quoted above did not contain any restriction to that effect. The Court considers that Costa Rica's final submission concerning rights of navigation is admissible.

133. Article VI of the 1858 Treaty provides that:

> "The Republic of Nicaragua shall have exclusive *dominium* and *imperium* over the waters of the San Juan River from its origin in the lake to its mouth at the Atlantic Ocean; the Republic of Costa Rica shall however have a perpetual right of free navigation on the said waters between the mouth of the river and a point located three English miles below Castillo Viejo, *[con objetos de comercio]*, whether with Nicaragua or with the interior of Costa Rica by the rivers San Carlos or Sarapiquí or any other waterway starting from the section of the bank of the San Juan established as belonging to that Republic. The vessels of both countries may land indiscriminately on either bank of the section of the river where navigation is common, without paying any taxes, unless agreed by both Governments." (Translation from the Spanish original as reproduced in *Dispute regarding Naviga-*

> *tional and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 236, para. 44: *"La República de Nicaragua tendrá exclusivamente el dominio y sumo imperio sobre las aguas del río de San Juan desde su salida del Lago, hasta su desembocadura en el Atlántico; pero la República de Costa Rica tendrá en dichas aguas los derechos perpetuos de libre navegación, desde la expresada desembocadura hasta tres millas inglesas antes de llegar al Castillo Viejo, con objetos de comercio, ya sea con Nicaragua ó al interior de Costa Rica, por los ríos de San Carlos ó Sarapiquí, ó cualquiera otra vía procedente de la parte que en la ribera del San Juan se establece corresponder á esta República. Las embarcaciones de uno ú otro país podrán indistintamente atracar en las riberas del río en la parte en que la navegación es común, sin cobrarse ninguna clase de impuestos, á no ser que se establezcan de acuerdo entre ambos Gobiernos."*)

The Cleveland Award contains some references to Costa Rica's rights of navigation that were quoted above (see paragraph 116). In its Judgment in *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua)*, the Court noted that:

> "two types of private navigation are certainly covered by the right of free navigation pursuant to Article VI of the 1858 Treaty: the navigation of vessels carrying goods intended for commercial transactions; and that of vessels carrying passengers who pay a price other than a token price (or for whom a price is paid) in exchange for the service thus provided" (*I.C.J. Reports 2009*, p. 245, para. 73).

While the express language of Article VI of the 1858 Treaty only considered navigation for purposes of commerce, the Court also observed that:

> "it cannot have been the intention of the authors of the 1858 Treaty to deprive the inhabitants of the Costa Rican bank of the river, where that bank constitutes the boundary between the two States, of the right to use the river to the extent necessary to meet their essential requirements, even for activities of a non-commercial nature, given the geography of the area" (*ibid.*, p. 246, para. 79).

In the operative part of the same Judgment, the Court found that:

> "the inhabitants of the Costa Rican bank of the San Juan River have the right to navigate on the river between the riparian communities for the purposes of the essential needs of everyday life which require expeditious transportation" (*ibid.*, p. 270, para. 156 (1) *(f)*).

134. Costa Rica includes among the alleged breaches of its rights of navigation the enactment by Nicaragua of Decree No. 079-2009 of 1 October 2009, concerning navigation on the San Juan River. The interpretation of this decree is controversial between the Parties: Costa Rica

considers that the decree is of general application, whereas Nicaragua contends that it applies only to tourist boats. While it is clear that the decree should be consistent with Article VI of the 1858 Treaty as interpreted by the Court, the Court observes that none of the instances of interference with Costa Rica's rights of navigation specifically alleged by Costa Rica relates to the application of Decree No. 079-2009. The Court is therefore not called upon to examine this decree.

135. Costa Rica alleges that breaches of its rights of navigation occurred in five instances. Nicaragua emphasizes the small number of alleged breaches, but does not contest two of those incidents. In the first one, in February 2013, a riparian farmer and his uncle were detained for several hours at a Nicaraguan army post and subjected to humiliating treatment. This incident is set out in an affidavit. In the second incident, in June 2014, a Costa Rican property owner and some members of a local agricultural co-operative were prevented by Nicaraguan agents from navigating the San Juan River. This is supported by five affidavits.

136. The Court finds that Nicaragua did not provide a convincing justification with regard to Article VI of the 1858 Treaty for the conduct of its authorities in these two incidents concerning navigation by inhabitants of the Costa Rican bank of the San Juan River. The Court concludes that the two incidents show that Nicaragua breached Costa Rica's rights of navigation on the San Juan River pursuant to the 1858 Treaty. Given this finding, it is unnecessary for the Court to examine the other incidents invoked by Costa Rica.

E. Reparation

137. Costa Rica requests the Court to order Nicaragua to "repeal, by means of its own choosing, those provisions of the Decree No. 079-2009 and the Regulatory Norms annexed thereto of 1 October 2009 which are contrary to Costa Rica's right of free navigation under Article VI of the 1858 Treaty of Limits, the 1888 Cleveland Award, and the Court's Judgment of 13 July 2009" and to cease all dredging activities in the San Juan River pending the fulfilment of certain conditions (final submissions, para. 3 *(a)* and *(b)*).

Costa Rica moreover asks the Court to order Nicaragua to:

> "make reparation in the form of compensation for the material damage caused to Costa Rica, including but not limited to: (i) damage arising from the construction of artificial *caños* and destruction of trees and vegetation on the 'disputed territory'; (ii) the cost of the remediation measures carried out by Costa Rica in relation to those damages . . .; the amount of such compensation to be determined in a separate phase of these proceedings" (*ibid.*, para. 3 *(c)*).

The Court is further requested to order Nicaragua to "provide satisfaction so [as] to achieve full reparation of the injuries caused to Costa Rica in a manner to be determined by the Court" (final submissions, para. 3 *(d)*) and to "provide appropriate assurances and guarantees of non-repetition of Nicaragua's unlawful conduct, in such a form as the Court may order" (*ibid.*, para. 3 *(e)*). Costa Rica finally requests an award of costs that will be considered later in the present section.

138. In view of the conclusions reached by the Court in Sections B and D above, the requests made by Costa Rica in its final submissions under paragraph 3 *(a)* and *(b)*, concerning the repeal of the Decree No. 079-2009 on navigation and the cessation of dredging activities respectively, cannot be granted.

139. The declaration by the Court that Nicaragua breached the territorial sovereignty of Costa Rica by excavating three *caños* 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 of the breach of the obligations under the Court's Order of 8 March 2011 on provisional measures. Finally, the declaration of the breach of Costa Rica's rights of navigation in the terms determined above in Section D provides adequate satisfaction for that breach.

140. The request for "appropriate assurances and guarantees of non-repetition" was originally based on Nicaragua's alleged "bad faith" in the dredging of the 2010 *caño* and later on Nicaragua's infringement of its obligations under the 2011 Order.

141. As the Court noted in the *Navigational and Related Rights* case, "there is no reason to suppose that a State whose act or conduct has been declared wrongful by the Court will repeat that act or conduct in the future, since its good faith must be presumed" and therefore assurances and guarantees of non-repetition will be ordered only "in special circumstances" (*I.C.J. Reports 2009*, p. 267, para. 150). While Nicaragua failed to comply with the obligations under the 2011 Order, it is necessary also to take into account the fact that Nicaragua later complied with the requirements, stated in the Order of 22 November 2013, to "refrain from any dredging and other activities in the disputed territory" and to "cause the removal from the disputed territory of any personnel, whether civilian, police or security" (*I.C.J. Reports 2013*, p. 369, para. 59). It is to be expected 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.

142. 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. 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.

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143. Costa Rica also requests the Court to order Nicaragua to:

> "pay all of the costs and expenses incurred by Costa Rica in requesting and obtaining the Order on provisional measures of 22 November 2013, including, but not limited to, the fees and expenses of Costa Rica's counsel and experts, with interest, on a full indemnity basis" (final submissions, para. 3 *(f)*).

The special reason for this request is that the proceedings which led to the Order of 22 November 2013 were allegedly due to the infringements by Nicaragua of its obligations under the Order of 8 March 2011.

144. According to Article 64 of the Statute, "[u]nless otherwise decided by the Court, each party shall bear its own costs". This Article provides that as a rule, costs are not awarded to any of the parties, but gives the Court the power to order that one of them will pay some or all of the costs. While 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 *Nicaragua* v. *Costa Rica* Case

145. The Application filed by Nicaragua on 22 December 2011 (see paragraph 9 above) 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. The Court will start by considering the alleged breach of procedural obligations; then it will address the alleged breach of substantive obligations.

A. The Alleged Breach of Procedural Obligations

1. The alleged breach of the obligation to carry out an environmental impact assessment

146. According to Nicaragua, 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.

147. Costa Rica denies the allegation. It argues that the construction of the road did not create a risk of significant transboundary harm through the discharge of harmful substances into the San Juan River or otherwise into Nicaraguan territory, and that there was no risk that the river would be materially affected by the relatively insignificant quantities of sediment coming from the road.

148. Costa Rica also maintains that it was exempted from the requirement to prepare an environmental impact assessment because of the state of emergency created by Nicaragua's occupation of Isla Portillos (see paragraphs 63-64 above). First, Costa Rica argues that an emergency can exempt a State from the requirement to conduct an environmental impact assessment, either because international law contains a *renvoi* to domestic law on this point, or because it includes an exemption for emergency situations. Secondly, Costa Rica submits that the construction of the road was an appropriate response to the emergency situation because it would facilitate access to the police posts and remote communities located along the right bank of the San Juan River, particularly in light of the real risk of a military confrontation with Nicaragua, which would require Costa Rica to evacuate the area. Thus, Costa Rica claims that it could proceed with its construction works without an environmental impact assessment.

149. In any event, Costa Rica maintains that, even if it was required under international law to conduct an environmental impact assessment in this case, it fulfilled the obligation by carrying out a number of environmental impact studies, including an "Environmental Diagnostic Assessment" in 2013.

150. In reply, Nicaragua argues that there was no *bona fide* emergency. It states that the road is not located near the disputed territory, as defined by the Court's Order of 8 March 2011, and that the emergency was declared several months after the beginning of the construction works. Nicaragua further argues that there is no emergency exemption from the international obligation to carry out an environmental impact assessment. It points out that Costa Rica improperly seeks to rely on a declaration of emergency made under its domestic law to justify its failure to perform its international law obligations.

151. Finally, Nicaragua points out that the environmental impact studies produced by Costa Rica after the bulk of the construction work

had been completed do not constitute an adequate environmental impact assessment. As a consequence, it asks the Court to declare that Costa Rica should not undertake any future development in the area without an appropriate environmental impact assessment.

152. Following the lines of argument put forward by the Parties, the Court will first examine whether Costa Rica was under an obligation to carry out an environmental impact assessment under general international law. If so, the Court will assess whether it was exempted from the said obligation or whether it complied with that obligation by carrying out the Environmental Diagnostic Assessment and other studies.

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153. The Court recalls (see paragraph 104 above) 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.

154. In the oral proceedings, counsel for Costa Rica stated that a preliminary assessment of the risk posed by the road project was undertaken when the decision to build the road was made. According to Costa Rica, this assessment took into account the nature of the project and its likely impact on the river, and concluded that the road posed no risk of significant harm. In support of this claim, Costa Rica emphasized the modest scale of the works, that the road was clearly not a highway, that some of it was constructed on pre-existing tracks, and that the only possible risk was the contribution of sediment by the road to a river that already carried a heavy sediment load.

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. However, Costa Rica has not adduced any evidence that it actually carried out such a preliminary assessment.

155. In evaluating whether, as of the end of 2010, the construction of the road posed a risk of significant transboundary harm, the Court will have regard to the nature and magnitude of the project and the context in which it was to be carried out.

First, the Court notes that, contrary to Costa Rica's submission, the scale of the road project was substantial. The road, which is nearly 160 km long, runs along the river for 108.2 km (see sketch-map

No. 2 above). Approximately half of that stretch is completely new construction.

Secondly, the Court notes that, because of the planned location of the road along the San Juan River, any harm caused by the road to the surrounding environment could easily affect the river, and therefore Nicaragua's territory. The evidence before the Court shows that approximately half of the stretch of road following the San Juan River is situated within 100 metres of the river bank; for nearly 18 km it is located within 50 metres of the river; and in some stretches it comes within 5 metres of the right bank of the river. The location of the road in such close proximity to the river and the fact that it would often be built on slopes, risked increasing the discharge of sediment into the river. Another relevant factor in assessing the likelihood of sedimentation due to erosion from the road is that almost a quarter of the road was to be built in areas that were previously forested. The possibility of natural disasters in the area caused by adverse events such as hurricanes, tropical storms and earthquakes, which would increase the risk of sediment erosion, must equally be taken into consideration.

Thirdly, the geographic conditions of the river basin where the road was to be situated must be taken into account. The road would pass through a wetland of international importance in Costa Rican territory and be located in close proximity to another protected wetland — the *Refugio de Vida Silvestre Río San Juan* — situated in Nicaraguan territory. The presence of Ramsar protected sites heightens the risk of significant damage because it denotes that the receiving environment is particularly sensitive. The principal harm that could arise was the possible large deposition of sediment from the road, with resulting risks to the ecology and water quality of the river, as well as morphological changes.

156. In conclusion, 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.

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157. The Court now 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 (see paragraph 104 above, quoting *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.

158. 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. In fact, completion of the project was going to take, and is indeed taking, several years. In addition, when Costa Rica embarked upon the construction of the road, the situation in the disputed territory was before the Court, which shortly thereafter issued provisional measures. Although Costa Rica maintains that the construction of the road was meant to facilitate the evacuation of the area of Costa Rican territory adjoining the San Juan River, the Court notes that the road provides access to only part of that area and thus could constitute a response to the alleged emergency only to a limited extent. Moreover, Costa Rica has not shown an imminent threat of military confrontation in the regions crossed by the road. Finally, the Court notes that the Executive Decree proclaiming an emergency was issued by Costa Rica on 21 February 2011, after the works on the road had begun.

159. Having thus concluded that, in the circumstances of this case, there was no emergency justifying the immediate construction of the road, 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.

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160. Turning now 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.

161. In its Judgment in the *Pulp Mills* case, the Court 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.

162. 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

163. Nicaragua submits that Costa Rica was required to carry out an environmental impact assessment by Article 14 of the Convention on Biological Diversity. Costa Rica responds that the provision at issue concerns the introduction of appropriate procedures with respect to projects that are likely to have a significant adverse effect on biological diversity. It claims that it had such procedures in place and that, in any event, they do not apply to the construction of the road, as it was not likely to have a significant adverse effect on biological diversity.

164. The Court recalls that the provision reads, in relevant part:

> "Each Contracting Party, as far as possible and as appropriate, shall: *(a)* Introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate, allow for public participation in such procedures."

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

165. Nicaragua contends 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 will examine each of Nicaragua's arguments in turn.

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166. In Nicaragua's view, Costa Rica should have notified it of the road project and should have consulted with it, as Costa Rica had every reason to believe that the construction of the road risked causing significant transboundary harm. According to Nicaragua, the alleged emergency did not exempt Costa Rica from this obligation.

167. For Costa Rica, the relevant threshold of "risk of significant adverse impact" was not met in this case. Moreover, Costa Rica claims to have invited Nicaragua to engage in consultations, but Nicaragua did not do so. In any event, according to Costa Rica, Nicaragua is prevented from relying on the obligation to notify since it has itself created the emergency to which Costa Rica had to respond by constructing the road.

168. The Court 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 (see paragraph 104 above). However, the duty to notify and consult does not call for examination by the Court in the present case, since the Court 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.

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169. Nicaragua further asserts the existence of an obligation to notify under the 1858 Treaty. In its 2009 Judgment in the *Navigational Rights* case, the Court held that Nicaragua has an obligation to notify Costa Rica of its regulations concerning navigation on the river. According to Nicaragua, since the construction of the road affects Nicaragua's navigational rights, the same reasoning applies *a fortiori* in this case.

170. For Costa Rica, Nicaragua's reference to the 1858 Treaty is misplaced, since the Treaty does not impose on Costa Rica an obligation to

notify Nicaragua if Costa Rica undertakes infrastructure works on its own territory.

171. The Court recalls its finding in the 2009 Judgment that Nicaragua's obligation to notify Costa Rica under the 1858 Treaty arises, amongst other factors, by virtue of Costa Rica's rights of navigation on the river, which is part of Nicaragua's territory (*Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, pp. 251-252, paras. 94-97). 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.

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172. Lastly, Nicaragua relies on Article 3, paragraph 2, and on Article 5 of the Ramsar Convention (see paragraphs 109-110 above) as imposing an obligation of notification and consultation upon the Contracting Parties. In the Court's view, 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 Ramsar 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 (see also paragraph 110 above).

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173. 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

174. The Court now turns to the examination of the alleged violations by Costa Rica of its substantive obligations under customary international law and the applicable international conventions. In particular, Nicaragua claims that the construction of the road caused damage to the San Juan River, which is under Nicaragua's sovereignty according to the 1858 Treaty. Thus, in Nicaragua's view, Costa Rica breached the obligation under customary international law not to cause significant transboundary harm to Nicaragua, the obligation to respect the territorial integrity of Nicaragua and treaty obligations regarding the protection of the environment.

175. Over the past four years, the Parties have presented to the Court a vast amount of factual and scientific material in support of their respective contentions. They have also submitted numerous reports and studies prepared by experts and consultants commissioned by each of them on questions such as technical standards for road construction; river morphology; sedimentation levels in the San Juan River, their causes and effects; the ecological impact of the construction of the road; and the status of remediation works carried out by Costa Rica. Some of these specialists have also appeared before the Court to give evidence in their capacity as experts pursuant to Articles 57 and 64 of the Rules of Court.

176. It is the duty of the Court, after having given careful consideration to all the evidence in the record, to assess its probative value, to determine which facts must be considered relevant, and to draw conclusions from them as appropriate. In keeping with this practice, the Court will make its own determination of the facts, on the basis of the totality of the evidence presented to it, and it will then apply the relevant rules of international law to those facts which it has found to be established (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 72, para. 168).

1. The alleged breach of the obligation not to cause significant transboundary harm to Nicaragua

177. Nicaragua claims that the construction works resulted in the dumping of large quantities of sediment into the San Juan River, in particular because Costa Rica's disregard of basic engineering principles led to significant erosion. For example, Costa Rica carried out extensive deforestation in areas adjacent to the river and earthmoving activities

that led to the creation of unstable cuts and fills in the river's proximity. Moreover, the road builders left piles of earth exposed to rainfall and failed to construct proper drainage systems and stream crossings so as to avoid erosion. Furthermore, Nicaragua maintains that the stretch of road along the San Juan River is situated too close to the river — nearly half of it was built within 100 metres of the river, and parts of it even within 5 metres of the river bank — or on steep slopes, thereby increasing the delivery of sediment to the river. Nicaragua's main expert opined that erosion is particularly severe in the 41.6 km stretch of the road containing the steepest sections, situated between a point denominated "Marker II" (the western point from which the right bank of the San Juan marks the boundary with Nicaragua) and Boca San Carlos (at the junction of the San Juan and San Carlos Rivers; see sketch-map No. 2 above).

178. According to Nicaragua, the delivery of these large quantities of sediment to the San Juan River caused an increase in sediment concentrations in the river, which are already unnaturally elevated. It argues that this increase, in and of itself, produced harm to the river, as sediment is a pollutant, and that it had a number of adverse effects. First, it brought about changes in the river morphology, as large quantities of the sediment eroded from the road accumulated on the bed of the Lower San Juan, thereby exacerbating the problems for navigation in this stretch of the river and rendering additional dredging necessary to restore the navigability of the channel. Moreover, sediment eroded from the road created large deltas along the Costa Rican bank of the river that obstruct navigation. Secondly, Nicaragua argues that sediment eroded from the road caused harm to the river's water quality and ecosystem. Thirdly, Nicaragua alleges that the construction of the road has had an adverse impact on tourism and the health of the river's riparian communities. In addition, Nicaragua maintains that Costa Rica's continuing failure to comply with road construction standards exposes Nicaragua to future harm, and that Costa Rica has failed to take appropriate remediation measures. Nicaragua further contends that additional risks derive from the possibility of spills of toxic materials into the river, the further development of the Costa Rican bank of the river and the likelihood of natural disasters caused by adverse events such as hurricanes, tropical storms and earthquakes.

179. For its part, Costa Rica argues that the construction of the road has not caused any harm to Nicaragua. According to Costa Rica, erosion is a natural process and sediment is not a pollutant. It contends that Nicaragua has not adduced any evidence of actual harm to the river, let alone significant harm. In addition, Costa Rica argues that the road's sediment contribution is tiny compared to the river's existing sediment load. It also recalls that, since 2012, it has carried out remediation works to mitigate erosion at slopes and watercourse crossings (such as slope-terracing; digging drainage channels; installing cross-drains on the road;

constructing sediment traps; and replacing log bridges with modular bridges), with a view to further reducing the quantity of sediment from the road that reaches the San Juan River.

180. In order to pronounce on Nicaragua's allegations, the Court will first address the Parties' arguments on the contribution of sediment from the road to the river; then it will examine whether the road-derived sediment caused significant harm to Nicaragua.

(a) *The contribution of sediment from the road to the river*

181. The Parties agree that sediment eroded from the road is delivered to the river, but disagree considerably as to the actual volume.

182. Nicaragua argues that the most direct and reliable method to assess the total amount of sediment contributed from the road is to estimate the volume of sediment entering the river from all the sites along the road that are subject to erosion. It submits, based on its main expert's estimates, that the total road-derived sediment reaching the river amounts to approximately 190,000 to 250,000 tonnes per year, including sediment eroded from the access roads that connect the road to inland areas. Nicaragua further submits that the volume of sediment in the river due to the construction of the road would increase by a factor of at least ten during a tropical storm or a hurricane.

183. Costa Rica challenges the estimates of road-derived sediment put forward by Nicaragua. In particular, it argues, relying on its main expert's evidence, that Nicaragua's experts over-estimated the areas subject to erosion, which they could not measure directly because the road is in Costa Rica's territory. It adds that Nicaragua's estimates are inflated by the inclusion of access roads, which do not contribute any appreciable quantities of sediment to the San Juan River. According to Costa Rica, the sediment contribution from the road is approximately 75,000 tonnes per year. In Costa Rica's view, even this figure is a significant over-estimate because it does not take into account the effects of mitigation works recently carried out. Finally, Costa Rica argues that Nicaragua's experts have overstated the risk of unprecedented rainfall and the impact on sediment loads in the river as a result of hurricanes or tropical storms.

184. Costa Rica further points out that the most direct and reliable method for measuring the road's impact on sediment concentrations in the San Juan River would have been for Nicaragua, which is sovereign over the river, to carry out a sampling programme. Yet Nicaragua has not provided measurements of sedimentation and flow levels in the river. The only empirical data before the Court are two reports of the Nicara-

guan Institute of Territorial Studies (INETER), which contain measurements of flow rates and suspended sediment concentrations taken at various locations along the San Juan River in 2011 and 2012. Costa Rica argues that neither set of measurements shows any impact from the road.

185. Nicaragua replies that a sampling programme would not have been of assistance to assess the impact of the road-derived sediment because the baseline sediment load of the San Juan prior to the construction of the road is unknown.

186. 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. The Court sees no need to go into a detailed examination of the scientific and technical validity of the different estimates put forward by the Parties' experts. Suffice it to note here 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 (see paragraphs 182-183 above and 188-191 below). The Court will come back to this point below (see paragraph 194), after considering further arguments by the Parties.

(b) *Whether the road-derived sediment caused significant harm to Nicaragua*

187. The core question before the Court is whether the construction of the road by Costa Rica has caused significant harm to Nicaragua. The Court will begin 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. The Court will then examine whether such increase in sediment concentrations caused harm in particular to the river's morphology, navigation and Nicaragua's dredging programme; the water quality and the aquatic ecosystem; or whether it caused any other harm that may be significant.

(i) Alleged harm caused by increased sediment concentrations in the river

188. Nicaragua contends that the volume (absolute quantity) of sediment eroded from the road, irrespective of its precise amount, polluted the river thereby causing significant harm to Nicaragua. In Nicaragua's

view, the impact of the road's contribution must be considered taking into account the elevated sediment load in the San Juan River which is allegedly due to deforestation and poor land use practices by Costa Rica. An expert for Nicaragua estimated the current sediment load to be approximately 13,700,000 tonnes per year. In this context, Nicaragua submits that there is a maximum load for sediment in the San Juan, and that any additional amount of sediment delivered from the road to the river is necessarily harmful.

189. Costa Rica responds that Nicaragua has not shown that the San Juan River has a maximum sediment capacity that has been exceeded. For Costa Rica, the question before the Court is whether the relative impact of the road-derived sediment on the total load of the San Juan River caused significant harm. Costa Rica claims that it did not. According to Costa Rica, the San Juan River naturally carries a heavy sediment load, which is attributable to the geology of the region, and in particular to the occurrence of earthquakes and volcanic eruptions in the drainage area of the river and its tributaries. The volume of sediment contributed by the road is insignificant in the context of the river's total sediment load (estimated by Costa Rica at 12,678,000 tonnes per year), of which it represents a mere 0.6 per cent at most. The road-derived sediment is also indiscernible considering the high variability in the river's sediment loads deriving from other sources. Costa Rica adds that, even if Nicaragua's figures were to be adopted, the sediment contribution due to the construction of the road would still only represent a small proportion, within the order of 1-2 per cent, of the total load transported by the San Juan. In Costa Rica's view, this amount is too small to have any significant impact.

190. Nicaragua further argues, drawing on the commentary to the International Law Commission's Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, that any detrimental impact of the construction of the road on the San Juan River need only be susceptible of being measured to qualify as significant harm. Since the amount of sediment in the river due to the construction of the road is measurable, as shown by the fact that both Nicaragua's and Costa Rica's experts have estimated its amount, Nicaragua claims that it caused significant harm.

191. Costa Rica retorts that Nicaragua has not shown significant harm by factual and objective standards. It also argues that, even lacking an appropriate baseline, Nicaragua could have measured the impact of the construction of the road on the river's sediment concentrations by taking its own measurements upstream and downstream of the construction works. However, Nicaragua failed to do so.

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192. 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*.

193. The Court will therefore proceed to consider the relative impact of the road-derived sediment on the current overall sediment load of the San Juan River. In this regard, the Court notes that the total sediment load of the San Juan River has not been established. Indeed, Nicaragua has not provided direct measurements of sediment levels in the river. Costa Rica, based on its main expert's report, estimated the river's total sediment load to be approximately 12,678,000 tonnes per year using measurements from the Colorado River. Nicaragua has not provided a comparable figure, although its expert stated that the current total sediment load of the San Juan River is roughly 13,700,000 tonnes per year.

194. 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.

195. In any event, in the Court's view, the only measurements that are before it, namely, those contained in the INETER reports from 2011 and 2012, do not support Nicaragua's claim that sediment eroded from the road has had a significant impact on sediment concentrations in the river. A comparison of the measurements taken in 2011, when most of the road had not yet been built, and in 2012, when construction works were under way, shows that sediment levels in the river are variable, and that tributaries (particularly the San Carlos and Sarapiquí Rivers) are major sources of sediment for the San Juan. However, the data do not indicate a significant impact on sediment levels from the construction of the road. Moreover, the measurements taken at El Castillo and upstream of Boca San Carlos, which are representative of the steepest stretch of the road, show no significant impact.

196. In light of the above, 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

197. The Court will now examine whether the sediment contributed by the road, which the Court has noted corresponds to at most 2 per cent of the river's average total load, caused any other significant harm. Nicaragua's primary argument on the harm caused by the construction of the road concerns the impact of the resulting sediment on the morphology of the river, and particularly on the Lower San Juan.

198. The Parties broadly agree that, on the assumption that at "Delta Colorado" 10 per cent of the waters of the San Juan River flow into the Lower San Juan, approximately 16 per cent of the suspended sediments and 20 per cent of the coarse load in the San Juan River would flow into the Lower San Juan. They also concur that, unlike the much larger Colorado River, the Lower San Juan has no unfilled capacity to transport sediment. Thus, coarse sediment deposits on the bed of the Lower San Juan. The Parties' experts further agree that sediment that settles on the riverbed does not spread evenly, but tends to accumulate in shoals and sandbars that may obstruct navigation, especially in the dry season. They disagree, however, on whether and to what extent the finer suspended sediments are also deposited on the riverbed and, more broadly, on the effects of the construction of the road on sediment deposition in the Lower San Juan.

199. According to Nicaragua's expert, all of the coarse sediment and 60 per cent of the fine sediment contributed by the road to the Lower San Juan settle on the riverbed. To maintain the navigability of the river, Nicaragua is thus required to dredge the fine and coarse sediment that accumulates in the Lower San Juan. In Nicaragua's view, in a river that is already overloaded with sediment such as the Lower San Juan, any addition of sediment coming from the road causes significant harm to Nicaragua because it increases its dredging burden. Furthermore, the accumulation of road-derived sediment reduces the flow of fresh water to the wetlands downstream, which depend on it for their ecological balance.

200. Nicaragua also argues that sediment eroded from the road created "huge" deltas along the river's channel that obstruct navigation, thereby causing significant harm to Nicaragua.

201. Costa Rica responds, relying on the evidence of its main expert, that the aggradation of the Lower San Juan is an inevitable natural phenomenon that is unrelated to the construction of the road. For Costa Rica, Nicaragua's experts also dramatically overestimate the amount of road-derived sediment that is deposited in the Lower San Juan. First, in Costa Rica's view, only coarse sediment accumulates on the riverbed, whereas most of the fine sediment is washed into the Caribbean Sea. Secondly, Costa Rica argues that there is no evidence that coarse sediment

from the road has actually reached the Lower San Juan. Sediment deposition is not a linear process; in particular, sediment tends to accumulate in stretches of the river called "response reaches" and may stay there for years before it is transported further down the channel. Moreover, Costa Rica points out that the Parties' estimates are based on a number of untested assumptions, including estimates of the split of flow and sediment loads between the Colorado River and the Lower San Juan at "Delta Colorado". Costa Rica further argues that Nicaragua's case on harm rests on the mistaken assumption that sediment accumulating on the bed of the Lower San Juan will necessarily need to be dredged.

202. As to the deltas along the Costa Rican bank of the river, Costa Rica argues that Nicaragua has not shown that they were created as a result of the construction of the road. For example, satellite imagery demonstrates that at least two of these deltas pre-date the road. Costa Rica further points out that similar deltas exist on the Nicaraguan bank of the river. In any event, their impact on the morphology of the river and on navigation is insignificant because of their small size relative to the width of the river.

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203. 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. Nicaragua's case once again rests on modelling and estimates by its experts, which have not been substantiated by empirical data. The Court observes in this regard that there are considerable uncertainties concerning the volume of sediment eroded from the road that has allegedly reached the Lower San Juan and deposited on its bed. For example, Nicaragua has not adduced scientific evidence on the division of flow and sediment loads at "Delta Colorado", but based its estimates on a report of the Costa Rican Institute of Electricity, which is in turn based on measurements taken only in the Colorado River.

204. The Court 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.

205. 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. In this connection, the Court also recalls that Nicaragua initiated its dredging programme before the construction of the road started (see paragraphs 63-64 above). In any event, the Court recalls its conclusion that the construction of the road has caused an increase in sediment concentrations in the river corresponding to at most 2 per cent (see paragraph 194 above). 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.

206. 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. The Court observes that Nicaragua submitted that in the steepest stretch of the road there are eight "huge" deltas but was not able to specify the total number of deltas allegedly created as a consequence of the construction of the road. The Court further notes that satellite images in the record show that at least two of these deltas pre-date the road. In any event, the Court 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.

207. 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

208. The Court will now consider Nicaragua's contention concerning harm to water quality and the aquatic ecosystem. In its written pleadings, Nicaragua alleged that the increased sediment concentrations in the river as a result of the construction of the road caused significant harm to fish species, many of which belong to families that are vulnerable to elevated levels of sediments, to macro-invertebrates and to algal communities in the river. Furthermore, according to Nicaragua, the road's sediment

caused a deterioration in the water quality of the river. To prove harm to aquatic organisms and water quality, Nicaragua relied *inter alia* on an expert report based on sampling at 16 deltas in the river, which concluded that both species richness and abundance of macro-invertebrates were significantly lower on the south bank than on the north bank.

209. During the course of the oral proceedings, Nicaragua's case shifted from its prior claim of actual harm to the river's ecosystem to a claim based on the risk of harm. The Parties now agree that there have been no studies of the fish species in the San Juan River to determine whether they are vulnerable to elevated levels of sediment. However, Nicaragua claims that Costa Rica's Environmental Diagnostic Assessment and the follow-up study carried out in January 2015 by the Tropical Science Centre (hereinafter "CCT", by its Spanish acronym) show that the road is harming macro-invertebrates and water quality in the tributaries that flow into the San Juan River. The CCT measured water quality in Costa Rican tributaries upstream and downstream of the road and recorded a lower water quality downstream of the road. For Nicaragua, this demonstrates a risk of harm to the river itself due to the cumulative impact of those tributaries.

210. For Costa Rica, Nicaragua's case on the impact on fish species fails due to the lack of evidence of actual harm. Relying on one of its experts, Costa Rica argues that it is very likely that species living in the river are adapted to conditions of high and variable sediment loads and are highly tolerant of such conditions. As to macro-invertebrates and water quality, Costa Rica submits that the CCT study shows no significant impact. In any event, its results are based on sampling on small tributary streams in Costa Rica, and cannot be transposed to the much larger San Juan River. Costa Rica further argues that the expert report adduced by Nicaragua does not provide sufficient support for Nicaragua's claim that the construction of the road has had an adverse impact on macro-invertebrates living in deltas along the south bank of the river.

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211. The Court observes that Nicaragua has not presented any evidence of actual harm to fish in the San Juan River, nor has it identified with precision which species of fish have allegedly been harmed by the construction of the road.

212. In the Court's view, the Environmental Diagnostic Assessment relied upon by Nicaragua only shows that the construction of the road

has had a localized impact on macro-invertebrate communities and water quality in small Costa Rican streams draining into the San Juan River. However, the Court is not persuaded that the results of the Environmental Diagnostic Assessment and the follow-up study can be transposed to the San Juan River, which has an average width of nearly 300 metres. As regards the expert report submitted by Nicaragua, the Court finds it difficult to attribute any differences in macro-invertebrate richness and abundance between the north and the south banks of the river to the construction of the road alone, as opposed to other factors such as the size of the catchment area and the nutrient levels therein.

213. On the basis of the foregoing considerations, the Court finds that Nicaragua has not proved that the construction of the road caused significant harm to the river's ecosystem and water quality.

(iv) Other alleged harm

214. Nicaragua also alleges 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. Furthermore, in Nicaragua's view, the road significantly affected the area's tourism potential as it has a negative visual impact on the natural landscape. Finally, Nicaragua argues that, in addition to the transboundary harm that the road has already caused, it poses a significant risk of future transboundary harm. According to Nicaragua, additional risks derive from the possibility of spills of toxic materials into the river whenever hazardous substances are transported on the road, and from any further development of the right bank of the river, such as increased agricultural and commercial activities.

215. Costa Rica responds that Nicaragua did not adduce any evidence of actual impact on tourism or on the health of riparian communities. Moreover, it did not explain the legal basis of its claims. Furthermore, Costa Rica contends that Nicaragua's arguments on the risk of toxic spills in the river are based entirely on speculation: Costa Rica's 1995 Regulations for the Ground Transportation of Hazardous Material provide that hazardous substances can only be transported on authorized roads, and Route 1856 is not one of them.

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216. The Court finds 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*

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

218. Nicaragua further argues that Costa Rica violated substantive obligations contained in several universal and regional instruments. First, it contends that Costa Rica breached Article 3, paragraph 1, of the Ramsar Convention. Secondly, it argues that Costa Rica acted contrary to the object and purpose of the 1990 Agreement over the Border Protected Areas between Nicaragua and Costa Rica ("SI-A-PAZ Agreement"). Thirdly, Nicaragua alleges that, by its activities, Costa Rica violated Articles 3 and 8 of the Convention on Biological Diversity. Fourthly, it claims that Costa Rica violated several provisions of the Convention for the Conservation of the Biodiversity and Protection of Priority Wilderness Areas in Central America. Fifthly, it alleges violations of the Central American Convention for the Protection of the Environment and the Tegucigalpa Protocol to the Charter of the Organization of Central American States. Finally, Nicaragua contends that Costa Rica breached Article 3 of the Regional Agreement on the Transboundary Movement of Hazardous Wastes, on the ground that it did not adopt and implement the precautionary approach to pollution problems provided for in that instrument.

219. In response to these allegations, Costa Rica argues at the outset that, since Nicaragua failed to prove that the construction of the road caused any significant transboundary harm, its contentions must fail. Costa Rica further points out that the construction of the road does not touch upon protected Nicaraguan wetlands falling within the Ramsar Convention. Moreover, it states that Nicaragua has identified no provision of the SI-A-PAZ Agreement that was allegedly breached. Costa Rica further maintains that the Central American Convention for the Protection of the Environment and the Tegucigalpa Protocol are of no relevance to the present dispute and that there is no factual basis for Nicaragua's contentions regarding the Regional Agreement on the Transboundary Movement of Hazardous Wastes.

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220. 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 (see paragraph 217 above). 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

221. Nicaragua further alleges 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. Moreover, Nicaragua maintains that the dumping of sediments, soil, uprooted vegetation and felled trees into the river by Costa Rica poses a serious threat to the exercise of Nicaragua's right of navigation on the San Juan, which is based on its sovereignty over the river. Nicaragua therefore claims that, by its conduct and activities, Costa Rica violated Nicaragua's territorial integrity and sovereignty over the San Juan River, as established by the 1858 Treaty.

222. Costa Rica argues that undertaking road infrastructure works entirely within its territory does not infringe the boundary delimited by the 1858 Treaty or violate Nicaragua's sovereignty, nor does it affect Nicaragua's right to navigate the San Juan River. Furthermore, Costa Rica maintains that the 1858 Treaty has no bearing on this case, as it does not regulate the issues that are at stake here.

223. 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 in paragraphs 203 to 207 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

224. Nicaragua requests the Court to adjudge and declare that, by its conduct, Costa Rica has breached its obligation not to violate Nicaragua's territorial integrity; its obligation not to damage Nicaraguan terri-

tory; and its obligations under general international law and the relevant environmental treaties (final submissions, para. 1; see paragraph 52 above).

In the light of its reasoning above, the Court's declaration that Costa Rica violated its obligation to conduct an environmental impact assessment is the appropriate measure of satisfaction for Nicaragua.

225. Secondly, Nicaragua asks the Court to order that Costa Rica "[c]ease all its continuing internationally wrongful acts that affect or are likely to affect the rights of Nicaragua" (*ibid.*, para. 2 (i)).

The Court considers that Costa Rica's failure to conduct an environmental impact assessment does not at present adversely affect the rights of Nicaragua nor is it likely further to affect them. Consequently, there are no grounds to grant the remedy requested.

226. Thirdly, Nicaragua requests the Court to order Costa Rica to restore to the extent possible the situation that existed before the road was constructed, and to provide compensation for the damage caused insofar as it is not made good by restitution (*ibid.*, para. 2 (ii) and (iii)). The Court recalls that restitution and compensation are forms of reparation for material injury. The Court notes that, although Costa Rica did not comply with the obligation to conduct an environmental impact assessment, it has not been established that the construction of the road caused significant harm to Nicaragua or was in breach of other substantive obligations under international law. As such, restoring the original condition of the area where the road is located would not constitute an appropriate remedy for Costa Rica's breach of its obligation to carry out an environmental impact assessment (see *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 103, para. 271). For the same reasons, the Court declines to grant Nicaragua's claim for compensation.

In view of Nicaragua's failure to prove that significant harm was caused, the Court does not need to consider the appointment of an expert or committee to evaluate the extent of harm and the chain of causation, as Nicaragua suggests.

227. The Court further considers that Nicaragua's request to order Costa Rica not to undertake any future development in the border area without an appropriate environmental impact assessment (final submissions, para. 3 (i)) must be rejected. As the Court stated in paragraph 173 above, Costa Rica's obligation to conduct an environmental impact assessment only applies to activities carrying a risk of significant transboundary harm, and there is no reason to suppose that Costa Rica will not comply with its obligations under international law, as outlined in this Judgment, as it conducts any future activities in the area, including further construction works on the road.

228. To conclude, the Court 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. It 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.

* * *

229. For these reasons,

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.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this sixteenth day of December, two thousand and fifteen, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Costa Rica and the Government of the Republic of Nicaragua, respectively.

(Signed) Ronny ABRAHAM,
President.

(Signed) Philippe COUVREUR,
Registrar.

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.

(Initialled) R.A.

(Initialled) Ph.C.

DECLARATION OF VICE-PRESIDENT YUSUF

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Signed) Abdulqawi A. YUSUF.

SEPARATE OPINION OF JUDGE OWADA

1. I have voted in favour of the conclusions reached by the Court in the operative part *(dispositif)* of the present Judgment, as I have no disagreement with these conclusions as such. It is my view, however, that certain specific aspects of the reasoning *(ratio decidendi)* of the Judgment that have led the Court to these conclusions have not been developed with sufficient clarity in the reasoning part *(motifs)* of the Judgment. For this reason, I wish to attach this opinion of mine, with a view to elaborating my own view on these points as I see them in the reasoning of the Judgment. (It goes without saying that I do not intend to put my own words into the language of the Judgment, but wish to explain how I see certain points covered by the Judgment.)

I. THE ISSUE OF SOVEREIGNTY OVER THE DISPUTED TERRITORY

2. In my view, the question of sovereignty over the "disputed territory" constitutes the central issue of the dispute brought before the Court in 2010 by Costa Rica in relation to certain activities conducted by Nicaraguan authorities. In the present Judgment, while 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, the language of the Judgment does not seem to have been sufficiently articulate on the logical sequence that exists between these relevant legal instruments. Thus on the issue of territorial sovereignty, which should be the prerequisite for determining the concrete allegations by the Applicant of violations of sovereignty by the Respondent, the Judgment summarily concludes that "Articles II and VI [of the 1858 Treaty], 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'" (Judgment, paragraph 76).

3. For the purpose of our analysis of these documents, however, the Court in my view should start from the premise that what is determinative in this case is first and foremost the interpretation of the 1858 Treaty and pursue the logical sequence of the relevant legal instruments, i.e., first the 1858 Treaty, then the Cleveland Award, which was meant to give an authoritative interpretation of the 1858 Treaty, and finally the Alexander Awards, which were given under the mandate of General Alexander to demarcate the boundary and to implement the Cleveland Award, in light of their assigned roles and purposes in their contexts. In my view, thus, the central issue that determines the issue of sovereignty over the disputed territory is *not* the identification of the geographical location of "the first channel met", used in the first Alexander Award, among the many watercourses that could have existed (or now exist) in the wetland of the disputed territory, as some of the counsel have tried to persuade the Court. In my view, however, the Court's task is rather to apply the basic interpretative reasoning followed by General Alexander within the scope of his mandate under the Pacheco-Matus Convention of 1896, to "proceed with [the demarcation] of the border line" on the basis of the 1858 Treaty and the Award rendered in 1888 by President Cleveland, who had been entrusted with the task of deciding upon, *inter alia*, "all . . . points of doubtful interpretation which either of the parties may find in the [1858 Treaty]", and thus of giving an authoritative interpretation of the 1858 Treaty. Under these circumstances, the task for the Court has not and cannot have been literally to follow the line described in the first Alexander Award in 1897, particularly as General Alexander already was faced with the difficulty of investigating what the Cleveland Award had established as the authoritative interpretation of the 1858 Treaty, because of the changed geography of the area over the intervening 30 years. The resolution by the Court of the question of territorial sovereignty over the disputed territory in this situation is to be based on the same legal sources (i.e., the national boundary as determined by the 1858 Treaty) and the same legal reasoning that General Alexander applied in implementing the Cleveland Award of 1888, which, even after the passage of 30 years, provided the authoritative and binding interpretation and determination of the boundary prescribed by the 1858 Treaty.

4. It is this reasoning in my view that General Alexander applied in his first Award of 30 September 1897, when considering how the natural terminus of the San Juan River (which used to be the "right-hand headland of the harbour mouth") as determined by the 1858 Treaty could reach the San Juan River proper following what used to be the San Juan River's right bank. Already at the time of the first Alexander Award, the only possible way to identify the navigable waterway (as contrasted to any watercourse) that connected this "natural terminus" of the San Juan River to the Lower San Juan River was to follow the edge of the Harbor Head Lagoon until it reached the San Juan River proper. If we transfer this reasoning to the present situation, the contour of the territory following from General Alexander's underlying reasoning, rather than the actual boundary line that he demarcated on the ground at that time, would unequivocally lead one to the conclusion that the disputed territory is under Costa Rican sovereignty.

5. Incidentally, in understanding the prescriptive description of the first Alexander Award, it is useful to note that the term used by General Alexander was "the first *channel* met" (emphasis added), and not "the first *caño* met". (The term "channel", according to the *Oxford English Dictionary*, denotes as a geographic term "[a] (comparatively) narrow piece of water, wider than a mere 'strait', connecting two larger pieces, usually seas". This would appear to be the proper definition of the term for establishing what General Alexander had in mind, assuming that the first Alexander Award was originally drafted in English.) Be that as it may, there seems to be no doubt that General Alexander came to the conclusion that this "channel" was the one to follow in determining the boundary line as defined by the 1858 Treaty and interpreted by the Cleveland Award, not because General Alexander found that it was there as the first watercourse that he came across on his journey following the water along the Harbor Head Lagoon, but because he acted on his understanding that this "first channel" represented part of the main stream of water flowing from the San Juan River proper leading to the starting point of the boundary line which was at the mouth of the River. In other words, General Alexander was trying faithfully to follow the prescription of the 1858 Treaty contained in its Article II, namely that: "The dividing line between the two Republics, starting from the Northern Sea, shall begin at the end of Punta de Castilla, at the mouth of the San Juan de Nicaragua river, and *shall run along the right bank of the said river up to point three English miles distant from Castillo Viejo* . . ." (Emphasis added.)

6. The third Alexander Award is also indicative of the reasoning of General Alexander, inasmuch as it explicitly affirms that the position of the boundary line will be altered only by "changes *in the banks or channels of the river* . . . as may be determined by the rules of international law applicable on a case-by-case basis" (third Alexander Award, *RIAA*, Vol. XXVIII, p. 230; emphasis added), and not just by any watercourse that can serve the purpose of letting water pass from the San Juan River proper to the Harbor Head Lagoon.

7. In other words, if we translate the language and transfer the reasoning of the Alexander Awards to the present-day geographical situation of the area, there could be no question that the reasoning underlying the first Alexander Award would lead to the unequivocal outcome that the Court has reached in the present Judgment on the question of sovereignty over the disputed territory. The task of the Court is simply to apply the reasoning of General Alexander in his first Award in a geographically generic, though not geodetically specific, manner to the boundary as prescribed in the 1858 Treaty, in order to reach the conclusion on the issue of sovereignty over the disputed territory. For this purpose, the Court has only to proceed from the "natural terminus" of the Lower San Juan River determined in the 1858 Treaty as interpreted by the Cleveland Award and as subsequently implemented by the Alexander Awards. This "natural terminus" is, as was determined by General Alexander in his first Award, "the northwestern extremity of what seems to be the solid land, on the east side of the Harbor Head Lagoon" (first Alexander Award, *RIAA*, Vol. XXVIII, p. 220). Having thus identified the terminus of the boundary, the determination of sovereignty over the disputed territory flows from the boundary line that runs along the right bank

of the river. Of course, such a riverine connection between the Harbor Head Lagoon and the San Juan River itself is no longer in existence at the present time. In this situation, the only logical way to draw that boundary line connecting what was "the right-hand headland of the harbour mouth" to the San Juan River is to follow the edge of the Harbor Head Lagoon until it reaches the present-day stream of the San Juan River proper. Once this line reaches the right bank of the river, the boundary line must turn upstream as the 1858 Treaty prescribes.

8. It should be added that the Parties in the present case have also provided the Court with a number of arguments, including references to *effectivités*, and have produced a range of supporting evidentiary materials, such as maps, witness affidavits, and expert statements relating to fluvial morphology and other aspects of the geographical context of the disputed territory, all relating to the question of whether or not any navigable channels might have traversed or currently traverse the disputed territory. The Judgment has assessed the evidentiary merit of all these materials for determining the question of territorial sovereignty, but has come to the conclusion that their evidentiary value was not determinative of the question of sovereignty. My own conclusion is 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, to the extent that the central issue that is determinative of the question is the content of the 1858 Treaty, as interpreted by the Cleveland Award and subsequently implemented by the Alexander Awards.

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

9. In my view, what is involved in the present dispute is not, in its fundamental nature, the situation of a classical territorial dispute that is normally brought before the International Court of Justice for judicial settlement. A territorial dispute is typically presented to the Court after attempts by the Parties at an exchange of views in order to identify the existence of a difference of positions on an issue and following a process of negotiations for its peaceful settlement. In the present case, however, the territorial dispute has been caused primarily by 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. This appreciation of the nature of the dispute in the present case is apparent from the language of the Judgment itself (Judgment, paragraphs 67-69 and paragraph 229 (2)), including in addition its finding that Nicaragua breached the Court's Order of 8 March 2011, *inter alia*, by establishing a military presence in the disputed territory (Judgment, paragraph 229 (3)). Whatever validity the claim by the Respondent over the disputed territory may have had, such a unilateral act of incursion by that State would amount to something more than an incidental violation of the territorial sovereignty of that latter State.

10. In my view, given this undisputable circumstance, it would have been appropriate for the Court to have treated the actions by Nicaragua in question as a straightforward case of the commission of an internationally wrongful act, which could arguably constitute an unlawful use of force under Article 2 (4) of the United Nations Charter. An act of this nature would generally entail an obligation to undertake remedial measures, including reparation, going beyond a mere obligation to achieve the *restitutio in integrum* of the *status quo ante*.

11. While I have concurred with the Court's decision to consider that an incursion has taken place, but to refrain from going further into the question of what other legal consequences of this incursion should follow in light of the Court's finding that "by excavating three *caños* and establishing a military presence on Costa Rican territory, Nicaragua has violated the territorial sovereignty of Costa Rica" (Judgment, paragraph 229 (2), see also paragraph 229 (3)), it is my view that 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.

12. The present Judgment has not pursued that course, limiting itself to the factual finding of an incursion as referred to above, without going into any further discussion on the possible legal consequences of such an incursion. A reference made to the Judgment in the *Cameroon* v. *Nigeria* case of 2002 in this context to justify this approach would seem to be quite inappropriate. In that earlier Judgment, the Court had concluded that

> "by the very fact of the present Judgment and of the evacuation of the Cameroonian territory occupied by Nigeria, the injury suffered by Cameroon by reason of the occupation of its territory will in all events have been sufficiently addressed. The Court will not therefore seek to ascertain whether and to what extent Nigeria's responsibility to Cameroon has been engaged as a result of that occupation." (Case concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 452, para. 319.)

This reference to the case of *Cameroon* v. *Nigeria* in my view could be quite misleading as the *Cameroon* v. *Nigeria* case is qualitatively different from the present case and should clearly be distinguished from the present situation, inasmuch as the former case, different from the present case, had not been caused by an action of one Party to alter the existing status quo through unilateral means. The Judgment should in my view have taken a more correct approach in its characterization of such a blatant case of incursion and its legal consequences.

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

13. In their written and oral pleadings, both Parties invoked the existence of a legal obligation under general international law not to cause significant transboundary harm. The existence of such an obligation has been confirmed in some of the Court's past decisions, including, in particular, its Judgment in the case concerning *Pulp Mills on the River Uruguay* (see *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I),* pp. 55-56, para. 101).

14. 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. This requirement comes to play a significant role in both of the joined cases in the present proceedings. The issue of environmental impact assessment has been raised by both Parties against each other respectively in each of the joint cases. In this context, they seemed to quote approvingly the *dictum* from the Court's Judgment in the *Pulp Mills* case.

15. In its Judgment in the *Pulp Mills* case, the Court 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" (*ibid.*, p. 83, para. 204).

16. This *dictum* of the Court should be placed in contrast with that of the International Tribunal for the Law of the Sea, which in its 2011 Advisory Opinion on the *Responsibilities and obligations of States with respect to activities in the Area* appears to have gone a step further by declaring that an environmental impact assessment as such is a "general obligation under

customary international law". More specifically, it states as follows: "It should be stressed that the obligation to conduct an environmental impact assessment is *a direct obligation under the [UNCLOS] and a general obligation under customary international law*." (*Responsibilities and obligations of States with respect to Activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, para. 145; emphasis added.)

17. 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, when it circumscribes the scope and content of such an environmental impact assessment in the following manner:

> "general international law [does not] specify the scope and content of an environmental impact assessment . . . Consequently, it is the view of the Court 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 the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment." (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 83, para. 205; emphasis added.)

The Court also stressed the continuous nature of the process of environmental impact assessment on a case-by-case basis, as follows:

> "an environmental impact assessment must be conducted prior to the implementation of a project. Moreover, once operations have started and, where necessary, throughout the life of the project, continuous monitoring of its effects on the environment shall be undertaken." (*Ibid.*, pp. 83-84, para. 205.)

18. These statements of the Court in its Judgment in the *Pulp Mills* case would seem to suggest that in the *dictum* quoted in paragraph 15 above, the Court emphasized the crucial importance of this element in the context of the process of carrying out the obligation of due diligence, which is a holistic process. To summarize, 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. This obligation to act with due diligence in such a way that the initiation of potentially environmentally hazardous activities may be avoided constitutes an established obligation of international environmental law. In this holistic process, an environmental impact assessment plays an important and even crucial role in ensuring that the State in question is acting with due diligence under general international environmental law. It should also be noted that in the *Pulp Mills* case there was no need for the Court to establish this requirement of environmental impact assessment as a general legal obligation of international environmental law or to define its limits under customary international law, to the extent that the case hinged upon the construction of the 1975 Statute, which was a *lex specialis* applicable to that case.

19. Against this background the Court in the present Judgment can be said in my view to have maintained this balanced approach when it stated as follows:

> "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.
>
> 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." (Judgment, paragraph 104.)

20. Based on this reasoning, the Court has held in the operative part of its Judgment 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" (Judgment, paragraph 229 (6)).

21. In sum, the environmental impact assessment, which is essentially of a technical nature, is a means to achieve the ultimate objective of preventing transboundary harm — an obligation relating to the due diligence required. In addition, an environmental impact assessment serves the purpose of enabling the public or civil society to participate in the ultimate decision-making process on activities with potentially significant environmental effects. Significant as the environmental impact assessment may be, as reflecting prevailing practice in recent years, the fact remains that the function of the environmental impact assessment is essentially one of a number of means to be employed when the circumstances of the case so require, in order to attain 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.

22. The present Judgment is in my view based on this position, as demonstrated by the passages of the Judgment quoted above. The relevant activities by States are to be reviewed in the specific circumstances of the case in light of this obligation of due diligence, through verifying whether the State has acted with due diligence, as evidenced by such elements as taking necessary measures to prevent significant transboundary harm, as it is the case here with Costa Rica in relation to its construction of the Road, or with Nicaragua in relation to the undertaking of its dredging activities. Conducting an environmental impact assessment is one important element (though not necessarily constituting an indispensable obligation as such) in the process of fulfilling the obligation of acting with due diligence to prevent significant transboundary harm in each case.

(Signed) Hisashi OWADA.

JOINT DECLARATION OF JUDGES TOMKA, GREENWOOD, SEBUTINDE AND JUDGE *AD HOC* DUGARD

Costs — Article 64 of the Statute of the Court — Provisional measures — Obligation of a State to comply with Order indicating provisional measures — Obligations imposed by 2011 Order violated by Nicaragua — Conduct of Nicaragua — Costs incurred by Costa Rica in seeking further Order in 2013 — Whether Court should have exercised discretion to order Nicaragua to pay Costa Rica's costs of the 2013 request for provisional measures.

1. We regret that we are unable to agree with the decision of the majority of the Court to reject Costa Rica's request that it be awarded the costs of having had to come to the Court in October 2013 for a second Order on provisional measures of protection. We have therefore voted against operative paragraph 5 *(c)* of the Judgment.

2. Article 64 of the Statute of the Court provides that "[u]nless otherwise decided by the Court, each party shall bear its own costs". This provision is supplemented by Article 97 of the Rules of Court, which provides that "[i]f the Court, under Article 64 of the Statute, decides that all or part of a party's costs shall be paid by the other party, it may make an order for the purpose of giving effect to that decision".

We accept that, in the words of a leading work on the Court, Article 64 of the Statute "may be interpreted as implying the general rule that each party bears its own costs, and that only in exceptional circumstances will the Court decide otherwise" (see Shabtai Rosenne, *The Law and Practice of the International Court, 1920-2005*, Vol. III, 4th ed., 2006, p. 1281). In no case so far has the Court considered that such exceptional circumstances existed. Nevertheless, it is clear that the Statute gives the Court discretion in this matter and we consider it important that the Court exercises that discretion, when it is called upon to do so, after careful consideration of the particular circumstances of the case.

3. What, then, are the circumstances of the present case? In its Order on provisional measures of 8 March 2011, the first measure, indicated unanimously by the Court, was 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" (*Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 27, para. 86 (1)). The "disputed territory" was

defined in paragraph 55 of that Order as "the area of wetland of some 3 square kilometres between the right bank of the disputed *caño*, the right bank of the San Juan River up to its mouth at the Caribbean Sea and the Harbor Head Lagoon" (*I.C.J. Reports 2011 (I)*, p. 19, para. 55). The first provisional measure, therefore, could not have been clearer. Nicaragua was prohibited from "sending to, or maintaining in the disputed territory" any personnel, military or civilian, let alone from carrying out any works therein. The Court's orders on provisional measures being binding (*LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 506, para. 109), Nicaragua had a legal obligation to comply with this measure. The Court also enjoined both Parties to "refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve" (*Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 27, para. 86 (3)).

4. On 13 September 2013, Costa Rica received evidence, in the form of satellite images, that two new *caños* had been dug in the disputed territory, that a dredger was operating in one of them and that a Nicaraguan military encampment had been established on the beach nearby. On 16 September, Costa Rica wrote to Nicaragua complaining of a violation of the provisional measures. According to counsel for Nicaragua, this letter prompted the President of Nicaragua to order an investigation into the state of affairs in the disputed territory. Nevertheless, on 18 September, the Nicaraguan Foreign Ministry replied to Costa Rica, stating that Nicaragua had authorized no works in the disputed territory (Costa Rica, Request for the Indication of New Provisional Measures, 24 September 2013, Attachment PM-5). As counsel for Nicaragua subsequently remarked, "[i]n retrospect, it would have been better if the Foreign Ministry had waited until the investigation ordered by President Ortega was completed, or at least until the following day" (CR 2013/25, p. 21). Costa Rica reacted to the Foreign Ministry's letter by filing, on 24 September 2013, a new request for provisional measures. In the meantime, however, the investigation ordered by President Ortega had disclosed that two new *caños* had indeed been dug on the orders of Mr. Eden Pastora, who was described in a Nicaraguan document as the "Government Delegate for [the] Dredging Works" (see letter from Nicaragua to the Court, 11 October 2013, Ref. HOL-EMB-197, Ann. 8). On 21 September 2013, President Ortega gave instructions that Mr. Pastora was to cease all operations on the two new *caños* and to withdraw the dredger. These instructions were complied with. Nicaragua did not, however, inform either Costa Rica or the Court of this development, or take any steps to rectify the impression created by its letter of 18 September, until Thursday 10 October 2013. In the meantime, the Court had informed both Parties that it would hold hearings on the new Costa Rican request for provisional measures beginning on Monday 14 October 2013. So far as the military encampment was concerned, Nicaragua maintained that it was located on Nica-

raguan territory outside the disputed territory, specifically, on a beach just to the north of the disputed territory, and that Nicaragua was therefore under no obligation to withdraw (CR 2013/25, p. 29).

5. The Court has unanimously found (see Judgment, paras. 121-129 and para. 229 (3)) that this conduct amounted to a violation of the provisional measures ordered by the Court in March 2011. While Mr. Pastora may have exceeded his instructions, he was a senior official of the Republic of Nicaragua and his actions purported to be an exercise of his official authority. That they would have seemed as such to any observer was accepted by Nicaragua, which stated that those who saw him may have assumed he was authorized to be in the area; in the words of Nicaragua's counsel, "Mr. Pastora is a well-known figure in Nicaragua" and "[i]t would have been quite strange that a young lieutenant in charge of the nearby areas would question what Mr. Pastora was doing" (CR 2013/25, p. 16). It is beyond question that Mr. Pastora's actions were attributable to Nicaragua and engaged its responsibility for a breach of the obligations under the March 2011 provisional measures Order. Nicaragua quite rightly accepted that responsibility. Nevertheless, while Nicaragua's counsel described the breach as "unintentional" (CR 2015/7, p. 61), the senior position held by Mr. Pastora means that the breach cannot be so lightly put aside. There was nothing "unintentional" about the breach of the Court's Order; it was a deliberate action undertaken on the instructions of the senior government official entrusted by Nicaragua with responsibility for the dredging programme in the area immediately adjacent to the disputed territory.

6. As for the establishment of a military encampment, the Court found, in its 2013 Order, that — contrary to what Nicaragua said — that encampment was not on the sandbank but on land that formed part of the disputed territory (*Order of 22 November 2013, I.C.J. Reports 2013*, p. 365, para. 46). Nicaragua has never suggested that the presence of this encampment was unauthorized.

7. The Court is thus faced with two serious violations of the obligations imposed upon Nicaragua by the 2011 Order on provisional measures. The Court has made plain that Nicaragua must compensate Costa Rica for any damage caused by its violation of those obligations. Costa Rica will therefore be able to recover, for example, the costs of any remediation work which was necessary in order to deal with the two additional *caños*. The Court has, however, denied Costa Rica the chance of recovering from Nicaragua what may well be the largest expense it was obliged to incur, namely the costs of nearly a week of hearings before the Court. Those costs were a direct consequence of Nicaragua's breach of the obligations imposed by the 2011 Order. Moreover, even after it had ordered Mr. Pastora's withdrawal, Nicaragua could have taken steps which would have made the hearings in October 2013 unnecessary but it did not do so. Instead of notifying the Court and Costa Rica of its order

to Mr. Pastora on 21 September 2013, it said nothing until the eve of the hearings, leaving Costa Rica — and the Court — under the impression that it denied that there had been any activity in the disputed territory. When it did inform the Court and Costa Rica of its actions, Costa Rica suggested that the Parties agree [to] an Order which the Court would issue and thus save the cost of the hearing itself. Nicaragua refused. It is illogical for the Court to adopt a posture in which a party which has been the victim of a breach of provisional measures indicated by the Court is treated less favourably if it incurs expense in coming back to the Court to seek redress than if it takes unilateral action to remedy the damage caused by that breach.

8. We consider that these are exceptional circumstances which warrant an exercise by the Court of the power given to it by Article 64 of the Statute. It is true that the Court has never previously exercised that power but it has seldom been asked to do so and none of the cases in which costs have been requested by a party has been remotely comparable to the present one. The power to indicate provisional measures is of the utmost importance for the maintenance of the integrity of proceedings before the Court. The measures thus indicated are legally binding and their breach is an autonomous violation of legal obligations, entirely distinct from the merits of the case. The Court, and those States appearing before it, are entitled to assume that a State litigating in good faith will be scrupulous in complying with those measures. If its failure to do so necessitates a further hearing, it is only right that that State should bear the costs incurred.

9. It is therefore a matter for regret that the Court has dismissed Costa Rica's request for the costs incurred in obtaining the Order of 22 November 2013 and that it has done so without any discussion of the circumstances considered in this declaration. This was surely a case in which something more was called for than a Delphic pronouncement that "taking into account the overall circumstances of the case, an award of costs to Costa Rica . . . would not be appropriate" (Judgment, para. 144).

(Signed) Peter TOMKA.

(Signed) Christopher GREENWOOD.

(Signed) Julia SEBUTINDE.

(Signed) John DUGARD.

SEPARATE OPINION OF JUDGE CANÇADO TRINDADE

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*

I. *Prolegomena*

1. I have accompanied the majority in voting in favour of the adoption today, 16 December 2015, of the present Judgment of the International Court of Justice (ICJ) in the two joined cases of *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and of the *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)*. Yet, there are certain points ensuing from the Court's decision which, though not dwelt upon at depth by the Court in its reasoning, are in my view endowed with importance, related as they are to the proper exercise of the international judicial function. I feel thus obliged to dwell upon them, in the present separate opinion, nourishing the hope that the considerations that follow may be useful for the handling of this matter by the ICJ in future cases.

2. I start drawing attention to the manifestations, in the *cas d'espèce*, of the preventive dimension in contemporary international law. I then turn attention to the key point, which I have been sustaining in the adjudication of successive cases in this Court, namely, that of the conformation of the *autonomous legal regime* of provisional measures of protection, in the course of their evolution (after their transposition from comparative domestic procedural law into international law). Next, I consider the widening of the scope of protection by means of provisional measures, and the breach of these latter as an autonomous breach, engaging State responsibility by itself. I then proceed to examine the determination by the ICJ of breaches of obligations under provisional measures of protection.

3. In sequence, I present a plea for the prompt determination by the Court of breaches of provisional measures of protection. My next line of consideration is on the supervision of compliance with provisional measures of protection. Following that, I examine the interrelationship between the breach of provisional measures and the duty of reparation (in its distinct forms) for damages. I then turn attention to due diligence, and the interrelatedness between the principle of prevention and the precautionary principle. Next, I purport to detect the path towards the progressive development of provisional measures of protection. Last but not least, I present, in an epilogue, my final considerations on the matter, in the form of a recapitulation of the main points sustained herein, in the course of the present separate opinion.

II. Manifestations of the Preventive Dimension in Contemporary International Law

4. May I begin by observing that 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* bring to the fore the relevance of the *preventive dimension* in contemporary international law, as reflected in the present Judgment, of 16 December 2015, 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 of conducting 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. Such preventive dimension stands out clearly in the succession of the Court's Orders of provisional measures of protection of 8 March 2011, 16 July 2013 and 22 November 2013[1].

5. The question of the non-compliance with, or of breaches of, the aforementioned Orders of provisional measures of protection, was carefully addressed by the two contending Parties in the course not only of the Court's proceedings pertaining to such Orders[2], but also in the course of its proceedings (written and oral phases) as to the merits of the *Certain Activities* case. Concern with the issue of non-compliance with, or breaches of the Court's Order of 8 March 2011, for example, was in effect expressed in Costa Rica's Memorial[3] — a whole chapter — as well as in its oral arguments[4]; Nicaragua, likewise, devoted a chapter of its Counter-Memorial[5], as well as its oral arguments[6], to the issue. The same concern was expressed, in respect of the Court's subsequent Order on provisional measures of 16 July 2013 — and of events following it — in the oral arguments of Costa Rica[7] and of Nicaragua[8]. Again, in respect of the Court's third Order on provisional measures, of 22 November 2013, reference can further be made to the oral arguments of both Costa Rica[9] and Nicaragua[10].

III. The Autonomous Legal Regime of Provisional Measures of Protection

6. The *autonomous legal regime* of provisional measures of protection has been quite discernible to me: I have been drawing attention to it, in

[1] Reference can further be made to the Court's subsequent Order of 13 December 2013.

[2] Cf., as to Costa Rica's oral arguments, CR 2013/24, of 14 October 2013, pp. 12-61; and CR 2013/26, of 16 October 2013, pp. 8-35; and, as to Nicaragua's oral arguments, CR 2013/25, of 15 October 2013, pp. 8-57; and CR 2013/27, of 17 October 2013, pp. 8-44.

[3] Cf. Memorial, Chapter VI, paras. 6.1-6.63.

[4] Cf. CR 2015/2, of 14 April 2015, pp. 17 and 23-25; CR 2015/4, of 15 April 2015, pp. 23-32; and CR 2015/14, of 28 April 2015, pp. 39-42 and 65-66.

[5] Cf. Counter-Memorial, Chapter 7, paras. 7.4-7.46.

[6] Cf. CR 2015/5, of 16 April 2015, p. 18; CR 2015/7, of 17 April 2015, pp. 46-50; and CR 2015/15, of 29 April 2015, pp. 43-44.

[7] Cf. CR 2015/2, of 14 April 2015, pp. 24-25; CR 2015/4, of 15 April 2015, pp. 31-32.

[8] Cf. CR 2015/7, of 17 April 2015, pp. 48-50.

[9] Cf. CR 2015/4, of 15 April 2015, pp. 31-34; and CR 2015/14, of 28 April 2015, pp. 65-66.

[10] Cf. CR 2015/7, of 17 April 2015, pp. 41-45.

the way I conceive such autonomous legal regime, in successive dissenting and individual opinions in this Court. The present Judgment of the ICJ in the two joined cases of *Certain Activities* and of the *Construction of a Road* is a proper occasion to dwell further upon it. The Court has duly considered the submissions of the Parties, Costa Rica and Nicaragua (Judgment, paras. 121-129), and has found that the respondent State incurred into a breach of the obligations under its Order on provisional measures of protection of 8 March 2011 by the excavation of two *caños* in 2013 and the establishment of a military presence in the disputed territory (*ibid.*, paras. 127 and 129, and resolutory point No. 3 of the *dispositif*). The ICJ has pointed out that the respondent State itself had acknowledged, in the course of the oral hearings, that "the excavation of the second and third *caños* represented an infringement of its obligations under the 2011 Order" (*ibid.*, para. 125)[11].

1. The Evolution of Provisional Measures of Protection

7. There are, as from this finding of the Court of a breach of provisional measures in the *cas d'espèce*, several points that come to my mind, all relating to what I have been conceptualizing, along the years, as the autonomous legal regime of provisional measures of protection[12]. This 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.

8. They thus emerged, in the domestic legal systems, 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

[11] In the oral hearing of 16 April 2015, the Agent of the respondent State asserted that "Nicaragua deeply regrets the actions following the 2011 Order on provisional measures that led the Court to determine, in November 2013, that a new Order was required"; CR 2015/5, of 16 April 2015, p. 8, para. 42. On the following day counsel recalled this (CR 2015/7, of 17 April 2015, p. 45, para. 14), and again it did so in the hearing of 29 April 2015, adding that there was thus "no need for future remedial measures"; CR 2015/15, of 29 April 2015, p. 44, paras. 23-24.

[12] Cf. A. A. Cançado Trindade, *Evolution du droit international au droit des gens — L'accès des particuliers à la justice internationale: le regard d'un juge*, Paris, Pedone, 2008, pp. 64-70; A. A. Cançado Trindade, "La Expansión y la Consolidación de las Medidas Provisionales de Protección en la Jurisdicción Internacional Contemporánea", *Retos de la Jurisdicción Internacional* (eds. S. Sanz Caballero and R. Abril Stoffels), Cizur Menor/Navarra, Cedri/CEU/Thomson Reuters, 2012, pp. 99-117; A. A. Cançado Trindade, *El Ejercicio de la Función Judicial Internacional — Memorias de la Corte Interamericana de Derechos Humanos*, 3rd ed., Belo Horizonte/Brazil, Edit. Del Rey, 2013, Chapters V and XXI (provisional measures), pp. 47-52 and 177-186; A. A. Cançado Trindade, "Les mesures provisoires de protection dans la jurisprudence de la Cour interaméricaine des droits de l'homme", *Mesures conservatoires et droits fondamentaux* (eds. G. Cohen-Jonathan and J.-F. Flauss), Brussels, Bruylant/Nemesis, 2005, pp. 145-163.

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. With the gradual transposition of provisional measures from domestic into international law level, 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.

9. 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), had the effect, in my perception, of enlarging the scope of international jurisdiction, and of refining their conceptualization. International case law on provisional measures of protection expanded considerably over the last three decades, making it clear to the contending parties that they are to abstain from any action which may aggravate the dispute *pendente lite*, or may have a prejudicial effect on the compliance with the subsequent judgment as to the merits.

10. 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. Over the last three decades, provisional measures of protection 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*.

11. For many years I have been insisting on this particular point. To recall but one example, already by the turn of the century, in another international jurisdiction, in my concurring opinion appended to the Order of 25 May 1999 of the Inter-American Court of Human Rights (IACtHR) in the case of *James et al.*, concerning Trinidad and Tobago, I deemed it fit to draw attention to the configuration, in provisional measures of protection of our times, of a true *jurisdictional guarantee of a preventive character* (para. 10). I further drew attention to the inherent power or *faculté* of an international tribunal to determine the *scope* of the provisional measures that it decided to order (para. 7). All this comes to reinforce the preventive dimension, proper of those measures.

12. In the case of the ICJ (like in that of the IACtHR), such provisional measures do have a conventional basis (Article 41 of the ICJ's Statute). But even if an international tribunal does not count on such a conventional basis, it has, in my understanding, inherent powers to indicate such measures, so as to secure the sound administration of justice *(la bonne administration de la justice)*. Contemporary international tribunals have the *compétence de la compétence (Kompetenz-Kompetenz)* in the

domain of provisional measures as well, so as to safeguard the respective rights of the contending parties in the course of the legal process. The grant of those measures is a significant manifestation of the preventive dimension in contemporary international law.

2. The Conformation of Their Autonomous Legal Regime

13. In effect, the evolution of provisional measures in recent years has, in my perception, made very clear that they operate within an autonomous legal regime of their own, encompassing their juridical nature, the rights and obligations at issue, their legal effects, and the duty of compliance with them. It is now the duty of contemporary international tribunals to elaborate on such autonomous legal regime, and to extract the legal consequences ensuing therefrom. In order to do so, it is necessary, in my understanding, to keep in mind — may I reiterate — their juridical nature, the rights to be preserved and the corresponding obligations in their wide scope, and their legal effects (cf. *infra*).

14. In my dissenting opinion in the Court's Order (of 28 May 2009) in the case of *Questions Relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, wherein the Court decided not to indicate or order provisional measures, I pondered that provisional measures of protection have lately much evolved, and appear nowadays as being "endowed with a character, more than precautionary, truly *tutelary*" (*I.C.J. Reports 2009*, p. 170, para. 13). Their development — I added — has led the Court gradually to overcome the strictly inter-State outlook in the acknowledgment of the rights to be preserved (*ibid.*, p. 174, para. 21, p. 175, para. 25 and p. 190, para. 72). Such rights to be protected by provisional measures have encompassed, in the *cas d'espèce*, the *right to the realization of justice*, — i.e., the right to see to it that justice is done, — "ineluctably linked to the rule of law at both national and international levels" (*ibid.*, pp. 196-197, paras. 92-95 and p. 199, para. 101).

15. Four years later, in my dissenting opinion in the Court's Order (of 16 July 2013) in the joined cases of *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)*, wherein the Court simply reaffirmed a previous Order (of 8 March 2011) and decided not to indicate or order new provisional measures or modify the previous Order, I drew attention to the overcoming of the inter-State outlook in the present domain of provisional measures (*I.C.J. Reports 2013*, p. 261, para. 49), given that they came to extend protection also to the human person (*ibid.*, pp. 257-258, paras. 39-42). I further warned that non-compliance with provisional measures of protection amounts to a breach of an international obligation, engaging State responsibility *per se* (*ibid.*, p. 267-268, paras. 70-72). Provisional measures have an *autonomous legal regime* of their own, I concluded, and they have grown in importance — with their preventive

dimension underlined by their juridical nature — "in respect of regimes of *protection*, such as those of the human person as well as of the environment" (*I.C.J. Reports 2013*, pp. 268-269, paras. 73 and 75).

16. Shortly afterwards, in my subsequent separate opinion in the Court's following Order on provisional measures (of 22 November 2013) in the same two joined cases opposing the two Central American countries, Nicaragua and Costa Rica, wherein the Court decided to indicate or order new provisional measures, I observed that the duty of compliance with provisional measures of protection outlines their *autonomous legal regime* (*ibid.*, pp. 379-380, paras. 23-24). Provisional measures — I proceeded — generate *per se* obligations, irrespective of, or independently from, those ensuing from the Court's Judgments on the merits or on reparations (*ibid.*, pp. 382-383, para. 29). I insisted that provisional measures of protection, in their evolution, have become, more than precautionary, truly *tutelary* (*ibid.*, p. 381, para. 26), and I then added, moving into their effects, that non-compliance with provisional measures of protection engages autonomously the international responsibility of the State (*ibid.*, p. 380, para. 24 and p. 387, paras. 39-40). Such non-compliance is "an autonomous breach of a conventional obligation (concerning provisional measures), without prejudice to what will later be decided by the Court as to the merits" (*ibid.*, p. 386, para. 37).

IV. Provisional Measures: The Enlargement of the Scope of Protection

17. In the present Judgment in the two joined cases of *Certain Activities* and of the *Construction of a Road*, the Court has found, in Section III.C concerning the *Certain Activities* case, that the excavation of the second and the third *caños* and the establishment of a military presence in the disputed territory breached the obligations of the provisional measures of protection it had ordered (on 8 March 2011), and constituted "a violation of the territorial sovereignty" of the applicant State (Judgment, para. 129). Beyond that, provisional measures, in my perception, do widen the scope of protection; it is not only a matter of State sovereignty. Protection extends to the environment, and the right to life; their safeguard is also necessary to avoid aggravating the dispute or rendering it more difficult to resolve (*ibid.*, cf. para. 123).

18. The enlargement, by provisional measures, of the scope of protection, is deserving of attention and praise. It is reassuring that prevention and precaution have found their place in the conceptual universe of the law of nations, the *droit des gens*, — and a prominent place in international environmental law. It could not have been otherwise. From the days of the UN Conference on Environment and Development (Rio de Janeiro, 1992) up to the present, this has occurred amidst the

acknowledgment of risks and the limitations of human knowledge. Prevention and precaution have enforced each other, and the new awareness of their need has paved the way to the aforementioned expansion of provisional measures of protection along the last three decades.

19. It is not casually that they came to be conceived as precautionary measures *(mesures provisoires/medidas cautelares)*, prevention and precaution underlying them all. 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[13].

20. In order to avoid irreparable harm, one cannot remain closed in the fugacious present, but rather look back in time and learn the lessons of the past, as much as, at the same time, look into the future, to see how to avoid irreparable harm. We live — or survive — surrounded by uncertainties, which call for precaution. As Seneca warned in his *De Brevitate Vitae* (circa 49 AD), it is wise to keep in mind all times — past, present and future — together: time past, by recollection; time present, by making the best use of it; and time future, by anticipating whatever one can, and thus making one's life meaningful, safer and longer[14]. In his late years, in his *Letters to Lucilius* (circa 62-64 AD), Seneca, in his Stoic search for some means of reconciliation with the frailty of human nature, stated: "We are tormented alike by what is past and what is to come. (. . .) [M]emory brings back the agony of fear while foresight brings it on prematurely. No one confines his unhappiness to the present."[15]

21. Back to our times, in this twenty-first century, in yet another case before this Court, in the *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the* Temple of Preah Vihear (Cambodia *v.* Thailand) *(Cambodia* v. *Thailand)*, the ICJ, in its Order on provisional measures of protection of 18 July 2011, took the unprecedented and correct decision to order, *inter alia*, the creation of a provisional "demilitarized zone" around the Temple and in the proximities of the border between the two countries, which contributed to put an end to the armed

[13] Cf., in this sense, A. A. Cançado Trindade, *International Law for Humankind — Towards a New Jus Gentium*, 2nd rev. ed., Leiden/The Hague, Nijhoff/Hague Academy of International Law, 2013, pp. 40-47.

[14] L. A. Seneca, *On the Shortness of Life (De Brevitate Vitae)* [circa 49 AD], Part XV.

[15] L. A. Seneca, "Letter V", *Letters to Lucilius* [circa 62-64 AD].

hostilities around the Temple in the border region between Cambodia and Thailand. In my separate opinion appended to that Order, I supported the Court's correct decision, which, in my understanding, extended protection not only to the territory at issue, but also to the populations living thereon, as well as to the monuments comprising the Temple which, by decision of UNESCO (of 2008), integrate the cultural and spiritual world heritage (*I.C.J. Reports 2011 (II)*, pp. 588-598, paras. 66-95).

22. In the same separate opinion, I dwelt upon the temporal dimension in international law, this latter being also *anticipatory* in the regulation of social facts (*ibid.*, p. 588, paras. 64-65). In the context of the *cas d'espèce*, provisional measures rightly extended protection also to cultural or spiritual heritage, upholding a universal value (*ibid.*, p. 598, para. 93). They brought "*territory, people and human values together*", well beyond State territorial sovereignty (*ibid.*, p. 600, para. 100), — as shown by the establishment, in the Order, of the aforementioned demilitarized zone (*ibid.*, p. 607, para. 117). I further observed that rights of States and rights of individuals evolve *pari passu* in contemporary *jus gentium*, and added: "Cultural and spiritual heritage appears more closely related to a *human context*, rather than to the traditional State-centric context; it appears to transcend the purely inter-State dimension (. . .)" (*Ibid.*, p. 606, para. 113.)

23. Beyond the classic territorialist outlook is the "human factor"; protection by means of provisional measures extended itself to local populations as well as to the cultural and spiritual world heritage (*ibid.*, pp. 598-606, paras. 96-113), in the light of the *principle of humanity*, orienting the *societas gentium* towards the realization of the common good (*ibid.*, p. 606, paras. 114-115 and p. 607, para. 117). After all, I added, one cannot consider territory (whereon hostilities were taking place) in isolation (as in the past), making abstraction of the population (or the local populations), which form the most precious component of statehood. One is to consider people on territory (cf. *ibid.*, p. 589, para. 67, p. 594, para. 81, p. 599, para. 97, p. 600, para. 100 and p. 606, para. 114), I concluded, there being epistemologically no inadequacy to extend protection, by means of provisional measures, also to human life and cultural and spiritual world heritage.

V. Breach of Provisional Measures of Protection as an Autonomous Breach, Engaging State Responsibility by Itself

24. The breach of a provisional measure of protection is *additional* to the breach which comes, or may come, later to be determined as to the merits of the case at issue. The factual context may be the same, but State responsibility is engaged not only with the occurrence and determination of a breach of an international obligation as to the merits, but also earlier

on, with the occurrence and determination of a breach of an obligation under an Order of provisional measures of protection. The latter is an autonomous breach. State responsibility is thus engaged time and time again, in respect of the breaches of obligations as to provisional measures (prevention) and as to the merits.

25. The breach of a provisional measure of protection is an autonomous breach, added to the one which comes, or may come, later to be determined as to the merits. As such, it can be promptly determined, with its legal consequences, without any need to wait for the conclusion of the proceedings as to the merits. Although in the Order of 22 November 2013 the Court did not expressly determine the occurrence of a breach of the earlier Order of 8 March 2011, it implicitly held so, in reiterating the earlier Order and indicating new provisional measures. In my view, the Court should have done so already in its Order of 16 July 2013, as explained in my dissenting opinion appended thereto.

VI. The International Court of Justice's Determination of Breaches of Obligations under Provisional Measures of Protection

26. In its practice, the ICJ has come to determine, on a few occasions so far, breaches of obligations under provisional measures of protection it had ordered; it has done so at the end of the proceedings as to the merits of the corresponding cases. This has occurred, until the Judgment the Court has just delivered today, 16 December 2015, in the joined cases of *Certain Activities* and of the *Construction of a Road*, in its Judgments as to the merits in the three cases of *LaGrand* (of 27 June 2001), of *Armed Activities on the Territory of the Congo* (of 19 December 2005), and of the *Bosnian Genocide* (of 26 February 2007).

27. Earlier on, in the case of the *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran)*, the ICJ stated that its Order on provisional measures of 15 December 1979 had been either "rejected" or "ignored" by the authorities of the respondent State (*Judgment, I.C.J. Reports 1980*, p. 35, para. 75 and p. 43, para. 93); the Court expressed its concern with the aggravation of the "tension between the two countries" (*ibid.*, p. 43, para. 93), but, in the *dispositif* of the Judgment, it did not expressly assert that the aforementioned Order on provisional measures had been breached. No consequences from non-compliance with its provisional measures were drawn by the Court.

28. The ICJ only started doing so in the course of the last 15 years, i.e., in the twenty-first century — although, in my view, nothing hindered it from doing so well before, in earlier cases. Thus, in its Judgment of 27 June 2001 in the *LaGrand* case *(Germany* v. *United States)*, the ICJ, after holding that its Order on provisional measures of 3 March 1999 had not been complied with (*I.C.J. Reports 2001*, p. 508, para. 115), stated, in resolutory point No. 5 of the *dispositif*, that the respondent State had

breached the obligation incumbent upon it under the aforementioned Order on provisional measures. Yet, once again the Court did not draw any consequences from the conduct in breach of its provisional measures.

29. Four years later, in its Judgment of 19 December 2005 in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, the ICJ, dwelling again on the matter, first recalled its finding that the respondent State was "responsible for acts in violation of international human rights law and international humanitarian law carried out by its military forces" in the territory of the Democratic Republic of the Congo (*I.C.J. Reports 2005*, p. 258, para. 264), committed in the period between the issue of its Order on provisional measures (of 1 July 2000) and the withdrawal of Ugandan troops in June 2003. Turning to its Order on provisional measures adopted half a decade earlier, the ICJ found that the respondent State had not complied with it *(ibid.)*, and reiterated its finding in resolutory point No. 7 of the *dispositif*.

30. Another case of determination by the ICJ of a breach of its Orders on provisional measures of protection was that of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*: the Court held so in its Judgment of 26 February 2007, while the Orders on provisional measures had been adopted 14 years earlier, on 8 April 1993 and 13 September 1993. They were intended to cease the atrocities that were already being perpetrated. The Court found, only in its Judgment of 2007 (*I.C.J. Reports 2007 (I)*, p. 231, para. 456), that the respondent State had failed to "take all measures within its power to prevent commission of the crime of genocide", as indicated in its Order of 8 April 1993 (*I.C.J. Reports 1993*, p. 24, para. 52.A (1)) and reaffirmed in its Order of 13 September 1993, nor did it comply with the measure of ensuring that "any (. . .) organizations and persons which may be subject to its (. . .) influence (. . .) do not commit any acts of genocide", as also indicated in its Order of 8 April 1993 (para. 52.A (2)) and reiterated in its Order of 13 September 1993[16].

31. Two years after the first Order (of 8 April 1993), the UN safe-area of Srebrenica collapsed, and the mass killings of July 1995 in Srebrenica occurred, in flagrant breach of the provisional measures ordered by the ICJ. In the meantime, the proceedings in the case before the ICJ prolonged in time: as to preliminary objections until 1996; as to counterclaims until 1997, and again until 2001; and as to the merits until 2007.

[16] Bosnia and Herzegovina promptly brought the matter before the UN Security Council. To have the Court's Orders enforced; the Security Council promptly adopted its resolution 819 (of 16 April 1993), which, after expressly invoking the ICJ's Order of 8 April 1993), ordered the immediate cessation of the armed attacks and several other measures to protect persons in Srebrenica and its surrounding areas.

Over these years, much criticism was expressed in expert writing that the manifest breaches of the ICJ's Orders of provisional measures of protection of 1993 *(supra)* passed for a long time without determination, and without any legal consequences.

32. As to the ICJ's Judgment on the merits of the aforementioned case of *Application of the Genocide Convention* (2007), the Court was requested by the applicant State to hold the respondent State to be under an obligation to provide "symbolic compensation" (*I.C.J. Reports 2007 (I)*, p. 231, para. 458) for the massacres at Srebrenica in July 1995. The Court, however, considered that, for the purposes of reparation, the respondent State's non-compliance with its Orders of 8 April 1993 and 13 September 1993 "is an aspect of, or merges with, its breaches of the substantive obligations of prevention and punishment laid upon it by the Convention" (*ibid.*, p. 236, para. 469). Thus, instead of ordering symbolic compensation, the Court deemed it fit to "include in the operative clause of the present Judgment, by way of satisfaction, a declaration that the Respondent has failed to comply with the Court's Orders indicating provisional measures" *(ibid.)*.

33. The ICJ then found, in resolutory point No. 7 of the *dispositif*, that the respondent State had "violated its obligations to comply with the provisional measures ordered by the Court on 8 April and 13 September 1993 in this case, inasmuch as it failed to take all measures within its power to prevent genocide in Srebrenica in July 1995". It took 14 years for the Court to determine the breach of its provisional measures of protection in the *cas d'espèce*. In my 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.

VII. A Plea for the Prompt Determination of Breaches of Provisional Measures of Protection: Some Reflections

34. In the *cas d'espèce*, 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 decades 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. This brings to the fore, in my

perception, an important point related to the autonomous legal regime of provisional measures of protection.

35. In effect, in my 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. The legal effects of a breach of a provisional measure of protection should in my view be promptly determined, with all its legal consequences. In this way, its anticipatory rationale would be better served. 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)*. And it could not be otherwise.

36. 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 Preah Vihear* (cf. *supra*). Likewise, the obligations (of prevention) are new or additional ones, in relation to those ensuing from the judgment on the merits. There is yet another point which I deem it fit to single out here, namely, contemporary international tribunals have, in my understanding, an inherent power or *faculté* to order provisional measures of protection, whenever needed, and to determine, *ex officio*, the occurrence of a breach of provisional measures, with its legal consequences. Having pointed this out, my concern here is now turned to a distinct, and very concrete point.

37. The fact that, in its practice, the ICJ has only indicated provisional measures *at the request* of a State party, in my view does not mean that it cannot order such measures *sponte sua*, *ex officio*. The ICJ Statute endows the Court with "the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party" (Art. 41 (1)). The Rules of Court provide for request by a party for the indication of provisional measures (Art. 73 (1)); yet they add that, irrespective of such request, the Court may indicate provisional measures that, in its view, "are in whole or in part other than those requested" (Art. 75 (2)).

38. For example, in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*, the ICJ indicated, in its Order of 15 March 1996 (*I.C.J. Reports 1996 (I)*, p. 18, para. 20 and pp. 24-25, para. 49), provisional measures that were distinct from, and broader than, those requested by the applicant State[17]. It expressly stated, in that Order, that it was entitled to do so, that it had the power to indicate measures

[17] The Court then found, six years later, in its Judgment of 10 October 2002, that the applicant State had not established that there had been a breach by the respondent State (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 453, para. 322) of the provisional measures indicated in its Order of 15 March 1996.

"in whole or in part other than those requested/*totalement ou partiellement différentes de celles qui sont sollicitées*" (*I.C.J. Reports 1996 (I)*, p. 24, para. 48). Furthermore, the Rules of Court provide that "The Court may at any time decide to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures which ought to be taken or complied with by any or all of the parties" (Art. 75 (1)). The Rules of Court moreover set forth that it "may request information from the parties on any matter connected with the implementation of any provisional measures it has indicated" (Art. 78).

39. 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[18]. 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.

40. In effect, there have lately been cases lodged with it, where the ICJ has been called upon to reason beyond the inter-State dimension, not being limited by the contentions or interests of the litigating States: this is the point I deemed it fit to stress in my separate opinion in the Court's Judgment (merits) of 30 November 2010 in the case of *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo)* (*I.C.J. Reports 2010 (II)*, p. 806, paras. 227-228). Earlier on, in the Court's Order (provisional measures) of 28 May 2009 in the case of *Questions Relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, I stated, in my dissenting opinion appended thereto, that the Court is not to relinquish its jurisdiction in respect of provisional measures of protection in face of what appears to be the professed intentions of the parties; on the contrary, the Court is to assume the role of guarantor of compliance with conventional obligations, beyond the professed intention or will of the parties (*I.C.J. Reports 2009*, p. 195, para. 88).

41. In the same line of thinking, in the ICJ's Judgment (preliminary objections) of 1 April 2011 in the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)*, I asserted, in my dissenting opinion appended thereto, that the ICJ cannot "keep on embarking on a literal or grammatical and static interpretation of the terms of compromissory clauses" enshrined in human rights treaties (such as the

[18] For my criticisms of the voluntarist conception of international law, cf. A. A. Cançado Trindade, "The Voluntarist Conception of International Law: A Re-Assessment", 59 *Revue de droit international de sciences diplomatiques et politiques*, Sottile (1981), pp. 201-240.

CERD Convention), "drawing 'preconditions' therefrom for the exercise of its jurisdiction, in an attitude remindful of traditional international arbitral practice" (*I.C.J. Reports 2011 (I)*, p. 320, para. 206). On the contrary, I added, "[w]hen human rights treaties are at stake, there is need, in my perception, to overcome the force of inertia, and to assert and develop the compulsory jurisdiction of the ICJ on the basis of the compromissory clauses contained in those treaties" *(ibid.)*.

42. The Court — may I reiterate — 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.

43. 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. The ICJ has in fact done so, not surprisingly, also in relation to situations of armed conflicts; the Court has been faced, in such situations (surrounded by complexity), with the imperative of *protection* of human life. Thus, in its Order on provisional measures of protection of 1 July 2000, in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, the ICJ, invoking Article 75 (2) of the Rules of Court, once again asserted its power to order measures that are "in whole or in part other than those requested/*totalement ou partiellement différentes de celles qui sont sollicitées*" (*I.C.J. Reports 2000*, p. 128, para. 43).

44. The Court, in my view, after examining the circumstances of the *cas d'espèce*, may proceed to order, *sponte sua*, provisional measures of protection. And it may, in my conception, proceed *motu proprio* — thus avoiding the aggravation of a situation — to determine *ex officio*, the occurrence of a breach of an Order of provisional measures of protection. Keeping in mind the preventive dimension in contemporary international law (cf. *supra*), and the need to prevent further irreparable harm, 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* (cf. *supra*).

VIII. Supervision of Compliance with Provisional Measures of Protection

45. 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 my view does not mean

that it cannot do so promptly, by means of another Order on provisional measures. Furthermore, the Court has monitoring powers as to *compliance* with provisional measures. If any unforeseeable circumstance may arise, the ICJ is, in my understanding, 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.

46. All the aforesaid enhances the preventive dimension of provisional measures of protection. These latter have experienced a remarkable development in recent years, in contemporary international law on the matter. Such measures now call for further development at conceptual level. They have an autonomous legal regime of their own, which encompasses supervision of compliance with them. The Court is endowed with monitoring powers to this effect. This is yet another element which comes to enforce the rule of law *(prééminence du droit)* at international level.

IX. Breach of Provisional Measures and Reparation for Damages

47. May I now turn to yet another relevant point pertaining to the autonomous legal regime of provisional measures of protection, namely, the legal consequences of the finding of a breach of such provisional measures. In addressing those consequences, the Court is likely to face the need to consider remedies, reparations in their distinct forms, and costs. This point has not passed unperceived in the present Judgment of the ICJ in the two joined cases of *Certain Activities* and of *Construction of a Road*. The Court has addressed reparations in the two joined cases[19].

48. Reparations are here contemplated in all their forms — namely, e.g., compensation, satisfaction, guarantee of non-repetition, among others. In the *cas d'espèce*, the *Certain Activities* case, the ICJ has determined the Respondent's duty of *compensation* for the material damage (Judgment, para. 142); it has further determined that, in the circumstances of the case, given its finding of a breach of provisional measures (by the excavation of the *caños* and the establishment of a military presence in the disputed territory), the declaration by the Court to this effect provides adequate *satisfaction* to the Applicant for the non-material damage (*ibid.*, para. 139), without the need to award costs (*ibid.*, para. 144).

49. The ICJ has found that it has thereby afforded "adequate satisfaction" (*ibid.*, para. 139) to the Applicant, by its declaration, in the *Certain Activities* case[20], of a breach of obligations ensuing from the Order of provisional measures of 8 March 2011. Furthermore, the ICJ indicated new provisional measures in its Order of 22 November 2013, so as to cease the effects of the harmful activities and to remedy that breach. In the joined case of *Construction of a Road*, the ICJ declined to award *com-*

[19] Paragraphs 137-144 and 224-228, respectively.
[20] Paragraphs 127 and 129, and resolutory point No. 3.

pensation (Judgment, para. 226), but determined — even if not here referring specifically to a breach of provisional measures — that its declaration of wrongful conduct for the Respondent's breach of the obligation to conduct an EIA provides adequate *satisfaction* to the Applicant (*ibid.*, para. 224).

50. The grant of this form of reparation (satisfaction) in the two joined cases is necessary and reassuring. 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 July 2013 (as it should, for the reasons explained in my dissenting opinion appended thereto), and only did so in its subsequent Order of 22 November 2013, gives weight to its decision not to award costs[21]. After all, the prolongation of the proceedings (as to provisional measures)[22] 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.

51. In effect, breach and duty of reparation come together. As I pointed out in my separate opinion in *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Compensation, Judgment*, 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 (*I.C.J. Reports 2012 (I)*, pp. 352-355, paras. 14-21). The duty of reparation is widely acknowledged as one of general or customary international law (*ibid.*, p. 356, para. 25). I stressed that

> "The duty of full reparation is the prompt and indispensable complement of an internationally wrongful act, so as to cease all the consequences ensuing therefrom, and to secure respect for the international legal order.
>
> . . . . . .
>
> The breach of international law and the ensuing compliance with the duty of reparation for injuries are two sides of the same coin; they form an *indissoluble whole*.
>
> . . . . . .
>
> [T]he *reparatio* (from the Latin *reparare*, 'to dispose again') ceases all the effects of the breaches of international law (. . .) at issue, and

[21] Paragraph 144 (*Certain Activities* case) of the present Judgment.

[22] After the hearings of 11-13 January 2011 (following Costa Rica's initial request for the indication of provisional measures in the *Certain Activities* case), those of 14-17 October 2013 (following Costa Rica's further request for the indication of provisional measures in the *Certain Activities* case), and those of 5-8 November 2013 (following Nicaragua's request for the indication of provisional measures in the *Construction of a Road* case).

> provides satisfaction (as a form of reparation) to the victims; by means of the reparations, the law re-establishes the legal order broken by those violations (. . .).
>
> One has to be aware that it has become commonplace in legal circles — as is the conventional wisdom of the legal profession — to repeat that the duty of reparation, conforming a 'secondary obligation', comes after the breach of international law. This is not my conception; when everyone seems to be thinking alike, no one is actually thinking at all. In my own conception, breach and reparation go together, conforming an indissoluble whole: the latter is the indispensable consequence or complement of the former. The duty of reparation is a *fundamental* obligation (. . .). The indissoluble whole that violation and reparation conform admits no disruption (. . .), so as to evade the indispensable consequence of the international breaches incurred into: the reparations due to the victims. (*I.C.J. Reports 2012 (I)*, p. 359, para. 32, p. 360, para. 35 and p. 362, paras. 39-40.)

52. 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.

X. Due Diligence, and the Interrelatedness between the Principle of Prevention and the Precautionary Principle

53. Now that I approach the conclusion of the present separate opinion, may I come back to its point of departure, namely, the relevance of the preventive dimension in contemporary international law. Such preventive dimension marks 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 *Construction of a Road in Costa Rica along the San Juan River*. It is significant that, in the course of the proceedings in the present joined cases, the duty of *due diligence* has been invoked, just as it was in an earlier Latin American case, that of the *Pulp Mills on the River Uruguay* (2010), opposing Argentina to Uruguay.

54. In respect of the *cas d'espèce* (and specifically of the *Construction of a Road* case), it has been asserted that the populations of both countries,

Nicaragua and Costa Rica, "deserve to benefit from the highest possible standards of environmental protection", and that the States of Central America have adopted and applied environmental and related laws to secure "high standards of protection"[23]. Due diligence has thus been duly acknowledged, once again, in a Latin American case before the ICJ. There are other related aspects in the preventive dimension. The duty to conduct an EIA, for example, as determined by the Court in the present Judgment, in the case of the *Construction of a Road* (paras. 153-162), brings to the fore, in my perception, the interrelatedness between the *principle of prevention* and the *precautionary principle*.

55. I had the occasion to dwell upon this particular point in the other aforementioned Latin American case, of half a decade ago, concerning *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*. In my separate opinion appended to the ICJ's Judgment of 20 April 2010 in the *Pulp Mills* case, I pondered that, 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 (*I.C.J. Reports 2010 (I)*, pp. 162-163, paras. 72-73).

56. Unlike the positivist belief in the certainties of scientific knowledge — I proceeded — the precautionary principle is geared to the duty of *due diligence*, in face of scientific uncertainties[24]; precaution is thus, nowadays, more than ever, needed (*ibid.*, p. 166, para. 83 and pp. 168-169, para. 89). 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 EIA (*ibid.*, pp. 170-171, paras. 94-96), as upheld by the ICJ in the joined case of the *Construction of a Road*.

57. In the present Judgment, the Court, recalling its earlier decision in the *Pulp Mills* case, referred in a reiterated way to the requirement of due diligence in order to prevent significant transboundary environmental harm (Judgment, para. 104). It focused on the undertaking of an EIA in the wider realm of general international law (*ibid.*, paras. 104-105). And it then stated that

> "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 obli-

[23] CR 2015/15, of 29 April 2015, pp. 44-45, paras. 26-27 (statement of counsel of Nicaragua).

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

gation, 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." (Judgment, para. 104.)

XI. The Path towards the Progressive Development of Provisional Measures of Protection

58. Having pointed that out, the main lesson learned from the adjudication of the *cas d'espèce*, that I deem it fit to leave on the records, in the present separate opinion, under the umbrella of the preventive dimension in contemporary international law, as developed in the preceding paragraphs, pertains to what I conceptualize as the conformation of an *autonomous legal regime* of provisional measures of protection, with all its elements and implications, as related to the Court's finding in the two joined cases.

59. Thus, in my dissenting opinion in the ICJ's Order of 16 July 2013 in *Certain Activities* and *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 8 March 2011, I asserted, and deem 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. This discloses their important preventive dimension, in their wide scope. The proper treatment of this subject-matter is the task before this Court, now and in the years to come.
>
> . . . . . .
>
> 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, focused, in particular, on the contemporary expansion of provisional measures, the means to secure due and prompt compliance with them, and the legal consequences of non-compliance — to the benefit of those protected thereunder.
>
> . . . . . .

> [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." (*I.C.J. Reports 2013*, p. 268, para. 72 and pp. 269-270, paras. 75-76.)

60. Provisional measures of protection have grown in importance, and have expanded and have much developed in recent years, particularly in the framework of regimes of protection (such as those, e.g., of the human person and of the environment). Provisional measures of protection have become, more than precautionary, truly *tutelary*, enlarging the scope of protection. The autonomous legal regime of provisional measures of protection, in conclusion, is conformed, in my conception, by the juridical nature of such measures, the rights at issue and the obligations derived therefrom, their legal effects, and the duty of compliance with them, — all running parallel to the proceedings as to the merits of the *cas d'espèce*. It also encompasses the legal consequences ensuing therefrom.

61. The rights protected by provisional measures of protection are not the same as those pertaining to the merits of the case at issue. 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. 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.

62. In order to avoid or prevent those damages, provisional measures of protection set forth obligations of their own[25], distinct from the obligations emanating later from the respective Judgments as to the merits of the corresponding cases[26]. As I pondered, one decade ago, in another international jurisdiction, an international tribunal has the inherent power or *faculté* to supervise *motu proprio* the compliance or otherwise, on the part of the State concerned, with the provisional measures of protection it ordered; this is "even more necessary and pressing in a situation of extreme gravity and urgency", so as to prevent or avoid irreparable damage[27].

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[25] Cf., in this sense, IACtHR, case of *The Barrios Family* v. *Venezuela*, Order of 29 June 2005, concurring opinion of Judge Cançado Trindade, paras. 5-6.

[26] Cf., in this sense, IACtHR, case of the *Communities of Jiguamiandó and Curbaradó*, concerning Colombia, Order of 7 February 2006, concurring opinion of Judge Cançado Trindade, paras. 5-6.

[27] Cf., in this sense, IACtHR, case of *The Barrios Family* v. *Venezuela*, Order of 22 September 2005, concurring opinion of Judge Cançado Trindade, para. 6.

63. In such circumstances, an international tribunal cannot abstain from exercising its inherent power or *faculté* of supervision of compliance with its own Orders, in the interests of the sound administration of justice *(la bonne administration de la justice)*. Non-compliance with provisional measures of protection amounts to a breach of international obligations deriving from such measures. This being so, the determination of their breach, in my understanding, 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.

64. Furthermore, the determination of their breach is not conditioned by the existence of a request to this effect by the State concerned; the Court, in my view, 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)*. The determination of a breach of provisional measures entails legal consequences; this paves the way for the granting of remedies, of distinct forms of reparation, and eventually costs.

65. In the present Judgment of the ICJ in the two joined cases of *Certain Activities* and of *Construction of a Road*, the ICJ was attentive to this point, having found that, by its own determination of a breach of obligations ensuing from the Order of provisional measures of 8 March 2011 — in the *Certain Activities* case[28] — it has afforded "adequate satisfaction" to the applicant State (para. 139). For all the aforesaid, it is high time to refine, at conceptual level, the autonomous legal regime of provisional measures of protection.

66. Such refinement 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*. The progressive development of provisional measures of protection is a domain in respect of which international case law seems to be preceding legal doctrine, and it is a source of satisfaction to me to endeavour to contribute to that.

XII. Epilogue: A Recapitulation

67. Provisional measures of protection provide, as we can see, a fertile ground for reflection at the juridico-epistemological level. Time and law are here ineluctably joined together, as in other domains of international law. 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. In order to endeavour to pave this way,

[28] Paragraphs 127 and 129, and resolutory point No. 3.

may I, last but not least, proceed to a brief recapitulation of the main points I deemed it fit to make, particularly in respect of provisional measures of protection, in the course of the present separate opinion.

68. *Primus*: The preventive dimension in contemporary international law is clearly manifested in the formation of what I conceive as the autonomous legal regime of provisional measures of protection. *Secundus*: Such preventive dimension grows in importance in the framework of regimes of protection (e.g., of the human person and of the environment), bringing us closer to general principles of law. *Tertius*: Provisional measures, historically emerged in comparative domestic law as a precautionary legal action, had their scope enlarged in international jurisdiction, becoming endowed with a tutelary — rather than only precautionary — character, as a true jurisdictional guarantee of a preventive nature. *Quartus*: Prevention and precaution underlie provisional measures, anticipatory in nature, so as to avoid the aggravation of the dispute and irreparable damage.

69. *Quintus*: In the framework of their autonomous legal regime, provisional measures guarantee rights which are not necessarily the same as those invoked in the proceedings as to the merits. *Sextus*: In the framework of their autonomous legal regime, provisional measures generate *per se* obligations, independently from those ensuing from the Court's subsequent judgment on the merits or on reparations. *Septimus*: The Court is fully entitled to order provisional measures of protection, and to order *motu proprio*, any measure which it deems necessary.

70. *Octavus*: The Court is fully entitled to order *motu proprio* provisional measures which are totally or partially different from those requested by the contending parties. *Nonus*: The Court is fully entitled to order further provisional measures *motu proprio*; it does not need to wait for a request by a party to do so. *Decimus*: The Court has inherent powers or *facultés* to supervise *ex officio* compliance with provisional measures of protection and thus to enhance their preventive dimension.

71. *Undecimus*: Non-compliance amounts to an autonomous breach of provisional measures, irrespective of what will later be decided (any other breach) by the Court as to the merits. *Duodecimus*: A breach of a provisional measure of protection engages by itself State responsibility, being additional to any other breach which may come later to be determined by the Court as to the merits. *Tertius decimus*: The notion of victim marks presence also in the realm of provisional measures of protection.

72. *Quartus decimus*: The determination by the Court of a breach of a provisional measure should not be conditioned by the completion of subsequent proceedings as to the merits; the legal effects of such breach should be promptly determined by the Court, in the interests of the sound administration of justice *(la bonne administration de la justice)*. *Quintus decimus*: Contemporary international tribunals have an inherent power

or *faculté* to determine promptly such breach, with all its legal consequences (remedies, satisfaction as a form of reparation, and eventually costs). *Sextus decimus*: The duty to provide reparation (in its distinct forms) is promptly generated by the breach of provisional measures of protection.

73. *Septimus decimus*: The interrelationship between breach and duty of reparation marks presence also in the realm of the autonomous legal regime of provisional measures of protection. *Duodevicesimus*: The autonomous legal regime of their own, with all its elements (cf. *supra*), contributes to the prevalence of the rule of law *(prééminence du droit)* at international level. *Undevicesimus*: Provisional measures of protection have much evolved in recent decades, but there remains a long way to go so as to reach their plenitude. *Vicesimus*: Contemporary international tribunals are to refine the autonomous legal regime of provisional measures of protection, and to foster their progressive development, to the benefit of all the *justiciables*.

(Signed) Antônio Augusto CANÇADO TRINDADE.

SEPARATE OPINION OF JUDGE DONOGHUE

Obligation under customary international law to exercise due diligence in preventing significant transboundary environmental harm — Environmental Impact Assessment — Notification — Consultation.

1. In each of these joined cases, the Applicant contends that the Respondent violated general international law by causing significant transboundary harm to the territory of the Applicant, by failing to conduct an environmental impact assessment and by failing to notify and to consult with the Applicant. I write separately to present my views regarding customary international law in respect of transboundary environmental harm. In particular, I emphasize that States have an obligation under customary international law to exercise due diligence in preventing significant transboundary environmental harm. I consider that the question whether a proposed activity calls for specific measures, such as an environmental impact assessment, notification to, or consultation with, a potentially affected State, should be judged against this underlying obligation of due diligence.

2. I begin with two points of terminology. First, the Court today, as in the *Pulp Mills* case (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 14), uses the terms "general international law" and "customary international law", apparently without differentiation. Although some writers have ascribed distinct meanings to these two terms, I consider that the task before the Court today is the examination of "international custom, as evidence of a general practice accepted as law" in accordance with Article 38, paragraph 1 *(b)*, of the Statute of the Court. Secondly, I use the term "State of origin" here to refer to a State that itself plans and engages in an activity that could pose a risk of transboundary harm. Much of what I have to say would also apply to a State that authorizes such an activity. I do not intend here to address the legal consequences of private activities that are not attributable to the territorial State, nor do I take account of ultra-hazardous activities, which are not before the Court today.

Customary International Law of the Environment

3. An assessment of the existence and content of customary international law norms is often challenging. Over the years, some have seized on the 1927 statement of the Permanent Court of International Justice that

"[r]estrictions upon the independence of States cannot . . . be presumed" (*"Lotus", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 18) to support the assertion that, where evidence of State practice and *opinio juris* is incomplete or inconsistent, no norm of customary international law constrains a State's freedom of action. Such an assertion, an aspect of the so-called *"Lotus"* principle, ignores the fact that the identification of customary international law must take account of the fundamental parameters of the international legal order. These include the basic characteristics of inter-State relations, such as territorial sovereignty, and the norms embodied in the Charter of the United Nations, including the sovereign equality of States (Article 2, paragraph 1, of the Charter of the United Nations).

4. In the case concerning *Jurisdictional Immunities of the State* (*(Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012 (I)*, p. 99), the question was whether, under customary international law, Germany was immune from certain lawsuits and measures of constraint in Italy. The Court recognized that it faced a situation in which two basic parameters of the international legal order — sovereign equality and territorial sovereignty — were in tension. It observed that State immunity "derives from the principle of sovereign equality of States" which "has to be viewed together with the principle that each State possesses sovereignty over its own territory" (*ibid.*, pp. 123-124, para. 57). More precisely, "[e]xceptions to the immunity of the State represent a departure from the principle of sovereign equality. Immunity may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it" (*ibid.*, p. 124, para. 57). The Court then evaluated the evidence of State practice and *opinio juris* in light of these competing principles, finding sufficient evidence of State practice and *opinio juris* to define with some precision the rules of customary international law that governed the facts in that case.

5. The Court's approach in *Jurisdictional Immunities of the State*, which grounds the analysis in fundamental background principles, applies with equal force to the consideration of the existence and content of customary international law regarding transboundary environmental harm. If a party asserts a particular environmental norm without evidence of general State practice and *opinio juris*, the *"Lotus"* presumption would lead to a conclusion that customary international law imposes no limitation on the State of origin. As in *Jurisdictional Immunities of the State*, however, the appraisal of the existence and content of customary international law regarding transboundary environmental harm must begin by grappling with the tension between sovereign equality and territorial sovereignty.

6. As a consequence of territorial sovereignty, a State of origin has broad freedom with respect to projects in its own territory (the building

of a road, the dredging of a river). However, the equal sovereignty of other States means that the State of origin is not free to ignore the potential environmental impact of the project on its neighbours. At the same time, the rights that follow from the equal sovereignty of a potentially affected State do not give it a veto over every project by the State of origin that has the potential to cause transboundary environmental harm.

7. The 1992 Rio Declaration on Environment and Development (Principle 2) and its predecessor, the 1972 Stockholm Declaration of the United Nations Conference on the Human Environment (Principle 21), offer a widely-cited formulation that balances the interests of the State of origin and potentially affected States:

> "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." (Rio Principle 2.)

8. The Court in the *Pulp Mills* case took an approach that synthesizes the competing rights and responsibilities of two sovereign equals in respect of transboundary environmental harm, by holding the State of origin to a standard of due diligence in the prevention of significant transboundary environmental harm:

> "The Court points out that the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory. It is 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States' (*Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 22). A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State. This Court has established that this obligation 'is now part of the corpus of international law relating to the environment' (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 242, para. 29)." (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, pp. 55-56, para. 101.)

Thus, taking into account the sovereign equality and territorial sovereignty of States, it can be said that, under customary international law, a State of origin has a right to engage in activities within its own territory,

as well as an obligation to exercise due diligence in preventing significant transboundary environmental harm.

9. The requirement to exercise due diligence, as the governing primary norm, is an obligation of conduct that applies to all phases of a project (e.g., planning, assessment of impact, decision to proceed, implementation, post-implementation monitoring). In the planning phase, a failure to exercise due diligence to prevent significant transboundary environmental harm can engage the responsibility of the State of origin even in the absence of material damage to potentially affected States. This is why (as in *Nicaragua* v. *Costa Rica*) a failure to conduct an environmental impact assessment can give rise to a finding that a State has breached its obligations under customary international law without any showing of material harm to the territory of the affected State. If, at a subsequent phase, the failure of the State of origin to exercise due diligence in the implementation of a project causes significant transboundary harm, the primary norm that is breached remains one of due diligence, but the reparations due to the affected State must also address the material damage caused to the affected State. (For these reasons, I do not find it useful to draw distinctions between "procedural" and "substantive" obligations, as the Court has done.)

10. This obligation to exercise due diligence is framed in general terms, but that does not detract from its importance. The question whether the State of origin has met its due diligence obligations must be answered in light of the particular facts and circumstances. Of course, it is possible that customary international law also contains specific procedural or substantive rules that give effect to this due diligence obligation. To reach conclusions on the existence and content of such specific rules, however, account must be taken of State practice and *opinio juris*. Absent consideration of such information, the Court is not in a position to articulate specific rules, and the rights and obligations of parties should be assessed with reference to the underlying due diligence obligation.

11. With this framework in mind, I turn next to some observations regarding environmental impact assessment, notification and consultation.

Environmental Impact Assessment

12. In the *Pulp Mills* case, the Court supported its interpretation of a bilateral treaty between the Parties by observing 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. Moreover, due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the régime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works." (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 83, para. 204.)

13. This statement is widely understood as a pronouncement that general (or customary) international law imposes a specific obligation to undertake an environmental impact assessment where there is a risk of significant transboundary environmental harm. I am not confident, however, that State practice and *opinio juris* would support the existence of such a specific rule, in addition to the underlying obligation of due diligence. This does not mean that I am dismissive of the importance of environmental impact assessment in meeting a due diligence obligation. If a proposed activity poses a risk of significant transboundary environmental harm, a State of origin would be hard pressed to explain a decision to undertake that activity without prior assessment of the risk of transboundary environmental harm.

14. In *Pulp Mills*, the Court wisely declined to elaborate specific rules and procedures regarding the assessment of transboundary environmental impacts, stating that:

> "[I]t 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 the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment." (*Ibid.*, para. 205.)

15. Today's Judgment makes clear that the above-quoted passage from the *Pulp Mills* case does not give rise to a *renvoi* to national law in respect of the content and procedures of environmental impact assessment (as one of the Parties had asserted). Instead, the "[d]etermination of the content of the environmental impact assessment should be made in light of the specific circumstances of each case" (para. 104). Thus, the Court does not presume to prescribe details as to the content and procedure of transboundary environmental impact assessment. This leaves scope for variation in the way that States of origin conduct the assessment, so long as the State meets its obligation to exercise due diligence in preventing transboundary environmental harm.

NOTIFICATION AND CONSULTATION

16. Today's Judgment also addresses the asserted obligations of notification and consultation in relation to significant transboundary environmental harm, stating that:

> "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." (Judgment, para. 104.)

17. The Court does not provide reasons for its particular formulation of the obligations of notification and consultation, which does not emerge obviously from the positions of the Parties or from State practice and *opinio juris*. Both Parties assert that general international law requires notification and consultation regarding activities which carry a risk of significant transboundary environmental harm. However, the Parties do not present a shared view of the specific content of such an obligation. For example, Nicaragua maintains that a duty to notify and consult only arises if an environmental impact assessment indicates a likelihood of significant transboundary harm to other States, whereas Costa Rica suggests that notice to the potentially affected State may be required prior to undertaking an environmental impact assessment.

18. Because each Party seeks to hold the other to these asserted requirements, neither has an incentive to call attention to aspects of State practice or *opinio juris* that would point away from the existence of particular obligations to notify or to consult. The Court is also ill-equipped to conduct its own survey of the laws and practices of various States on this topic. (To arrive at an understanding of United States federal law regarding environmental impact assessment in a transboundary context, for example, one would need to study legislation, extensive regulations, judicial decisions and the pronouncements of several components of the executive branch.)

19. The Parties do not offer direct evidence of State practice regarding notification and consultation with respect to transboundary environmental impacts, but instead refer the Court to international instruments and decisions of international courts and tribunals. The Court's formulation of specific obligations regarding notification and consultation bears similarity to Articles 8 and 9 of the International Law Commission's 2001 Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (*Yearbook of the International Law Commission*, 2001, Vol. II, Part Two, pp. 146-147). Although these widely-cited Draft Articles and associated commentaries reflect a valuable contribution by the Commission, their role in the assessment of State practice and *opinio juris*

must not be overstated. One must also be cautious about drawing broad conclusions regarding the content of customary international law from the text of a treaty or from judicial decisions that interpret a particular treaty (such as the Judgment in *Pulp Mills*). The 1991 Convention on Environmental Impact Assessment in a Transboundary Context (the Espoo Convention), for example, contains specific provisions on notification and consultation. The Treaty was drafted to reflect practices in Europe and North America, and, although it is now open to accession by States from other regions, it remains largely a treaty among European States and Canada. When a broader grouping of States has addressed environmental impact assessment, notification and consultation, as in the 1992 Rio Declaration, the resulting formulation has been more general (see Rio Principle 19, which calls for the provision of "prior and timely notification and relevant information" to potentially affected States and consultations with those States "at an early stage and in good faith").

20. For these reasons, whereas I agree that a State's obligation under customary international law to exercise due diligence in preventing significant transboundary environmental harm can give rise to requirements to notify and to consult with potentially affected States, I do not consider that customary international law imposes the specific obligations formulated by the Court. I note two particular concerns.

21. First, the Judgment could be read to suggest that there is only one circumstance in which the State of origin must notify potentially affected States — when the State of origin's environmental impact assessment confirms that there is a risk of significant transboundary harm. A similar trigger for notification appears in Article 8 of the International Law Commission's 2001 Draft Articles on Prevention of Transboundary Harm from Hazardous Activities. However, due diligence may call for notification of a potentially affected State at a different stage in the process. For example, input from a potentially affected State may be necessary in order for the State of origin to make a reliable assessment of the risk of transboundary environmental harm. The Espoo Convention (Art. 3) calls for notification of a potentially affected State before the environmental impact assessment takes place, thereby allowing that State to participate in that assessment.

22. The facts in the *Nicaragua* v. *Costa Rica* case illustrate the importance of notification before the environmental impact assessment is complete. Only Nicaragua is in a position to take measurements or samples from the San Juan River, or to authorize such activities by Costa Rica.

Consequently, it is difficult to see how Costa Rica could conduct a sufficient assessment of the impact on the river without seeking input from its neighbour.

23. Secondly, there are topics other than measures to prevent or to mitigate the risk of significant transboundary harm as to which consultations could play a role in meeting the State of origin's due diligence obligation, such as the parties' respective views on the sensitivity of the environment in the affected State or the procedural details of an environmental impact assessment process.

24. Because the Court today reaffirms that the fundamental duty of the State of origin is to exercise due diligence in preventing significant transboundary environmental harm, I do not understand the Judgment to mean that a State is obligated to notify a potentially affected State only when an environmental impact assessment finds a risk of significant transboundary environmental harm, nor do I consider that the Court has excluded the possibility that the due diligence obligation of the State of origin would call for notification of different information or consultation regarding topics other than those specified by the Court. The question whether due diligence calls for notification or consultation, as well as the details regarding the timing and content of such notification and consultation, should be evaluated in light of particular circumstances.

(Signed) Joan E. DONOGHUE.

SEPARATE OPINION OF JUDGE BHANDARI

Introduction

1. In the instant case, the Court has been presented with two separate but related disputes that have arisen between Costa Rica and Nicaragua pertaining to the San Juan River, which serves as the international boundary between these two nation-States.

2. The first dispute, known as the *Certain Activities* case, deals with, *inter alia*, the dredging by Nicaragua of the Lower San Juan River, over which it has sovereign title up to the right bank, in order to improve the navigability of the said river.

3. The second dispute, known as the *Construction of a Road* case, is centred around the construction by Costa Rica within its own territory of a road nearly 160 km in length, which follows the course of the right bank of the San Juan River for approximately 108 km (Judgment, para. 64).

4. As the Judgment's analysis explains (*ibid.*, paras. 63-64; 104-105 and 160-161), since both Nicaragua's dredging of the Lower San Juan River and Costa Rica's construction of a road along the right bank of that river are public projects that have occurred near an international boundary, the possibility of transboundary harm arises in both contexts. Consequently, in both the *Certain Activities* and *Construction of a Road* cases the Applicant argued that the Respondent did not, contrary to its obligations under public international law, perform an Environmental Impact Assessment ("EIA").

5. While I concur with the majority's conclusion that Costa Rica ought to have produced an EIA in the *Construction of a Road* case (Judgment, paras. 104-105 and 160-162), I feel the present Judgment offers a welcome opportunity to expand upon the present state of the law surrounding EIAs, and to offer insight as to how the body of law governing such instruments may be complemented so as to provide clearer guidance to nation-States contemplating large-scale public works projects that contain a prospect of transboundary impacts.

6. As I shall discuss at greater length below, the obligation to produce an EIA presently arises not only under general international law, but has also been codified by various international treaties and other legal instruments. Regrettably, despite the current widespread acceptance of the necessity to conduct an EIA where there is a risk of transboundary harm, public international law presently offers almost no guidance as to the spe-

cific circumstances giving rise to the need for an EIA, nor the requisite content of any such assessment.

7. For these reasons, in the present opinion I intend to offer some suggestions as to how the public international law standards governing EIAs could be improved. In undertaking this endeavour, I draw inspiration from the words of Judge Weeramantry in his dissenting opinion to this Court's *Nuclear Tests II* Order:

> "This Court, situated as it is at the apex of international tribunals, necessarily enjoys a position of special trust and responsibility in relation to the principles of environmental law, especially those relating to what is described in environmental law as the Global Commons. When a matter is brought before it which raises serious environmental issues of global importance, and a prima facie case is made out of the possibility of environmental damage, the Court is entitled to take into account the Environmental Impact Assessment principle in determining its preliminary approach."[1]

8. In keeping with this sage pronouncement, I shall first examine how the legal instrument of an EIA fits within the broader history and contemporary régime of international environmental law. Against this backdrop I shall proceed to a discussion of current trends in public international law pertaining to transboundary EIAs. Finally, I shall provide some recommendations that in my respectful view could serve as useful minimum standards for determining the content of transboundary EIAs under public international law.

Brief History of the Law Pertaining to EIAs

9. Over approximately the past half-century remarkable progressive steps have been taken with regard to international environmental law since the United Nations Conference on the Human Environment was held at Stockholm in 1972 ("Stockholm Conference")[2]. One of the reasons for this evolution is scientific development, in so far as increased technological capacity for scientific inquiry has heightened the ability of

[1] *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the* Nuclear Tests (New Zealand *v.* France) *Case, Order of 22 September 1995, I.C.J. Reports 1995*, p. 345 (*"Nuclear Tests II* Order").

[2] The United Nations Conference on the Human Environment (1972) convened by United Nations General Assembly res. 2398 (XXIII).

mankind to ascertain the harm it is committing against its own natural habitat. This is demonstrated most obviously through a greatly intensified focus on climate change over the past twenty years[3].

10. Some of the driving forces behind the advent and growing acceptance of the need to conduct EIAs are the concomitant rise in other international environmental law doctrines, such as 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.

Principle of Sustainable Development

11. The principle of sustainable development has been a driving force in international environmental law for several decades. Indeed, the Stockholm Conference culminated in the issuance of a comprehensive report recognizing, *inter alia*, that environmental management is designed for the purpose of facilitating comprehensive planning that takes into account the side effects of human activities on the environment[4]. Chapter I of that report consisted of a declaration ("Stockholm Declaration") containing 26 principles.

12. Principle 1 of the Stockholm Declaration implicitly embodied the principle of sustainable development when it stated in relevant part that:

> "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations."

The actual term "sustainable development" was coined in a report prepared in 1987 by the World Commission on Environment and Development[5], commonly known as the "Brundtland Report"[6], and has figured prominently in numerous international treaties, legal instruments and cases applying international environmental law ever since.

13. The notion of sustainable development is said to embody the balancing of two ideas. The first is the idea of granting priority to essential needs such as food, clothing, shelter, and the second is the idea of limitations imposed by the ability of the environment to meet such future needs[7]. As the term implies, the industrial development and scientific progress

[3] See, generally, *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7.

[4] Report of the United Nations Conference on the Human Environment, UN doc. A/CONF.48/14/Rev.1, p. 28.

[5] Philippe Sands, *Principles of International Environmental Law*, 2nd ed., 2003, p. 252.

[6] Report of the World Commission on Environment and Development, *Our Common Future* (1987), p. 43.

[7] *Ibid.*

taking place in the world must be done in a manner that takes into account the impact of such activities on the environment. In fact, in the *Gabčíkovo-Nagymaros Project* Judgment, this Court discussed this balancing act in the following terms:

> "Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind — for present and future generations — of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development."[8]

The principle of sustainable development is thought of as an underlying concern in all negotiations and discussions of the international community relating to the environment[9].

Principle of Preventive Action

14. In addition to sustainable development, the principle of preventive action is another pillar of modern international environmental law[10]. Whereas certain principles of international environmental law such as sustainable development focus on balancing the often competing needs of industrial development and environmental protection, the principle of preventive action, by contrast, focuses solely on the minimization of environmental damage[11]. As the term would imply, the preventive action called for must be done prior to the occurrence of any environmental damage. This Court has recognized the importance of the principle of preventive action in the *Gabčíkovo-Nagymaros Project* Judgment, where it stated that:

> "[t]he Court is mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irre-

[8] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 78, para. 140.

[9] Xue Hanqin, *Transboundary Damage in International Law*, p. 326.

[10] Report of the International Law Commission, Draft Principles on the Prevention of Transboundary Harm from Hazardous Activities, with Commentaries (2001), 56th Session, UN doc. A/56/10.

[11] Philippe Sands, *Principles of International Environmental Law*, 2nd ed., 2003, p. 281.

versible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage"[12].

Global Commons

15. Central to the principles of sustainable development and preventive action is the core idea of common custody over the earth's resources and that stewardship over the environment cannot end at the border of a nation-State. These values of good neighbourliness and co-operation[13] are based on the maxim of *sic utere tuo ut alienum non laedas*[14]. Indeed, a logical corollary of the foundational principle under international law that each nation is sovereign over its own territory, is that if one nation deleteriously affects the territory of another, certain obligations and/or liabilities might arise.

16. One expression of this imperative can be found in Principle 24 of the Stockholm Declaration, which urges the need for such co-operation:

> "International matters concerning the protection and improvement of the environment should be handled in a co-operative spirit by all countries, big and small, on an equal footing.
>
> Co-operation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all States."[15]

Precautionary Principle

17. The precautionary principle aims to provide guidance in development and application of international environmental law where there is scientific uncertainty[16]. Although the precautionary principle is an important one, its status in international law is still evolving. Its core ethos, however, is captured by Principle 15 of the Rio Declaration:

> "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where

[12] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 78. para. 140.

[13] Philippe Sands, *Principles of International Environmental Law*, 2nd ed., 2003, p. 249; Report of the International Law Commission, Draft Principles on the Prevention of Transboundary Harm from Hazardous Activities, with Commentaries (2001), 56th Session, UN doc. A/56/10, Art. 4.

[14] "Use your own property in such a way that you do not injure other people's", *Oxford Dictionary of Law*, 7th ed., 2009, 2014 online version.

[15] The United Nations Conference on the Human Environment (1972) convened by United Nations General Assembly res. 2398 (XXIII).

[16] Philippe Sands, *Principles of International Environmental Law*, 2nd ed., 2003, p. 267.

there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."[17]

18. There exists some confusion in the international community with regard to this principle as it has been provided for in many conventions though in different language. Certain conventions couch this principle in terms similar to progressive realization of enhanced scientific capabilities and available knowledge[18]. This principle was urged before the Court by New Zealand (as well as all five intervening nations) in *Nuclear Tests II*[19]. However, in that Order the Court did not make any finding as to the applicability of the precautionary principle. Nearly two decades later, and despite being urged by New Zealand as an intervening State, the Court did not take into account the precautionary principle in its analysis during the *Whaling in the Antarctic*[20] case. This was pointed out in the separate opinions of Judge Cançado Trindade[21] and Judge *ad hoc* Charlesworth[22].

Polluter Pays Principle

19. The principle of polluter pays[23] might be looked at as a retrospective method of allocating loss after an incident resulting in transboundary harm has already occurred. This principle could contribute to enhancing economic efficiency[24] in the case of an incident that causes transboundary

[17] United Nations Conference on Environment and Development, Rio Declaration on Environment and Development, UN doc. A/Conf.151/26 (1992).

[18] International Convention for the Regulation of Whaling, 161 United Nations, *Treaty Series (UNTS)*, 1946, signed at Washington, D.C.; Convention concerning the Protection of Workers against Ionising Radiations (entry into force: 17 June 1962), adoption: Geneva, 44th Session of the International Law Commission (22 June 1960).

[19] *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the* Nuclear Tests (New Zealand *v.* France) *Case, Order of 22 September 1995, I.C.J. Reports 1995*, p. 288.

[20] *Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 226.

[21] *Ibid.*, pp. 371-375, paras. 60-71; separate opinion of Judge Cançado Trindade.

[22] *Ibid.*, pp. 455-456, paras. 6-10; separate opinion of Judge *ad hoc* Charlesworth.

[23] Report of the International Law Commission, Draft Principles on the Prevention of Transboundary Harm from Hazardous Activities, with Commentaries (2006), 58th Session, UN doc. A/61/10 (2006), pp. 145-147; UN Conference on Environment and Development, Rio Declaration on Environment and Development, UN doc. A/Conf.151/26, (1992), Principles 13 and 16.

[24] Alan E. Boyle, "Making the Polluter Pay? Alternatives to State Responsibility in the Allocation of Transboundary Environmental Costs" in Francesco Francioni and Tulio Scovazzi (eds.), *International Responsibility for Environmental Harm*, pp. 363, 369.

harm, by judging the actions of polluters under a strict liability standard of care. As the concept arose from the Organization for Economic Co-operation and Development ("OECD")[25] and does not have the status of a principle of general international law[26], it presently acts as merely a general guideline of public international law[27].

Transboundary Harm

20. As the preceding discussion underscores, there are a variety of overlapping principles when it comes to international environmental law, with distinct approaches and objectives, that converge upon the common conclusion that nation-States owe certain obligations toward the environment, particularly in a transboundary context. When nation-States transgress these obligations vis-à-vis their neighbours, the resultant consequences may fall under the rubric of transboundary harm.

21. There exists no single definition of transboundary harm under international law. Though the Draft Principles relating to prevention of transboundary harm by the International Law Commission ("ILC")[28] do contain a definition of this concept, the idea of "risk of causing significant transboundary harm" is quite vague. Harm as per the ILC must be physical and is limited to persons, property or the environment[29]. However, the accompanying commentary does provide some clarity in this regard and explains that the idea of risk and harm are not to be isolated, but thought of in conjunction with each other:

> "For the purposes of these articles, 'risk of causing significant transboundary harm' refers to the combined effect of the probability of occurrence of an accident and the magnitude of its injurious impact. It is, therefore, the combined effect of 'risk' and 'harm' which sets the threshold."[30]

[25] OECD, Guiding Principles concerning International Economic Aspects of Environmental Policies, 26 May 1972, C (72), p. 128.

[26] Declaration on the Human Environment, Report of the UN Conference on the Human Environment (Stockholm, 1972), UN doc. A/Conf.48/14/Rev.1; Alan E. Boyle, "Making the Polluter Pay? Alternatives to State Responsibility in the Allocation of Transboundary Environmental Costs" in Francesco Francioni and Tulio Scovazzi (eds.), *International Responsibility for Environmental Harm*, pp. 363, 369; James Crawford (ed.), *Brownlie's Principles of Public International Law*, Oxford University Press, 7th ed., 2008, p. 359; Philippe Sands, *Principles of International Environmental Law*, 2nd ed., 2003, p. 281.

[27] Antonio Cassese, *International Law*, 2nd ed., pp. 492-493.

[28] Report of the International Law Commission, Draft Principles on the Prevention of Transboundary Harm from Hazardous Activities, with Commentaries (2001), 56th Session, UN doc. A/56/10.

[29] *Ibid.*, Art. 2 *(b)*.

[30] *Ibid.*, Art. 2, Commentary 2.

The ILC also gives guidance on the meaning of the word "significant" by way of its commentary:

> "The term 'significant' is not without ambiguity and a determination has to be made in each specific case. It involves more factual considerations than legal determination. It is to be understood that *'significant' is something more than 'detectable' but need not be at the level of 'serious' or 'substantial'*. The harm must lead to a real detrimental effect on matters such as, for example, human health, industry, property, environment or agriculture in other States. Such detrimental effects must be susceptible of being measured by factual and objective standards."[31]

22. Transboundary harm has been succinctly described by this Court as "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States"[32]. However, a review of the various authorities in which the concept is discussed reveals four common factors present in cases of transboundary environmental harm: firstly, the harm must be a result of human activity; secondly, the harm must result as a consequence of that human activity; thirdly, there must be transboundary effects on a neighbouring nation-State; and fourthly, the harm must be significant or substantial[33].

23. The requirement of a country contemplating a public works project that poses a risk of transboundary harm to produce an EIA can thus be seen as a tangible manifestation of these collective requirements that has gained increasing recognition amongst the community of nations. The Goals and Principles of Environmental Impact Assessment promulgated by the United Nations Environment Programme ("UNEP") in 1987, and endorsed by the United Nations General Assembly that same year ("UNEP Principles") demonstrate that the rise in the importance of conducting EIAs has been commensurate with the increase in the possibility of transboundary harm emanating from activities carried out by neighbouring nation-States[34]. Moreover, when the United Nations Conference on Environment and Development, popularly known as the "Earth Summit", was held in Rio de Janeiro in 1992, it issued its Declaration on Environment and Development ("Rio Declaration")[35],

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[31] Cf. *op. cit. supra* note 28, p. 152.

[32] *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J Reports 1949*, p. 22.

[33] O. Schachter, *International Law in Theory and Practice* (1991), pp. 366-368 as referred in Xue Hanqin, *Transboundary Damage in International Law*, p. 4.

[34] UNEP Goals and Principles of Environmental Impact Assessment, UN doc. UNEP/GC/14/25, 14th Session (1987), endorsed by UNGA res. 42/184 (1987), p. 1.

[35] UN Conference on Environment and Development, Rio Declaration on Environment and Development, UN doc. A/Conf.151/26 (1992).

the obligation to undertake an EIA already existed in many international law instruments[36].

24. However, despite the burgeoning acceptance of this obligation under international law, discerning the exact procedural and substantive requirements of an EIA has proven elusive. Indeed, the present-day régime governing EIAs consists of a patchwork of different international law instruments, including UNGA resolutions[37], the UNEP Principles[38], the Rio Declaration[39] and a host of multilateral conventions[40].

25. For example, the Rio Declaration does not dictate the contents of an EIA, but rather simply states that: "Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority".[41]

26. Moreover, the UNEP Principles define an EIA in similarly vague language, describing it merely as "a process of identifying, predicting, interpreting and communicating the potential impacts that a proposed project or plan may have on the environment"[42].

27. Another pertinent example is the Convention on Biological Diversity ("CBD")[43], also an outcome of the Earth Summit at Rio de Janeiro[44], to which both Parties in the present case are signatories. It contains the requirement to conduct an EIA in situations giving rise to "significant

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[36] Convention on Biological Diversity, 1760 *UNTS*, p. 79, signed on 5 June 1992 at Rio de Janeiro; UN Convention on the Law of the Sea, 1833 *UNTS*, p. 320, signed on 10 December 1982 at Montego Bay.

[37] Co-operation between States in the Field of the Environment, General Assembly res. 2995 (XXVII), UNGAOR 27th Session, Supplement No. 30 (1972), para. 2.

[38] UNEP Principles on Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States, 17 *International Legal Materials (ILM)* 1094, UN doc. UNEP/IG.12/2 (1978), Principle 4; UNEP Goals and Principles of Environmental Impact Assessment, UN doc. UNEP/GC/14/25, 14th Session (1987), endorsed by United Nations General Assembly, res. 42/184, UNGAOR 42nd Session, UN doc. A/Res/42/184 (1987).

[39] UN Conference on Environment and Development, Rio Declaration, 14 June 1992, 31 *ILM* 874, UN doc. A/Conf.151/5/Rev.1, Principle 17.

[40] Convention on Biological Diversity, 1760 *UNTS*, p. 79, signed on 5 June 1992 at Rio de Janeiro; UN Convention on the Law of the Sea, 1833 *UNTS*, p. 320, signed on 10 December 1982 at Montego Bay.

[41] UN Conference on Environment and Development, Rio Declaration, 14 June 1992, 31 *ILM* 874, UN doc. A/Conf.151/5/Rev.1, Principle 17.

[42] UNEP Principles on EIA, p. 1.

[43] 1760 *UNTS*, p. 79, signed on 5 June 1992 at Rio de Janeiro.

[44] UN Conference on Environment and Development, Rio Declaration on Environment and Development, UN doc. A/Conf.151/26 (1992).

adverse effects on biological diversity"[45] but does not provide any further elucidation as to the practical implications of this responsibility.

28. Finally, in the *Pulp Mills* Judgment of 2010, upon which the present Judgment has placed considerable emphasis, this Court noted:

> "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 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. Moreover, due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the régime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works.
>
> . . . . . .
>
> The Court also considers that an environmental impact assessment must be conducted prior to the implementation of a project. Moreover, once operations have started and, where necessary, throughout the life of the project, continuous monitoring of its effects on the environment shall be undertaken."[46]

However, in the same section of that Judgment, the Court opined that

> "it is the view of the Court 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 the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment".[47]

29. Thus, we see that while the *Pulp Mills* Judgment elevated the practice of conducting an EIA to an imperative under general international law when certain preconditions are met, at the same time it allowed for a *renvoi* to domestic law in terms of the procedure and content required when carrying out such an assessment. In view of the paucity of guidance from the Court and other sources of international law, it could plausibly be argued there are presently no minimum binding standards under pub-

[45] Convention on Biological Diversity, signed on 5 June 1992 at Rio de Janeiro, 1760 *UNTS*, p. 79, Art. 14 (1).

[46] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, pp. 83-84, paras. 204-205.

[47] *Ibid.*, p. 83, para. 205.

lic international law that nation-States must follow when conducting an EIA.

30. One reason for the lack of clarity as to what exactly a nation-State must do under international law to discharge its burden of conducting an EIA under these various authorities could be that the extent of the obligations arising under such instruments are difficult to define with precision. Some have suggested that this lack of precision is attributable to the fact that such assessments are a policy instrument[48]. Whatever the reason, the situation as it currently stands is less than ideal.

Basic Requirements of an EIA under Contemporary Public International Law

31. To discern the current state of the law on this point, one must endeavour to assimilate the various international law instruments that impose upon nation-States an obligation to conduct an EIA and synthesize the obligations imposed thereunder. Notwithstanding the lack of guidance under general international law and other binding or hortatory instruments, as the present Judgment at paragraphs 147-155 demonstrates, there are three cumulative stages that must be fulfilled when it comes to assessing the impact of a proposed project in a case of possible transboundary harm. The first stage is to conduct a preliminary assessment measuring the possibility of transboundary harm. In the present case, we see the Court has looked at the magnitude of the road project and local geographic conditions in assessing that a preliminary assessment by Costa Rica was warranted as to the possibility of harm to the San Juan River (Judgment, para. 155). If a preliminary assessment determines that there is a risk of significant transboundary harm, then the State has no choice but to conduct an EIA. The actual production of this document constitutes the second stage of the overall process, and entails certain corollary procedural obligations such as the duty to notify and consult the affected neighbouring nation-State (*ibid.*, para. 168). The third and final stage of this process is that of post-project assessment (*ibid.*, para. 161). This is in keeping with the Court's reasoning in the *Pulp Mills* Judgment that "once operations have started and, where necessary, throughout the life of the project, continuous monitoring of its effects on the environment shall be undertaken"[49].

32. In my respectful view, what appears to be missing in this analysis by the Court is what specific obligations arise during *stage two* of this

[48] Neil Craik, *The International Law of Environmental Impact Assessment*, Cambridge University Press, 2008, pp. 3-6.

[49] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, pp. 83-84, para. 205.

process. In attempt to fill this lacuna, the present opinion will offer suggestions as to appropriate minimum standards that should be fulfilled by any nation-State conducting an EIA. In this regard, the Convention on Environmental Impact Assessment in a Transboundary Context ("Espoo Convention")[50] drafted by the United Nations Economic Commission for Europe ("UNECE") provides, in my view, an exemplary standard for the process to be followed when conducting an EIA. In making this statement, I readily concede that the Espoo Convention is primarily a regional instrument designed to regulate transboundary harm in a European context. Because international law is grounded in the bedrock principle of consent between sovereign nation-States, and bearing in mind that the present case arises in the geopolitical context of Latin America, I am acutely aware that one cannot simply interpose the obligations arising under this regional treaty to non-signatories from other parts of the world. Indeed, criticism has been levied against the Espoo Convention as it derives its obligations from the domestic legislation of highly developed nations, which reduces the probability of ratification[51].

33. Taking such valid criticism into account, but also noting that the Espoo Convention contains a provision that allows for non-European nation-States to join it[52], I believe that it is helpful to consider the Espoo Treaty as a standard that nation-States should strive toward, as it contains novel and progressive guidelines that the community of nations would be well served to treat as persuasive authority in creating a more comprehensive global régime regarding the required content of transboundary EIAs under public international law. If the international community were to come together for the purpose of putting in place a convention dealing with transboundary EIAs, I propose that the Espoo Convention would constitute a very useful starting-point.

Espoo Convention: A Brief Overview

34. I shall now consider what are, in my opinion, certain important characteristics of the Espoo Convention that lay out what may be considered "best practices" in carrying out transboundary EIAs.

35. Article 2 (6) of the Convention places heavy emphasis on the need for public participation of the likely affected population(s). The form that this obligation takes under the Convention requires that the State propos-

[50] *UNTS*, Vol. 1989, p. 309.

[51] John H. Knox, «Assessing the Candidates for a Global Treaty on Transboundary Environmental Impact Assessment», 12 *NYU Envtl. L.J.* 153 (2003).

[52] Report of the Second Meeting [of the Parties to the Convention on Environmental Impact Assessment in a Transboundary Context] UN doc. ECE/MP.EIA/4 (2001), p. 144, Ann. XIV.

ing the project allow for the participation of not only its own affected population but that of the potentially affected neighbouring State as well. The notion that international law has begun to pay more attention to individuals is demonstrated by the requirement of public participation[53]. This concept of public participation expands upon prior pronouncements contained in Principle 10 of the Rio Declaration[54]. However, it should be noted that the notion that there is a duty to consult affected populations was rejected by the Judgment of this Court in the *Pulp Mills* case[55].

36. Article 3 of the Convention requires the nation proposing a project to notify a potentially affected neighbouring nation-State regarding any proposed activity that is likely to cause a "significant adverse transboundary impact". There is, naturally, great debate about the extent of the obligation that this phrase entails. A country proposing a project might argue that any impact is neither significant nor adverse, and thus escapes the ambit of Article 3. In fact this seems to be a similar threshold provided for by the Judgment, i.e., "risk of significant adverse impact" (Judgment, para. 167). This provision also lays down all the information one State must provide to another. Article 3 (7) stipulates that if there is a question that an activity will have a significant impact or not then the question is to be settled by an inquiry commission.

37. Article 5 of the Convention requires consultations with the affected State, to give recommendations to the State of origin methods for the reduction or the elimination of the harmful impact. This allows for a more amicable settling of disputes and problems arising out of a particular project.

38. Article 6 of the Convention outlines that a final decision regarding a proposed project is to be made with due regard to the conclusion of the EIA. This provision requires transmitting the final decision to the

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[53] Simon Marsden, "Public Participation in Transboundary Environmental Impact Assessment: Closing the Gap between International and Public Law", in Brad Jessup and Kim Rubenstein, *Environmental Discourses in Public and International Law*, p. 238.

[54] Principle 10:

> "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

[55] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, pp. 86-87, paras. 215-219: "The Court is of the view that no legal obligation to consult the affected populations arises for the Parties from the instruments invoked by Argentina." (Para. 216.)

affected party, along with reasons and considerations on which a decision is based.

39. Article 15 of the Convention discusses the settlement of disputes if they arise between parties. The dispute might either be settled by way of arbitration or by this Court. Regrettably, there is no specific provision dealing with reparations or compensation of any kind.

40. Importantly, Appendix I has a non-exhaustive list of activities that require conducting an EIA, in the manner prescribed under Appendix II of the Convention. Thus, for the purpose of ascertaining minimum requirements it is helpful to refer to Appendix II of the Convention as it lays down what the content of an EIA must be. Additionally, Appendix III provides guidance in deciding whether an activity would fall within the list provided in Appendix I.

Suggested Minimum Standards for EIA under International Law

41. This part outlines certain minimum standards to be followed in cases where there is no domestic legislation that guides an EIA. These minimum standards reflect in large part my affinity toward the ambitious approach taken in the Espoo Convention. However, rather than using the sometimes onerous obligations arising from that treaty as the requisite minimum standard for every country, in every context, I have instead laid out what, in my considered opinion, ought to be adopted as the lowest common denominator while conducting an EIA. These minimum standards may be broken down into procedural and substantive obligations. In my opinion, procedural obligations of an EIA would relate to when and under what circumstances such an assessment must be carried out, whereas substantive obligations refer to what must be done by a nation-State when conducting an EIA.

Procedural Obligations

42. Procedural obligations arising out of the obligation to perform an EIA arise out of questions of when an EIA is to be conducted. Presently, an EIA is required to be conducted when there is "risk of significant adverse impact" (Judgment, para. 167). A nation-State contemplating a project might claim that the risk of harm is not significant and therefore there exists no obligation to conduct an EIA. However, to avoid the possibility that countries may abuse their discretion in labelling certain activities as environmentally benign, I suggest that the best approach to take lies in the Espoo Convention, which lays down certain types of industries for which there is an automatic requirement to conduct an EIA if the said activities are being proposed near an international border. To that end, I

recall my observation above that Appendix 1 to the Espoo Convention lists a number of activities that require an EIA per se[56]. However, the fact that a project does not appear on this list does not mean it cannot be subject to an EIA. For instance, there might be other types of activities not contemplated within Appendix 1 of the Espoo Convention, but which might still produce dangerous pollutants or effluents as a by-product. Those activities must also be recognized as harmful, thus giving rise to EIA obligations. To this end, Appendix III of the Espoo Convention contains general criteria to assist in the determination of the environmental significance of various activities.

43. Once it is established that a certain activity requires that an EIA be carried out, nation-States may invoke certain exemptions that would relieve them of their obligation to conduct an EIA. Such pleas may include natural disasters, nuclear disasters, terrorism, internal disturbance or emergency, among others. If such a claim is made by a nation it has to be well substantiated and the burden of proof, which would lie with the country proposing the project, must be high.

44. It should be remembered that even private companies might propose projects near an international border. It is then the responsibility of

[56] 1. Crude oil refineries; 2. Thermal and nuclear power stations; 3. Any type of work that requires or uses nuclear elements (for any purpose, as fuel, for storage, or as fissionable material); 4. Smelting of cast iron and steel; 5. Any type of work that requires or uses asbestos for any purpose; 6. Integrated chemical installations; 7. Construction of motorways, express roads, railways, airports with runways of more than 2,100 m; 8. Large-diameter pipelines for the transport of oil, gas or chemicals; 9. Trading ports and also inland waterways and ports for inland-waterway traffic which permit the passage of vessels of over 1,350 metric tons; 10. Waste-disposal installations for the incineration, chemical treatment or landfill of toxic and dangerous wastes, or if it is non-hazardous waste then chemical treatment of the same waste with a capacity increasing 100 metric tonnes per day; 11. Dams and reservoirs; 12. Groundwater abstraction activities or artificial groundwater recharge schemes where the annual volume of water to be abstracted or recharged amounts to 10 million cubic metres or more; 13. Pulp, paper and board manufacturing of 200 air-dried metric tons or more per day; 14. Major quarries, mining, on-site extraction and processing of metal ores or coal; 15. Offshore hydrocarbon production, extraction of petroleum and natural gas for commercial purposes where the amount extracted exceeds 500 metric tons/day in the case of petroleum and 500,000 cubic metres/day in the case of gas; 16. Major storage facilities for petroleum, petrochemical and chemical products. 17. Deforestation of large areas; 18. Works for the transfer of water resources between river basins; 19. Waste-water treatment plants with a capacity exceeding 150,000 population equivalent; 20. Installations for the intensive rearing of poultry or pigs with more than: 85,000 places for broilers, 60,000 places for hens, 3,000 places for production pigs (over 30 kg), or 900 places for sows; 21. Construction of overhead electrical power lines with a voltage of 220 kV or more and a length of more than 15 km; 22. Major installations for the harnessing of wind power for energy production (wind farms).

the country in whose territory the project is being proposed to provide an EIA to a potentially affected country. Essentially, if a private project that falls within one of the above mentioned industries listed at Appendix 1 to the Espoo Convention, or is part of an industry that creates pollutants or dangerous effluents, then the responsibility to ensure that an EIA has been completed and duly transmitted to the neighbouring nation-State that might be affected, and the host country's international responsibility should be invoked, irrespective of the fact that the project falls within the domain of private enterprise.

Substantive Obligations

45. As noted above, the required content of an EIA has not specifically been laid down under public international law. However, by referring to the above-referenced documents it is possible to distil certain minimum criteria which must be adhered to while performing an EIA.

46. For example, UNEP Principle 4 stipulates certain minimum contents of an EIA:

"*(a)* A description of the proposed activity;
(b) A description of the potentially affected environment, including specific information necessary for identifying and assessing the environmental effects of the proposed activity;
(c) A description of practical alternatives, as appropriate;
(d) An assessment of the likely or potential environmental impacts of the proposed activity and alternatives, including the direct, indirect, cumulative, short-term and long-term effects;

(e) An identification and description of measures available to mitigate adverse environmental impacts of the proposed activity and alternatives, and an assessment of those measures;

(f) An indication of gaps in knowledge and uncertainties which, may be encountered in compiling the required information;
(g) An indication of whether the environment of any other State or areas beyond national jurisdiction is likely to be affected by the proposed activity or alternatives;

(h) A brief, non-technical summary of the information provided under the above headings."

Notably, these criteria are not as burdensome as the requirements of the Espoo Convention. The Espoo Convention requires certain additional information to be included in an EIA, such as the purpose of the project[57].

[57] The Espoo Convention, App. II *(a)*.

It also requires that alternatives to the project be proposed, including the alternative that no action will be taken[58]. Another way in which the Espoo Convention increases the substantive obligations of a country contemplating a project is by requiring "an explicit indication of predictive methods and underlying assumptions as well as all the environmental data used"[59]. Finally, the Espoo Convention imposes the further hurdle that an EIA must contain an outline of how post-project assessment is to be conducted[60].

Conclusion

47. As I have detailed throughout the present opinion, the current state of international environmental law is lamentably silent on the exact procedural steps and substantive content that are required when a situation of potential transboundary harm gives rise to the obligation of a nation-State to produce an EIA. In my view, it is incumbent upon the international community to come together and develop a sound, pragmatic and comprehensive régime of EIA that rectifies this problem. The suggestions I have made during the course of this opinion are in keeping with the principles of sustainable development, preventive action and global commons and reflect the bedrock international law values of consensus, co-operation and amicable relations between nations.

48. In my considered opinion, the above minimum standards should be reflected in a comprehensive international convention with global reach, given the fact that the concept of EIA is a general principle of international law applicable to all nation-States.

(Signed) Dalveer BHANDARI.

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[58] The Espoo Convention, App. II *(b)*, Art. 2 (6).
[59] *Ibid.*, App. II *(f)*.
[60] *Ibid.*, App. II *(h)*.

SEPARATE OPINION OF JUDGE ROBINSON

Failure of the Court to rule on the merits of the claim that Nicaragua breached the prohibition of the use of force set out in Article 2 (4) of the United Nations Charter — the centrality of that prohibition in the United Nations Charter system for the maintenance of international peace and security — the need for the Court to adopt a practice of ruling on the merits of a claim for a breach of Article 2 (4) of the United Nations Charter, unless the claim is patently unmeritorious or frivolous — the assumption that reparation for a breach of territorial sovereignty sufficiently addresses a breach of the prohibition of the use of force — international law envisages a spectrum of activities that may breach Article 2 (4) of the United Nations Charter — the finding that in this case a breach of Article 2 (4) of the United Nations Charter has been committed.

1. As my votes indicate, I am in broad agreement with the Court's decision in this case. I write separately to explain my vote against the Court's rejection in paragraph 229 (7) of all other submissions made by the Parties.

2. In its final submissions, 2 *(b)* (ii), Costa Rica asked the Court to find a breach by Nicaragua of "the prohibition of the threat or use of force under Article 2 (4) of the United Nations Charter and Article 22 of the Charter of the Organization of American States"[1]. In its earlier submissions, Costa Rica also asked the Court to find Nicaragua responsible for its violation of the prohibition of the threat or use of force pursuant to Article 2 (4) of the United Nations Charter, and Articles 1, 19, 21, 22 and 29 of the Charter of the Organization of American States[2].

3. I am of the opinion that the facts establish Nicaragua's breach of Article 2 (4) of the United Nations Charter and that in the circumstances of this case the Court should have separately and explicitly determined the claim that there was a breach of that provision. The opinion also argues that the Court should adopt a practice of determining the merits of a claim that Article 2 (4) of the United Nations Charter has been breached, unless the claim is patently unmeritorious or frivolous. In this

[1] CR 2015/14, p. 68, para. 2 *(b)* (ii); see paragraph 97 of the Judgment.

[2] Memorial of Costa Rica (MCR), Submissions, p. 303, para. 1 *(b)* (invoking Article 2 (4) of the UN Charter and Article 1, 19, 21 and 29 of the OAS Charter); CR 2015/14, p. 68, para. 2 *(b)* (ii) (invoking Article 2 (4) of the UN Charter and Article 22 of the OAS Charter).

opinion, I also explain my hesitations regarding what appears to be the Court's finding that, in this case, reparation awarded for a breach of territorial sovereignty would sufficiently address the injury suffered as a result of any potential breach of Article 2 (4).

4. This opinion is divided as follows:

A. The Court's approach
B. The background
C. The need for the Court to determine the merits of a claim that there is a breach of Article 2 (4) of the United Nations Charter

D. Interpreting paragraph 97
E. The determination of a breach of Article 2 (4) of the United Nations Charter
   (i) The gravity of Nicaragua's actions
   (ii) Purpose
F. Conclusion

A. The Court's Approach

5. In ruling on Costa Rica's submissions about the prohibition of the threat or use of force, the Court states the following in paragraph 97:

> "The fact that Nicaragua considered that its activities were taking place on its own territory does not exclude the possibility of characterizing them as 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. However, in the circumstances, given that the unlawful character of these activities has already been established, the Court need not dwell any further on this submission. As in the case concerning *Land and the Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening)*, the Court finds that, 'by the very fact of the present Judgment and the evacuation' of the disputed territory, the injury suffered by Costa Rica 'will in all events have been sufficiently addressed' (*Judgment, I.C.J. Reports 2002*, p. 452, para. 319)."

6. In doing so, the Court follows its approach in *Land and Maritime Boundary (Cameroon* v. *Nigeria)*. In that case, Cameroon had asked the Court to adjudge and declare that by "invading and occupying its territory", Nigeria had violated its conventional and customary obligations; in particular, the prohibition of the use of force, the principle of non-inter-

vention and Cameroon's territorial sovereignty[3]. Cameroon argued that Nigeria was under an obligation to end its presence in Cameroonian territory, evacuate any occupied areas, refrain from such acts in future, and to make reparation for material and non-material injury[4]. Given the unsettled nature of the boundary, Nigeria argued that it believed its actions were lawful[5].

7. The evidence shows that the acts pleaded by Cameroon included at least 80 incidents[6], some of them resulting in loss of life[7] due to active engagements between Cameroonian and Nigerian military forces on Cameroonian territory and arrests by military forces. The alleged acts had taken place over a 15-year period and the large majority occurred on parts of the territory that were in dispute[8].

8. The Court found that, in light of its decision on the boundary between the two States, Nigeria was under an obligation to withdraw its civilian and military presence from occupied areas that the Court had found to belong to Cameroon[9]. The Court did not explicitly adjudicate Cameroon's claims of breach of the prohibition of the use of force[10], holding that:

> "In the circumstances of the case, the Court considers moreover that, by the very fact of the present Judgment and of the evacuation of the Cameroonian territory occupied by Nigeria, the injury suffered

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[3] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 450, para. 310.

[4] *Ibid.*

[5] *Ibid.*, p. 451, para. 311.

[6] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria)*, Memorial of Cameroon, pp. 564-595; Observations by the Republic of Cameroon on the Preliminary Objections of Nigeria, Book II (C.O. Ann. 1); Counter-Memorial of Nigeria, pp. 653-800.

[7] While there appears to have been disagreement between the Parties about the number of persons killed, it is clear that lives were lost. For example, Cameroon and Nigeria appear to agree on the fact that during the military exchange between the two countries on 16 May 1981, some Nigerian soldiers died, Reply of Cameroon, p. 505, para. 11.58; Memorial of Cameroon, pp. 567-569, paras. 6.12-6.27; in relation to an exchange of fire between the two countries on 3 February 1996, Nigeria states in its Rejoinder "thus what Cameroon presents as a carefully prepared surprise attack by Nigeria killed or wounded 30 Nigerian civilians", Rejoinder of Nigeria, Part V, State Responsibility and Counter-Claims, Chap. 16, Appendix, para. 160.

[8] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria)*, Memorial of Cameroon, pp. 564-595; Observations by the Republic of Cameroon on the Preliminary Objections of Nigeria, Book II (C.O. Ann. 1); Counter-Memorial of Nigeria, pp. 653-800.

[9] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 451, para. 314.

[10] Christine Gray, "The International Court of Justice and the Use of Force" in Christian J. Tams and James Sloan (eds.), *The Development of International Law by the International Court of Justice*, Oxford University Press, 2013, p. 237 (fn. 7).

> by Cameroon by reason of the occupation of its territory will in all events have been sufficiently addressed. The Court will not therefore seek to ascertain whether and to what extent Nigeria's responsibility to Cameroon has been engaged as a result of that occupation."[11]

9. The Court went on to decide that, in respect of "various boundary incidences" alleged by both Parties to breach the other Party's international obligations, neither Party had proved their case[12].

B. The Background

10. The Judgment does not set out in detail the facts which substantiate Costa Rica's claim of a breach of Article 2 (4) of the United Nations Charter. The treatment of this issue is very sparse, being confined to: (i) paragraphs 66 and 67, which mention Nicaragua's placement of military units in the area of Isla Portillos with the indication that the matter would be considered in relation to Nicaragua's compliance with the Court's Order on provisional measures, of 8 March 2011; (ii) paragraph 93, where the Court finds that Nicaragua's activities were a breach of Costa Rica's territorial sovereignty; (iii) paragraph 97, in which the Court finds that the injury suffered by Costa Rica will in all events have been sufficiently addressed; (iv) paragraphs 121 to 129, which address the question of Nicaragua's compliance with provisional measures; and (v) paragraph 139 and 142, in which the Court deals with reparation for certain activities by Nicaragua, are also relevant to the discussion.

11. These paragraphs have to be read along with relevant passages from the pleadings of the Parties. The Court has held, in paragraph 67 of the Judgment, that violations that occurred in 2013, although taking place after Costa Rica's Application was filed, may be examined "as part of the merits of the claim" since "they concern facts which are of the same nature as those covered in the Application and which the Parties had the opportunity to discuss in their pleadings". As such, they are considered in this opinion.

12. Nicaragua and Costa Rica have a history of an at times difficult and fractious relationship. In 1857, one year before the adoption of the Treaty of Limits, there were hostilities between the two countries. During the well-known period of conflict between the Sandinista government in

[11] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 452, para. 319.
[12] *Ibid.*, p. 453, paras. 323-324.

Nicaragua and the Contras in the 1980s, some of the Contras operated from camps established in Costa Rica.

13. On 31 October 2010, Costa Rica became aware that the Costa Rican flag at Finca Aragón had been removed, and noticed Nicaraguan military camps in that area. On 1 November 2010, Costa Rica noticed the presence of Nicaraguan personnel close to the first *caño* during an overflight of the area of Finca Aragón in Costa Rica[13]. During this overflight Nicaraguan personnel pointed AK-47s, and one soldier appears to be pointing an anti-aircraft type missile, at the Costa Rican aircraft[14]. On the same day, the Costa Rican Foreign Minister sent a note to the Minister for Foreign Affairs of Nicaragua protesting the presence of the military personnel[15].

14. Costa Rica further raised the situation with the Organization of American States (OAS) on 3 November, but efforts to find a consensual solution failed. On 12 November 2010, the Permanent Council of the OAS, by a majority of 22 votes in favour, with two votes against (Nicaragua and Venezuela) and three abstentions, adopted the OAS Secretary-General's recommendation to demilitarize the area of Isla Portillos[16].

15. In a speech on the following day, Nicaraguan President Daniel Ortega denied the propriety of the OAS vote, asserting that Costa Rica was occupying and attempting to take possession of Nicaraguan territory to the north-east of the first *caño*[17].

16. On 18 November 2010, Costa Rica decided to file the Application for the *Certain Activities* proceedings and at the same time requested the Court to indicate provisional measures of protection[18].

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[13] CR 2011/1, p. 30, para. 24.

[14] *Ibid.*

[15] *Ibid.*, pp. 30-31, para. 25.

[16] CP/RES. 978 (1777/10), "Situation in the Border Area Between Costa Rica and Nicaragua" (12 Nov. 2010), available at http://www.oas.org/council/resolutions/res978.asp; see also *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 10, para. 16.

[17] Application of Costa Rica, Attachment 6, p. 70, Speech by President-Commander Daniel Ortega, Defending the Sovereign Right of the Nicaraguan People over the San Juan River (English translation), 13 Nov. 2010, 19:25: "We as the harmed party [of the case], because we are being harmed by Costa Rica, will have recourse to the Court and denounce Costa Rica for wanting to occupy Nicaraguan territory, because this is what Costa Rica wants! To take possession of Nicaraguan territory", *ibid.*, p. 88; "Then there is the area they called Isla Portillos, as well; and then there is this area where we have the lagoon and the channel where we are working on, and here, we are already in Nicaraguan territory. In Costa Rican territory, we have neither occupied Isla Calero, that is not true! Nor occupied what they call Isla Portillos . . . there are no soldiers or police there." *Ibid.*, p. 76.

[18] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 9, para. 11.

17. On 7 December 2010, Special Adviser to the OAS Secretary-General, Ambassador Caputo, after conducting an overflight, reported to the OAS that he "saw no members of the armed forces on the ground", but went on to say that this "does not necessarily mean that there were none. In contrast, the military presence on board the dredger was obvious."[19]

18. During the Court's January 2011 hearings for Costa Rica's request for the indication of provisional measures, Costa Rica presented evidence that the Nicaraguan military presence in the disputed territory had increased[20]. In this context, counsel for Costa Rica also made reference to alleged Nicaraguan violations of Costa Rica's territorial waters in the Caribbean Sea and "underline[d] that the inhabitants of the region are extremely worried and scared"[21].

19. During its oral pleadings before the Court on 11 January 2011, Nicaragua stated that "there are no troops in the swampland. There is no permanent military post in the area."[22]

20. On 19 January 2011, a Costa Rican overflight established that Nicaraguan military personnel continued to be present on the disputed territory and that the size of their encampment had increased since October 2010[23].

21. The Court, in its Order for provisional measures of 8 March 2011, required both Parties to "refrain from sending to, or maintaining in the disputed territory, including the *caño*, any personnel, whether civilian, police or security"[24].

22. However, about two years later, in a photograph dated 5 February 2013 and submitted to the Court on 15 March 2013, a new military camp was visible on the beach[25]. On 18 September 2013, a Costa Rican overflight provided further evidence of the Nicaraguan military troops and camps on the beach within the disputed territory[26].

23. During Nicaragua's oral pleadings on 15 and 17 October 2013 in response to Costa Rica's request for new provisional measures, Nicara-

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[19] Report of the OAS Secretary-General, pursuant to resolution CP/RES. 979 (1780/10), presented to the Twenty-Sixth Meeting of Consultation of Ministers of Foreign Affairs, 7 December 2010, cited in CR 2011/1, pp. 33-34, para. 36.

[20] *Ibid.*, p. 35, para. 46.

[21] *Ibid.*, para. 47.

[22] CR 2011/2, p. 13, para. 28.

[23] MCR, p. 93, para. 3.53, citing Vol. 5, Ann. 223.

[24] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 27, para. 86 (1).

[25] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua) — Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Provisional Measures, Order of 22 November 2013, I.C.J. Reports 2013*, p. 365, para. 46.

[26] CR 2013/24, p. 21, para. 18.

gua claimed that Costa Rica had been aware of the "Nicaraguan military detachment" for almost two years and that its purpose was to fight drug trafficking[27]. Nicaragua also pointed out that in its request for new provisional measures, Costa Rica did not, again, complain about Nicaraguan military presence[28].

24. In its Order of provisional measures of 22 November 2013, the Court found that the photograph dated 5 February 2013 did show a "Nicaraguan army encampment" and that "military personnel" had been stationed there since at least 5 February 2013[29]. The Court also held that the encampment was within the disputed territory[30]. In the Order's operative paragraph the Court again explicitly required Nicaragua to remove, and consequently prevent from entering, any "civilian, police or security" personnel[31].

25. In conclusion, the evidence before the Court establishes the presence of Nicaraguan military personnel from at least 1 November 2010 to 19 January 2011 on what the Court today has confirmed is Costa Rican territory. The Nicaraguan military was therefore on Costa Rican territory for just over 11 weeks in the years 2010-2011.

26. The evidence before the Court further establishes that from 5 February 2013 until sometime shortly before 22 November 2013, a period of nine months, Nicaragua had an established military presence on the beach, which is also, as confirmed by the Judgment, Costa Rican territory.

C. The Need for the Court to Determine the Merits of a Claim that there Is a Breach of Article 2 (4) of the United Nations Charter

27. The prohibition of the threat or use of force is a foundational rule of the international legal system. It has been described by the Court as "a cornerstone of the United Nations Charter"[32]. The prohibition has been deemed to "represent . . . beside the protection of human rights, 'the major achievement of the international legal order in the 20th century . . .

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[27] CR 2013/27, p. 16, para. 35.

[28] *Ibid.*, p. 17, para. 36.

[29] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua) — Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Provisional Measures, Order of 22 November 2013, I.C.J. Reports 2013*, p. 365, para. 46.

[30] *Ibid.*

[31] *Ibid.*, p. 369, para. 59 (2) *(C)*.

[32] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 223, para. 148.

the cornerstone of that order and an undisputed core principle of the international community'"[33].

28. Up to the end of World War I, and despite early twentieth-century attempts to the contrary, international law did not prohibit the use of force among States. Significantly, the Covenant of the League of Nations did not contain a general prohibition on the use of force. Article 11 defined war and the threat of war as a "matter of concern to the whole League", but only in specific circumstances were States prohibited from resorting to war[34]. It was only after Article 1 of the Kellogg-Briand Pact was adopted in 1928 that "recourse to war" was prohibited. It was renounced "as an instrument of national policy" by the majority of States[35]. It took the atrocities of World War II to convince States to agree on the prohibition of force in its modern form. It is found in Article 2, paragraph 4, of the Charter of the United Nations and reads as follows:

> "The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles
>
> . . . . . .
>
> 4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

29. The history of the prohibition of the use of force, and in particular, the difficulties encountered by the international community in arriving at agreement on the prohibition, is one indication of its pivotal role in the architecture established after World War II for the maintenance of international peace and security. The centrality of that role is no doubt one of the factors explaining why the prohibition has the status not only of a rule of customary international law, but also of a peremptory norm of

[33] Oliver Dörr, Albrecht Randelzhofer, "Chapter I Purposes and Principles, Article 2 (4)", in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, Andreas Paulus, (eds.), Nikolai Wessendorf (assistant ed.), *The Charter of the United Nations: A Commentary*, Vol. I, 3rd ed., Oxford University Press, 2012, para. 71.

[34] Covenant of the League of Nations, Arts. 11-13.

[35] The initial parties were Australia, Belgium, Canada, Czechoslovakia, France, Germany, British India, the Irish Free State, Italy, Japan, New Zealand, Poland, South Africa, the United Kingdom and the United States of America. Forty more States also adopted the Pact. A similar provision in the Saavedra Lamas Treaty applies to many of the Latin American States.

general international law from which no derogation is permitted[36]. The virtual universal acceptance of this norm through membership of the United Nations also serves to highlight the significance of the prohibition.

30. The United Nations Charter also highlights the important role the Court has in the peaceful settlement of disputes, "the continuance of which is likely to endanger the maintenance of international peace and security" and thus undermine the purposes of the United Nations Charter[37]. Article 92 of the United Nations Charter identifies the Court as the principal judicial organ of the United Nations and provides that its Statute — annexed to the United Nations Charter — is an integral part of the United Nations Charter. Article 36 (3) of the United Nations Charter provides that the Security Council "should also take into consideration that legal disputes, as a general rule, be referred by the parties to the International Court of Justice". It is thus clear that the Court is expected, through its judicial function, to contribute to the maintenance of international peace and security. Therefore, the discharge by the Court of its judicial functions is not peripheral to, but is an integral part of the post-World War II system for the maintenance of international peace and security.

31. The law in this area should work to discipline States to refrain from unlawful behaviour. Every State presenting a claim that another State has breached Article 2 (4) of the United Nations Charter (that is not patently unmeritorious or frivolous) deserves a decision as to whether, on the basis of the relevant law and facts, that foundational provision has been breached; equally, the State against whom the claim is made needs to know whether its acts breached Article 2 (4). It is therefore the Court's responsibility, as the "principal judicial organ of the United Nations", to take on the sometimes difficult and sensitive task of identifying the contours of international law's prohibition of the use of force[38].

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[36] For example, in the *Military and Paramilitary Activities* case, the Court noted that Article 2 (4):

> "is frequently referred to in statements by State representatives as being not only a principle of customary international law but also a fundamental or cardinal principle of such law. The International Law Commission, in the course of its work on the codification of the law of treaties, expressed the view that 'the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*' (paragraph (1) of the commentary of the Commission to Article 50 of its Draft Articles on the Law of Treaties, *ILC Yearbook*, 1966-II, p. 247)." (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 100, para. 190.)

[37] Article 33 of the UN Charter.

[38] Article 92 of the UN Charter; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 435, para. 96: "It must also be remembered that, as the *Corfu Channel (United Kingdom* v. *Albania)* case (*I.C.J. Reports 1949*, p. 4) shows, the Court has never shied away from a case brought before it merely because it had political implications or because it involved serious elements of the use of force."

32. This is a view that has been shared by former Members of the Court. In his separate opinion in *Oil Platforms*, Judge Simma found it

> "regrettable that the Court has not mustered the courage of restating, and thus re-confirming, more fully fundamental principles of the law of the United Nations as well as customary international law (principles that in my view are of the nature of *jus cogens*) on the use of force, or rather the prohibition on armed force, in a context and at a time when such a reconfirmation is called for with the greatest urgency"[39].

In 2005, Judge Elaraby criticized the Court's decision in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)* not to rule on the Democratic Republic of Congo's claim that Uganda's acts amounted to aggression. In his view, it was part of the Court's "judicial responsibility" to determine whether Uganda's acts met the legal standard for aggression[40].

In the same case, Judge Simma also wondered why the Court was not prepared to "call a spade a spade" when the Court refrained from making a finding that Uganda's military activities on Congolese territory were not only violations of Article 2 (4) of the United Nations Charter but also amounted to aggression[41].

33. The use of force among States has taken new forms, and entered new arenas, since the San Francisco Conference in 1945. While the prohibition of the use of force is a bedrock principle of the international legal order, its edges are in need of further definition. It may even be worth asking whether the ambiguity still present in the contours of the prohibition of the use of force damages respect for the norm. If so, this again highlights the importance of the principal judicial organ of the United Nations clarifying the contours of that prohibition when the opportunity arises.

34. Consequently, in my view, the Court should only refrain from making an express and discrete finding on a claim that the prohibition of

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[39] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*, separate opinion of Judge Simma, p. 327, para. 6.

[40] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, separate opinion of Judge Elaraby, p. 329, para. 9; pp. 331-332, para. 17.

[41] In their opinions, both judges mention the relative functions of the Security Council and the Court, and the Court's role in resolving legal questions. Yet, as the citations show, they still conclude that the Court should have been more explicit in its decisions on the use of force (in *Oil Platforms*) and an act of aggression (in *Armed Activities*). Their words are relevant in indicating a reluctance of the Court in recent times to determine certain issues relating to the use of force.

the use of force has been breached, if it is of the opinion that the claim is patently unmeritorious or frivolous.

D. Interpreting Paragraph 97

35. In paragraph 93, the Court found that the activities carried out by Nicaragua in the disputed territory after 2010, including the excavation of three *caños* and establishing a military presence in part of that territory, constituted a breach of Costa Rica's territorial sovereignty. The Court further considers reparation for this breach in paragraphs 139 and 142. In paragraph 97, the Court turns to Costa Rica's claim that Nicaragua breached the prohibition of the use of force. On this claim, the Court's position is that since it had already determined the unlawful character of Nicaragua's activities, there was no need to consider any further Costa Rica's submission that those activities breached the prohibition of the use of force in Article 2 (4) of the United Nations Charter. As noted earlier, the Court followed its decision in *Cameroon* v. *Nigeria* where the Court finds that, "by the very fact of the present Judgment and the evacuation" of the disputed territory, the injury suffered by Costa Rica "will in all events have been sufficiently addressed" (*Judgment, I.C.J. Reports 2002*, p. 452, para. 319).

36. The Court did not therefore make any discrete, express determination as to whether the prohibition of the use of force under Article 2 (4) of the United Nations Charter had been breached. But it is not at all clear that the Court has dispensed with any further consideration of Costa Rica's submissions relating to the use of force. A question arises as to the meaning of the phrase "the injury suffered by Costa Rica". The initial impression might be that the finding is confined to the injury suffered by Costa Rica as a result of the breach of its sovereignty and territorial integrity. The most relevant feature of the "Judgment as a whole" is the Court's finding that Costa Rica has sovereignty over the disputed territory, that its territorial sovereignty has been breached and the reparation awarded as a result. Yet, the Court has deemed it unnecessary to rule on submissions relating to the use of force because *any* injury suffered as a result of those allegations would, in its view, be remedied. The sweeping phrase "in all events" suggests a wider coverage and there would not seem to be any need for this broader, all-embracing phrase if "injury" were confined to a breach of sovereignty and territorial integrity. I therefore interpret the phrase "the injury suffered by Costa Rica" as encompassing any injury suffered by Costa Rica as a result of a breach of the prohibition of the use of force.

37. If that is the correct interpretation, the question that arises is, how does the Court determine the appropriate reparation for a breach of the prohibition of the use of force without having first examined the claim and decided that there was such a breach? The obligation to make reparation flows from a breach of an international obligation and the appropriate form and parameters of reparation are thus influenced by the *fact*

of and *circumstances of* that breach[42]. Further, while the appropriate modality of reparation is determined by the circumstances[43], satisfaction, by its very nature, relies upon some recognition of the fact of breach.

38. Moreover, can a breach of Article 2 (4) of the Charter, even if it is not the most egregious breach, but nonetheless a breach of a provision that is so fundamental to the maintenance of international peace and security and to international relations as a whole that it constitutes *jus cogens*, be remedied in the manner adopted by the Court? The approach by the Court in relation to a claim that "a cornerstone of the United Nations Charter"[44] has been removed is, in the context of this case, somewhat summary, dismissive and indiscriminate. The last sentence of paragraph 97 is properly interpreted as referring to the Judgment as a whole and the evacuation of the disputed territory as the factors that sufficiently address the putative breach of the prohibition of the use of force. Yet the term "Judgment as a whole" is vague and imprecise. In my view, the finding that comes closest to reparation for that breach is the finding of a breach of Costa Rica's sovereignty and territorial integrity. The paragraph also seems to proceed on the basis that, even if there is no equivalence between the two norms, their relative values are such that a breach of the prohibition of the use of force may be sufficiently remedied by what flows from a finding of a breach of sovereignty and territorial integrity. The Court's conclusion in paragraph 97 suggests that it has engaged in a comparative exercise. However, it is a conclusion that is arrived at without any examination by the Court of the evidence relating to the use of force.

39. While the Court's jurisprudence establishes that the norms prohibiting the use of force and requiring respect for sovereignty and territorial

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[42] Paragraph 4 to the Commentary to Article 31 of the ILC's Draft Articles on State Responsibility 2001 states: "The general obligation of reparation is formulated in Article 31 as the immediate corollary of a State's responsibility i.e., as an obligation of the responsible State resulting from the breach, rather than as a right of an injured State or States . . ." And as was famously stated by the Permanent Court of International Justice in the *Factory at Chorzów* case (*Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 21): "It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore, is the indispensable complement of a failure to apply a convention . . ."

[43] See, e.g., the Court's practice of a declaration of its findings as a form of satisfaction laid down in the *Corfu Channel* case:

> "[T]o ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty.
>
> This declaration is in accordance with the request made by Albania through her Counsel, and is in itself appropriate satisfaction." (*Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 35.)

[44] See footnote 32.

integrity serve distinct functions, they reflect overlapping, but not identical, concerns[45]. It is the element of the use of force that fundamentally distinguishes the interests protected by Article 2 (4) of the United Nations Charter from conduct that breaches sovereignty and territorial integrity *simpliciter*. What the Court has done in its finding in the last sentence of paragraph 97 requires some kind of weighing exercise leading to a conclusion as to the relative values of the prohibition of the use of force against territorial integrity and the relative values of the legal protection of sovereignty and territorial integrity. But the Judgment offers no explanation as to how this weighing exercise is carried out. In my view, a finding that a country's territorial sovereignty is breached should not, in the context of this case, be used to provide reparation for a breach of Article 2 (4) of the United Nations Charter.

40. The consequences of a breach of the norm prohibiting the use of force will usually, or is much more likely to be far more calamitous than a breach of the norm protecting sovereignty and territorial integrity *simpliciter*; the first breach contains a greater risk of escalation posing a threat to international peace and security. The overriding concern about the use of force is that a powerful State may use it for its own advantage and selfish purposes to the detriment of the international community. This concern is well reflected in *Corfu Channel* where the Court spoke of "the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses"[46]. Of course, breaches of territorial integrity can lead, and have in the past led to international conflicts. But the Court was right to emphasize the very likely connection between a policy of force and consequential calamitous abuses. In that case, the Court did not accept the United Kingdom's claim that it could, with the help of its military, enter Albanian territorial waters to secure possible evidence of Albania's internationally wrongful conduct. Such a "right of intervention", the Court said, "would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself"[47]. Similarly, and in general terms, the act of a country that is militarily stronger than its neighbour claiming its neighbour's territory and placing troops thereon might easily lead to outright military confrontation, posing a threat to international peace and security.

[45] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 128, para. 251: "The effects of the principle of respect for territorial sovereignty inevitably overlap with those of the principles of the prohibition of the use of force and of non-intervention."

[46] *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 35.

[47] *Ibid.*

E. The Determination of a Breach of Article 2 (4) of the United Nations Charter

41. As alluded to earlier, while the principle is a "cornerstone", firmly embedded in the legal order, there remains ambiguity in the parameters of what amounts to a use of force. However, guidance regarding the relevant factors to consider in determining a use of force can be drawn from the Court's jurisprudence. An appropriate legal analysis for the prohibition of the use of force considers the *gravity* of the acts and the *purpose* that is reasonably deduced from the State's actions and statements[48].

42. In the legal analysis it is important to maintain the distinction between the rule protecting a State's territorial sovereignty and the rule prohibiting the use of force. Article 2 (4) of the United Nations Charter prohibits the "threat or use of force against the territorial integrity . . . of any state". The Court's finding that Costa Rica's territorial integrity has been breached, is, as explained above, entirely different from a finding that a State has threatened or *used force against* the territorial integrity of a State or the purposes of the United Nations Charter in breach of Article 2 (4) of the United Nations Charter.

43. The Court's jurisprudence establishes that the customary principle of the non-use of force and Article 2 (4) of the United Nations Charter contain a threshold of force that needs to be surpassed for the legal prohibition to be violated[49]. The jurisprudence also establishes that non-violent use of force is not exempted from the prohibition[50]. No shots need be fired, no heavy armaments need be used and certainly no one need be killed before a State can be said to have violated the prohibition. Yet, the measures need to reach a certain *gravity* and have an unlawful *purpose* before they cross the threshold and qualify as a use of force.

44. In assessing the placement of the relevant threshold for determining a use of force, I agree with commentators who argue that "in its restriction to armed or military force the prohibition must, however, be interpreted very broadly to basically capture each and every form of armed force by individual States"[51]. This is in keeping with both the purpose of the norm to maintain peace and security, as well as the foundational nature of the norm in the current legal order.

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[48] For an analysis of examples drawn from the Court's jurisprudence, see Olivier Corten, *The Law against War* (Hart, 2010), particularly pp. 73 *et seq*.

[49] *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 35.

[50] *Ibid*.

[51] Oliver Dörr, "Use of Force, Prohibition of", *Max Planck Encyclopedia of Public International Law*, June 2011, para. 13.

45. While an assessment of a State's purpose is informed by gravity of the acts, I analyse the facts of this case, as against the two criteria, separately in the following section. This opinion argues that the gravity and the purposes of Nicaragua's activities attain the level of force prohibited by Article 2 (4) of the United Nations Charter and the customary principle of the non-use of force.

(i) The Gravity of Nicaragua's Actions

46. Article 2 (4) of the United Nations Charter prohibits 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". The greater the use of force compromises the elements of statehood or the purposes of the United Nations, the graver is the breach of that norm.

47. In determining the applicability of gravity as a criterion for the unlawfulness of the use of force under Article 2 (4) of the United Nations Charter, it is helpful to advert to the 1974 United Nations resolution on the Definition of Aggression (XXIX). The Preamble to the 1974 resolution characterized aggression as the "most serious and dangerous form of the illegal use of force"[52]. Article 2 of the Definition provides that a determination that an act of aggression has been committed would not be justified if "the acts concerned or their consequences are not of sufficient gravity". A certain gravity therefore determines, not only the existence of the use of force, but also the classification of that use of force.

48. Similarly, in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, the Court considered the criterion of gravity to distinguish between an "armed attack" and a "mere frontier incident"[53]. It classified armed attack as the "most grave" form of the use of force, but referred to "other less grave forms" of the use of force[54], noting that an armed attack differed from other forms of the use of force in terms of scale and effect. In considering what constituted an "armed attack", the Court drew upon the Definition of Aggression in Article 3 *(g)* of resolution XXIX[55].

49. Assessing gravity is a case-by-case exercise, requiring the consideration of such factors as, for example, location of the use of force, the state of relations between the parties at the time, and other contextual factors, etc. As was emphasized in the Court's Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the prohibition of the use of

[52] Fifth preambular paragraph of the UN General Assembly resolution 3314 (1974).

[53] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, pp. 103-104, para. 195.

[54] *Ibid.*, p. 101, para. 191.

[55] *Ibid.*, p. 103, para. 195.

force applies "regardless of the weapons employed"[56]. The suggestion is that a consideration of effect — and intended effect — are relevant to a consideration of gravity, including (as noted in Nicaragua and quoted above) for the characterization of the type of the use of force.

50. In this case, the factor that most clearly establishes gravity is the prolonged presence of military camps and personnel on Costa Rican territory — 11 weeks in 2010 to 2011 and nine months in 2013[57]. The evidence before the Court clearly establishes that both the camp close to the first *caño* and the camp on the beach were manned by regular Nicaraguan military personnel, not by the Nicaraguan police[58]. Generally, a country's regular military personnel is seen as a greater coercive threat than its police force. This military presence is a use of force "against the territorial integrity" of Costa Rica, exactly the conduct prohibited by Article 2 (4) of the United Nations Charter.

51. In the United Nations General Assembly resolution 2625 (XXV) entitled "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations" (the Friendly Relations Declaration), which reflects customary international law[59], the General Assembly reiterated every State's duty "to refrain from the threat or use of force to *violate the existing international boundaries of another State* or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States" (emphasis added). In the present case, the Nicaraguan military was used to "violate the existing international boundaries" of Costa Rica. The Court's Judgment implicitly recognizes that the boundaries established by today's Judgment were those set by the 1858 Treaty of Limits, as interpreted by the relevant Awards. Equally, given that the location of the boundary was subject to a case before the Court, to the extent that Nicaragua's use of force may be seen "as a means of solving international disputes", it will violate the customary norm reflected in this duty.

52. Another index of the gravity of Nicaragua's use of force is the pointing of weapons, including what appears to be an anti-aircraft type

[56] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 244, para. 39.
[57] *Supra* at paras. 22, 23.
[58] *Supra* at para. 19.
[59] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, pp. 101-103, paras. 191-193; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II)*, p. 437, para. 80.

missile at the Costa Rican aircraft on 1 November 2010[60]. In the context of a State's military force already being stationed on another State's territory without the latter's consent, the pointing of weapons is probative of a use of force. It is a signal of its willingness to shoot when it considers that to be necessary.

53. In conclusion, the facts before the Court establish that Nicaragua's actions were of sufficient gravity to warrant the application of Article 2 (4) of the United Nations Charter and the customary principle of the non-use of force provided they are accompanied by the requisite purpose. It is to that question that the opinion now turns.

(ii) Purpose

54. The second aspect of the analysis for an alleged breach of the prohibition of the use of force is concerned with the purpose reasonably deduced from a State's actions, including their gravity, as well as statements made by the State and the relevant context.

55. The first argument for the requirement of purpose is textual. Article 2 (4) of the United Nations Charter prohibits the 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. It is the ordinary meaning of the word *"against"* that clearly indicates the purposive element in the Charter's prohibition of the use of force. Absent this element, there is no breach. The *Concise Oxford Dictionary* gives the meaning of "against" as "in opposition to" or "to the disadvantage of". Put in more practical terms, the central question is whether a reasonable interpretation of the evidence is that the purpose of the acts of the State in question is to change the outcome of a matter with another State by using force. In considering this qualification, it must be noted that the drafters of the United Nations Charter did not intend to restrict the scope of the prohibition by the specific mention of territorial integrity or political independence, but rather to emphasize their protection[61].

56. When considering whether a State's actions violate the prohibition of the use of force, it is important to remember that: "[t]he essential feature which characterizes the prohibition of the use of force is the applica-

[60] MCR, pp. 74-75, para. 3.19.

[61] Oliver Dörr, Albrecht Randelzhofer, "Chapter I Purposes and Principles, Article 2 (4)", in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte and Andreas Paulus, (eds.), Nikolai Wessendorf (assistant ed.), *The Charter of the United Nations: A Commentary*, Vol. I, 3rd ed., Oxford University Press, 2012, pp. 215-216.

tion of military forces as a means of coercion . . .”[62]. In this regard, I note that the regular military forces of a State exist because of their coercive abilities. An army is the symbol of a State’s coercive power, and, absent consent, it will be a rare incident when the sending of its military forces by one State to another does not evidence a coercive purpose.

57. In the first case to come before the Court, *Corfu Channel*, the Court was presented with allegations that the United Kingdom had violated the prohibition of the use of force. The situation in this case did not, in the Court’s view, meet the threshold:

> “[The Court] does not consider that the action of the British Navy was a demonstration of force for the purpose of exercising political pressure on Albania. The responsible naval commander, who kept his ships at a distance from the coast, cannot be reproached for having employed an important covering force in a region where twice within a few months his ships had been the object of serious outrages.”[63]

In its determination, the Court considered the evidence in light of the *purpose* of the “demonstration of force” by the British Navy.

58. The Court’s case law considering allegations of an armed attack also establishes that an appreciation of a State’s purpose is relevant to the test for this form of the use of force. In *Oil Platforms*, the Court, in the context of analysing whether certain actions, allegedly attributable to Iran, would constitute an armed attack, explicitly considered relevant the intention and purpose that could be deduced from the actions. It said:

> “On the hypothesis that all the incidents complained of are to be attributed to Iran, and thus setting aside the question, examined above, of attribution to Iran of the specific attack on the *Sea Isle City*, the question is whether that attack, either in itself or in combination with the rest of the ‘series of . . . attacks’ cited by the United States can be categorized as an ‘armed attack’ on the United States justifying self-defence. The Court notes first that the *Sea Isle City* was in Kuwaiti waters at the time of the attack on it, and that a Silkworm missile fired from (it is alleged) more than 100 km away *could not have been aimed at the specific vessel*, but simply programmed to hit some target in Kuwaiti waters. Secondly, the *Texaco Caribbean*, whatever its ownership, was not flying a United States flag, *so that an attack on the vessel is not in itself to be equated with an attack on that State*. As regards the alleged firing on United States helicopters from Iranian

[62] Oliver Dörr, “Use of Force, Prohibition of”, *Max Planck Encyclopedia of Public International Law*, June 2011, para. 18.

[63] *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 35.

> gunboats and from the Reshadat oil platform, no persuasive evidence has been supplied to support this allegation. There is no evidence that the mine-laying alleged to have been carried out by the *Iran Ajr*, at a time when Iran was at war with Iraq, was aimed specifically at the United States; and similarly it has not been established that the mine struck by the *Bridgeton* was laid with *the specific intention of harming that ship, or other United States vessels*. Even taken cumulatively, and reserving, as already noted, the question of Iranian responsibility, these incidents do not seem to the Court to constitute an armed attack on the United States, of the kind that the Court, in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, qualified as a 'most grave' form of the use of force . . ."[64] (Emphasis added.)

59. In *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, the Court considered that the "possible motivations" driving a State's use of force may be relevant for a finding of an armed attack. It said:

> "Turning to Honduras and Costa Rica, the Court has also stated . . . that it should find established that certain transborder incursions into the territory of those two States, in 1982, 1983 and 1984, were imputable to the Government of Nicaragua. Very little information is however available to the Court as to the circumstances of these incursions or their *possible motivations*, which renders it difficult to decide whether they may be treated for legal purposes as amounting, singly or collectively, to an 'armed attack' by Nicaragua on either or both States."[65] (Emphasis added.)

60. The logic that makes a purposive analysis relevant for finding an armed attack for the purposes of Article 51 of the United Nations Charter applies equally to finding a use of force unlawful for purposes of Article 2 (4) of the United Nations Charter. While the use of force may often engage the international responsibility of a State, the United Nations Charter itself recognizes that it may at times be lawful. Articles 42 and 51 of the United Nations Charter are to that effect. The end to which force will be used, both in the context of Article 2 (4) and 51 of the United Nations Charter, is therefore crucial in determining its legal status; the inquiry into the pursued end is nothing other than an analysis to discern the purpose of the facts.

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[64] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*, pp. 191-192, para. 64.

[65] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, pp. 119-120, para. 231.

61. In this case, the question is whether the placement of Nicaraguan military presence on the disputed territory can reasonably be interpreted as action *against* Costa Rica in the sense that it was aimed at compromising its territorial integrity and political independence. Several pieces of evidence lead to the conclusion that the long and repeated presence of Nicaraguan military personnel on Costa Rican territory warrants that interpretation; it evidences the purpose of a State policy of the use of force against Costa Rica.

62. The first item of evidence is the existence of a territorial dispute between the Parties as soon as Costa Rica's Government noticed the Nicaraguan military presence and made its objections thereto known[66]. From 1 November 2010, Nicaragua was therefore on notice of Costa Rica's position, and any presence beyond that date is to be seen as an action *against* the principal elements of statehood of that country — its territorial integrity and political independence.

The second factor is the general history of hostilities and tense relationship between the two States[67]. When the evidence before the Court is examined in the context of that history, it is reasonable to see the incursions as acts *against,* that is, designed to compromise the principal elements of statehood of Costa Rica.

Third, Nicaragua's initial refusal to withdraw the troops, both in response to Costa Rica's diplomatic Note and later, to the OAS resolution, also show the confrontational, if not hostile, use of its military presence and purpose to stand its ground.

Fourth, it is relevant that Nicaragua chose to increase its military presence near the first *caño* after Costa Rica had communicated its objections; this is reasonably interpreted as a signal of that State's readiness to apply force, whenever Nicaragua considered it necessary[68].

Relatedly, and fifth, the establishment of a second camp in a different location at a later stage again indicates a hardening of Nicaragua's position and is evidence of its purpose to defend the stance taken by force if it considered that course necessary[69].

Sixth is the fact that both camps were established next to the *caño*-digging operations and therefore reasonably to be interpreted as protecting another Nicaraguan policy directed *against* Costa Rica's sovereign interests.

Seventh, Nicaragua was using regular military forces, rather than irregular, unidentifiable personnel, or police forces. The signalling effect of

[66] *Supra* at para. 13.
[67] *Supra* at para. 12.
[68] *Supra* at para. 18.
[69] *Supra* at paras. 22-24.

using regular forces, which in general have a greater coercive potential than police forces, is also to be seen not merely as confrontational, but as evidence of its aim to challenge Costa Rica's sovereign rights, by using force, if it considered that course necessary.

Eighth, the second Nicaraguan military camp was on the disputed territory and in breach of the Court's provisional measures Order of 8 March 2011[70]. This is an act of defiance which goes to the State's purpose and is to be contrasted with the situation at issue in *Land and Maritime Boundary (Cameroon* v. *Nigeria)* on which the Court relies but in which Nigeria's military presence at the time of the proceedings was not in contravention of an Order by the Court[71]. This brazen violation of the Court's Order is perhaps the greatest indication of the unlawful aim behind Nicaragua's actions, showing as it does, that Nicaragua was prepared to go as far as breaching an Order of the principal judicial organ of the United Nations in order to maintain its claim to the disputed territory.

F. Conclusion

63. The foregoing analysis leads to the conclusion that Nicaragua's activities were accompanied by the requisite gravity and purpose to warrant a finding of the use of force in breach of Article 2 (4) of the United Nations Charter. It is for this reason that I am unable to join the Court with respect to its conclusion in paragraph 229 (7).

64. One has to guard against the possibility that the Court's approach in this Judgment, together with the position it took in *Land and Maritime Boundary (Cameroon* v. *Nigeria)* could be seen as developing a line of jurisprudence in which it abstains from ruling on the merits of claims of breaches of Article 2 (4) of the United Nations Charter in instances where the acts complained of take place (at least in large part) on disputed territory. In that regard, one notes and welcomes the salutary warning given by the Court 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"[72]. If indeed a line of jurisprudence is developing in which the Court abstains from ruling on

[70] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 27, para. 86 (1): "Each Party shall refrain from sending to, or maintaining in the disputed territory, including the *caño*, any personnel, whether civilian, police or security."

[71] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 451, paras. 312 and 314; p. 457, para. 325 (V) (A).

[72] See paragraph 97 of the Judgment.

the merits of claims of the use of force in a disputed territory, this course is to be regretted. Disputed territories are one of the most sensitive categories of international relations and particularly prone to provoking the use of force by States. A judicial practice of ruling on the merits of every claim by a State that another State has breached Article 2 (4) of the United Nations Charter would be entirely consistent with, and supportive of the system established after World War II for the maintenance of international peace and security and the Court's role in that system. Both Applicant and Respondent will learn valuable lessons for their future conduct from the Court's ruling. Indeed, the international community as a whole will profit from this judicial practice. It is reiterated that the argument is not that the Court must rule on the merits of every claim made by a State, but rather that the centrality of Article 2 (4) of the Charter in modern international relations requires the Court to determine the merits of a claim of a breach of the prohibition of the use of force, unless it is patently unmeritorious or frivolous.

65. Nothing in this opinion is to be seen as taking a position that devalues the legal prohibition of the use of force or as taking the proverbial sledgehammer to kill a flea. International law has a spectrum of activities that may breach Article 2 (4) of the United Nations Charter at its higher, middle and lower reaches; some of the activities at the higher reaches may amount to aggression, "the most serious and dangerous form of illegal use of force"[73]; others may constitute an armed attack giving rise to self-defence. Activities at the middle and lower reaches may also breach Article 2 (4) of the United Nations Charter if they are accompanied by the requisite gravity and purpose; such activities may very well be what the Court had in mind in *Paramilitary Activities* when it referred to "other less grave forms of the use of force"[74]. The presence of gradations in the law relating to the use of force responds to the concern that a finding that activities at the middle or lower end of the spectrum, if accompanied by the requisite gravity and purpose, constitute a breach of Article 2 (4) of the United Nations Charter, would somehow discredit the seriousness of the international obligations involved.

66. In order to determine the rules applicable to those "less grave forms of the use of force" the Court, after emphasizing the customary status of the Friendly Relations Declaration, went on to cite a number of duties set out in the declaration. Included in the Court's list, as already

[73] International Criminal Court, RC/Res. 6, Ann. III, Understanding No. 6.
[74] See footnote 54.

stated[75], is "the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and concerning frontiers of States". It is precisely this duty that Nicaragua breached when it placed its soldiers on Costa Rican territory.

67. In my view, a State placing members of its military force on the territory of another State on two occasions for a combined period of about one year over a three-year period is a breach of the norm prohibiting the use of force. These activities by Nicaragua certainly cannot be characterized as a "mere frontier incident" of the kind referred to by the Court in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*[76]. The presence of a military force for such a long period without the consent of the other State constitutes, by itself, a breach of Article 2 (4) of the United Nations Charter. This action could certainly have led to a military conflict between Nicaragua and Costa Rica and posed a threat to international peace and security, warranting the intervention of the Security Council, had Costa Rica not exercised commendable restraint and chosen to have recourse to the Court rather than to respond in kind. Nicaragua by its military presence excluded Costa Rica from its own territory by staking a claim to territory that had been determined from 1858 in the Treaty of Limits to be Costa Rican, and which Nicaragua had never claimed as its own until 26 November 2010 after Costa Rica had filed its Application before the Court on 18 November 2010. While not at the higher reaches of the spectrum, Nicaragua's acts are certainly not at the lower end; they are somewhere in between. Arguably, the prolonged presence of Nicaragua's forces on Costa Rican territory signifies that Nicaragua's acts are not at the lower end of the spectrum.

68. In my view, since the affront to Costa Rica is aggravated by the prolonged Nicaraguan military presence on Costa Rican territory, particularly so in the nine-month period after the Court ordered Nicaragua to remove its soldiers, it would be appropriate to consider an apology as satisfaction.

69. It is not clear from the evidence how many soldiers were actually placed by Nicaragua in the disputed territory. What is certain, however, is that the military presence was sufficiently substantial to have been described by Costa Rica and acknowledged by Nicaragua as "a military encampment"[77] and notably, in its Order for provisional measures of 22 November 2013, the Court found that the photograph dated 5 Febru-

[75] *Supra* at para. 51.

[76] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 104, para. 195.

[77] Paragraph 125 of the Judgment.

ary 2013 did show a "Nicaraguan army encampment"[78]. The fact that the Nicaraguan force may not have been constituted by a very large number of soldiers does not in any way detract from the characterization of Nicaragua's conduct as an unlawful use of force in contravention of Article 2 (4) of the Charter. Generally, the size of a military force deployed will depend upon a variety of factors, including the purpose of the deployment, the characteristics of the particular location and a State's military capability, including the number of troops at its disposal.

70. It is recalled that while the means employed in using force is relevant in determining gravity and therefore, lawfulness, it is not conclusive; the effect of the means must also be considered. In this case, the number of soldiers deployed by Nicaragua was sufficient to achieve its unlawful ends: it was able to remain on Costa Rican territory for a period of about one year over a three-year period in order to further its policy.

71. The years since the adoption of the United Nations Charter have only served to re-emphasize the importance to the international legal order, of Article 2 (4) and its customary equivalent. The Court should play its role in upholding and applying the prohibition, adjudicating claims that the norm has been breached, unless the claim is patently unmeritorious or frivolous.

(Signed) Patrick ROBINSON.

[78] See *supra* para. 24 and footnote 31 of this opinion.

DECLARATION OF JUDGE GEVORGIAN

Paragraph 1 of the dispositif *— The Court's finding that Costa Rica has sovereignty over the "disputed territory" is unnecessary — The limits of that territory are not clear — The geography of the area is unstable — Possible source of future disagreement — Article II of the Treaty of Limits of 1858 — First, second and third Alexander Awards — "First channel met".*

1. While I agree with most of the conclusions of the Court (in particular, paragraph 2 dealing with Nicaragua's violation of Costa Rica's territorial sovereignty), I have voted against paragraph 1 of the *dispositif*, which provides that "Costa Rica has sovereignty over the 'disputed territory', as defined by the Court in paragraphs 69-70 of the present Judgment", for reasons that I will explain below.

2. Costa Rica's claims to sovereignty have their origin in Nicaragua's activities carried out in the border area, which included the construction of three channels or *caños*, the deposit of sediments resulting therefrom and the establishment of a military presence in the area. The area where the said activities took place is located in the northern part of "Isla Portillos" or "Harbor Head", in close proximity to the Caribbean Sea and an enclosed area of water known as "Laguna Los Portillos" or "Harbor Head Lagoon". In essence, Costa Rica argues that the alleged activities violated its territorial boundary, which, according to Article II of the 1858 Treaty of Limits — as interpreted by the 1888 Cleveland Award and the 1897 Alexander Awards — runs along the right bank of the San Juan River. For its part, Nicaragua, while not denying the undertaking of the said activities, has contended that they were carried out on its own territory. In Nicaragua's view, the eastern *caño*, which it began constructing in October 2010, is the "first channel met" linking Harbor Head Lagoon with the San Juan River, a geomorphological feature identified by General Alexander as part of the boundary line between both States in that area (first Alexander Award, Memorial of Costa Rica, Vol. II, Ann. 9). According to Nicaragua, the said *caño* was not an artificial construction, but rather a natural watercourse that it was entitled to "clear", in full compliance with its international obligations.

3. This is the essence of a dispute which, for the greater part of the proceedings, had been litigated by the Parties primarily as a problem of territorial sovereignty over the area where the above-mentioned *caño* is situated. In fact, Costa Rica's initial Application had only requested the Court to declare that Nicaragua had breached "the territory of the Republic of Costa Rica, as agreed and delimited by the 1858 Treaty of Limits, the Cleveland Award and the first and second Alexander Awards". A similar request was made in the written pleadings (Memorial of Costa Rica, Vol. I, p. 303). It was only on 28 April 2015, the date of pre-

sentation of its final submissions in the *Certain Activities* case, that the Applicant formally broadened this claim so as to request the Court to declare its "[s]overeignty over the 'disputed territory', as defined by the Court in its Orders of 8 March 2011 and 22 November 2013".

For its part, Nicaragua never made a formal sovereignty claim extending to the whole of the "disputed territory", but only referred to the *caño* that it had begun constructing in October 2010. In my opinion, the latter claim encapsulates with more precision the subject-matter of the dispute, since, in essence, the Court is requested to determine whether the said *caño* is in Nicaraguan or Costa Rican territory, that is, whether it constitutes "the first channel met" in the sense of the first Alexander Award.

4. When defining the "disputed territory", the Judgment correctly avoids delimiting the course of the boundary in the whole area. Instead, the Court reiterates the definition given in its Orders for provisional measures rendered on 8 March 2011 and 22 November 2013. However, at the same time, the Judgment declares Costa Rica's sovereignty over an area whose limits are far from being clear. In the circumstances of the present case, I believe that the Court should have avoided such a finding for two main reasons.

5. 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 Court majority rightly indicates in paragraph 70. Although, as stated above, Costa Rica's final submission referred to the "disputed territory", neither Party had submitted adequate information on its whole perimeter. The Judgment thus deliberately refrained from establishing the geographical limits of the "disputed territory" — an approach that is reflected in sketch-map No. 1. As a consequence, it is my view that the Court was not in a position to fully address Costa Rica's final submission.

6. Second, the geography of the disputed area is highly unstable. Since General Alexander demarcated the boundary of the area, several important geomorphological alterations have occurred. In particular, Harbor Head Lagoon appears today as an area of water totally isolated from the sea and disconnected from the San Juan River. The possibility that such changes might occur had already been envisaged by General Alexander during the demarcation process. In fact, his second and third Awards had aimed precisely at striking a fair balance between, on the one hand, the stability of the boundary line, and, on the other, the flexibility required to adjust the demarcated line to "gradual or sudden" changes. For this reason, the Court's conclusion on sovereignty over the disputed territory may become the source of future disagreement between the Parties.

(Signed) Kirill GEVORGIAN.

DECLARATION OF JUDGE *AD HOC* GUILLAUME

[Translation]

I. *Case concerning* Certain Activities Carried Out by Nicaragua in the Border Area — *New submissions presented by Costa Rica at the close of the hearings seeking recognition of its sovereignty over the disputed territory — Submissions belated and hence inadmissible — Nicaragua's compliance with the Order of 8 March 2011 — Freedom of navigation on the San Juan River — Régime applicable to transboundary harm caused by river dredging.*

II. *Case concerning* Construction of a Road in Costa Rica along the San Juan River — *Proven harm to Nicaragua as a result of construction of the road, but no evidence that such harm is significant.*

1. I agree with a number of the Court's findings. I should, however, like to present here certain comments, and to explain why I do not agree with some of the points in the Judgment. I will do so by taking each of the joined cases in turn.

I. Case concerning *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)*

2. This first case, entitled case concerning *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)*, initially related only to those activities, and Costa Rica's pleadings were directed exclusively to seeking a finding that Nicaragua had been in breach of certain of its obligations, in particular by failing to respect Costa Rica's sovereignty over the northern part of Isla Portillos (see in particular paragraphs 1 and 2 of the Application instituting proceedings). In its final submissions, Costa Rica additionally asked the Court to find that it has sovereignty over the disputed territory (paragraph 2 *(a)* of its final submissions).

3. In its decision the Court found:

(a) that Costa Rica has sovereignty over the "disputed territory", as defined by the Court in paragraphs 69 and 70 of its Judgment;

(b) that, by excavating three *caños* and establishing a military presence on Costa Rica's territory, Nicaragua had violated the latter's sovereignty.

4. I voted against the first of these findings and in favour of the second. I believe that it would be helpful if I explained my reasons for those votes. In order to do so, I will recall the applicable law and the local geographical situation, before explaining my reasoning.

1. Applicable Law

5. Article II of the Treaty of Limits between Costa Rica and Nicaragua of 15 April 1858 provides that "[t]he dividing line between the two Republics, starting from the Northern Sea, shall begin at the end of Punta de Castilla, at the mouth of the San Juan de Nicaragua River, and shall run along the right bank of the said river up to a point three English miles distant from Castillo Viejo". Article IV provides that the Bay of San Juan del Norte shall be "common to both Republics". Article VI further provides that: "[t]he Republic of Nicaragua shall have exclusively the dominion and sovereign jurisdiction over the waters of the San Juan River from its origin in the Lake to its mouth in the Atlantic".

6. Those provisions were interpreted as follows in point 1 of the third paragraph of President Cleveland's Award of 22 March 1888:

> "the boundary line between the Republics of Costa Rica and Nicaragua, on the Atlantic side, begins at the extremity of Punta de Castilla at the mouth of the San Juan de Nicaragua River, as they both existed on the 15th day of April 1858. The ownership of any accretion to said Punta de Castilla is to be governed by the laws applicable to that subject."

7. Those texts were in turn interpreted by General Alexander, who, in his first Arbitral Award of 30 September 1897, noted the following:

(a) "Costa Rica was to have as a boundary line the right . . . bank of the river";

(b) "this division implied also, of course, the ownership by Nicaragua of all islands in the river and of the left . . . bank and headland";

(c) "there is but one starting-point possible for such a line, and that is at the right headland of the bay", that is to say "the extremity of Punta de Castill[a], at the mouth of the river", as it was in 1858.

However, given that, between 1858 and 1897, the extremity of the headland had become covered by the sea, General Alexander took as the starting-point for the delimitation that same headland as it was at the time of his Award. He accordingly decided as follows:

> "the initial line of the boundary to run as follows:
>
> Its direction shall be due northeast and southwest, across the bank of sand, from the Caribbean Sea into the waters of Harbor Head Lagoon. It shall pass, at its nearest point, 300 feet on the northwest side from the small hut now standing in that vicinity. On reaching the waters of Harbor Head Lagoon, the boundary line shall turn to the left, or southeastward, and shall follow the water's edge around the harbor until it reaches the river proper by the first channel met. Up this channel, and up the river proper, the line shall continue to ascend as directed in the treaty."

8. In his second Award of 20 December 1897, General Alexander further noted that

> "the San Juan River runs through a flat and sandy delta in the lower portion of its course and . . . it is obviously possible that its banks will not only gradually expand or contract but that there will be wholesale changes in its channels . . . Today's boundary line must necessarily be affected in future by all these gradual or sudden changes. But the impact in each case can only be determined by the circumstances of the case itself, on a case-by-case basis in accordance with such principles of international law as may be applicable."

He added that "[t]he proposed measurement and demarcation of the boundary line will not have any effect on the application of those principles", concluding that "[t]he only effect obtained from measurement and demarcation is that the nature and extent of future changes may be easier to determine".

9. It was in these circumstances that the demarcation was effected, and that its results were recorded on 2 March 1898 (Alexander Proceedings Acta X).

10. In his third Award of 22 March 1898, General Alexander further stated that "[b]orders are intended to maintain peace, thus avoiding disputes over jurisdiction. In order to achieve that goal, the border should be as stable as possible." He accordingly concluded that "[f]luctuations in the water level will not alter a position of the boundary line, but changes in the banks or channels of the river will alter it, as may be determined by the rules of international law applicable on a case-by-case basis".

11. It should be noted that these various awards are not totally consistent. Thus the Cleveland Award states that the boundary begins at the extremity of Punta de Castilla at the mouth of the river, as those features were on 15 April 1858. That award accordingly appears to freeze the situation as it was at a precise date. On the other hand, the second and third Alexander Awards do not preclude the possibility of changes in the boundary in the future.

2. The Current Geographical Situation

12. As to be expected, the geographical situation has radically changed since 1897 as a result of erosion to the east of the delta and accretion to the west.

(a) The headland of Punta de Castilla has been reduced still further, and the initial marker placed there in 1897 is today under the sea.

(b) Harbor Head Lagoon has essentially retained its former shape.

(c) The Parties disagree regarding the sandbank which partially closed the lagoon in 1897. Costa Rica claims that this feature still exists only

in its eastern part, and that its western part has disappeared. It further contends that the channel referred to in the Alexander Awards has also disappeared (CR 2015/14, p. 31). Nicaragua maintains that this feature still exists and that it remains connected both to San Juan Island and to Punta de Castilla (CR 2015/15, p. 24).

(d) The Island of San Juan has, it appears, been reduced in size, but is still shown on the most recent maps.

(e) The main channel of the San Juan River has remained comparable to what it was before (with some slight changes). It is, however, difficult to determine at the current time where its actual mouth lies.

(f) The Bay of San Juan del Norte is now completely silted up. It has disappeared, as have the Port of Greytown and the lighthouse and facilities constructed by Vanderbilt on San Juan Island.

3. The Judgment of the Court

13. Nicaragua recalls that, according to General Alexander's first Arbitral Award, from the headland of Punta de Castilla the boundary "shall follow the water's edge around the harbor [at Harbor Head] until it reaches the river proper by the first channel met". It will then continue "up this channel and up the river proper". Nicaragua claims that today the first channel met coming from the east is the *caño* which it dredged, and that the boundary runs along that channel. It accordingly concludes that the activities carried out by it on that *caño* and a little further north were conducted on Nicaraguan territory and were lawful. Costa Rica denies this.

14. The Court has concluded that "the right bank of the *caño* which Nicaragua dredged in 2010 is not part of the boundary between Costa Rica and Nicaragua" (Judgment, para. 92). I entirely agree with this, and I accordingly consider, like the Court, that in dredging that *caño* and then excavating two others, and in establishing a military presence in the area, Nicaragua violated Costa Rica's territorial sovereignty.

15. On the other hand, in my view the Court was not entitled to rule on the belated submissions by Costa Rica in which it asked the Court to recognize its sovereignty over the disputed territory, since the latter was not in a position to take such a decision in light of the material in the case file.

16. Article 40, paragraph 1, of the Statute provides that the subject of the dispute must be indicated in the application, and this is reiterated in Article 38, paragraph 1, of the Rules. The Court has deemed those provisions "essential from the point of view of legal security and the good administration of justice" (*Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, p. 656, para. 38, citing *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports*

1992, p. 267, para. 69). The subject of a dispute is thus defined by the claims presented in the application. Additional claims are not admissible unless they fall within the scope of that subject; if not, they must be dismissed for lateness. The only exception to that rule is if the new claims were implicit in the application, or arose directly out of the question which is the subject-matter of the application (*Ahmadou Sadio Diallo*, *op. cit.*, p. 657, para. 41, citing those two criteria as identified by the Court in its preliminary objections Judgment in the case concerning *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)*, *op. cit.*, p. 266, para. 67). However, in the present case, the Application concerned certain activities carried out by Nicaragua in the border area, and its subject was not the delimitation of the Parties' territory. Moreover, Costa Rica's new claims were not implicit in the Application; nor did they arise directly out of the question that was the latter's subject-matter. They transformed a dispute over State responsibility into a territorial dispute.

17. Furthermore, it makes no difference that Nicaragua did not object to Costa Rica's new submissions, and that one of its counsel even admitted that both Parties were asking the Court to rule on the course of the boundary and the resultant territorial sovereignty (CR 2015/15, p. 58). In so doing, Nicaragua did indeed accept the Court's jurisdiction to rule on Costa Rica's new submissions. But jurisdiction must not be confused with admissibility. Even if those new submissions fell within the Court's jurisdiction under the *forum prorogatum* principle, they still had to comply with the procedural rules set out in the Statute and the Rules of Court. It was for the Court to ask itself *proprio motu* whether Costa Rica's new submissions were admissible[1].

18. This was particularly necessary here, since the Court did not have before it all of the necessary material to enable it to give a clear ruling. Moreover, it carefully avoided doing so. Thus, while recognizing Costa Rica's sovereignty over the disputed territory, it refrained from defining that territory's limits. It is true that it defined that territory as "the northern part of Isla Portillos . . . between the right bank of the disputed *caño*, the right bank of the San Juan River up to its mouth at the Caribbean Sea and the Harbor Head Lagoon" (Judgment, para. 69). Thus, the Court agreed with the Parties in its recognition of Nicaragua's sovereignty over the lagoon and over the sandbank marking the latter's margin. The Court further found that Costa Rica had sovereignty over the disputed territory. However, it also noted that the Parties had expressed differing views on the location of the mouth of the San Juan River where it flows into the Caribbean Sea, and did not address the question of its precise location. It accordingly decided to refrain from ruling on that point (*ibid.*, para. 70). It adopted the same reasoning for the

[1] See to this effect, R. Kolb, *La Cour internationale de Justice*, Paris, Pedone, 2013, p. 256.

stretch of the Caribbean coast lying between Harbor Head Lagoon and the mouth of the San Juan (Judgment, para. 70).

19. I can understand the Court's scruples on these two latter points. The case file is silent on the first, and incomplete on the second. I note in particular that Professor Thorne, Costa Rica's expert, does not address this second question in his report. On the other hand, Professor Kondolf, Nicaragua's expert, states that "[t]he lagoon appears to have a hydrologic connection to Greytown Harbor to the west, via a channel behind the barrier spit" (App. 1, Sec. 2.7, of Nicaragua's Counter-Memorial, Vol. I). Furthermore, that channel appears on some of the recent photos. Finally, it is shown on the most reliable of the maps produced by Costa Rica. I would therefore tend to think that Nicaragua's description of the area is closer to the reality than that claimed by Costa Rica. The Court's silence nonetheless remains understandable.

20. The Court thus took it upon itself to define the disputed territory, and then to decide which State had sovereignty over that territory, without completely fixing its boundaries. However, according to the Court's jurisprudence, "'to define' a territory is to define its frontiers" (*Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 26, para. 52). In acting as it did, the Court ignored that principle, just as it ignored its jurisprudence on the admissibility of new claims. It would have sufficed in this case to find that Nicaragua's activities had taken place on Costa Rican territory, without ruling on these additional claims.

21. I also agreed with the Judgment's finding 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" (point 3 of the operative clause). I would add that, contrary to what Costa Rica claims, Nicaragua did comply with the Order's other provisions, as the Court implicitly recognizes.

22. Point 4 of the operative clause concerns certain incidents cited by Costa Rica. It calls for certain additional comments on my part. The two incidents mentioned in paragraph 135 of the Judgment undoubtedly involved a violation by Nicaragua of Costa Rica's rights of navigation under the 1858 Treaty, as interpreted by the Court in favour of inhabitants of the right bank of the river. On the other hand, the three other instances mentioned by Costa Rica, and not accepted by the Court, did not involve such a violation (Judgment, para. 136). The first of them concerns a teacher who was allegedly prevented from reaching his school by boat in the absence of a letter of authorization from Nicaragua. However, the only evidence was from press articles, and the incident was not proved. The same applies to another incident involving two Costa Rican residents, who, according to a statement by a Costa Rican police officer who received the complaint, were made to pay a departure tax at a Nicara-

guan army post. The last incident concerned journalists who were not allowed to travel to Isla Portillos. However, they were not engaged in commerce on the San Juan, nor were they inhabitants of the river's right bank; thus their travel was not covered by the provisions of the 1858 Treaty as interpreted by the Court. In sum, the two proven incidents are clearly regrettable, but one is bound to note that these were two isolated incidents over a period of five years, from which no general conclusions can be drawn regarding the overall conduct of the Nicaraguan authorities.

23. Costa Rica further complained of the manner in which Nicaragua was carrying out dredging works on the San Juan River. The Court rejected Costa Rica's submissions for reasons with which I am entirely in agreement. In particular, it took the view that, in the absence of any transboundary harm as a result of the dredging programme, it was unnecessary for it to determine the responsibility régime applicable in the matter (Judgment, para. 119). The Court thus refrained from deciding whether or not the rules governing responsibility for this type of harm under the 1858 Treaty had been modified as a result of developments in international customary law.

24. In this regard I would recall that, according to point 6 of the third paragraph of President Cleveland's Arbitral Award of 22 March 1888:

> "The Republic of Costa Rica cannot prevent the Republic of Nicaragua from executing at her own expense and within her own territory such works of improvement, *provided* such works of improvement do not result in the occupation or flooding or damage of Costa Rica territory, or in the destruction or serious impairment of the navigation of the said River or any of its branches at any point where Costa Rica is entitled to navigate the same. The Republic of Costa Rica has the right to demand indemnification for any places belonging to her on the right bank of the River San Juan which may be occupied without her consent, and for any lands on the same bank which may be flooded or damaged in any other way in consequence of works of improvement."

25. It is clear from this passage that, to quote what the Court said in its Judgment of 13 July 2009:

> "Nicaragua may execute [at its own expense] such works of improvement [of navigation] as it deems suitable, provided that such works do not seriously impair navigation on tributaries of the San Juan belonging to Costa Rica" (*Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 269, para. 155).

26. Furthermore, according to the Cleveland Award, works of improvement conducted for purposes of navigation on the San Juan must

be carried out without resulting in the occupation or flooding or damage of Costa Rican territory. The Award further states that Costa Rica is entitled to be indemnified on account of any such damage.

27. The Parties disagree on the interpretation of this latter provision. Nicaragua maintains that, in the event of any damage as a result of improvement works on the river, Costa Rica is not entitled to have those works halted, but can only claim compensation for any damage suffered. Costa Rica disagrees.

28. For my part, I observe that the first and the second sentences of point 6 of the third paragraph of the Cleveland Award differ in scope. Thus, Costa Rica's right to indemnification is recognized in the second sentence solely in the event of damage to its territory and not in the case of serious impairment of navigation. Moreover, incidental damage to Costa Rican territory as a result of works carried out on the San Juan requires indemnification on account of the damage suffered. This, it seems to me, is a case of transboundary harm covered by a régime of objective responsibility (for a comparable case, see the Arbitral Awards of 16 April 1938 and 11 March 1941 in the *Trail Smelter* case (United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. 3, pp. 1905-1982)). In my view that responsibility régime is still applicable. The 1858 Treaty and the Cleveland Award give Nicaragua wide freedom of action in relation to works on the San Juan River. The counterpart of that freedom is an obligation to indemnify Costa Rica for damage caused to its territory, irrespective of whether such damage is significant. This special régime, which forms a single whole, remains applicable, and I see no reason to restrict Costa Rica's right to be compensated, any more than Nicaragua's right to act. The two rights are indissolubly linked.

29. Finally, I agree entirely with the Court's rejection of all of Costa Rica's submissions regarding reparation for such damage as it may have suffered, with the exception of material damage caused by Nicaragua's wrongful acts on Costa Rican territory, that is to say, any damage resulting from the construction of the *caños*. Such damage is plainly modest, and it is to be hoped that the two States can succeed in evaluating it by joint agreement.

II. Case concerning *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)*

30. As regards the second case, I agree with the Court's decision that, in constructing Route 1856, Costa Rica was in breach of its procedural obligations by not carrying out a prior environmental impact study. Nicaragua further contended that the construction of the road had had a significant harmful impact on the San Juan River. The Court rejected those claims. I agreed with that finding with a certain amount of hesita-

tion, and would now like to provide some additional clarification in this regard.

31. There is no doubt that this road, constructed in haste by a variety of undertakings, without prior technical planning or proper supervision, suffered from numerous defects, which to date have not been remedied, or only remedied in part, and sometimes temporarily.

32. The Parties agree that the construction of the road resulted in an increase in the sedimentary load of the San Juan River. They disagree on the quantity of sediment involved.

According to Professor Kondolf, it amounts to 190,000 to 250,000 tonnes per year (Judgment, para. 182). In the view of Professor Thorne, it amounts, at most, to 75,000 tonnes per year (*ibid.*, para. 183). The experts further debated the proportion of those sediment totals deposited on the bed of the river to those remaining suspended. The former, according to the estimates, varies from 5 to 18 per cent.

On the other hand, both Parties consider that 90 per cent of the waters of the San Juan flow into the sea via the Colorado River, and 10 per cent via the Lower San Juan (*ibid.*, para. 198). They further agree that 16 per cent of the suspended sediments and 20 per cent of the coarse load are carried by the San Juan, with the remainder being carried by the Colorado *(ibid.)*.

On the basis of these figures, Nicaragua states that 22,192 tonnes of sediment reach the Lower San Juan each year, including 7,600 tonnes of coarse sediment (CR 2015/10, p. 13). Costa Rica contends that the latter only amounts to some 750 to 1,500 tonnes per year (see, *inter alia*, the report by Professor Thorne in the Appendix to Costa Rica's Rejoinder, Vol. I, para. 4.100).

33. On the other hand, the Parties agree that the sedimentary load of the San Juan is already very high. Costa Rica estimates it at 12,678,000 tonnes per year, while Nicaragua's expert mentions a figure of 13,700,000 tonnes (Judgment, para. 193). Thus, the average annual sedimentary load attributable to the road is estimated at from 0.6 percent to 2 per cent of the total (*ibid.*, paras. 186 and 194).

34. It therefore appears to me clearly established that the increase in the river's sedimentary load as a result of the construction of the road has inevitably led to additional dredging works on the Lower San Juan, and thus caused harm to Nicaragua.

35. Does that amount to significant transboundary harm? That is open to question, given the sedimentary load already carried by the San Juan. Nicaragua indeed claims that the additional sedimentary load produced by the construction of the road, although marginal, has created serious obstacles to navigation over the first 3 km of the lower part of the river. While not excluding such a possibility, I am bound to note that Nicaragua has provided no evidence of this, and that its submissions on this point must accordingly be rejected.

(Signed) Gilbert GUILLAUME.

SEPARATE OPINION OF JUDGE *AD HOC* DUGARD

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I. Separate Opinion

1. I am in agreement with the Court's decisions on what I consider to be three of the principal issues: Nicaragua's violation of Costa Rica's territorial sovereignty; Costa Rica's failure to perform an environmental impact assessment (EIA) before embarking on the construction of Route 1856 along the San Juan River; and the failure of Nicaragua to prove that the construction of Route 1856 caused significant transboundary harm. I dissent from the Court's decision on two issues: first, the rejection of Costa Rica's complaint that Nicaragua failed to carry out a proper environmental impact assessment for its programme of dredging of the San Juan River and to consult with Costa Rica on this subject, as required by the Ramsar Convention; second, the rejection of Costa Rica's request for an order of costs arising from Nicaragua's construction of two *caños* in 2013. As I am in broad agreement with the Court, I consider that my opinion is more accurately to be viewed as a separate opinion.

2. I will address the first issue on which I dissent below, after some comments on Nicaragua's violation of Costa Rica's territorial integrity. In the case of the second issue I join Judges Tomka, Greenwood and Sebutinde in a joint declaration on the ordering of costs.

II. Territorial Integrity

3. I agree with the Court's finding that Nicaragua has violated Costa Rica's territorial sovereignty by excavating three *caños* and establishing a military presence in part of that territory. I believe that Nicaragua further violated Costa Rica's territorial sovereignty by encouraging members of the Guardabarranco Environmental Movement to trespass on Costa Rican territory. (See my dissenting opinion in *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), Provisional Measures, Order of 16 July 2013, I.C.J. Reports 2013*, pp. 275-276, paras. 13-14.) The Court has on previous occasions emphasized that the principle of territorial integrity is an important feature of the international legal order (*Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J Reports 2010 (II)*, p. 437, para. 80). This principle is enshrined in the Charter of the United Nations and the Charter of the Organization of American States and was reiterated by the General Assembly in resolution 2625 (XXV) on the Declaration of Principles of International Law concerning Friendly Relations and Cooperation among States. In these circumstances I believe that the Court should have placed greater emphasis on the serious nature of Nicaragua's violation of the territorial integrity of Costa Rica.

III. Protection of the Environment

4. The protection of the environment featured prominently in both *Certain Activities* and *Construction of a Road*. In both cases the Court was required to address the questions of action that might result in significant transboundary harm and the failure to produce an environmental impact assessment in respect of projects that risk causing significant transboundary harm. I agree with the Court that neither Costa Rica nor Nicaragua proved that the actions of their neighbour had caused significant transboundary harm. I also agree with the finding of the Court, and its reasoning for this finding, that the evidence showed that Costa Rica had breached a rule of international law by failing to carry out an envi-

ronmental impact assessment when it embarked on the construction of the road along the San Juan River. I disagree, however, with the finding of the Court that Nicaragua was not obliged to conduct an environmental impact assessment in respect of its project for dredging the San Juan River and that it was not obliged to consult with Costa Rica on this subject. This disagreement, which relates to both the factual findings and the reasoning of the Court, provides the basis for my dissent. In summary, I believe that the Court erred in its findings of fact and that it failed to apply the same reasoning in *Certain Activities* that it applied in *Construction of a Road.* I also believe that the Court erred in its interpretation of the Ramsar Convention on the duty to consult.

5. Before examining the Court's finding and reasoning on the absence of an obligation on the part of Nicaragua to conduct an environmental impact assessment when it embarked on the dredging of the San Juan River it is necessary to consider the source, nature and content of the obligation to conduct an environmental impact assessment.

IV. The Principle of Prevention and the Source of the Environmental Impact Assessment Obligation

6. The main purpose of environmental law is to prevent harm to the environment. This is because of the "often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage" (*Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 78, para. 140). A cluster of principles seek to achieve this goal, including the principle of prevention, the precautionary principle, the principle of co-operation, notification and consultation and the obligation of due diligence.

7. The obligation of due diligence flows from the principle of prevention. This is emphasized by the International Law Commission's Commentary on Article 3 of its Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities which declares "[t]he obligation of the State of origin to take preventive or minimization measures is one of due diligence" (*Yearbook of the International Law Commission (YILC)*, 2001, Vol. II, Part Two, p. 154, para. 7; see also, p. 155, para. 17). The duty of due diligence therefore is the standard of conduct required to implement the principle of prevention.

8. The principle of prevention is also implemented through a number of specific obligations, which include the obligation to carry out an environmental impact assessment. These obligations must be carried out in accordance with the due diligence standard. Thus if an environmental impact assessment has been carried out, but not with sufficient care

in the circumstances, a State may be found to be in breach of its obligation to do an environmental impact assessment[1]. That due diligence and the obligation to conduct an environmental impact assessment are legal tools employed to ensure the prevention of significant transboundary harm is confirmed by the Court in its present Judgment when it states that "a State's obligation to exercise due diligence in preventing significant transboundary harm" requires it to conduct a screening exercise to determine whether it is required to do an environmental impact assessment prior to undertaking an activity. Such an obligation will arise if it ascertains that such activity has "the potential adversely to affect the environment of another State" (Judgment, para. 153; see also para. 104).

9. A State's obligation to conduct an environmental impact assessment is an independent obligation designed to prevent significant transboundary harm that arises when there is a risk of such harm. It is not an obligation dependent on the obligation of a State to exercise due diligence in preventing significant transboundary harm. Due diligence is the standard of conduct that the State must show at all times to prevent significant transboundary harm, including in the decision to conduct an environmental impact assessment, the carrying out of the environmental impact assessment and the continued monitoring of the activity in question. The International Law Commission views the obligation to conduct an environmental impact assessment as an independent obligation (Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, *YILC*, 2001, Vol. II, Part Two, Art. 7, p. 157), as do the Rio Declaration (Principle 17), the Convention on Biological Diversity (Art. 14) and the Convention on Environmental Impact Assessment in a Transboundary Context ("Espoo Convention") (Art. 2). None of these instruments mentions due diligence in their formulation of the obligation to conduct an EIA. The decision of the Court in *Pulp Mills on the River Uruguay* invokes the principles of prevention, vigilance and due diligence as a basis for an environmental impact assessment when it states that "due diligence, and the duty of vigilance and prevention which it implies" would not have been exercised if a State embarking on an activity that might cause significant transboundary harm failed to carry out an environmental impact assessment (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 83, para. 204). But the Court then explains that the content of the environmental impact assessment obligation is to be assessed "having regard . . . to the need to exercise due diligence in conducting such an assessment" (*ibid.*, para. 205). This means that the due diligence obligation informs the environmental impact assessment obligation, so that, in assessing whether the duty of prevention has been satisfied, and in determining its necessary content, the Court will apply a due diligence standard. Due diligence is therefore the standard of

[1] See *Responsibilities and Obligations of States with respect to Activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 49, para. 141.

care required when carrying out the environmental impact assessment and not the obligation itself.

10. The danger of viewing the due diligence obligation as the source of the obligation to perform an environmental impact assessment is that it allows a State to argue, retrospectively, that because no harm has been proved at the time of the legal proceedings, no duty of due diligence arose at the time the project was planned. This backward looking approach was adopted by the Court in *Certain Activities* but not in *Construction of a Road*. If the obligation to perform an environmental impact assessment is viewed as an independent obligation it is clear that a State must ascertain the risk at the time the project is planned and prior to embarking upon the project. Moreover, it is clear that the threshold for making such a decision is not the high standard for determining whether significant transboundary harm has been caused but the lower standard of *risk* assessment — even if it is proved *later* that no significant transboundary harm has been caused. An environmental impact assessment not only ensures that the principle of prevention is adhered to but also encourages environmental consciousness on the part of States by requiring them to assess the risk of harm even if no harm is proved after the project has been undertaken.

11. As the Court here has affirmed, *Pulp Mills* makes clear that the obligation to do an environmental impact assessment exists as a separate legal obligation from due diligence. Moreover, policy considerations confirm that the obligation to perform an environmental impact assessment must be viewed as an obligation separate from that of due diligence. The obligation of due diligence is vague and lacking in clear content or procedural rules. It is an obligation that can be applied either prospectively or retrospectively — as shown by the reasoning in *Certain Activities*. The obligation to conduct an environmental impact assessment, on the other hand, imposes a specific obligation on States to examine the circumstances surrounding a particular project when it is planned and before it is implemented. It is characterized by certainty whereas due diligence is a more open-textured obligation that could potentially be satisfied in a number of different ways.

V. Environmental Impact Assessment: General Rule or Customary Rule

12. The Court has chosen to describe the obligation to conduct a transboundary environmental impact assessment concerning activities carried out within a State's jurisdiction that risk causing significant harm to other States as an obligation under "general international law". This

term is used in both *Certain Activities* (paras. 101, 104) and *Construction of a Road* (paras. 152, 162, 168, 229 (6)). In so doing the Court has carefully followed the language employed by the Court in *Pulp Mills* when it stated

> "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" (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 83, para. 204).

13. As the term "general international law" does not appear in the sources of international law listed in Article 38 (1) of the Court's Statute there will inevitably be some debate about the precise meaning to be attached to the term.

14. "General international law" cannot be equated with "general principles of law recognized by civilized nations" referred to in Article 38 (1) *(c)* in the present context as the Court has accepted the obligation to conduct an environmental impact assessment as an obligation that gives rise to a cause of action (Judgment, para. 162). Were the term to be interpreted as synonymous with "general principles of law" the question would be raised whether such a "general principle of law" might found a cause of action and require the Court to enter this jurisprudential minefield.

15. General principles fall largely into the categories of rules of evidence or procedure or are used as a defence (e.g., *res judicata*). Abuse of procedure has been invoked as a general principle in a number of cases before the Court but the Court has never found the conditions for an application of the principle to be fulfilled[2]. That a general principle of law might give rise to a cause of action cannot be discounted. In *Factory at Chorzów* the Court declared that "it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation" (*Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J, Series A, No. 17*, p. 29). However, that obligation to pay reparation was not an independent cause of action but a secondary obligation that arose only after the determination of a breach of some other obligation. On the other hand, there is some authority for the proposition that a general principle cannot be construed as a separate obligation. In *Mavrommatis Jerusalem Concessions (Greece* v. *United Kingdom)*, the Permanent Court of International Justice stated:

> "It is true that the Claimant has maintained that the provision of the Protocol should be supplemented by certain principles taken from

[2] A. Zimmermann *et al.* (eds.), *Statute of the International Court of Justice: A Commentary*, 2nd ed., 2012, pp. 904-905.

general international law; the Court, however, considers that Protocol XII is complete in itself, for a principle taken from general international law cannot be regarded as constituting an obligation contracted by the Mandatory except in so far as it has been expressly or implicitly incorporated in the Protocol." (*P.C.I.J., Series A, No. 5, 1925*, p. 27.)

16. What meaning then is to be attached to the term "general international law" which the International Court has used in *Pulp Mills* and other decisions? Possibly it includes general international conventions, particularly those that codify principles of international law; and widely accepted judicial decisions, particularly decisions of the International Court of Justice. Certainly it includes both customary international law and general principles of law within the meaning of Article 38 (1) *(c)* and *(d)* of the Court's Statute. In the present case I understand the term "general international law" to denote a rule of customary international law requiring an environmental impact assessment to be carried out where there is a risk of transboundary harm.

17. There can be little doubt that there is an obligation under customary international law to conduct an environmental impact assessment when there is a risk of significant transboundary harm. The ITLOS Seabed Disputes Chamber has held that there is a "general obligation under customary international law" to conduct such an assessment[3]. Fourteen years ago, the International Law Commission stated in its Draft Articles on Prevention of Transboundary Harm from Hazardous Activities that "the practice of requiring an environmental impact assessment has become very prevalent", citing the laws of several developed States in support of such an obligation and declaring that some 70 developing countries had legislation of some kind on this subject (Commentary on Article 7, para. 4, *YILC*, 2001, Vol. II, Part Two, p. 158). These Draft Articles have been commended by the General Assembly of the United Nations (resolution of 6 December 2007, UN doc. A/Res/62/68, para. 4). In addition, a growing number of multilateral conventions recognize the obligation to conduct an environmental impact assessment. See, in particular, the Convention on Environmental Impact Assessment in a Transboundary Context ("Espoo Convention"), the Antarctic Treaty on Environmental Protection (the Antarctic Protocol), the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Art. 6 (1) *(b)*), the Convention on Biological Diversity (Art. 14), and the Convention of the Law of the Sea (Art. 206). The writings of jurists lend strong support to such an obligation under customary international law. Significantly, neither Costa Rica or Nicaragua has denied such an obligation as binding on them although in their pleadings

[3] *Responsibilities and Obligations of States with respect to Activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 50, para. 145.

they followed *Pulp Mills* and used the language of "general international law". There was no argument as to what this term meant and it was apparently assumed that it was a synonym for custom.

VI. Rules relating to an Environmental Impact Assessment

18. In *Pulp Mills* the Court stated that general international law does not "specify the scope and content of an environmental impact assessment" with the result "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" (*I.C.J. Reports 2010 (I)*, p. 83, para. 205). This dictum, which is reaffirmed by the Court in the present case (Judgment, para. 104), has on occasion been interpreted as meaning that the environmental impact assessment obligation has no independent content and that there is simply a *renvoi* to domestic law[4]. This is incorrect. Obviously there are some matters relating to the carrying out of an environmental impact assessment which must be left to domestic law. These include the identity of the authority responsible for conducting the examination, the format of the assessment, the time frame and the procedures to be employed. But there are certain matters inherent in the nature of an environmental impact assessment that must be considered if it is to qualify as an environmental impact assessment and to satisfy the obligation of due diligence in the preparation of an environmental impact assessment. This is made clear by the International Law Commission in its Commentary on Article 7 of its Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities which declares that an environmental impact assessment should relate the risk involved in an activity "to the possible harm to which the risk could lead", contain "an evaluation of the possible transboundary harmful impact of the activity", and include an assessment of the "effects of the activity not only on persons and property, but also on the environment of other States" (*YILC*, 2001, Vol. II, Part Two, pp. 158-159, paras. 6-8).

19. In the present case the Court has recognized that the following rules are inherent in the nature of an environmental impact assessment. An environmental impact assessment must be undertaken *prior* to the implementation of the activity in question (Judgment, paras. 104, 153, 159, 161 and 168). The State undertaking an activity must assess the risk

[4] See, for instance, the statement of the Sea-bed Disputes Chamber of ITLOS in its Advisory Opinion of 2011 (footnote 1 above), p. 51, para. 149.

of significant transboundary harm prior to implementing the activity "on the basis of an objective evaluation of all the relevant circumstances" (Judgment, para. 153). The burden of proof in showing that an environmental impact assessment or similar preliminary assessment of the risk involved has been done is upon the State undertaking the activity (*ibid.*, para. 154). The circumstances of the particular environment must be considered in assessing the threshold for deciding whether an environmental impact assessment is required (*ibid.*, paras. 104 and 155). The fact that the activity is conducted in a Ramsar protected site "heightens the risk of significant damage because it denotes that the receiving environment is particularly sensitive" (*ibid.*, para. 155). (From this it follows that the threshold for deciding whether to conduct an environmental impact assessment is lower in the case of a wetland of international significance protected by the Ramsar Convention.) A State must exercise due diligence in carrying out an environmental impact assessment with regard to the nature and magnitude of the activity and its likely impact on the environment (*ibid.*, paras. 104 and 155). In determining the need for an environmental impact assessment it is necessary to have regard to the *risk* of harm being caused (*ibid.*, paras. 104 and 153). (By necessary implication, this rejects that argument that the test is not the risk of transboundary harm but the likelihood or probability of such harm occurring. It is also recognition of the fact that there is a lower standard — *risk* — that triggers the obligation to conduct an environmental impact assessment than the higher standard required for proving that significant transboundary harm has actually been caused. This is confirmed by the finding of the Court that Costa Rica was required to conduct an environmental impact assessment because of the *risk* its activity posed to Nicaragua's environment, despite the fact that Nicaragua failed to prove that significant transboundary harm had in fact occurred.) Finally, the Court affirmed that a subsequent finding of an absence of significant transboundary harm does not exonerate the State that carries out an activity that risks causing such harm for its failure to carry out an environmental impact assessment when the activity was planned.

VII. *Construction of a Road* and the Obligation to Conduct an Environmental Impact Assessment

20. Here the Court scrupulously applied the principles governing an environmental impact assessment that it had expounded in the present case (see para. 19 above). First, it held that Costa Rica had breached its obligation to conduct an environmental impact assessment by failing to carry out such an assessment *prior* to embarking on the construction of the road (Judgment, paras. 153, 159, 161 and 168). The fact that it later carried out an environmental diagnostic assessment and other studies on the impact of the road did not suffice (*ibid.*, para. 161). Second, it held

that Costa Rica had failed to prove that it had carried out a preliminary assessment before embarking on the construction of the road (Judgment, para. 154). Third, it held that the geographic conditions of the river basin where the road was to be built were to be considered in assessing the risk involved in the activity (*ibid.*, para. 155). The Court made a careful examination of these conditions and the proximity of the road to the San Juan River in order to show that the road posed a risk to Nicaragua's environment *(ibid.)*. Fourth, the Court held that the fact that the road was built in the proximity of Nicaragua's Ramsar protected wetland of *Refugio de Vida Silvestre Río San Juan* heightened the risk of significant impact because of the sensitive nature of the environment *(ibid.)*. Fifth, it held that in determining the need for an environmental impact assessment it was necessary for Costa Rica to have regard to the *risk* of significant transboundary harm being caused by the construction of the road (*ibid.*, para. 153). Sixth, it held that the fact that Nicaragua did not prove that significant transboundary harm had in fact been caused by the construction of the road did not absolve Costa Rica from its obligation to conduct an environmental impact assessment prior to commencing this activity.

VIII. *Certain Activities* and the Obligation to Conduct an Environmental Impact Assessment in respect of Costa Rica's Wetlands

21. The reasoning and fact-finding of the Court on the need for an environmental impact assessment in *Construction of a Road* must be compared to the approach it adopted in *Certain Activities*.

22. In its application and subsequent submissions Costa Rica made it clear that it had two main concerns about Nicaragua's plan to dredge the Lower San Juan River: first, the impact it might have on Costa Rica's Ramsar protected wetlands and, second, the damage it might cause to the Colorado River. In the course of the oral proceedings, on 28 April 2015, Costa Rica asked the Court to adjudge and declare that Nicaragua had breached "the obligation to respect Costa Rica's territory and environment, including its wetland of international importance under the Ramsar Convention 'Humedal Caribe Noreste', on Costa Rican territory"; and "the obligation to carry out an appropriate transboundary environmental assessment, which takes account of all potential significant adverse impacts on Costa Rican Territory" (*ibid.*, para. 49). Costa Rica also requested the Court to find that Nicaragua had breached it obligation to refrain from any activity that might cause damage to the Colorado River. This opinion will focus entirely on Costa Rica's submissions in respect of its wetlands. This is done for the sake of brevity. The expert witnesses

of both Parties agreed in 2015 that Nicaragua's dredging programme was not likely to affect the flow of water to the Colorado River. Whether the dredging as initially planned in 2006 posed a risk to the Colorado River, warranting an environmental impact assessment, remains unanswered.

23. The Court's response to Costa Rica's submissions was terse. First, it stated that

> "In 2006 Nicaragua conducted a study of the impact that the dredging programme would have *on its own environment*, which also stated that the programme would not have a significant impact on the flow of the Colorado River. This conclusion was *later* confirmed by both Parties' experts." (Judgment, para. 105; emphasis added.)

This passage indicates that the Court was aware that Nicaragua's study of 2006 dealt only with the likely impact of dredging "on its own environment" and that the Court was satisfied, in the light of the "later" evidence of experts of both Parties, that the dredging programme would have no impact on the Colorado River. Then came the Court's finding on both the flow of the Colorado River and the impact on Costa Rica's wetlands:

> "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." *(Ibid.)*

24. In order to compare and contrast the reasoning employed by the Court in *Certain Activities* with its reasoning in *Construction of a Road* it is necessary to examine the evidence in the case file of the Court, particularly "the reports submitted and the testimony given by experts called by both Parties" *(ibid.)*, upon which the Court bases its finding that the Nicaraguan dredging programme planned in 2006 was not such as to give rise to a risk of significant transboundary harm with respect to Costa Rica's wetland, the *Humedal Caribe Noreste.*

25. There are four important documents dealing with the impact of Nicaragua's dredging programme: the terms of reference of the Ministry of the Environment and Natural Resources (MARENA)[5], Nicaragua's

[5] Ministry of the Environment and Natural Resources (MARENA), Specific Terms of Reference for the Preparation of the Environmental Impact Study for the Project "Dredging of the San Juan River" (undated), Counter-Memorial of Nicaragua (CMN), Vol. II, Ann. 9, p. 221.

environmental impact study (EIS) of 2006[6], the Project Design Study attached as an annexure to the environmental impact study[7] and the report of the Ramsar Advisory Mission No. 72 on the impact of the dredging programme on Nicaragua's wetland, the *Refugio de Vida Silvestre Río San Juan*[8]. The first three documents prepared by Nicaragua have one thing in common: they carefully examine the impact of the dredging programme on Nicaragua's own environment but make no mention of its possible impact on the territory of Costa Rica, least of all on its wetland. The terms of reference of MARENA, which define the scope of the study, do not direct any transboundary impacts to be studied. The environmental impact study mentions only Nicaragua's Ramsar protected wetland. The Project Design Study is concerned only with the increase in the flows of the channel bed of the San Juan River and makes no mention of any possible transboundary impact of the dredging programme. The Court is therefore correct in stating that Nicaragua's study considered only the "impact that the dredging programme would have on its own environment" (Judgment, para. 105).

26. The Ramsar Report of 2011, on the other hand, is concerned with the wetlands of the Lower San Juan River basin belonging to both Nicaragua and Costa Rica. It states that because any changes to the fluvial dynamics of the river due to dredging will alter the dynamics of the Nicaraguan and Costa Rican wetlands and "the distribution and abundance of the species living there", it is "important to perform studies of the relevant environmental impacts prior to its implementation"[9]. It adds that:

> "Considering the main role of the San Juan River basin [is] on the entire dynamics of the San Juan River as well as the Ramsar sites *Refugio de Vida Silvestre* and *Caribe Noreste*, it is essential to develop joint actions of co-operation between Nicaragua and Costa Rica, enabling compliance with their international commitments within the framework of the Ramsar Convention, and particularly the maintenance of the ecological characteristics."[10]

The report then recommends "strong co-operation" between Nicaragua and Costa Rica "for a more integrated management of activities that may potentially affect the river" and "its related wetlands of international importance"[11]. Finally it recommends the monthly monitoring of the hydrometric levels, the concentration of suspended solids in the water col-

[6] Environmental Impact Study for Improving Navigation on the San Juan de Nicaragua River, September 2006, CMN, Vol. II, Ann. 7, p. 77.
[7] Project Design Study, September 2006, CMN, Vol. II, Ann. 8, p. 213.
[8] Ramsar Report of 18 April 2011.
[9] *Ibid.*, Conclusions, para. 5.
[10] *Ibid.*, para. 6.
[11] *Ibid.*, Recommendations, para. 1.

umn and the groundwater levels of the river at least during the construction phase of the dredging[12].

27. Not surprisingly, the Ramsar Report of 2011 was not produced by Nicaragua until requested by Costa Rica. Nicaragua wrote a hostile reply[13] to the Ramsar Secretariat criticizing the actions of Costa Rica and requesting, *inter alia*, the deletion of the report's conclusion that any changes to the fluvial dynamics of the river due to dredging will alter the dynamics of the wetlands of Nicaragua and Costa Rica and the species living there, resulting in the need "to perform studies of the relevant environmental impacts prior to its implementation". In the oral proceedings Nicaragua dismissed the Ramsar Report as only a draft report which the Ramsar Secretariat never finalized. In the light of the concern expressed by the Ramsar Report over the impact that dredging might have on the wetlands of both Nicaragua and Costa Rica it is unlikely that this was one of the reports "in the case file" of the Court (Judgment, para. 105) which led it to conclude that the dredging programme planned in 2006 was not such as to give rise to a risk of significant transboundary harm.

28. The principal witnesses called by Nicaragua in *Certain Activities* were Professors Kondolf and van Rhee. Kondolf's report in Nicaragua's Counter-Memorial[14] is largely concerned with the clearing of the *caño* and does not consider the impact of dredging on the wetlands other than in the vicinity of the *caño*. His written statement is likewise focused mainly on the clearing of the *caño* but he does state that the contemplated diversion of the Colorado River's flow into the San Juan River "does not risk harming the Colorado or the wetlands it feeds". There is no indication of the wetlands to which he refers. Kondolf's oral testimony was again centred on the clearing of the *caño* without mention of the impact of the dredging upon the wetlands. Professor van Rhee's report in Nicaragua's Counter-Memorial[15] is about the dredging programme itself but it does state that it "helps to ensure the survival of the wetlands of international importance", including the *Refugio de Vida Silvestre Río San Juan* and the *Humedal Caribe Noreste*[16]. In a subsequent report, Professor van Rhee makes the important point that the dredging project described in the environmental impact study of 2006 "has since been reduced in scope. As such, even the small impact of the dredging project on the environ-

[12] Ramsar Report, Recommendations, para. 3.

[13] Considerations and Changes of the Government of the Republic of Nicaragua to the draft Ramsar Mission Report No. 72.

[14] G. Mathias Kondolf, "Distributary Channels of the Rio San Juan, Nicaragua and Costa Rica: Review of Reports by Thorne, UNITAR, Ramsar, MEET and Araya-Montero", CMN, Vol. I, p. 461.

[15] C. van Rhee and H. J. de Vriend, "The Influence of Dredging on the Discharge and Environment of the San Juan River", CMN, Vol. I, p. 525.

[16] *Ibid.*, p. 540, para. 3.2.

ment . . . will likely be reduced."[17] In his written statement, van Rhee states that dredging is an "effective technique for maintaining flows to wetlands" which serves to preserve the ecological health of the environmentally sensitive wetlands of the Lower San Juan River. Professor van Rhee's oral testimony was hampered by the fact that he had not seen the 2011 Ramsar Report No. 72 on which he was cross-examined.

29. Costa Rica's main witness was Professor Thorne. He was unable to access the San Juan River in person as the Nicaraguan authorities denied such access. In contrast to the reports of Professors Kondolf and van Rhee, his report in Costa Rica's Memorial[18] had much to say about the impact of dredging on Costa Rica's wetlands. In the executive summary of his report, he states that the wetland of *Humedal Caribe Noreste* that could be indirectly impacted by the dredging "provides habitats for a wide array of plants, birds, fish, amphibians, reptiles and mammals, including many iconic and endangered species"[19]. Risks to such species "include the possibility of extinction of those already threatened or endangered"[20]. The report itself declares that dredging has "direct, short-term impacts on river environments and ecosystems through disturbing aquatic flora and fauna, destroying benthic communities and, potentially, increasing turbidity and reducing water quality, with impacts that will be felt throughout the trophic network"[21]. The report spells out the potential environmental impacts on the wetlands of dredging on such issues as surface drainage, water quality, vegetation, fish, aquatic plant life, birds and fauna[22]. The report concludes that the evidence suggests that the "morphological, environmental and ecological risks associated with continuing the dredging programme are serious"[23]. Professor Thorne's written statement was largely concerned with maps and the construction of the three *caños*. He did, however, state that "disturbance to the environment and ecosystem at each dredging site are inherent and inevitable". Significantly, Professor Thorne accepts Professor van Rhee's assessment that Nicaragua's reduced dredging programme is likely to cause less environmental damage to the wetlands. He warns, however,

[17] C. van Rhee and H. J. de Vriend, "Morphological Stability of the San Juan River Delta, Nicaragua/Costa Rica", CMN, Vol. IV, pp. 19 and 23.

[18] Colin Thorne, "Assessment of the physical impact of works carried out by Nicaragua since October 2010 on the geomorphology, hydrology and sediment dynamics of the San Juan River and the environmental impacts on Costa Rican territory", Memorial of Costa Rica (MCR), Vol. I, p. 307.

[19] *Ibid.*, p. 313.

[20] *Ibid.*, p. 315.

[21] *Ibid.*, pp. 443-444.

[22] *Ibid.*, pp. 454-458.

[23] *Ibid.*, p. 461.

that if the dredging programme were to be expanded to achieve its initial goal of greater navigability of the river this would have adverse impacts. Professor Thorne's testimony in the oral proceedings was largely devoted to maps and the cutting of the *caños*. However, when he testified in *Construction of a Road*, in response to a question by Judge Tomka, he issued the stark warning that "[t]he dredging programme, if it cuts off the sediment supply, will starve the delta, the Caribbean Sea will take it away, we will lose hundreds of hectares of wetland due to coastal erosion" (CR 2015/12, p. 52).

30. Only one expert on environmental impact assessments testified in the joined cases. He was Dr. William Sheate, who was called as a witness by Nicaragua in the *Construction of a Road* to give evidence on the question whether Costa Rica had breached its obligation to conduct an environmental impact assessment when it embarked on the construction of a road along the San Juan River. Although he did not provide evidence in *Certain Activities* there is no reason why his evidence should not be considered in that case as the two cases were joined and the issue of the obligation of a State to conduct an environmental impact assessment prior to embarking on an activity that risks causing significant transboundary harm arose in both cases. In his report in Nicaragua's Reply in the *Construction of a Road*[24], Dr. Sheate repeatedly stresses the sensitivity of the two wetlands, the *Refugio de Vida Silvestre* and the *Humedal Caribe Noreste*, the fact that they are designated by Ramsar as wetlands of international importance and the need to conduct an environmental impact assessment in respect of any activity in the region. He declares that "[t]he Ramsar and UNESCO designations covering the San Juan River and adjacent areas should have been sufficient triggers on their own for an environmental impact assessment or some form of advance assessment to have been undertaken"[25]. Later he goes further in saying that Ramsar designation should "alone" be sufficient reason to require an environmental impact assessment[26]. Referring to the designation of an area as a Ramsar protected site, he states that

> "[t]he likelihood of *significant* effects is increased because of the sensitive nature of the designated environment and the habitats and wild-

[24] William R. Sheate, "Comments on the Lack of EIA for the San Juan Border Road in Costa Rica, July 2014", Reply of Nicaragua (RN), Vol. II, Ann. 5, p. 281.

[25] *Ibid.*, pp. 284 and 297.

[26] *Ibid.*, p. 296.

> life for which the area has been designated — the threshold for triggering an environmental impact assessment is therefore rightly expected to be much lower than if the receiving environment were not a Ramsar designated area".[27]

These opinions were restated by Dr. Sheate in his written statement and his oral evidence.

31. It is difficult to conclude that an examination of the "reports submitted and testimony given by experts called by both Parties" indicates that there was support for the finding that "the dredging programme planned in 2006 was not such as to give rise to a risk of significant transboundary harm . . . with respect to Costa Rica's wetland" (Judgment, para. 105). The documents/reports submitted by Nicaragua failed to examine the impact of the dredging programme on Costa Rica's wetlands at all. The fact that Nicaragua felt obliged to conduct an environmental impact study in respect of its own territory, however, suggests that it had cause for concern about the environmental impacts of its dredging on the area. The report of the Ramsar Advisory Mission No. 72 of 2011 stated that dredging presented a risk of environmental impact on the wetlands of both Costa Rica and Nicaragua and suggested that a new environmental impact study be carried out. It also recommended that there be regular monthly monitoring of the situation. Professor Kondolf had little to say about the impact of the dredging on the wetlands while Professor van Rhee merely affirmed that dredging would promote the flow of water in the river which would be beneficial to the wetlands. Moreover, he was unable to respond to questions about the Ramsar Report of 2011 because Nicaragua had failed to provide him with this important report. Professor Thorne, on the other hand, made it clear that the dredging programme had serious consequences for the wetlands. The only expert witness on environmental impact assessments, Dr. Sheate, testified that the fact that an area had been designated a Ramsar site of international importance was alone sufficient to trigger the need for an environmental impact assessment and that there was a lower threshold for the assessment of risk of harm in such a designated area.

32. Rather than showing that there was no need for Nicaragua to conduct an environmental impact assessment in respect of the risk of significant transboundary harm to Costa Rica's wetlands, the evidence contained in the reports and testimonies of witnesses called by both Parties shows that there was a risk of harm to Costa Rica's Ramsar-designated site at the time the dredging was planned regardless of the fact that no harm was later proved. The Court should have held that in a Ramsar-designated wetland there was a lower threshold of risk, that Nicaragua had failed to show that it had considered the question of transboundary harm at all and that the risk to the wetland was sufficient for

[27] *Op. cit. supra* note 24, p. 297.

Nicaragua to have conducted an environmental impact assessment that examined the risk that its dredging programme posed to Costa Rica's wetlands.

33. The temporal factor is important in assessing Nicaragua's obligation to conduct an environmental impact assessment. The planned aim of the dredging in 2006 was to improve navigability on the San Juan River by deepening and widening the navigation channel[28]. Both van Rhee (*supra*, para. 28) and Thorne (*supra*, para. 29) testified that Nicaragua had reduced the scale of the dredging programme that was planned in 2006. As a result of this the risk of harm to the wetlands had been diminished. However, in assessing the risk for the purpose of deciding whether Nicaragua should have conducted an environmental impact assessment, it is necessary to have regard to the dredging programme *as it was planned in 2006*. This was the question that required consideration and not the question whether the evidence of the implementation of the dredging in 2015 showed that the dredging programme planned in 2006 was not such as to give rise to a risk of significant transboundary harm. The evidence of Professor Thorne is important in this regard. In his first report, included in Costa Rica's Memorial, he provides a comprehensive account of the potential environmental impact of the dredging as planned in 2006. But in his written statement of 2015 he is less critical of this impact on account of the reduction of the dredging that had been planned (*supra*, para. 29). That the original dredging plan of 2006 held a risk of transboundary harm was confirmed by the Ramsar Report of 2011. Moreover, the clear implication of Dr. Sheate's evidence is that an environmental impact assessment was without doubt required when a Ramsar-designated wetland was at risk. The Court's pronouncement that "the dredging programme planned in 2006 was not such as to give rise to a risk of significant transboundary harm . . . with respect to . . . Costa Rica's wetland" (Judgment, para. 105) based on the reports submitted and the testimony given by experts called by both Parties takes no account of the fact that Nicaragua's documents/reports had nothing to say on this subject, that the Ramsar Report of 2011 expressed serious concern about the risk to the environment and that the testimony of witnesses showed on a balance of probabilities (and possibly beyond reasonable doubt) that there was a risk to Costa Rica's wetland in 2006. Furthermore it takes no account of the fact that Costa Rica was prevented by Nicaragua from measuring the flow of water in the river to provide proof of the impact of the dredging on its wetlands; and that Nicaragua had itself either not taken such measurements or refused to disclose them. Such conduct on the part of Nicaragua

[28] See Environmental Impact Study for Improving Navigation on the San Juan de Nicaragua River, September 2006, CMN, Vol. II, Ann. 7, para. 2.1.3.

affects the burden of proof as was stated by the Court in the *Corfu Channel* case:

> "exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available . . . By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence." (*Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 18.)

34. The fact-finding of the Court cannot be substantiated. To make matters worse the decision of the Court cannot be reconciled either with the reasoning on the obligation to conduct an environmental impact assessment employed by the Court in *Construction of a Road* or with the rules relating to environmental impact assessments expounded by the Court and set out in paragraph 19 above. First, there is no examination of the factual situation of Costa Rica's wetlands of the kind carried out by the Court in respect of the road along the San Juan River (Judgment, para. 155). Second, there is no suggestion that Nicaragua carried out "an objective evaluation of all the relevant circumstances" (*ibid.*, para. 153). On the contrary, the Court itself states that Nicaragua's environmental study was confined to "its own environment" (*ibid.*, para. 105). This flies in the face of the statement of the International Law Commission that an environmental impact assessment should include an assessment of the effects of the activity "on the environment of other States" (see *supra* para. 18). In these circumstances it is impossible to conclude that Nicaragua had discharged the burden of proof in showing that it had carried out an adequate preliminary assessment of the impact of its dredging programme on Costa Rica's wetlands. Third, the Court's finding fails to take into account the circumstances affecting the environment of the Lower San Juan River. In particular it does not mention that the Costa Rican wetland in question — the *Humedal Caribe Noreste* — like the Nicaraguan wetland — the *Refugio de Vida Silvestre Río San Juan*, invoked in the *Construction of a Road*, is a Ramsar Convention protected wetland "which heightens the risk of significant damage because it denotes that the receiving environment is particularly sensitive" (Judgment, para. 155). Fourth, the Court disregards its requirement that a State must exercise due diligence in ascertaining 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 (*ibid.*, para. 153). Nicaragua's environmental impact study which took no account of *transboundary* harm clearly failed to meet the standard of due diligence. Fifth, the Court seems to have reached its conclusion that there was no risk of significant transboundary harm when the dredging programme was

planned in 2006 on the basis of the evidence of witnesses testifying on the impact of the dredging in 2015. This inference is drawn from the fact that the Court examined the impact of the dredging in its consideration of the question whether it had caused significant transboundary harm in 2015 but not the risk — a lower threshold — that it might cause significant transboundary harm in 2006. This finding differs fundamentally from that of the Court in *Construction of a Road* where it was careful to distinguish between the risk of transboundary harm when the road was planned and the question whether such harm had been proved in 2015. If the Court's conclusion was reached in some other way, it was careful to conceal this in paragraph 105.

35. The evidence examined shows that there was a risk of significant transboundary impacts to Costa Rica's wetlands arising from the dredging project as planned in 2006. This risk was not as obvious or as great as that posed by the construction of Route 1856 in *Construction of a Road.* Nevertheless there was a risk and Nicaragua had an obligation to carry out an environmental impact assessment that examined not only the impact of the dredging on its own territory but also the impact on Costa Rica's territory. By failing to do so it breached its obligation under general international law to conduct an environmental impact assessment.

IX. Ramsar Convention

36. *Certain Activities* and *Construction of a Road* are both concerned with the protection of the wetlands environment and the Ramsar Convention is the most important multilateral convention on this subject. It was the first conservation convention that focused exclusively on habitat. Both Parties appreciated the importance of the Ramsar Convention and accused each other of violating its terms by failing to notify and consult one other in respect of potential environmental impacts. In these circumstances, one might have expected the Court to have more seriously considered the relevance of the Convention to the two cases before it.

37. Two wetlands in the vicinity of the disputed territory and the Lower San Juan River are listed with the Secretariat of Ramsar as Wetlands of International Importance: the *Humedal Caribe Noreste* wetland of Costa Rica and the *Refugio de Vida Silvestre Río San Juan* of Nicaragua. Wetlands are selected for listing on account of their international significance in terms of ecology, botany, zoology, limnology or hydrology. Both wetlands include estuaries, lagoons and marshes and are home to migratory birds, salamanders and aquatic life.

38. The legal provisions of the Ramsar Convention relating to notification and consultation invoked by both Parties are Articles 3 (1) and 5:

> "Article 3
>
> 1. The Contracting Parties shall formulate and implement their planning so as to promote the conservation of the wetlands included in the List, and as far as possible the wise use of wetlands in their territory.
>
> . . . . . .
>
> Article 5
>
> The Contracting Parties shall consult with each other about implementing obligations arising from the Convention especially in the case of a wetland extending over the territories of more than one Contracting Party or where a water system is shared by Contracting Parties. They shall at the same time endeavour to co-ordinate and support present and future policies and regulations concerning the conservation of wetlands and their flora and fauna."

39. In *Certain Activities* Costa Rica alleged that Nicaragua had violated Article 5 of the Ramsar Convention by refusing to provide it with information about its dredging programme or to inform it about the environmental impact study that it had conducted so that Costa Rica would have been able to consider the impacts of the proposed works on its territory (MCR, Vol. I, para. 5.17). Nicaragua contested this, arguing that the obligation to notify, consult or provide an environmental impact assessment arose only under general international law where there was a risk of a significant transboundary impact, but failed to address the obligation to consult under Article 5 of the Ramsar Convention which is not restricted to situations involving a risk of significant transboundary impact. However, Nicaragua changed its position on this in the *Construction of a Road* when it stated that "there is no requirement in this article [Art. 5] that a party's activities cause or risk causing significant harm to another party" (RN, Vol. I, para. 6.114).

40. Article 5 requires States to consult with each other on the implementation of "obligations arising from the Convention especially in the case of a wetland extending over the territories of more than one Contracting State or where a water system is shared by Contracting Parties". As the listed wetlands of Costa Rica and Nicaragua share a common water system it follows that there is an obligation on both Parties to consult with each other on issues affecting this shared water system.

41. Article 5 must be read with Article 3 (1) which provides: "The Contracting Parties shall formulate and implement their planning so as to promote the conservation of the wetlands included in the List, and as far

as possible the wise use of wetlands in their territory." While the "wise use of wetlands in their territory" obligation is limited to Nicaragua's territory and thus may not give rise to a specific obligation to consult, the same cannot be said of the first half of Article 3 (1) dealing with listed wetlands. According to *Lyster's International Wildlife Law* there is "some form of collective responsibility for such sites"[29]. Their designation as sites of international importance means that they are "resources of 'common concern' to the international community as a whole"[30]. The obligation to formulate and implement planning so as to promote the conservation of wetlands applies generally to all wetlands included in the List, and thus has extraterritorial effect. "The precise nature and extent of their responsibility towards sites designated by other States is uncertain, but should at least involve an obligation to avoid causing them significant harm."[31]

42. Article 3 (1) should therefore be read as imposing an obligation to undertake planning "to promote the conservation of the wetlands included in the List" which clearly covers the wetlands of Costa Rica and Nicaragua that share the same water system. Thus it may convincingly be argued that when Nicaragua planned its dredging programme in 2006 and carried out an environmental impact study it was bound to "formulate and implement" its planned environmental assessment study in such a way as to promote the conservation not only of its own wetland, the *Refugio de Vida Silvestre Río San Juan*, but also of Costa Rica's *Humedal Caribe Noreste*. Article 3 (1) thus enlivens the procedural obligation to conduct an environmental impact assessment under general international law, giving it a substantive content requirement — namely to promote the conservation of the wetlands. It does not stipulate the circumstances in which such planning is to take place, and is not subject to any separate threshold requirement. But it makes it clear that the planning must be formulated and implemented to promote the conservation of wetlands.

43. Nicaragua does not deny that there is a relationship between the environmental impact assessment obligation and Article 3 (1). In its Memorial in *Construction of a Road*, alleging that Costa Rica had breached Article 3 (1), it noted that Article 3 (1) applied whether or not the affected wetland was within Costa Rican territory, and explained that conservation of wetlands "is premised upon appropriate planning, something Costa Rica did not do in respect of its road project" (Memorial of Nicaragua (MN), Vol. I, paras. 5.74-5.75). Nicaragua accepted that the

[29] M. Bowman, P. Davies and C. Redgwell, *Lyster's International Wildlife Law*, Cambridge University Press, 2nd ed., 2010, p. 420.
[30] *Ibid.*
[31] *Ibid.*, p. 424.

obligation under Article 3 (1) applies equally to both Costa Rican and Nicaraguan wetlands (MN, Vol. I, para. 5.74) and acknowledged the link between Article 3 (1) and the obligation to conduct an environmental impact assessment (*ibid.*, paras. 6.112-6.115). As shown in paragraph 39 above, Nicaragua recognized that Article 5 does not require proof of significant transboundary harm to bring it into operation (*ibid.*, para. 6.114).

44. When read in conjunction with Article 3 (1), Nicaragua was obliged to consult with Costa Rica on the promotion of conservation in both its own wetland and that of Costa Rica in its planning of activities affecting the wetlands. This included the carrying out of an environmental impact assessment. To effectively consult in the implementation of Article 3 (1), Nicaragua was required at a minimum to provide a draft copy of its 2006 environmental impact study to Costa Rica and to seek its input before finalizing its plans. Nicaragua does not contest that it failed to do so, although it says that the information was publicly available, at least in summary form, through Nicaraguan press sources. This is not sufficient to constitute consultation. It therefore appears that Nicaragua is in breach of its obligations under Article 5 of the Ramsar Convention in that it failed to consult with Costa Rica on the implementation of Article 3 (1).

45. This final part of my opinion is concerned with Nicaragua's failure to conduct an adequate environmental impact assessment and to consult with Costa Rica in respect of its dredging programme as required by the Ramsar Convention. It should, however, be made clear that Costa Rica likewise breached its obligations under the Ramsar Convention by failing to conduct an environmental impact assessment for the construction of a road along the San Juan River, which forms part of Nicaragua's wetland. It is in breach of Article 3 (1) because by not carrying out an environmental impact assessment it failed to take measures to promote the conservation of the listed wetlands. Costa Rica is also in breach of Article 5 of the Ramsar Convention because it failed to consult with Nicaragua on its planned activities involving the construction of the road. Paragraph 172 of the Judgment wrongly seems to assume that the obligation to consult under Article 5 of the Ramsar Convention only comes into operation when there is proof of significant transboundary harm. As shown above, in paragraph 39, Article 5 contains no such requirement.

(*Signed*) John DUGARD.