COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

QUESTION DE LA DÉLIMITATION DU PLATEAU CONTINENTAL ENTRE LE NICARAGUA ET LA COLOMBIE AU-DELÀ DE 200 MILLES MARINS DE LA CÔTE NICARAGUAYENNE

(NICARAGUA c. COLOMBIE)

EXCEPTIONS PRÉLIMINAIRES

ARRÊT DU 17 MARS 2016

2016

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

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(NICARAGUA *v.* COLOMBIA)

PRELIMINARY OBJECTIONS

JUDGMENT OF 17 MARCH 2016

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PRELIMINARY OBJECTIONS

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JUDGMENT

Present: *President* Abraham; *Vice-President* Yusuf; *Judges* Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Gevorgian; *Judges* ad hoc Brower, Skotnikov; *Registrar* Couvreur.

In the case concerning the question of the delimitation of the continental shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan coast,

between

the Republic of Nicaragua,

represented by

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

as Agent and Counsel;

Mr. Vaughan Lowe, Q.C., member of the Bar of England and Wales, Emeritus Professor of International Law, Oxford University, member of the Institut de droit international,

Mr. Alex Oude Elferink, Director, Netherlands Institute for the Law of the Sea, Professor of International Law of the Sea, Utrecht University,

Mr. Alain Pellet, Emeritus Professor at the Université Paris Ouest, Nanterre-La Défense, former member and Chairman of the International Law Commission, member of the Institut de droit international,

Mr. Antonio Remiro Brotóns, Professor of International Law, Universidad Autónoma de Madrid, member of the Institut de droit international,

as Counsel and Advocates;

Mr. César Vega Masís, Deputy Minister for Foreign Affairs, Director of Juridical Affairs, Sovereignty and Territory, Ministry of Foreign Affairs,

Mr. Walner Molina Pérez, Juridical Adviser, Ministry of Foreign Affairs,

Mr. Julio César Saborio, Juridical Adviser, Ministry of Foreign Affairs,

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, Ph.D. Candidate, Centre de droit international de Nanterre (CEDIN), Université Paris Ouest, Nanterre-La Défense,

Ms Gimena González,

as Assistant Counsel;

Ms Sherly Noguera de Argüello, Consul General of the Republic of Nicaragua,

as Administrator,

and

the Republic of Colombia,

represented by

H.E. Ms María Angela Holguín Cuéllar, Minister for Foreign Affairs,

Hon. Ms Aury Guerrero Bowie, Governor of the Archipelago of San Andrés, Providencia and Santa Catalina,

H.E. Mr. Francisco Echeverri Lara, Vice-Minister of Multilateral Affairs, Ministry of Foreign Affairs,

as National Authorities;

H.E. Mr. Carlos Gustavo Arrieta Padilla, former Judge of the Council of State of Colombia, former Attorney General of Colombia and former Ambassador of Colombia to the Kingdom of the Netherlands,

as Agent;

H.E. Mr. Manuel José Cepeda Espinosa, former President of the Constitutional Court of Colombia, former Permanent Delegate of Colombia to UNESCO and former Ambassador of Colombia to the Swiss Confederation,

as Co-Agent;

Mr. W. Michael Reisman, McDougal Professor of International Law at Yale Law School, member of the Institut de droit international,

Mr. Rodman R. Bundy, former *avocat à la Cour d'appel de Paris*, member of the New York Bar, Eversheds LLP, Singapore,

Sir Michael Wood, K.C.M.G., member of the Bar of England and Wales, member of the International Law Commission,

Mr. Tullio Treves, member of the Institut de droit international, Senior Public International Law Consultant, Curtis, Mallet-Prevost, Colt & Mosle LLP, Milan, Professor, University of Milan,

Mr. Eduardo Valencia-Ospina, member of the International Law Commission, President of the Latin American Society of International Law,

Mr. Matthias Herdegen, Dr. h.c., Professor of International Law, Director of the Institute of International Law at the University of Bonn,

as Counsel and Advocates;

H.E. Mr. Juan José Quintana Aranguren, Ambassador of the Republic of Colombia to the Kingdom of the Netherlands, Permanent Representative of Colombia to the Organisation for the Prohibition of Chemical Weapons, former Permanent Representative of Colombia to the United Nations in Geneva,

H.E. Mr. Andelfo García González, Ambassador of the Republic of Colombia to the Kingdom of Thailand, Professor of International Law, former Deputy Minister for Foreign Affairs,

Ms Andrea Jiménez Herrera, Counsellor, Embassy of the Republic of Colombia in the Kingdom of the Netherlands,

Ms Lucía Solano Ramírez, Second Secretary, Embassy of the Republic of Colombia in the Kingdom of the Netherlands,

Mr. Andrés Villegas Jaramillo, Co-ordinator, Group of Affairs before the ICJ, Ministry of Foreign Affairs,

Mr. Giovanny Andrés Vega Barbosa, Group of Affairs before the ICJ, Ministry of Foreign Affairs,

Ms Ana María Durán López, Group of Affairs before the ICJ, Ministry of Foreign Affairs,

Mr. Camilo Alberto Gómez Niño, Group of Affairs before the ICJ, Ministry of Foreign Affairs,

Mr. Juan David Veloza Chará, Third Secretary, Group of Affairs before the ICJ, Ministry of Foreign Affairs,

as Legal Advisers;

Rear Admiral Luís Hernán Espejo, National Navy of Colombia,

CN William Pedroza, International Affairs Bureau, National Navy of Colombia,
CF Hermann León, National Maritime Authority (DIMAR), National Navy of Colombia,
Mr. Scott Edmonds, Cartographer, International Mapping,
Mr. Thomas Frogh, Cartographer, International Mapping,

as Technical Advisers;

Ms Charis Tan, Advocate and Solicitor, Singapore, member of the New York Bar, Solicitor, England and Wales, Eversheds LLP, Singapore,

Mr. Eran Sthoeger, LL.M., New York University School of Law,
Mr. Renato Raymundo Treves, Associate, Curtis, Mallet-Prevost, Colt & Mosle LLP, Milan,
Mr. Lorenzo Palestini, Ph.D. Candidate, Graduate Institute of International and Development Studies, Geneva,

as Legal Assistants,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 16 September 2013, the Government of the Republic of Nicaragua (hereinafter "Nicaragua") filed with the Registry of the Court an Application instituting proceedings against the Republic of Colombia (hereinafter "Colombia") with regard to a "dispute [which] concerns the delimitation of the boundaries between, on the one hand, the continental shelf of Nicaragua beyond the 200-nautical-mile limit from the baselines from which the breadth of the territorial sea of Nicaragua is measured, and on the other hand, the continental shelf of Colombia".

In its Application, Nicaragua seeks to found the jurisdiction of the Court on Article XXXI of the American Treaty on Pacific Settlement signed on 30 April 1948, officially designated, according to Article LX thereof, as the "Pact of Bogotá" (hereinafter referred to as such).

In addition, Nicaragua contends that the subject-matter of its Application remains within the jurisdiction of the Court established in the case concerning the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*. In particular, it maintains that the Court, in its Judgment dated 19 November 2012 (hereinafter the "2012 Judgment"), did not definitively determine the question of the delimitation of the continental shelf between Nicaragua and Colombia in the area beyond 200 nautical miles from the Nicaraguan coast, "which question was and remains before the Court".

2. In accordance with Article 40, paragraph 2, of the Statute of the Court, the Registrar immediately communicated the Application to the Government of Colombia; and, under paragraph 3 of that Article, all other States entitled to appear before the Court were notified of the Application.

3. Since the Court included upon the Bench no judge of the nationality of either of the Parties, each Party proceeded to exercise the right conferred upon it

by Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case. Nicaragua chose Mr. Leonid Skotnikov and Colombia Mr. Charles N. Brower.

4. By an Order of 9 December 2013, the Court fixed 9 December 2014 as the time-limit for the filing of the Memorial of Nicaragua and 9 December 2015 for the filing of the Counter-Memorial of Colombia.

5. On 14 August 2014, before the expiry of the time-limit for the filing of the Memorial of Nicaragua, Colombia, referring to Article 79 of the Rules of Court, raised preliminary objections to the jurisdiction of the Court and to the admissibility of the Application. For its part, Nicaragua, by letter dated 16 September 2014, though expressing its surprise that the said objections were raised four months before the expiry of the time-limit for the filing of its Memorial, requested the Court, in the event that the proceedings on the merits were suspended, to give it a sufficient period of time to present a written statement of its observations and submissions on those objections.

Consequently, by an Order of 19 September 2014, the Court, noting that, by virtue of Article 79, paragraph 5, of the Rules of Court, the proceedings on the merits were suspended, fixed 19 January 2015 as the time-limit for the presentation by Nicaragua of a written statement of its observations and submissions on the preliminary objections raised by Colombia. Nicaragua filed such a statement within the prescribed time-limit. The case thus became ready for hearing in respect of the preliminary objections.

6. Pursuant to the instructions of the Court under Article 43 of the Rules of Court, the Registrar addressed to States parties to the Pact of Bogotá the notifications provided for in Article 63, paragraph 1, of the Statute of the Court. In accordance with the provisions of Article 69, paragraph 3, of the Rules of Court, the Registrar, by letter dated 10 November 2014, moreover addressed to the Organization of American States (hereinafter the "OAS") the notification provided for in Article 34, paragraph 3, of the Statute of the Court, explaining that copies of the preliminary objections filed by Colombia and the written statement to be filed by Nicaragua would be communicated in due course. By letter dated 5 January 2015, and before having received copies of these pleadings, the Secretary-General of the OAS indicated that the Organization did not intend to submit any observations in writing within the meaning of Article 69, paragraph 3, of the Rules of Court. By letter dated 30 January 2015, the Registrar, taking note of the fact that the OAS did not intend to present any such observations, and bearing in mind the confidentiality of the pleadings, advised the Secretary-General of the OAS that, unless there was a specific reason why that Organization wished to receive copies of the written proceedings, no copies thereof would be provided.

7. Referring to Article 53, paragraph 1, of the Rules of Court, the Government of the Republic of Chile asked to be furnished with copies of the pleadings and documents annexed in the case. Having ascertained the views of the Parties in accordance with that same provision, the President of the Court decided to grant that request. The Registrar duly communicated that decision to the Government of Chile and to the Parties.

8. Pursuant to Article 53, paragraph 2, of the Rules of Court, the Court, after ascertaining the views of the Parties, decided that copies of the preliminary objections of Colombia and the written observations of Nicaragua would be made accessible to the public on the opening of the oral proceedings.

9. Public hearings on the preliminary objections raised by Colombia were held from Monday 5 October 2015 to Friday 9 October 2015, at which the Court heard the oral arguments and replies of:

For Colombia: H.E. Mr. Manuel José Cepeda Espinosa,
Sir Michael Wood,
Mr. Matthias Herdegen,
Mr. Rodman R. Bundy,
Mr. W. Michael Reisman,
Mr. Tullio Treves,
H.E. Mr. Carlos Gustavo Arrieta Padilla.

For Nicaragua: H.E. Mr. Carlos José Argüello Gómez,
Mr. Antonio Remiro Brotóns,
Mr. Alain Pellet,
Mr. Alex Oude Elferink,
Mr. Vaughan Lowe.

*

10. In the Application, the following claims were presented by Nicaragua:

> "Nicaragua requests the Court to adjudge and declare:
>
> *First:* The precise course of the maritime boundary between Nicaragua and Colombia in the areas of the continental shelf which appertain to each of them beyond the boundaries determined by the Court in its Judgment of 19 November 2012.
>
> *Second:* The principles and rules of international law that determine the rights and duties of the two States in relation to the area of overlapping continental shelf claims and the use of its resources, pending the delimitation of the maritime boundary between them beyond 200 nautical miles from Nicaragua's coast."

11. In the written pleadings, the following submissions were presented on behalf of the Parties:

On behalf of the Government of Colombia,

in the preliminary objections:

> "The Republic of Colombia requests the Court to adjudge and declare, for the reasons set forth in this Pleading,
>
> 1. That it lacks jurisdiction over the proceedings brought by Nicaragua in its Application of 16 September 2013; or, in the alternative,
>
> 2. That the claims brought against Colombia in the Application of 16 September 2013 are inadmissible."

On behalf of the Government of Nicaragua,

in the written statement of its observations and submissions on the preliminary objections raised by Colombia:

> "For the above reasons, the Republic of Nicaragua requests the Court to adjudge and declare that the Preliminary Objections submitted by the

Republic of Colombia, both in respect of the jurisdiction of the Court and of the admissibility of the case, are invalid."

12. At the oral proceedings on the preliminary objections, the following submissions were presented by the Parties:

On behalf of the Government of Colombia,

at the hearing of 7 October 2015:

"For the reasons set forth in [its] written and oral pleadings on preliminary objections, the Republic of Colombia requests the Court to adjudge and declare:

1. That it lacks jurisdiction over the proceedings brought by Nicaragua in its Application of 16 September 2013; or, in the alternative,
2. That the claims brought against Colombia in the Application of 16 September 2013 are inadmissible."

On behalf of the Government of Nicaragua,

at the hearing of 9 October 2015:

"In view of the reasons Nicaragua has presented in its written observations and during the hearings, the Republic of Nicaragua requests the Court:

— to reject the preliminary objections of the Republic of Colombia; and
— to proceed with the examination of the merits of the case."

* * *

I. Introduction

13. It is recalled that in the present proceedings, Nicaragua seeks to found the Court's jurisdiction on Article XXXI of the Pact of Bogotá. According to this provision, the parties to the Pact recognize the Court's jurisdiction as compulsory in "all disputes of a juridical nature" (see paragraph 19 below).

14. In addition, Nicaragua maintains that the subject-matter of its Application remains within the jurisdiction of the Court, as established in the case concerning the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, because in its 2012 Judgment (*I.C.J. Reports 2012 (II)*, p. 624), the Court did not definitively determine the question — of which it was seised — of the delimitation of the continental shelf between Nicaragua and Colombia in the area beyond 200 nautical miles of the Nicaraguan coast.

15. Colombia has raised five preliminary objections to the jurisdiction of the Court or to the admissibility of Nicaragua's Application. According to the first objection put forward by Colombia, the Court lacks jurisdiction *ratione temporis* under the Pact of Bogotá because the proceedings

were instituted by Nicaragua on 16 September 2013, after Colombia's notice of denunciation of the Pact became effective on 27 November 2012. In its second objection, Colombia argues that the Court does not possess "continuing jurisdiction" because it fully dealt with Nicaragua's claims in the *Territorial and Maritime Dispute* case with regard to the delimitation of the continental shelf between Nicaragua and Colombia in the area beyond 200 nautical miles of the Nicaraguan coast. Colombia contends in its third objection that the issues raised in Nicaragua's Application of 16 September 2013 were "explicitly decided" by the Court in its 2012 Judgment; the Court therefore lacks jurisdiction because Nicaragua's claim is barred by the principle of *res judicata*. In its fourth objection, Colombia submits that Nicaragua's Application is an attempt to appeal and revise the Court's 2012 Judgment, and, as such, the Court has no jurisdiction to entertain the Application. Finally, according to Colombia's fifth objection, Nicaragua's First Request (regarding the delimitation of the continental shelf between the Parties in the area beyond 200 nautical miles from Nicaragua's baselines) and Second Request (regarding the determination of the principles and rules of international law governing the rights and duties of the two States in the relevant area pending the delimitation) in its Application (see paragraph 10 above) are inadmissible. The First Request is, in Colombia's view, inadmissible because the Commission on the Limits of the Continental Shelf (hereinafter the "CLCS") has not made recommendations to Nicaragua with respect to whether, and if so how far, Nicaragua's claimed outer continental shelf extends beyond 200 nautical miles. According to Colombia, the Second Request is inadmissible because, if "the Court decides that it has no jurisdiction over the First Request or that such request is inadmissible, no delimitation issue will be pending before the Court". Colombia adds that there would be no time-frame within which to apply any decision on the Second Request, as the Court would deal with both requests simultaneously; consequently, the Second Request is also inadmissible because, even if the Court were able to entertain it, the Court's decision would be without object.

16. In its written observations and final submissions during the oral proceedings, Nicaragua requested the Court to reject Colombia's preliminary objections in their entirety (see paragraphs 11 and 12 above).

17. Since Colombia's second preliminary objection is concerned exclusively with the additional basis for jurisdiction suggested by Nicaragua, the Court will address it after it has considered the first, third and fourth objections. The fifth preliminary objection, which concerns the admissibility of Nicaragua's claims, will be considered last.

II. First Preliminary Objection

18. Colombia's first preliminary objection is that Article XXXI of the Pact of Bogotá cannot provide a basis for the jurisdiction of the Court, because Colombia had given notification of denunciation of the Pact before Nicaragua filed its Application in the present case. According to Colombia, that notification had an immediate effect upon the jurisdiction of the Court under Article XXXI, with the result that the Court lacks jurisdiction in respect of any proceedings instituted after the notification was transmitted.

19. Article XXXI of the Pact of Bogotá provides:

> "In conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice, the High Contracting Parties declare that they recognize, in relation to any other American State, the jurisdiction of the Court as compulsory *ipso facto*, without the necessity of any special agreement so long as the present Treaty is in force, in all disputes of a juridical nature that arise among them concerning:
>
> *(a)* [t]he interpretation of a treaty;
> *(b)* [a]ny question of international law;
> *(c)* [t]he existence of any fact which, if established, would constitute the breach of an international obligation;
> *(d)* [t]he nature or extent of the reparation to be made for the breach of an international obligation."

20. Denunciation of the Pact of Bogotá is governed by Article LVI, which reads:

> "The present Treaty shall remain in force indefinitely, but may be denounced upon one year's notice, at the end of which period it shall cease to be in force with respect to the State denouncing it, but shall continue in force for the remaining signatories. The denunciation shall be addressed to the Pan American Union, which shall transmit it to the other Contracting Parties.
>
> The denunciation shall have no effect with respect to pending procedures initiated prior to the transmission of the particular notification."

21. On 27 November 2012, Colombia gave notice of denunciation by means of a diplomatic Note from the Minister for Foreign Affairs to the Secretary-General of the OAS as head of the General Secretariat of the OAS (the successor to the Pan American Union). That notice stated that Colombia's denunciation "takes effect as of today with regard to procedures that are initiated after the present notice, in conformity with [the] second paragraph of Article LVI".

22. The Application in the present case was submitted to the Court after the transmission of Colombia's notification of denunciation but before the one-year period referred to in the first paragraph of Article LVI had elapsed.

* *

23. Colombia maintains that Article LVI of the Pact of Bogotá should be interpreted in accordance with the customary international law rules on treaty interpretation enshrined in Articles 31 to 33 of the 1969 Vienna Convention on the Law of Treaties (hereinafter, the "Vienna Convention"). Colombia relies, in particular, on the general rule of interpretation in Article 31 of the Vienna Convention, which requires that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". According to Colombia, the application of the general rule of treaty interpretation must lead to the conclusion that procedures initiated after transmission of a notification of denunciation are affected by the denunciation.

24. Colombia contends that the natural implication of the express provision in the second paragraph of Article LVI of the Pact that denunciation shall have no effect on pending procedures initiated *before* the transmission of a notification is that denunciation is effective with regard to procedures initiated *after* that date. Such effect must follow, according to Colombia, from the application to the second paragraph of Article LVI of an *a contrario* interpretation of the kind applied by the Court in its Judgment of 16 April 2013 in the case concerning the *Frontier Dispute (Burkina Faso/Niger)* (*I.C.J. Reports 2013*, pp. 81-82, paras. 87-88). Moreover, to adopt a different interpretation would deny *effet utile* to the second paragraph and thus run counter to the principle that all of the words in a treaty should be given effect. Colombia refutes the suggestion that its interpretation of the second paragraph of Article LVI would deny *effet utile* to the first paragraph of that provision. Even though Colombia accepts that its interpretation would mean that none of the different procedures provided for in Chapters Two to Five of the Pact could be initiated by, or against, a State which had given notification of denunciation during the year that the treaty remained in force in accordance with the first paragraph of Article LVI, it maintains that important substantive obligations contained in the other chapters of the Pact would nevertheless remain in force during the one-year period, so that the first paragraph of Article LVI would have a clear effect.

25. Colombia argues that its interpretation of Article LVI is confirmed by the fact that if the parties to the Pact had wanted to provide that denunciation would not affect any procedures initiated during the one-year period of notice, they could easily have said so expressly, namely by adopting a wording similar to provisions in other treaties, such as Article 58, paragraph 2, of the 1950 European Convention on Human Rights, or Article 40, paragraph 2, of the 1972 European Convention on State Immunity. Colombia also observes that the function and language of Article XXXI are very similar to those of Article 36, paragraph 2, of the Statute of the Court and that States generally reserve the right to withdraw their declarations under Article 36, paragraph 2, without notice.

26. Finally, Colombia maintains that its interpretation is "also consistent with the State practice of the parties to the Pact" and the *travaux*

préparatoires. With regard to the first argument, it points to the absence of any reaction, including from Nicaragua, to Colombia's notice of denunciation, notwithstanding the clear statement therein that the denunciation was to take effect as of the date of the notice "with regard to procedures . . . initiated after the present notice". It also emphasizes that there was no reaction from other parties to the Pact when El Salvador gave notice of denunciation in 1973, notwithstanding that El Salvador's notification of denunciation stated that the denunciation "will begin to take effect as of today". With regard to the *travaux préparatoires*, Colombia contends that the first paragraph of Article LVI was taken from Article 9 of the 1929 General Treaty of Inter-American Arbitration (and the parallel provision in Article 16 of the 1929 General Convention of Inter-American Conciliation). Colombia maintains that what became the second paragraph of Article LVI was added as the result of an initiative taken by the United States of America in 1938 which was accepted by the Inter-American Juridical Committee in 1947 and incorporated into the text which was signed in 1948. According to Colombia, this history shows that the parties to the Pact of Bogotá intended to incorporate a provision which limited the effect of the first paragraph of Article LVI.

*

27. Nicaragua contends that the jurisdiction of the Court is determined by Article XXXI of the Pact of Bogotá, according to which Colombia and Nicaragua had each recognized the jurisdiction of the Court "so long as the present Treaty is in force". How long the treaty remains in force is determined by the first paragraph of Article LVI, which provides that the Pact remains in force for a State which has given notification of denunciation for one year from the date of that notification. Since the date on which the jurisdiction of the Court has to be established is that on which the Application is filed, and since Nicaragua's Application was filed less than one year after Colombia gave notification of its denunciation of the Pact, it follows — according to Nicaragua — that the Court has jurisdiction in the present case. Nicaragua maintains that nothing in the second paragraph of Article LVI runs counter to that conclusion and no inference should be drawn from the silence of that paragraph regarding procedures commenced between the transmission of the notification of denunciation and the date on which the treaty is terminated for the denouncing State; in any event, such inference could not prevail over the express language of Article XXXI and the first paragraph of Article LVI.

28. That conclusion is reinforced, in Nicaragua's view, by consideration of the object and purpose of the Pact. Nicaragua recalls that, according to the Court, "[i]t is . . . quite clear from the Pact that the purpose of the American States in drafting it was to reinforce their mutual commitments with regard to judicial settlement" (*Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 89, para. 46). Colombia's interpretation of the sec-

ond paragraph of Article LVI would, Nicaragua maintains, deprive of all meaning the express provision of Article XXXI that the parties to the Pact accept the jurisdiction of the Court so long as the Pact is in force between them, as well as the express provision of Article LVI that the Pact remains in force for one year after notification of denunciation. According to Nicaragua, it would also render the purpose of the Pact — as defined by the Court — unachievable during the one-year notice period.

29. Nicaragua disputes Colombia's argument that the Colombian interpretation of the second paragraph of Article LVI would still leave important obligations in place during the one-year period of notice. According to Nicaragua, the Colombian interpretation would remove from the effect of the first paragraph of Article LVI all of the procedures for good offices and mediation (Chapter Two of the Pact), investigation and conciliation (Chapter Three), judicial settlement (Chapter Four) and arbitration (Chapter Five), which together comprise forty-one of the sixty Articles of the Pact. Of the remaining provisions, several — such as Article LII on ratification of the Pact and Article LIV on adherence to the Pact — are provisions which have entirely served their purpose and would fulfil no function during the one-year period of notice, while others — such as Articles III to VI — are inextricably linked to the procedures in Chapters Two to Five and impose no obligations independent of those procedures. Colombia's interpretation of Article LVI would thus leave only six of the Pact's sixty Articles with any function during the period of one year prescribed by the first paragraph of Article LVI. Nicaragua also notes that the title of Chapter One of the Pact is "General Obligation to Settle Disputes by Pacific Means" and contends that it would be strange to interpret Article LVI of the Pact as maintaining this chapter in force between a State which had given notice of denunciation and the other parties to the Pact, but not the chapters containing the very means to which Chapter One refers.

30. Finally, Nicaragua denies that the practice of the parties to the Pact of Bogotá or the *travaux préparatoires* support Colombia's interpretation. So far as practice is concerned, Nicaragua maintains that nothing can be read into the absence of a response to the notices of denunciation by El Salvador and Colombia as there was no obligation on other parties to the Pact to respond. As for the *travaux préparatoires*, they suggest no reason why what became the second paragraph of Article LVI was included or what it was intended to mean. Most importantly, the *travaux préparatoires* contain nothing which suggests that the parties to the Pact intended, by the addition of what became the second paragraph, to restrict the scope of the first paragraph of Article LVI. In Nicaragua's view, the second paragraph of Article LVI, while not necessary, serves a useful purpose in making clear that denunciation does not affect pending procedures.

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31. The Court recalls that the date at which its jurisdiction has to be established is the date on which the application is filed with the Court (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, pp. 437-438, paras. 79-80; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 613, para. 26). One consequence of this rule is that "the removal, after an application has been filed, of an element on which the Court's jurisdiction is dependent does not and cannot have any retroactive effect" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 438, para. 80). Thus, even if the treaty provision by which jurisdiction is conferred on the Court ceases to be in force between the applicant and the respondent, or either party's declaration under Article 36, paragraph 2, of the Statute of the Court expires or is withdrawn, after the application has been filed, that fact does not deprive the Court of jurisdiction. As the Court held, in the *Nottebohm* case:

> "When an Application is filed at a time when the law in force between the parties entails the compulsory jurisdiction of the Court . . . the filing of the Application is merely the condition required to enable the clause of compulsory jurisdiction to produce its effects in respect of the claim advanced in the Application. Once this condition has been satisfied, the Court must deal with the claim; it has jurisdiction to deal with all its aspects, whether they relate to jurisdiction, to admissibility or to the merits. An extrinsic fact such as the subsequent lapse of the Declaration, by reason of the expiry of the period or by denunciation, cannot deprive the Court of the jurisdiction already established." (*Nottebohm (Liechtenstein* v. *Guatemala), Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 123.)

32. By Article XXXI, the parties to the Pact of Bogotá recognize as compulsory the jurisdiction of the Court, "so long as the present Treaty is in force". The first paragraph of Article LVI provides that, following the denunciation of the Pact by a State party, the Pact shall remain in force between the denouncing State and the other parties for a period of one year following the notification of denunciation. It is not disputed that, if these provisions stood alone, they would be sufficient to confer jurisdiction in the present case. The Pact was still in force between Colombia and Nicaragua on the date that the Application was filed and, in accordance with the rule considered in paragraph 31 above, the fact that the Pact subsequently ceased to be in force between them would not affect that jurisdiction. The only question raised by Colombia's first preliminary objection, therefore, is whether the second paragraph of Article LVI so alters what would otherwise have been the effect of the first paragraph as to require the conclusion that the Court lacks jurisdiction in respect of the

proceedings, notwithstanding that those proceedings were instituted while the Pact was still in force between Nicaragua and Colombia.

33. That question has to be answered by the application to the relevant provisions of the Pact of Bogotá of the rules on treaty interpretation enshrined in Articles 31 to 33 of the Vienna Convention. Although that Convention is not in force between the Parties and is not, in any event, applicable to treaties concluded before it entered into force, such as the Pact of Bogotá, it is well established that Articles 31 to 33 of the Convention reflect rules of customary international law (*Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, p. 48, para. 83; *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 502, para. 101; *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 812, para. 23; *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, pp. 21-22, para. 41; *Arbitral Award of 31 July 1989 (Guinea-Bissau* v. *Senegal), Judgment, I.C.J. Reports 1991*, p. 70, para. 48). The Parties agree that these rules are applicable. Article 31, which states the general rule of interpretation, requires that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

34. Colombia's argument regarding the interpretation of the second paragraph of Article LVI is based not upon the ordinary meaning of the terms used in that provision but upon an inference which might be drawn from what that paragraph does not say. That paragraph is silent with regard to procedures initiated after the transmission of the notification of denunciation but before the expiration of the one-year period referred to in the first paragraph of Article LVI. Colombia asks the Court to draw from that silence the inference that the Court lacks jurisdiction in respect of proceedings initiated after notification of denunciation has been given. According to Colombia, that inference should be drawn even though the Pact remains in force for the State making that denunciation, because the one-year period of notice stipulated by the first paragraph of Article LVI has not yet elapsed. That inference is said to follow from an *a contrario* reading of the provision.

35. An *a contrario* reading of a treaty provision — by which the fact that the provision expressly provides for one category of situations is said to justify the inference that other comparable categories are excluded — has been employed by both the present Court (see, e.g., *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Application by Honduras for Permission to Intervene, Judgment, I.C.J. Reports 2011 (II)*, p. 432, para. 29) and the Permanent Court of International Justice (*S.S. "Wimbledon", Judgments, 1923, P.C.I.J., Series A, No. 1*, pp. 23-24). Such an interpretation is only warranted, however, when it is appropriate in light of the text of all the provisions concerned, their context and the object and purpose of the treaty. Moreover, even where an *a contrario* interpretation is justified, it is important to determine precisely what inference its application requires in any given case.

36. The second paragraph of Article LVI states that "[t]he denunciation shall have no effect with respect to pending procedures initiated prior to the transmission of the particular notification". However, it is not the denunciation *per se* that is capable of having an effect upon the jurisdiction of the Court under Article XXXI of the Pact, but the termination of the treaty (as between the denouncing State and the other parties) which results from the denunciation. That follows both from the terms of Article XXXI, which provides that the parties to the Pact recognize the jurisdiction of the Court as compulsory *inter se* "so long as the present Treaty is in force", and from the ordinary meaning of the words used in Article LVI. The first paragraph of Article LVI provides that the treaty may be terminated by denunciation, but that termination will occur only after a period of one year from the notification of denunciation. It is, therefore, this first paragraph which determines the effects of denunciation. The second paragraph of Article LVI confirms that procedures instituted before the transmission of the notification of denunciation can continue irrespective of the denunciation and thus that their continuation is ensured irrespective of the provisions of the first paragraph on the effects of denunciation as a whole.

37. Colombia's argument is that if one applies an *a contrario* interpretation to the second paragraph of Article LVI, then it follows from the statement that "denunciation shall have no effect with respect to pending procedures initiated prior to the transmission of the particular notification [of denunciation]" that denunciation does have an effect upon procedures instituted after the transmission of that notification. Colombia maintains that the effect is that any procedures instituted after that date fall altogether outside the treaty. In the case of proceedings at the Court commenced after that date, Colombia maintains that they would, therefore, fall outside the jurisdiction conferred by Article XXXI. However, such an interpretation runs counter to the language of Article XXXI, which provides that the parties to the Pact recognize the jurisdiction of the Court as compulsory "so long as the present Treaty is in force".

The second paragraph of Article LVI is open to a different interpretation, which is compatible with the language of Article XXXI. According to this interpretation, whereas proceedings instituted before transmission of notification of denunciation can continue in any event and are thus not subject to the first paragraph of Article LVI, the effect of denunciation on proceedings instituted after that date is governed by the first paragraph. Since the first paragraph provides that denunciation terminates the treaty for the denouncing State only after a period of one year has elapsed, proceedings instituted during that year are instituted while the Pact is still in force. They are thus within the scope of the jurisdiction conferred by Article XXXI.

38. Moreover, in accordance with the rule of interpretation enshrined in Article 31, paragraph 1, of the Vienna Convention, the text of the second paragraph of Article LVI has to be examined in its context. Colombia admits (see paragraph 28 above) that its reading of the second paragraph has the effect that, during the one-year period which the first

paragraph of Article LVI establishes between the notification of denunciation and the termination of the treaty for the denouncing State, none of the procedures for settlement of disputes established by Chapters Two to Five of the Pact could be invoked as between a denouncing State and any other party to the Pact. According to Colombia, only the provisions of the other Chapters of the Pact would remain in force between a denouncing State and the other parties, during the one-year period of notice. However, Chapters Two to Five contain all of the provisions of the Pact dealing with the different procedures for the peaceful settlement of disputes and, as the Court will explain, play a central role within the structure of obligations laid down by the Pact. The result of Colombia's proposed interpretation of the second paragraph of Article LVI would be that, during the year following notification of denunciation, most of the Articles of the Pact, containing its most important provisions, would not apply between the denouncing State and the other parties. Such a result is difficult to reconcile with the express terms of the first paragraph of Article LVI, which provides that "the present Treaty" shall remain in force during the one-year period without distinguishing between different parts of the Pact as Colombia seeks to do.

39. It is also necessary to consider whether Colombia's interpretation is consistent with the object and purpose of the Pact of Bogotá. That object and purpose are suggested by the full title of the Pact, namely the American Treaty on Pacific Settlement. The preamble indicates that the Pact was adopted in fulfilment of Article 23 of the Charter of the OAS. Article 23 (now Article 27) provides that:

> "A special treaty will establish adequate means for the settlement of disputes and will determine pertinent procedures for each peaceful means such that no dispute between American States may remain without definitive settlement within a reasonable period of time."

That emphasis on establishing means for the peaceful settlement of disputes as the object and purpose of the Pact is reinforced by the provisions of Chapter One of the Pact, which is entitled "General Obligation to Settle Disputes by Pacific Means". Article I provides:

> "The High Contracting Parties, solemnly reaffirming their commitments made in earlier international conventions and declarations, as well as in the Charter of the United Nations, agree to refrain from the threat or the use of force, or from any other means of coercion for the settlement of their controversies, and to have recourse at all times to pacific procedures."

Article II provides:

> "The High Contracting Parties recognize the obligation to settle international controversies by regional pacific procedures before referring them to the Security Council of the United Nations.

> Consequently, in the event that a controversy arises between two or more signatory States which, in the opinion of the parties, cannot be settled by direct negotiations through the usual diplomatic channels, the parties bind themselves to use the procedures established in the present Treaty, in the manner and under the conditions provided for in the following articles, or, alternatively, such special procedures as, in their opinion, will permit them to arrive at a solution."

Finally, the Court recalls that, in its 1988 Judgment in the *Armed Actions* case, quoted at paragraph 28 above, it held that "the purpose of the American States in drafting [the Pact] was to reinforce their mutual commitments with regard to judicial settlement" (*Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 89, para. 46).

40. These factors make clear that the object and purpose of the Pact is to further the peaceful settlement of disputes through the procedures provided for in the Pact. Although Colombia argues that the reference to "regional . . . procedures" in the first paragraph of Article II is not confined to the procedures set out in the Pact, Article II has to be interpreted as a whole. It is clear from the use of the word "consequently" at the beginning of the second paragraph of Article II that the obligation to resort to regional procedures, which the parties "recognize" in the first paragraph, is to be given effect by employing the procedures laid down in Chapters Two to Five of the Pact. Colombia maintains that its interpretation of the second paragraph of Article LVI would leave Article II — which contains one of the core obligations in the Pact — in effect during the one-year period. The Court observes, however, that Colombia's interpretation would deprive both the denouncing State and, to the extent that they have a controversy with the denouncing State, all other parties of access to the very procedures designed to give effect to that obligation to resort to regional procedures. As the Court has already explained (see paragraph 34 above), that interpretation is said to follow not from the express terms of the second paragraph of Article LVI but from an inference which, according to Colombia, must be drawn from the silence of that paragraph regarding proceedings instituted during the one-year period. The Court sees no basis on which to draw from that silence an inference that would not be consistent with the object and purpose of the Pact of Bogotá.

41. An essential part of Colombia's argument is that its interpretation is necessary to give *effet utile* to the second paragraph of Article LVI. Colombia maintains that if the effect of the second paragraph is confined to ensuring that procedures commenced before the date of transmission of the notification of denunciation can continue after that date, then the provision is superfluous. The rule that events occurring after the date on which an application is filed do not deprive the Court of jurisdiction which existed on that date (see paragraph 31 above) would ensure, in any

event, that denunciation of the Pact would not affect procedures already instituted prior to denunciation.

The Court has recognized that, in general, the interpretation of a treaty should seek to give effect to every term in that treaty and that no provision should be interpreted in a way that renders it devoid of purport or effect (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, pp. 125-126, para. 133; *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgments, I.C.J. Reports 1949*, p. 24). There are occasions, however, when the parties to a treaty adopt a provision for the avoidance of doubt even if such a provision is not strictly necessary. For example, Article LVIII of the Pact of Bogotá provides that certain earlier Inter-American treaties shall cease to have effect with respect to parties to the Pact as soon as the Pact comes into force. Article LIX then provides that the provisions of Article LVIII "shall not apply to procedures already initiated or agreed upon" in accordance with any of those earlier treaties. While neither Party made reference to these provisions, if one applies to them the approach suggested by Colombia with regard to Article LVI, then Article LIX must be considered unnecessary. It appears that the parties to the Pact of Bogotá considered that it was desirable to include Article LIX out of an abundance of caution. The fact that the parties to the Pact considered that including Article LIX served a useful purpose even though it was not strictly necessary undermines Colombia's argument that the similar provision in the second paragraph of Article LVI could not have been included for that reason.

42. The Court also considers that, in seeking to determine the meaning of the second paragraph of Article LVI, it should not adopt an interpretation which renders the first paragraph of that Article devoid of purport or effect. The first paragraph provides that the Pact shall remain in force for a period of one year following notification of denunciation. Colombia's interpretation would, however, confine the effect of that provision to Chapters One, Six, Seven, and Eight. Chapter Eight contains the formal provisions on such matters as ratification, entry into force and registration and imposes no obligations during the period following a notification of denunciation. Chapter Seven (entitled "Advisory Opinions") contains only one Article and is purely permissive. Chapter Six also contains one provision, which requires only that before a party resorts to the Security Council regarding the failure of another party to comply with a judgment of the Court or an arbitration award, it shall first propose a Meeting of Consultation of Ministers of Foreign Affairs of the parties.

Chapter One ("General Obligation to Settle Disputes by Pacific Means") contains eight Articles which impose important obligations upon the parties but, as has already been shown (see paragraph 40 above), Article II is concerned with the obligation to use the procedures in the Pact (none of which would be available during the one-year period if Colombia's interpretation were accepted), while Articles III to VI have no

effect independent of the procedures in Chapters Two to Five. That leaves only three provisions. Article I provides that the Parties,

> "solemnly reaffirming their commitments made in earlier international conventions and declarations, as well as in the Charter of the United Nations, agree to refrain from the threat of the use of force, or from any other means of coercion for the settlement of their controversies, and to have recourse at all times to pacific procedures".

Article VII binds the parties not to exercise diplomatic protection in respect of their nationals when those nationals have had available the means to place their cases before competent domestic courts. Article VIII provides that recourse to pacific means shall not preclude recourse to self-defence in the case of an armed attack.

Colombia's interpretation of the second paragraph of Article LVI would thus confine the application of the first paragraph of Article LVI to these few provisions.

43. Colombia, basing itself on the language employed in other treaties, argues that, had the parties to the Pact of Bogotá wished to provide that proceedings instituted at any time before the expiry of the one-year period stipulated by the first paragraph of Article LVI would be unaffected, they could easily have made express provision to that effect. Conversely, however, had the parties to the Pact intended the result for which Colombia contends, they could easily have made express provision to that effect — but they chose not to do so. The comparison with those other treaties is not, therefore, a persuasive argument in favour of Colombia's interpretation of the second paragraph of Article LVI. Nor is the fact that many declarations made under Article 36, paragraph 2, of the Statute of the Court are terminable without notice. Article 36, paragraph 2, of the Statute and Article XXXI of the Pact of Bogotá both provide for the compulsory jurisdiction of the Court. However, Article 36, paragraph 2, of the Statute confers jurisdiction only between States which have made a declaration recognizing that jurisdiction. In its declaration under Article 36, paragraph 2, a State is free to provide that that declaration may be withdrawn with immediate effect. By contrast, Article XXXI of the Pact of Bogotá is a treaty commitment, not dependent upon unilateral declarations for its implementation (*Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 84, para. 32). The conditions under which a State party to the Pact may withdraw from that commitment are determined by the relevant provisions of the Pact. The fact that many States choose to frame their declarations under Article 36, paragraph 2, in such a way that they may terminate their acceptance of the jurisdiction of the Court with immediate effect thus sheds no light on the interpretation of the provisions of the Pact.

44. The Court has noted Colombia's argument (see paragraph 26 above) regarding the State practice in the form of the denunciation of the Pact by El Salvador in 1973 and Colombia itself in 2012, together with what Colombia describes as the absence of any reaction to the notification of those denunciations.

The two notifications of denunciation are not in the same terms. While El Salvador's notification stated that its denunciation "will begin to take effect as of today", there is no indication of what effect was to follow immediately upon the denunciation. Since the first paragraph of Article LVI requires one year's notice in order to terminate the treaty, any notification of denunciation begins to take effect immediately in the sense that the transmission of that notification causes the one-year period to begin. Accordingly, neither El Salvador's notification, nor the absence of any comment thereon by the other parties to the Pact, sheds any light on the question currently before the Court.

Colombia's own notification of denunciation specified that "[t]he denunciation [of the Pact] takes effect as of today with regard to procedures that are initiated after the present notice, in conformity with the second paragraph of Article LVI". Nevertheless, the Court is unable to read into the absence of any objection on the part of the other parties to the Pact with respect to that notification an agreement, within the meaning of Article 31 (3) *(b)* of the Vienna Convention, regarding Colombia's interpretation of Article LVI. Nor does the Court consider that the absence of any comment by Nicaragua amounted to acquiescence. The fact that Nicaragua commenced proceedings in the case concerning *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)* and in the present case within one year of the transmission of Colombia's notification of denunciation reinforces this conclusion.

45. Turning to Colombia's argument regarding the *travaux préparatoires*, the Court considers that the *travaux préparatoires* of the Pact demonstrate that what became the first paragraph of Article LVI was taken over from Article 9 of the 1929 General Treaty of Inter-American Arbitration and Article 16 of the 1929 General Convention of Inter-American Conciliation. The second paragraph of Article LVI originated with a proposal from the United States in 1938 which had no counterpart in the 1929 Treaties. However, the *travaux préparatoires* give no indication as to the precise purpose behind the addition of what became the second paragraph of Article LVI. The Court also notes that, if Colombia's view as to the significance of the second paragraph were correct, then the insertion of the new paragraph would have operated to restrict the effect of the provision which, even before the United States made its proposal, the parties were contemplating carrying over from the 1929 Treaty. Yet there is no indication anywhere in the *travaux préparatoires* that anyone considered that incorporating this new paragraph would bring about such an important change.

46. For all of the foregoing reasons the Court considers that Colombia's interpretation of Article LVI cannot be accepted. Taking Article LVI as a whole, and in light of its context and the object and purpose of the

Pact, the Court concludes that Article XXXI conferring jurisdiction upon the Court remained in force between the Parties on the date that the Application in the present case was filed. The subsequent termination of the Pact as between Nicaragua and Colombia does not affect the jurisdiction which existed on the date that the proceedings were instituted. Colombia's first preliminary objection must therefore be rejected.

III. Third Preliminary Objection

47. In its third preliminary objection, Colombia contests the jurisdiction of the Court on the ground that the Court has already adjudicated on Nicaragua's requests in its 2012 Judgment. Colombia therefore argues that the principle of *res judicata* bars the Court from examining Nicaragua's requests.

48. The Court first observes that it is not bound by the characterization of a preliminary objection made by the party raising it, and may, if necessary, recharacterize such an objection (*Interhandel (Switzerland* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1959*, p. 26). The Court considers that Colombia's third preliminary objection has the characteristics of an objection to admissibility, which "consists in the contention that there exists a legal reason, even when there is jurisdiction, why the Court should decline to hear the case, or more usually, a specific claim therein" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 456, para. 120; in the same sense, see *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*, p. 177, para. 29). The Court will deal with Colombia's third preliminary objection as an objection to admissibility.

49. The Court will now examine the *res judicata* principle and its application to subparagraph 3 of the operative clause of the 2012 Judgment, in which the Court found "that it cannot uphold the Republic of Nicaragua's claim contained in its final submission I (3)" (*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 719). In its final submission I (3), Nicaragua requested the Court to adjudge and declare that:

> "[t]he appropriate form of delimitation, within the geographical and legal framework constituted by the mainland coasts of Nicaragua and Colombia, is a continental shelf boundary dividing by equal parts the overlapping entitlements to a continental shelf of both Parties" (*ibid.*, p. 636, para. 17).

The Court described this submission as a request "to define 'a continental shelf boundary dividing by equal parts the overlapping entitlements to a continental shelf of both Parties'" (*ibid.*, p. 664, para. 106).

50. Colombia considers that Nicaragua's First Request, in its Application of 16 September 2013 instituting the present proceedings, "is no more than a reincarnation of Nicaragua's claim contained in its final submission I (3)" of 2012, in so far as it asks the Court to declare "[t]he precise course of the maritime boundary between Nicaragua and Colombia in the areas of the continental shelf which appertain to each of them beyond the boundaries determined by the Court in its Judgment of 19 November 2012".

51. Colombia adds that the Court, in its 2012 Judgment, decided that the claim by Nicaragua contained in final submission I (3) was admissible, but it did not uphold it on the merits. That fact is said to prevent the Court, by virtue of *res judicata*, from entertaining it in the present case.

52. Colombia argues that the fate of the Second Request contained in the Application of 16 September 2013 is entirely linked to that of the first. In its Second Request, Nicaragua asks the Court to adjudge and declare

> "[t]he principles and rules of international law that determine the rights and duties of the two States in relation to the area of overlapping continental shelf claims and the use of its resources, pending the delimitation of the maritime boundary between them beyond 200 nautical miles from Nicaragua's coast".

53. The question as to the effect of the *res judicata* principle relates to the admissibility of Nicaragua's First Request. The Second Request forms the subject, as such, of the fifth objection by Colombia, so the Court will examine it under that heading.

54. Even if their views converge on the elements that constitute the principle of *res judicata*, the Parties disagree on the meaning of the decision adopted by the Court in subparagraph 3 of the operative clause of its 2012 Judgment, and hence on what falls within the scope of *res judicata* in that decision.

1. The Res Judicata *Principle*

55. The Parties agree that the principle of *res judicata* requires an identity between the parties *(personae)*, the object *(petitum)* and the legal ground *(causa petendi)*. They likewise accept that this principle is reflected in Articles 59 and 60 of the Statute of the Court. These Articles provide, respectively, that "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case", and that "[t]he judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party." As the Court underlined in its Judgment on the preliminary objections in the case concerning the *Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the* Land

and Maritime Boundary between Cameroon and Nigeria (Cameroon *v.* Nigeria), Preliminary Objections *(Nigeria* v. *Cameroon)*, "[t]he language and structure of Article 60 reflect the primacy of the principle of *res judicata*" (*I.C.J. Reports 1999 (I)*, p. 36, para. 12).

56. For Colombia, there must be an identity between the parties, the object and the legal ground in order for the principle of *res judicata* to apply. Colombia adds that it is not possible for the Court, having found in the operative clause of the 2012 Judgment, which possesses the force of *res judicata*, that it "cannot uphold" Nicaragua's claim for lack of evidence, then to decide in a subsequent judgment to uphold an identical claim.

57. Nicaragua considers that an identity between the *personae*, the *petitum* and the *causa petendi*, though necessary for the application of the *res judicata* principle, is not sufficient. It is also necessary that the question raised in a subsequent case should previously have been disposed of by the Court finally and definitively. Relying on the Judgment rendered on the merits in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Nicaragua argues that no force of *res judicata* can be attached to a matter which has not been decided by the Court. Consequently, Nicaragua considers that, in order to determine whether the 2012 Judgment has the force of *res judicata* in respect of the First Request by Nicaragua in the present case, the central question is whether the Court, in that Judgment, made a decision on the delimitation of the continental shelf beyond 200 nautical miles from the Nicaraguan coast.

For Nicaragua, it is not sufficient to demonstrate that, in the case concerning the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, the Parties developed arguments similar to those on which its First Request is founded in these proceedings; it is also necessary to determine what the Court actually decided on the basis of those arguments.

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58. The Court recalls that the principle of *res judicata*, as reflected in Articles 59 and 60 of its Statute, is a general principle of law which protects, at the same time, the judicial function of a court or tribunal and the parties to a case which has led to a judgment that is final and without appeal (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, pp. 90-91, para. 116). This principle establishes the finality of the decision adopted in a particular case (*ibid.*, p. 90, para. 115; *Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the* Land and Maritime Boundary between Cameroon and Nigeria (Cameroon *v.* Nigeria), Preliminary Objections *(Nigeria* v. *Cameroon), Judgment, I.C.J. Reports 1999 (I)*, p. 36, para. 12; *Corfu Channel (United Kingdom* v. *Albania), Assessment of Amount of Compensation, Judgment, I.C.J. Reports 1949*, p. 248).

59. It is not sufficient, for the application of *res judicata*, to identify the case at issue, characterized by the same parties, object and legal ground; it is also necessary to ascertain the content of the decision, the finality of which is to be guaranteed. The Court cannot be satisfied merely by an identity between requests successively submitted to it by the same parties; it must determine whether and to what extent the first claim has already been definitively settled.

60. The Court underlined in its Judgment of 26 February 2007, rendered in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, that "[i]f a matter has not in fact been determined, expressly or by necessary implication, then no force of *res judicata* attaches to it; and a general finding may have to be read in context in order to ascertain whether a particular matter is or is not contained in it" (*I.C.J. Reports 2007 (I)*, p. 95, para. 126).

61. The decision of the Court is contained in the operative clause of the judgment. However, in order to ascertain what is covered by *res judicata*, it may be necessary to determine the meaning of the operative clause by reference to the reasoning set out in the judgment in question. The Court is faced with such a situation in the present case, since the Parties disagree as to the content and scope of the decision that was adopted in subparagraph 3 of the operative clause of the 2012 Judgment.

2. The Decision Adopted by the Court in Its Judgment of 19 November 2012

62. The Parties, in both their written and oral pleadings, have presented divergent readings of the decision adopted in subparagraph 3 of the operative clause of the 2012 Judgment, and of the reasons underpinning it. They draw opposing conclusions as to precisely what that decision covers and which issues the Court has definitively settled.

63. Colombia attempts to show, in essence, that the grounds of Nicaragua's First Request, its *petitum* and *causa petendi*, had already been put forward in the case concerning the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*. Colombia contends that, having tried and failed to meet its burden of proof in that case, Nicaragua is asking for "another chance" in the present proceedings. Colombia further argues that, since the Court did not uphold the arguments made by Nicaragua in its 2012 Judgment, it is barred by the effect of the *res judicata* principle from dealing with Nicaragua's Application in the present case.

64. Colombia contends that, in the written and oral proceedings which preceded the 2012 Judgment, Nicaragua developed arguments identical to those that it puts forward in the present case. Colombia maintains that these arguments had already been presented in the Reply, where Nicaragua had claimed an extended continental shelf on the basis of Article 76 of the United Nations Convention on the Law of the Sea (UNCLOS) by

virtue of geological and geomorphological criteria. Colombia adds that, in reliance on the Preliminary Information provided by it to the CLCS, Nicaragua had then proceeded to claim an equal share of the areas in which the continental shelves of the two States overlapped.

65. Colombia stresses that, during the oral proceedings which preceded the 2012 Judgment, it disputed the "tentative data" submitted by Nicaragua, which it contended were incapable of supporting Nicaragua's position. According to Colombia, those data did not satisfy the criteria required by the CLCS, as detailed in its Guidelines.

66. In Colombia's view, Nicaragua had not demonstrated, as it was obliged to do, that its continental margin extended sufficiently far to overlap with the continental shelf that Colombia was entitled to claim up to 200 nautical miles from its mainland coast. Colombia maintains that the Court, having found Nicaragua's claim to be admissible, settled it on the merits in 2012 by deciding not to uphold it. According to Colombia, that decision, whereby the Court effected a full delimitation of the maritime boundary between the Parties, was both expressly and by necessary implication a final one. Hence, when the Court held that it "[was] not in a position to delimit the continental shelf boundary between Nicaragua and Colombia" (paragraph 129 of the 2012 Judgment), what it meant was that its examination of the facts and arguments presented by Nicaragua impelled it to reject the latter's claim.

67. Colombia furthermore cites the reasoning of the 2012 Judgment in order to show that the Court's decision "was the culmination of a process of reasoning".

Colombia points to paragraph 126 of the Judgment, which, in its view, sets out the applicable law and makes it clear that Nicaragua is bound by its obligations under Article 76 of UNCLOS. Colombia further relies on paragraph 129, in which it claims the Court decided that Nicaragua had not established that it had a continental margin extending far enough to overlap with the continental shelf that Colombia was entitled to claim. Colombia concludes from its reading of this part of the reasoning that the Court did indeed settle the question submitted to it in the present case.

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68. For its part, Nicaragua contends that the Court's decision, in subparagraph 3 of the operative clause of the 2012 Judgment, not to uphold its claim did not amount to a rejection of that claim on the merits. The Court expressly refused to rule on the issue because Nicaragua had not completed its submission to the CLCS.

69. Citing the reasoning of the 2012 Judgment, Nicaragua maintains that the Court limited its examination to the question of whether it was "in a position to determine 'a continental shelf boundary dividing by equal parts the overlapping entitlements to a continental shelf of both Parties'" (paragraph 113 of the 2012 Judgment). Nicaragua argues that the Court concluded that it was not in a position to delimit each Party's

continental shelf, as a result of its finding in paragraph 127 of the Judgment's reasoning, that Nicaragua had only provided the CLCS with "Preliminary Information". Thus, the Court had not been in a position to delimit, because Nicaragua had failed to establish that its continental margin extended far enough to create an overlap of entitlements of the Parties (paragraph 129 of the 2012 Judgment).

70. Nicaragua considers that, on 24 June 2013, it discharged the procedural obligation imposed upon it under Article 76, paragraph 8, of UNCLOS to provide the CLCS with information on the limits of its continental shelf beyond 200 nautical miles, and that the Court now has all the necessary information to carry out the delimitation and settle the dispute.

71. Nicaragua admits that the phrase "cannot uphold" might appear "ambiguous" from a reading of subparagraph 3 of the operative clause alone, but it contends that such ambiguity is dispelled if one looks at the reasoning of the decision. Moreover, Nicaragua continues, the reasoning is inseparable from the operative clause, for which it provides the necessary underpinning, and must be taken into account in order to determine the scope of the operative clause of the Judgment. It follows from the reasoning of the Judgment that the operative clause takes no position on the delimitation beyond 200 nautical miles. Nicaragua is therefore of the view that the Court is not prevented, in the present case, from entertaining its claim relating to the delimitation of the continental shelf beyond 200 nautical miles.

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72. The Court first notes that, although in its 2012 Judgment it declared Nicaragua's submission to be admissible, it did so only in response to the objection to admissibility raised by Colombia that this submission was new and changed the subject-matter of the dispute. However, it does not follow that the Court ruled on the merits of the claim relating to the delimitation of the continental shelf beyond 200 nautical miles from the Nicaraguan coast.

73. The Court must now examine the content and scope of subparagraph 3 of the operative clause of the 2012 Judgment. As a result of the disagreement between the Parties on the matter, the Court must determine the content of the decision adopted by it in response to Nicaragua's request for delimitation of "a continental shelf boundary dividing . . . the overlapping entitlements . . . of both Parties". As the Permanent Court of International Justice stated in the context of a request for interpretation, where there is a "difference of opinion [between the parties] as to whether a particular point has or has not been decided with binding force . . . the Court cannot avoid the duty incumbent upon it of interpreting the judgment in so far as necessary, in order to adjudicate upon such a difference of opinion" (*Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, pp. 11-12,

cited by the Court in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 95, para. 126; see also *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), Judgment, I.C.J. Reports 2013*, p. 296, para. 34). That statement is relevant for the present case.

74. Nicaragua has placed great emphasis upon the fact that, in subparagraph 3 of the operative clause, the Court decides that it "cannot uphold" Nicaragua's claim contained in its final submission I (3). Nicaragua maintains that this decision is quite different from one to "reject" the submission. The Court is not, however, persuaded that the use of that formula leads to the conclusion suggested by Nicaragua. Nor is the Court convinced by Colombia's argument that "cannot uphold" automatically equates to a rejection by the Court of the merits of a claim. The Court will not, therefore, linger over the meaning of the phrase "cannot uphold", taken in isolation, in the way the Parties have done. It will examine this phrase in its context, in order to determine the meaning of the decision not to uphold Nicaragua's request for the Court to delimit the continental shelf between the Parties. In particular, the Court will determine whether subparagraph 3 of the operative clause of its 2012 Judgment must be understood as a straightforward dismissal of Nicaragua's request for lack of evidence, as Colombia claims, or a refusal to rule on the request because a procedural and institutional requirement had not been fulfilled, as Nicaragua argues.

75. In order to do this, the Court will examine subparagraph 3 of the operative clause of the 2012 Judgment in its context, namely by reference to the reasoning which underpins its adoption and accordingly serves to clarify its meaning. As the Permanent Court of International Justice recognized in its Advisory Opinion of 16 May 1925 on the *Polish Postal Service in Danzig*, "all the parts of a judgment concerning the points in dispute explain and complete each other and are to be taken into account in order to determine the precise meaning and scope of the operative portion" (*P.C.I.J., Series B, No. 11*, p. 30). Moreover, "[i]n determining the meaning and scope of the operative clause of the original Judgment, the Court, in accordance with its practice, will have regard to the reasoning of that Judgment to the extent that it sheds light on the proper interpretation of the operative clause" (*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), Judgment, I.C.J. Reports 2013*, p. 306, para. 68). While that remark was made in the context of a request for interpretation of a judgment under Article 60 of the Statute (something which is not sought in the present case), the requirement that the meaning of the operative part of a judgment be ascertained through an examination of the reasoning on which the operative part is based is of more general application.

76. The reasoning may relate to points debated by the Parties in the course of the proceedings, but the fact that a point was argued by the Parties does not necessarily mean that it was definitively decided by the Court.

77. The Court devoted Section IV of its 2012 Judgment to the "[c]onsideration of Nicaragua's claim for delimitation of a continental shelf extending beyond 200 nautical miles". That section consists of paragraphs 113 to 131 of the Judgment.

78. Paragraph 113 defines the question examined by the Court as whether "it [the Court] is in a position to determine 'a continental shelf boundary dividing by equal parts the overlapping entitlements to a continental shelf of both Parties'" (*I.C.J. Reports 2012 (II)*, p. 665, para. 113). In paragraphs 114 to 118, the Court then concludes that the law applicable in the case, which is between a State party to UNCLOS (Nicaragua) and a non-party State (Colombia), is customary international law relating to the definition of the continental shelf, as reflected in Article 76, paragraph 1, of that Convention. The Court indicates that

> "in view of the fact that the Court's task is limited to the examination of whether it is in a position to carry out a continental shelf delimitation as requested by Nicaragua, it does not need to decide whether other provisions of Article 76 of UNCLOS form part of customary international law" (*ibid.*, p. 666, para. 118).

79. Paragraphs 119 to 121 summarize Nicaragua's arguments regarding the criteria for determining the existence of a continental shelf and the procedural conditions, laid down in Article 76, paragraph 8, of UNCLOS, for a State to be able to establish the outer limits of the continental shelf beyond 200 nautical miles and the steps which Nicaragua had taken to that end (*ibid.*, pp. 666-667).

80. Paragraphs 122 to 124 set out Colombia's arguments opposing Nicaragua's request for delimitation of the continental shelf (*ibid.*, pp. 667-668). Colombia contended that Nicaragua's rights to an extended shelf "ha[d] never been recognized or even submitted to the Commission" (*ibid.*, p. 667, para. 122), and that "the information provided to the Court [by Nicaragua]. . . based on the 'Preliminary Information' submitted by Nicaragua to the Commission, [was] 'woefully deficient'" *(ibid.)*. Colombia emphasized that "the 'Preliminary Information' [did] not fulfil the requirements for the Commission to make recommendations" *(ibid.)*. It added that, in any event, Nicaragua could not rely on Article 76 in order to encroach on other States' 200-mile limits, particularly when it "[had] not followed the procedures of the Convention" (*ibid.*, p. 668, para. 123).

81. In paragraphs 126 and 127 respectively, the Court points out that the fact that Colombia is not a party to UNCLOS "does not relieve Nicaragua of its obligations under Article 76 of that Convention", and it observes that, at the time of the 2012 Judgment, Nicaragua had only submitted to the CLCS "Preliminary Information", which, by its own admis-

sion, "falls short of meeting the requirements" under paragraph 8 of Article 76 of UNCLOS (*I.C.J. Reports 2012 (II)*, p. 669).

82. At the close of this section of its reasoning, the Court reaches the following conclusion at paragraph 129:

> "However, since Nicaragua, in the present proceedings, has not established that it has a continental margin that extends far enough to overlap with Colombia's 200-nautical-mile entitlement to the continental shelf, measured from Colombia's mainland coast, the Court is not in a position to delimit the continental shelf boundary between Nicaragua and Colombia, as requested by Nicaragua, even using the general formulation proposed by it." *(Ibid.)*

This paragraph must be read in the light of those preceding it in the reasoning of the 2012 Judgment. Three features of that reasoning stand out. First, although the Parties made extensive submissions regarding the geological and geomorphological evidence of an extension of the continental shelf beyond 200 nautical miles submitted by Nicaragua, the Judgment contains no analysis by the Court of that evidence. Secondly, the Court considered (see paragraph 78 above) that, in view of the limited nature of the task before it, there was no need to consider whether the provisions of Article 76 of UNCLOS which lay down the criteria which a State must meet if it is to establish continental shelf limits more than 200 nautical miles from its coast reflected customary international law, which it had already determined was the applicable law in the case. The Court did not, therefore, consider it necessary to decide the substantive legal standards which Nicaragua had to meet if it was to prove vis-à-vis Colombia that it had an entitlement to a continental shelf beyond 200 nautical miles from its coast. Thirdly, what the Court did emphasize was the obligation on Nicaragua, as a party to UNCLOS, to submit information on the limits of the continental shelf it claims beyond 200 nautical miles, in accordance with Article 76, paragraph 8, of UNCLOS, to the CLCS. It is because, at the time of the 2012 Judgment, Nicaragua had not yet submitted such information that the Court concluded, in paragraph 129, that "Nicaragua, in the present proceedings, has not established that it has a continental margin that extends far enough to overlap with Colombia's 200-nautical-mile entitlement to the continental shelf, measured from Colombia's mainland coast".

83. The conclusions of the Court in paragraph 129 can only be understood in the light of those features of its reasoning. They indicate that the Court did not take a decision on whether or not Nicaragua had an entitlement to a continental shelf beyond 200 nautical miles from its coast. That is confirmed by the language of paragraph 129 itself. The first sentence of that paragraph states that

> "Nicaragua, in the present proceedings, has not established that it has a continental margin that extends far enough to overlap with Colom-

bia's 200-nautical-mile entitlement to the continental shelf, measured from Colombia's mainland coast".

Not only does the reference to "the present proceedings" seem to contemplate the possibility of future proceedings, but the Court there speaks only of a continental margin which overlaps with the 200-nautical-mile entitlement from the Colombian mainland. The Judgment says nothing about the maritime areas located to the east of the line lying 200 nautical miles from the islands fringing the Nicaraguan coast, beyond which the Court did not continue its delimitation exercise, and to the west of the line lying 200 nautical miles from Colombia's mainland. Yet, the Court was, as regards these areas, faced with competing claims by the Parties concerning the continental shelf: Nicaragua, on the one hand, claimed an extended continental shelf in these areas, and Colombia, on the other, maintained that it had rights in the same areas generated by the islands over which it claimed sovereignty, and that the Court indeed declared to be under its sovereignty.

84. It therefore follows that while the Court decided, in subparagraph 3 of the operative clause of the 2012 Judgment, that Nicaragua's claim could not be upheld, it did so because the latter had yet to discharge its obligation, under paragraph 8 of Article 76 of UNCLOS, to deposit with the CLCS the information on the limits of its continental shelf beyond 200 nautical miles required by that provision and by Article 4 of Annex II of UNCLOS.

3. Application of the Res Judicata *Principle in the Case*

85. The Court has clarified the content and scope of subparagraph 3 of the operative clause of the 2012 Judgment, taking into account the differing views expressed by the Parties on the subject. It has found that delimitation of the continental shelf beyond 200 nautical miles from the Nicaraguan coast was conditional on the submission by Nicaragua of information on the limits of its continental shelf beyond 200 nautical miles, provided for in paragraph 8 of Article 76 of UNCLOS, to the CLCS. The Court thus did not settle the question of delimitation in 2012 because it was not, at that time, in a position to do so.

86. The Court recalls that, in its Application, Nicaragua states that on 24 June 2013 it provided the CLCS with "final" information. This statement has not been contested by Colombia.

87. The Court accordingly considers that the condition imposed by it in its 2012 Judgment in order for it to be able to examine the claim of Nicaragua contained in final submission I (3) has been fulfilled in the present case.

88. The Court concludes that it is not precluded by the *res judicata* principle from ruling on the Application submitted by Nicaragua on 16 September 2013. In light of the foregoing, the Court finds that Colombia's third preliminary objection must be rejected.

IV. Fourth Preliminary Objection

89. Colombia bases its fourth preliminary objection on the assertion that, in its 2012 Judgment, the Court rejected Nicaragua's request for delimitation of the continental shelf between the Parties beyond 200 nautical miles, and fixed the boundary between each Party's maritime spaces. According to Colombia, that decision was "final and without appeal" pursuant to Article 60 of the Statute, so that, through its Application of 16 September 2013, Nicaragua was seeking to "appeal" the previous Judgment, or to have it revised.

90. Nicaragua does not request the Court to revise the 2012 Judgment, nor does it frame its Application as an "appeal". Accordingly, the Court finds that the fourth preliminary objection is not founded.

V. Second Preliminary Objection

91. Colombia's second preliminary objection concerns Nicaragua's argument that, independent of the applicability of Article XXXI of the Pact of Bogotá between Colombia and Nicaragua, the Court possesses continuing jurisdiction over the subject-matter of the Application. According to Nicaragua, this continuing jurisdiction is based on the Court's jurisdiction in the case concerning the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, given that the Court, in its 2012 Judgment, did not definitively determine the question of the delimitation of the continental shelf between Nicaragua and Colombia in the area beyond 200 nautical miles from the Nicaraguan coast, so that this question remains pending.

92. Colombia denies that any such continuing jurisdiction exists in the present case. In Colombia's view, unless the Court expressly reserves its jurisdiction, which it did not do in the 2012 Judgment, there is no basis on which the Court can exercise continuing jurisdiction once it has delivered its judgment on the merits. According to Colombia, the Statute provides only two procedures by which the Court can act, without an independent basis of jurisdiction, in respect of matters which have previously been the subject of a judgment of the Court in a case between the same parties: requests under Article 60 of the Statute for interpretation of the earlier judgment and requests under Article 61 for revision of the earlier judgment. Since the present case falls within neither Article 60, nor Article 61, Colombia contends that the Court lacks jurisdiction on the additional basis advanced by Nicaragua.

93. Nicaragua rejects Colombia's analysis. According to Nicaragua, the Court has an obligation to exercise to the full its jurisdiction in any case properly submitted to it. The Court declined, in its 2012 Judgment, to exercise its jurisdiction in respect of the part of Nicaragua's case that is the subject of the current proceedings for reasons which, according to Nicaragua, no longer appertain. Nicaragua maintains that the Court

must now exercise the jurisdiction which it possessed at the time of the 2012 Judgment. Accordingly, Nicaragua argues that the Court possesses continuing jurisdiction over the issues raised by its present Application, irrespective of whether it expressly reserved that jurisdiction in its earlier judgment. Nicaragua maintains that this basis of jurisdiction is additional to the jurisdiction conferred by Article XXXI of the Pact of Bogotá.

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94. The Court recalls that it has already held (see paragraphs 46, 88 and 90, above) that Article XXXI confers jurisdiction upon it in respect of the present proceedings since Nicaragua's Application was filed before the Pact of Bogotá ceased to be in force between Nicaragua and Colombia. It is therefore unnecessary to consider whether an additional basis of jurisdiction exists. Consequently, there is no ground for the Court to rule upon the second preliminary objection raised by the Republic of Colombia.

VI. Fifth Preliminary Objection

95. Colombia contends, in the alternative, on the hypothesis that the four other objections raised by it were to be rejected, that neither of the two requests put forward in Nicaragua's Application is admissible. Colombia considers that the First Request is inadmissible due to the fact that Nicaragua has not secured the requisite recommendation on the establishment of the outer limits of its continental shelf from the CLCS, and that the Second Request is inadmissible because, if it were to be granted, the decision of the Court would be inapplicable and would concern a non-existent dispute.

96. The Court will examine in turn the question of the admissibility of each of those two requests.

1. The Preliminary Objection to the Admissibility of Nicaragua's First Request

97. In its First Request, Nicaragua asks the Court to determine "[t]he precise course of the maritime boundary between Nicaragua and Colombia in the areas of the continental shelf which appertain to each of them beyond the boundaries determined by the Court in its Judgment of 19 November 2012". Colombia maintains that "the [Court] cannot consider the Application by Nicaragua because the CLCS has not ascertained that the conditions for determining the extension of the outer edge of Nicaragua's continental shelf beyond the 200-nautical-mile line are satisfied and, consequently, has not made a recommendation".

98. Citing Article 76, paragraph 1, of UNCLOS, Colombia argues that there is a distinction between a coastal State's entitlement to the continental shelf up to a distance of 200 nautical miles from the baselines, which

exists automatically, *ipso jure*, and its entitlement to the shelf beyond 200 nautical miles, as far as the outer edge of the continental margin, which is subject to the conditions set out in paragraphs 4, 5 and 6 of that Article.

99. Colombia recognizes that, in accordance with Article 76, it is for the coastal State, as a party to UNCLOS, to establish the outer limits of its continental shelf beyond 200 nautical miles. It nonetheless considers that, in order to do so, the latter must follow the procedure prescribed in paragraph 8 of the same Article. In particular, the relevant coastal State requires a recommendation of the CLCS in order to establish, on the basis thereof, a "final and binding" outer limit.

100. Thus, in Colombia's view, Nicaragua, as a party to UNCLOS, needs to obtain a recommendation from the CLCS if it wishes to claim an entitlement to a continental shelf beyond 200 nautical miles. Colombia adds that, in the present case, Nicaragua "requests a continental shelf delimitation between opposite coasts, which cannot be done without first identifying the extent, or limit, of each State's shelf entitlement". The absence of a recommendation from the CLCS must therefore result in the inadmissibility of the First Request contained in the Application of 16 September 2013.

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101. Nicaragua responds that a coastal State has inherent rights over the continental shelf, which exist *ipso facto* and *ab initio*, and that its own rights over its continental shelf vest in it automatically, *ipso jure*, by operation of law. Furthermore, the CLCS is concerned only with the precise location of the outer limits of the continental shelf; it does not grant or recognize the rights of a coastal State over its shelf and is not empowered to delimit boundaries in the shelf.

102. According to Nicaragua, the role of the CLCS is to protect the common heritage of mankind against possible encroachments by coastal States. It adds that, even though the role of the CLCS is to protect the international community from excessive claims, its recommendations are not binding on the submitting State. If that State disagrees with the recommendations, it can make a revised or new submission.

103. Furthermore, Nicaragua considers that State practice shows that States have concluded delimitation agreements on the continental shelf beyond 200 nautical miles in the absence of recommendations from the CLCS. In certain cases, they are said to have concluded such agreements without even having submitted information to the CLCS. Nicaragua accordingly argues that an international court or tribunal would equally be in a position to settle a delimitation dispute regarding the extended continental shelf before the CLCS has issued its recommendations.

104. Nicaragua adds that, in the event of a dispute over its extended continental shelf beyond 200 nautical miles, the CLCS, in accordance with its own rules and established practice, would not address a recommendation to Nicaragua. And if the Court were to refuse to act because the CLCS had not issued such a recommendation, the result would be an impasse, as had been pointed out by the International Tribunal for the Law of the Sea in its Judgment of 14 March 2012 in the *Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*.

* *

105. The Court has already established (see paragraph 82) that Nicaragua was under an obligation, pursuant to paragraph 8 of Article 76 of UNCLOS, to submit information on the limits of the continental shelf it claims beyond 200 nautical miles to the CLCS. The Court held, in its 2012 Judgment, that Nicaragua had to submit such information as a prerequisite for the delimitation of the continental shelf beyond 200 nautical miles by the Court.

106. The Court must now determine whether a recommendation made by the CLCS, pursuant to Article 76, paragraph 8, of UNCLOS, is a prerequisite in order for the Court to be able to entertain the Application filed by Nicaragua in 2013.

107. The Court notes that Nicaragua, as a State party to UNCLOS, is under an obligation to communicate to the CLCS the information on the limits of its continental shelf beyond 200 nautical miles, which is provided for in paragraph 8 of Article 76 of UNCLOS, whereas the making of a recommendation, following examination of that information, is a prerogative of the CLCS.

108. When the CLCS addresses its recommendations on questions concerning the outer limits of its continental shelf to coastal States, those States establish, on that basis, limits which, pursuant to paragraph 8 of Article 76 of UNCLOS, are "final and binding" upon the States parties to that instrument.

109. The Court furthermore emphasizes that this procedure enables the CLCS to perform its main role, which consists of ensuring that the continental shelf of a coastal State does not extend beyond the limits provided for in paragraphs 4, 5 and 6 of Article 76 of UNCLOS and thus preventing the continental shelf from encroaching on the "area and its resources", which are "the common heritage of mankind" (UNCLOS, Article 136).

110. Because the role of the CLCS relates only to the delineation of the outer limits of the continental shelf, and not delimitation, Article 76 of UNCLOS states in paragraph 10 that "[t]he provisions of this article are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts".

111. Indeed, Article 76 of UNCLOS, which contains the definition of the continental shelf, makes provision, in view of the technical complexity of determining the outer edge of the continental margin and of the outer limits of the continental shelf, for a Commission whose function, pursuant to Annex II of UNCLOS establishing the statute of the CLCS, is "to consider the data and other material submitted by coastal States concerning the outer limits of the continental shelf in areas where those limits extend beyond 200 nautical miles, and to make recommendations in accordance with Article 76 [of UNCLOS]" (Article 3, paragraph 1 *(a)* of Annex II of UNCLOS).

112. The procedure before the CLCS relates to the delineation of the outer limits of the continental shelf, and hence to the determination of the extent of the sea-bed under national jurisdiction. It is distinct from the delimitation of the continental shelf, which is governed by Article 83 of UNCLOS and effected by agreement between the States concerned, or by recourse to dispute resolution procedures.

113. Notwithstanding the fact that UNCLOS distinguishes between the establishment of the outer limits of the continental shelf and its delimitation between States with adjacent or opposite coasts, it is possible that the two operations may impact upon one another. The CLCS has, in its internal rules (Article 46 and Annex 1), established procedures, in accordance with Article 9 of Annex II to UNCLOS, to ensure that its actions do not prejudice matters relating to delimitation.

114. The Court accordingly considers that, since the delimitation of the continental shelf beyond 200 nautical miles can be undertaken independently of a recommendation from the CLCS, the latter is not a prerequisite that needs to be satisfied by a State party to UNCLOS before it can ask the Court to settle a dispute with another State over such a delimitation.

115. In light of the foregoing, the Court finds that the preliminary objection to the admissibility of Nicaragua's First Request must be rejected.

2. The Preliminary Objection to the Admissibility of Nicaragua's Second Request

116. In its Second Request, Nicaragua asks the Court to determine

> "[t]he principles and rules of international law that determine the rights and duties of the two States in relation to the area of overlapping continental shelf claims and the use of its resources, pending the delimitation of the maritime boundary between them beyond 200 nautical miles from Nicaragua's coast".

117. Colombia contends that Nicaragua's Second Request invites the Court to make a ruling pending its decision on the First Request, and

that, since the Court would have to rule on both requests simultaneously, it could not accept the Second Request, because it would be without object.

118. Colombia is also of the view that Nicaragua's Second Request is a disguised request for provisional measures and that it should therefore be dismissed.

119. Finally, Colombia argues that there is no dispute between the Parties concerning a hypothetical legal régime to be applied pending the decision on the maritime boundary beyond 200 nautical miles of Nicaragua's coast.

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120. Nicaragua considers that the relevance of the Second Request depends on the Court's decision on the merits in respect of the question of the delimitation of the continental shelf beyond 200 nautical miles from Nicaragua's coast between the Parties. It maintains that arguments as to the content of the duties of restraint and co-operation that may be incumbent on the Parties are a matter for the merits stage, and not for preliminary objections.

121. Nicaragua disagrees with Colombia that its Second Request is a disguised request for provisional measures. It asserts that there is indeed a dispute between the Parties, since Colombia denies that Nicaragua has any legal rights — or even any claims — beyond 200 nautical miles from its coast. According to Nicaragua, its Second Request is an issue which is subsumed within the dispute that is the subject-matter of this case.

* *

122. The Court notes that, in its Second Request, Nicaragua invites it to determine the principles and rules of international law governing a situation that will be clarified and settled only at the merits stage of the case.

123. However, it is not for the Court to determine the applicable law with regard to a hypothetical situation. It recalls that its function is "to state the law, but it may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties" (*Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, pp. 33-34).

124. This is not the case, at this stage of the proceedings, in respect of Nicaragua's Second Request. This request does not relate to an actual dispute between the Parties, that is, "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons" (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A,*

No. 2, p. 11), nor does it specify what exactly the Court is being asked to decide.

125. Accordingly, the Court finds that the preliminary objection to the admissibility of Nicaragua's Second Request must be upheld.

* * *

126. For these reasons,

THE COURT,

(1) *(a)* Unanimously,

Rejects the first preliminary objection raised by the Republic of Colombia;

(b) By eight votes to eight, by the President's casting vote,

Rejects the third preliminary objection raised by the Republic of Colombia;

IN FAVOUR: *President* Abraham; *Judges* Owada, Tomka, Bennouna, Greenwood, Sebutinde, Gevorgian; *Judge* ad hoc Skotnikov;

AGAINST: *Vice-President* Yusuf; *Judges* Cançado Trindade, Xue, Donoghue, Gaja, Bhandari, Robinson; *Judge* ad hoc Brower;

(c) Unanimously,

Rejects the fourth preliminary objection raised by the Republic of Colombia;

(d) Unanimously,

Finds that there is no ground to rule upon the second preliminary objection raised by the Republic of Colombia;

(e) By eleven votes to five,

Rejects the fifth preliminary objection raised by the Republic of Colombia in so far as it concerns the First Request put forward by Nicaragua in its Application;

IN FAVOUR: *President* Abraham; *Judges* Owada, Tomka, Bennouna, Greenwood, Donoghue, Gaja, Sebutinde, Gevorgian; *Judges* ad hoc Brower, Skotnikov;

AGAINST: *Vice-President* Yusuf; *Judges* Cançado Trindade, Xue, Bhandari, Robinson;

(f) Unanimously,

Upholds the fifth preliminary objection raised by the Republic of Colombia in so far as it concerns the Second Request put forward by Nicaragua in its Application;

(2) *(a)* Unanimously,

Finds that it has jurisdiction, on the basis of Article XXXI of the Pact of Bogotá, to entertain the First Request put forward by the Republic of Nicaragua;

(b) By eight votes to eight, by the President's casting vote,

Finds that the First Request put forward by the Republic of Nicaragua in its Application is admissible.

IN FAVOUR: *President* Abraham; *Judges* Owada, Tomka, Bennouna, Greenwood, Sebutinde, Gevorgian; *Judge* ad hoc Skotnikov;

AGAINST: *Vice-President* Yusuf; *Judges* Cançado Trindade, Xue, Donoghue, Gaja, Bhandari, Robinson; *Judge* ad hoc Brower.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this seventeenth day of March, two thousand and sixteen, 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 Nicaragua and the Government of the Republic of Colombia, respectively.

(Signed) Ronny ABRAHAM,
President.

(Signed) Philippe COUVREUR,
Registrar.

Vice-President YUSUF, Judges CANÇADO TRINDADE, XUE, GAJA, BHANDARI, ROBINSON and Judge *ad hoc* BROWER append a joint dissenting opinion to the Judgment of the Court; Judges OWADA and GREENWOOD append separate opinions to the Judgment of the Court; Judge DONOGHUE appends a dissenting opinion to the Judgment of the Court; Judges GAJA, BHANDARI, ROBINSON and Judge *ad hoc* BROWER append declarations to the Judgment of the Court.

(Initialled) R.A.
(Initialled) Ph.C.

JOINT DISSENTING OPINION OF VICE-PRESIDENT YUSUF, JUDGES CANÇADO TRINDADE, XUE, GAJA, BHANDARI, ROBINSON AND JUDGE *AD HOC* BROWER

Regret that the Court was evenly split on res judicata *— Court should have upheld Colombia's third preliminary objection and rejected Nicaragua's requests as inadmissible —* Res judicata *is reflected in Articles 59 and 60 of the Statute of the Court — Its main elements are identity of parties, identity of cause, and identity of object — Parties agree on these elements but disagree on the finality of the decision taken by the Court in 2012 — There should be no doubt about that decision — It was unanimously adopted by the Court — The* dispositif *of the 2012 Judgment was that the Court "cannot uphold" Nicaragua's final submission I (3) — This phrase has always been used by the Court for the dismissal of requests by parties — Reasoning in 2012 Judgment supports this — Paragraph 129 of the 2012 Judgment summarizes that reasoning — It emphasizes lack of evidence of an overlapping continental shelf between the Parties — Majority introduces a new procedural requirement into 2012 Judgment — Such requirement is nowhere to be found in the Judgment — Had it actually existed, Nicaragua's final submission I (3) should have been declared inadmissible in the 2012 Judgment — Nicaragua's requests are also barred by the principle of* ne bis in idem *and exhaustion of treaty processes.*

I. Introduction

1. It is with great regret that we are unable to concur with the decision on the third preliminary objection of Colombia, on which the Court was evenly split and which was reached with the casting vote of the President. Colombia's objection, which is based on the principle of *res judicata*, should have been upheld. Consequently, Nicaragua's Application in the present case should have been dismissed. Not only does the rejection of Colombia's third preliminary objection constitute a misreading of the Judgment of the Court in *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)* (*I.C.J. Reports 2012 (II)*, p. 624), (hereinafter referred to as the "2012 Judgment"), but it also detracts from the values of legal stability and finality of judgments that the principle of *res judicata* operates to protect.

2. The Court rendered the 2012 Judgment less than four years ago. Most of the Members of the present Court were also sitting Members in that case. The division of the Court in this case is thus particularly surprising. The majority not only misconstrues why the Court decided as it did in 2012, but also reads into the Judgment a procedural requirement that did not — and does not — exist. By allowing Nicaragua to proceed in the current case, the Court's decision may be viewed as undermining the finality of its judgments. It is for these reasons that we cannot join the majority in voting in favour of subparagraph (1) *(b)* of the operative paragraph.

3. In this joint dissenting opinion, we express our views in more detail. First, we outline our understanding of the principle of *res judicata* and its application to the present case (Sec. II). Secondly, we examine the *dispositif* of the 2012 Judgment, demonstrating that it rejected the request of Nicaragua to delimit allegedly overlapping continental shelf entitlements (Sec. III). Thirdly, we analyse the reasoning of the Court in the 2012 Judgment, highlighting that Nicaragua's request was rejected because Nicaragua had failed to establish the existence of an extended continental shelf that overlapped with Colombia's 200-nautical-mile entitlement, as measured from the latter's mainland coast (Sec. IV). Fourthly, we address the incoherent nature of the procedural requirement that the majority claims to have been established by the 2012 Judgment (Sec. V). Fifthly, we outline the purposes for the submission of information under Article 76 (8) of the United Nations Convention on the Law of the Sea (hereinafter referred to as "UNCLOS"), and Article 4 of its Annex II, in order to demonstrate that there is no requirement to submit information on an extended continental shelf except for obtaining recommendations from the Commission on the Limits of the Continental Shelf (hereinafter referred to as "CLCS") (Sec. VI). Sixthly, we note that, even if one were to accept the argument of the majority, the request of Nicaragua in the present case is still precluded on the basis of *ne bis in idem* and the exhaustion of treaty processes (Sec. VII). Finally, we conclude by highlighting the potential negative effect of repeat litigation, if allowed, on the authority of *res judicata* and the necessity to bring to an end proceedings relating to inter-State disputes (Sec. VIII).

II. The Principle of *Res Judicata* in the Jurisprudence of the Court and Its Application to the Present Case

4. *Res judicata* is a principle that is found in distinct forms and under different names in every legal system. The principle has been of paramount importance to the operation of legal systems all over the world for

centuries. According to this principle, "the decisions of the Court are not only binding on the parties, but are final, in the sense that they cannot be reopened by the parties as regards the issues that have been determined" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 90, para. 115). The principle of *res judicata* is reflected in Articles 59 and 60 of the Statute of the Court. As the Court has previously noted, "[t]he fundamental character of that principle appears from the terms of the Statute of the Court and the Charter of the United Nations. The underlying character and purposes of the principle are reflected in the judicial practice of the Court." *(Ibid.)*

5. The main elements of *res judicata* are well-known, and agreed upon by both Parties to this case; namely, that a subsequent claim is barred if there is identity of parties, identity of cause and identity of object with a previous claim that has been adjudicated upon (dissenting opinion of Judge Anzilotti, *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, p. 23; dissenting opinion of Judge Jessup, *South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Second Phase, Judgment, I.C.J. Reports 1966*, p. 333).

6. As the Court has stated previously, it is well established that the *dispositif* of a judgment possesses the force of *res judicata* (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 94, para. 123). However, the Court has also noted that *res judicata* may attach to the reasons of a judgment of the Court if those reasons are "inseparable" from the operative clause of a judgment (*Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the* Land and Maritime Boundary between Cameroon and Nigeria (Cameroon *v.* Nigeria), Preliminary Objections *(Nigeria* v. *Cameroon), Judgment, I.C.J. Reports 1999 (I)*, p. 35, para. 10) or if they constitute a "condition essential to the Court's decision" (*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), Judgment, I.C.J. Reports 2013*, p. 296, para. 34; *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, p. 20).

7. The main point of disagreement between the Parties is what exactly the Court "finally disposed of for good" (*Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium* v. *Spain), Preliminary Objections, Judgment, I.C.J. Reports 1964*, p. 20) in the 2012 Judgment. In its written and oral pleadings, Colombia stated that it understood the Court to have rejected Nicaragua's request to delimit an extended continental shelf entitlement that overlapped with that of Colombia on the basis of failure to establish the existence of such a continental shelf (Preliminary Objections of Colombia (hereinafter referred to as "POC"), footnote 122). Nicaragua, on the other hand, considers

that the Court's decision "not to 'uphold' Nicaragua's claim did not, in fact, entail a determination of Nicaragua's request to delimit the continental shelf beyond 200 M [nautical miles] on the merits" and hence is not a decision to which *res judicata* attaches (Written Statement of Nicaragua (hereinafter referred to as "WSN"), para. 4.19).

8. In order to determine if the requests of Nicaragua in the present case are barred by the principle of *res judicata*, we turn first to the *dispositif* of the 2012 Judgment, to which *res judicata* attaches, and second to the reasoning of the Court which laid the foundation for that *dispositif*.

III. The *Dispositif* of the 2012 *Territorial and Maritime Dispute* Judgment

9. The Court stated in the *dispositif* of the 2012 Judgment: "[The Court]. . . *[f]inds* that it cannot uphold the Republic of Nicaragua's claim contained in its final submission I (3)" (*I.C.J. Reports 2012 (II)*, p. 719, para. 251 (3)). Nicaragua had requested the Court to adjudge and declare that "[t]he appropriate form of delimitation, within the geographical and legal framework constituted by the mainland coasts of Nicaragua and Colombia, is a continental shelf boundary dividing by equal parts the overlapping entitlements to a continental shelf of both Parties" (*ibid.*, p. 636, para. 17).

10. Both Parties in the present case have discussed in their pleadings what exactly the Court meant by the phrase "cannot uphold". Colombia understands "cannot uphold" to be a rejection of Nicaragua's request to delimit allegedly overlapping continental shelf entitlements (POC, footnote 122). Nicaragua, on the other hand, claims that by using the phrase "cannot uphold", "[t]he Court did not 'reject' Nicaragua's submission; nor did it use other wording indicative of a substantive determination of Nicaragua's claims" (WSN, para. 4.20). Rather, in the view of Nicaragua, the Court in its 2012 Judgment "a décidé . . . de ne pas décider"[1].

11. The case law of the Court clearly demonstrates that when the phrase "cannot uphold" is used in the *dispositif*, it is employed to reject a claim or request made by a party. It is not used to refrain from making a decision pending the fulfilment of a procedural requirement, nor is it used to abstain from making a decision until the claimant State adduces sufficient evidence. Three examples raised and discussed by the Parties suffice to demonstrate this point.

12. In the *Oil Platforms* case *(Islamic Republic of Iran* v. *United States of America)*, Iran claimed that the United States' attacks on two oil platforms constituted a breach of the United States' obligation to accord freedom of commerce between the territories of the two States under Article X

[1] CR 2015/29, p. 25, para. 23 (Pellet). English translation of the Registry: "the Court decided not to take any decision . . .".

of the 1955 Treaty of Amity, Economic Relations and Consular Rights (*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*, pp. 172-173, para. 20). The Court found that there was no commerce in crude oil between the Iranian platforms in question and the United States at the time of the attacks, due to either the non-operational nature of the oil platforms or the effect of a trade embargo on Iranian imports to the United States (*ibid.*, p. 207, para. 98). As a result, the Court found that the attacks "cannot be said to have infringed the rights of Iran under Article X, paragraph 1, of the 1955 Treaty" *(ibid.)*. This led the Court to state in the *dispositif* of the Judgment that it "cannot . . . uphold the submission of the Islamic Republic of Iran that those actions [the United States' attacks] constitute a breach of the obligations of the United States of America under Article X of [the 1955] Treaty" (*ibid.*, p. 218, para. 125 (1)). The Court thus used "cannot uphold" as a synonym for "reject".

13. Similarly, in the *Frontier Dispute* case *(Burkina Faso/Niger)*, Burkina Faso requested the Court to adjudge and declare that certain co-ordinates constituted the boundary along two sections of its border with Niger in points 1 and 3 of its final submissions (*Judgment, I.C.J. Reports 2013*, p. 66, para. 35). These sections of the boundary were not the subject of the dispute before the Court. Burkina Faso, however, wanted the Court to include them in the *dispositif* of the Judgment to "endow this line with the force of *res judicata*" (*ibid.*, p. 66, para. 37). Noting that the function of the Court is to "decide in accordance with international law such *disputes* as are submitted to it" (*ibid.*, p. 70, para. 48; emphasis added), the Court held that Burkina Faso's request was "not compatible with its judicial function" (*ibid.*, p. 72, para. 58) and thus did not proceed to delimit the boundary along these two sections. In the *dispositif*, the Court stated that "it cannot uphold the requests made in points 1 and 3 of the final submissions of Burkina Faso" (*ibid.*, p. 92, para. 114 (1)). Again, the phrase "cannot uphold" was used to signify a clear rejection of the Burkinabe requests by the Court; it was not a refusal to make a decision, as counsel for Nicaragua suggested during the hearings in the present case[2].

14. A final example is the 1985 *Tunisia* v. *Libya Continental Shelf* Interpretation Judgment (*Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the* Continental Shelf (Tunisia/Libyan Arab Jamahiriya) *(Tunisia* v. *Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1985*, p. 192). In that case, the Court used the phrase "cannot uphold" twice in the *dispositif* of the Judgment. First, Tunisia claimed that the criteria for the delimitation of the first section of continental shelf enunciated by the Court in the case concerning the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 18 (hereinafter referred to as the "1982 Judg-

[2] CR 2015/27, p. 38, para. 24 (Pellet).

ment") could not be simultaneously applied, and therefore requested the Court to clarify which of these criteria took precedence (*I.C.J. Reports 1985*, pp. 219-220, para. 50). The Court rejected the claim that the 1982 Judgment was incoherent, noting that it "laid down a single precise criterion for the drawing of the [delimitation] line" and that Tunisia's request for interpretation was therefore "founded upon a misreading of the purport of the relevant passage of the operative clause of the 1982 Judgment" (*ibid.*, p. 220, para. 50). In the *dispositif*, the Court stated that "the submission of the Republic of Tunisia of 14 June 1985 relating to the first sector of the delimitation cannot be upheld" (*ibid.*, p. 230, para. 69 (B) (3)). This statement was clearly based on the rejection of Tunisia's understanding of the 1982 Judgment, and thus a rejection of its request for interpretation under Article 60 of the Statute of the Court.

15. The second use of the words "cannot uphold" in the 1985 *Tunisia* v. *Libya* Judgment was to reject Tunisia's request for interpretation of the 1982 Judgment in relation to the second sector of delimitation. In the 1982 Judgment, the Court stated that the point between the first and second sectors of delimitation was the "point of intersection with the parallel passing through the most westerly point of the Tunisian coastline between Ras Kaboudia and Ras Adjir, that is to say, the most westerly point on the shoreline (low-water mark) of the Gulf of Gabes" (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 94, para. 133 (C) (2)). The Court gave no indication of the co-ordinates of this point in the *dispositif*, leaving it instead to the Parties' experts to determine its precise location. However, in the body of the 1982 Judgment, the Court did give indicative co-ordinates of this point (*ibid.*, p. 87, para. 124). Tunisia requested the Court to state explicitly that the most westerly point of the Gulf of Gabes did indeed have the co-ordinates that were indicated as its approximate location in the 1982 Judgment. However, in the 1985 Judgment the Court rejected this request, noting that it expressly decided that it was for the experts of the Parties to determine the precise location of this point (*I.C.J. Reports 1985*, pp. 226-227, paras. 62-63). Thus, in the *dispositif*, the Court stated that "the submission of the Republic of Tunisia, 'that the most westerly point of the Gulf of Gabes lies on latitude 34° 05′ 20″ N (Carthage)', cannot be upheld" (*ibid.*, p. 230, para. 69 (D) (3)). The Court was not abstaining from making a decision; clearly, it was a rejection of Tunisia's request for the Court to state that the westernmost point of the Gulf lay on the indicative co-ordinates given by the Court.

16. The consistent use of the phrase "cannot uphold" demonstrates that the Court rejected Nicaragua's request to delimit purportedly overlapping extended continental shelf entitlements in the 2012 Judgment. The majority states in the present Judgment that, as it was not persuaded

by Nicaragua and Colombia's interpretations of the phrase "cannot uphold", it will not "linger over the meaning of the phrase 'cannot uphold'" (Judgment, para. 74). Yet, the majority gives no clear explanation as to why it rejects the Parties' interpretations; moreover, it does not examine the meaning and scope of the phrase. Since, according to the Court's jurisprudence, *res judicata* attaches to the *dispositif*, it is beyond comprehension why the majority chooses not to "linger" over the meaning of "cannot uphold". This is both a mistake and a missed opportunity, for if the majority had "linger[ed]" on this phrase, the true import of the Court's decision in the 2012 Judgment would have become apparent. Indeed, as demonstrated above, this phrase has consistently been used by the Court to indicate the dismissal of a request by a party.

17. In its Application in the present case, Nicaragua's First Request to the Court is to adjudge and declare "[t]he precise course of the maritime boundary between Nicaragua and Colombia in the areas of the continental shelf which appertain to each of them beyond the boundaries determined by the Court in its Judgment of 19 November 2012" (Application of Nicaragua, hereinafter "AN", p. 8, para. 12). Paragraph 11 of Nicaragua's Application states that Nicaragua's claimed extended continental shelf "includes an area beyond Nicaragua's 200-nautical-mile maritime zone and in part overlaps with the area that lies within 200 nautical miles of Colombia's coast" (*ibid.*, p. 6, para. 11 *(c)*), and that this entitlement to an extended continental shelf exists under both customary international law and the provisions of UNCLOS (*ibid.*, para. 11 *(a)*).

18. The final submission I (3) of Nicaragua in the *Territorial and Maritime Dispute* case and the First Request in Nicaragua's Application in the present case have both the same object (the delimitation of an extended continental shelf entitlement that overlaps with Colombia's 200-nautical-mile entitlement, measured from the latter's mainland coast), the same legal ground (that such an entitlement exists as a matter of customary international law and under UNCLOS), and involve the same Parties. Nicaragua is therefore attempting to bring the same claim against the same Party on the same legal grounds. As explained above, the Court rejected Nicaragua's final submission I (3) in the 2012 Judgment. Nicaragua's First Request in the present Application is thus an exemplary case of a claim precluded by *res judicata.*

IV. The Reasoning of the Court in the 2012 *Territorial and Maritime Dispute* Judgment

19. Having refrained from examining the meaning of the key phrase "cannot uphold" in the operative clause, the majority bases its position on the reasoning that led the Court to state that it "cannot uphold" Nicaragua's final submission I (3), which is contained in paragraphs 113 to 129

of the 2012 Judgment. An analysis of this reasoning, the majority contends, demonstrates that

> "Nicaragua's claim could not be upheld . . . because the latter had yet to discharge its obligation, under paragraph 8 of Article 76 of UNCLOS, to deposit with the CLCS the information on the limits of its continental shelf beyond 200 nautical miles required by that provision and by Article 4 of Annex II of UNCLOS." (Judgment, para. 84.)

This is a misreading of the 2012 Judgment.

20. An examination of the reasoning of the 2012 Judgment demonstrates that the Court rejected Nicaragua's request because it failed to prove the existence of an extended continental shelf which overlapped with Colombia's 200-nautical-mile entitlement, measured from the latter's mainland coast. Nowhere in the reasoning of the 2012 Judgment did the Court state that there was a procedural requirement incumbent on Nicaragua to submit information to the CLCS before the Court could proceed with delimitation, nor did the Court suggest that Nicaragua would be able to return to the Court once it had made its submission to the CLCS. In previous cases, whenever the Court intended to admit the possibility of future proceedings, it expressly provided for such possibility for parties to return to the Court following delivery of a judgment (see for example, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Judgment, I.C.J. Reports 2015 (II)*, p. 741, para. 229 (5) *(b)*; and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 281, para. 345 (6)). This was clearly not the case in the 2012 Judgment.

21. Section IV of the 2012 Judgment addresses Nicaragua's final submission I (3), described above. Paragraphs 113 to 118 of the Judgment state that the applicable law regarding delimitation of the continental shelf must be customary international law, as reflected in Article 76 (1) of UNCLOS, as Colombia is not a party to UNCLOS.

22. Paragraphs 119 to 121 of the 2012 Judgment outline the submissions of Nicaragua, which are threefold: first, that its claim to an extended continental shelf is "essentially a question of fact"; secondly, that Nicaragua has submitted "Preliminary Information" within the ten-year deadline established by Article 4 of Annex II of UNCLOS, and is "well advanced" in its process of compiling a submission of information to the CLCS under Article 76 (8); and, thirdly, that a continental shelf entitlement based on the distance criterion of 200 nautical miles does not take precedence over an entitlement established by natural prolongation.

23. Paragraphs 122 to 124 recall the submissions of Colombia regarding Nicaragua's request to delimit its alleged overlapping continental shelf entitlements with Colombia. Colombia's submissions on this point were also threefold: first, that Nicaragua did not prove that a natural prolongation exists so as to overlap with Colombia's 200-nautical-mile entitlement; secondly, that, in any case, a continental shelf entitlement based on natural prolongation cannot encroach upon a continental shelf entitlement based on the distance criterion of 200 nautical miles; and, thirdly, that the CLCS would not make recommendations regarding the limits of the continental shelf without the consent of Colombia, and in any case those limits did not prejudice questions of delimitation and would not be opposable to Colombia.

24. The analysis of the Court takes place in paragraphs 125 to 129. Paragraph 125 rejects Nicaragua's reliance on the ITLOS Judgment in the *Bay of Bengal* delimitation case (*Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment of 14 March 2012) as authority for the proposition that an international court or tribunal may delimit overlapping extended continental shelf entitlements in the absence of recommendations by the CLCS. The following paragraph recalls the Judgment of the Court in *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)* (*I.C.J. Reports 2007 (II)*, p. 659), in which it stated that "any claim of continental shelf rights beyond 200 miles [by a State party to UNCLOS] must be in accordance with Article 76 of UNCLOS and reviewed by the Commission on the Limits of the Continental Shelf established thereunder" (*ibid.*, p. 759, para. 319). The Court added that the fact that Colombia was not party to UNCLOS did not in any way relieve Nicaragua of its obligations under Article 76.

25. Paragraphs 127 to 129 of the 2012 Judgment contain the crux of the Court's reasoning and are thus worth quoting in full:

> "127. The Court observes that Nicaragua submitted to the Commission only 'Preliminary Information' which, by its own admission, falls short of meeting the requirements for information on the limits of the continental shelf beyond 200 nautical miles which 'shall be submitted by the coastal State to the Commission' in accordance with paragraph 8 of Article 76 of UNCLOS. Nicaragua provided the Court with the annexes to this 'Preliminary Information' and in the course of the hearings it stated that the 'Preliminary Information' in its entirety was available on the Commission's website and provided the necessary reference.

> 128. The Court recalls that in the second round of oral argument, Nicaragua stated that it was 'not asking [the Court] for a definitive ruling on the precise location of the outer limit of Nicaragua's continental shelf'. Rather, it was 'asking [the Court] to say that Nicaragua's continental shelf entitlement is divided from Colombia's continental shelf entitlement by a delimitation line which has a defined course'. Nicaragua suggested that 'the Court could make that delimitation by defining the boundary in words such as 'the boundary is the median line between the outer edge of Nicaragua's continental shelf fixed in accordance with UNCLOS Article 76 and the outer limit of Colombia's 200-mile zone' '. This formula, Nicaragua suggested, 'does not require the Court to determine precisely where the outer edge of Nicaragua's shelf lies'. The outer limits could be then established by Nicaragua at a later stage, on the basis of the recommendations of the Commission.
>
> 129. However, since Nicaragua, in the present proceedings, has not established that it has a continental margin that extends far enough to overlap with Colombia's 200-nautical-mile entitlement to the continental shelf, measured from Colombia's mainland coast, the Court is not in a position to delimit the continental shelf boundary between Nicaragua and Colombia, as requested by Nicaragua, even using the general formulation proposed by it." (*I.C.J. Reports 2012 (II)*, p. 669; cross-references omitted.)

26. The language used by the Court in paragraph 129 makes clear that the Court rejected Nicaragua's claim because it had "*not established* that it has a continental margin that extends far enough to overlap with Colombia's 200-nautical-mile entitlement" (emphasis added) (in the French text: "le Nicaragua n'ayant pas . . . *apporté la preuve* que sa marge . . ."). The Court did *not* say that it was unable to delimit the continental shelf boundary because Nicaragua had failed to submit information to the CLCS as required by Article 76 (8) of UNCLOS, nor did it imply this at any point in the previous paragraphs. The Court could not have been clearer in its conclusion: Nicaragua failed to adduce evidence to prove that it had a continental shelf that extended far enough to overlap with Colombia's 200-nautical-mile entitlement to the continental shelf measured from Colombia's mainland coast; thus, the Court was not in a position to delimit the continental shelf boundary between the two States as requested by Nicaragua.

27. Support for this is also found in the Court's rejection of Nicaragua's proposed "general formulation" for delimitation in paragraph 128 of the 2012 Judgment. In proposing this formulation, Nicaragua, as shown above in paragraph 25, suggested that

> "the Court could make that delimitation by defining the boundary in words such as 'the boundary is the median line between the outer edge of Nicaragua's continental shelf fixed in accordance with UNCLOS

> Article 76 and the outer limit of Colombia's 200-mile zone'" (*I.C.J. Reports 2012 (II)*, p. 669, para. 128).

Yet, the Court found that "*even* using the general formulation proposed" by Nicaragua (*ibid.*, p. 669, para. 129; emphasis added), it was not in a position to effect a delimitation between the Parties. If, as the majority contends, the Court's rejection of Nicaragua's request was based on the failure of Nicaragua to deposit information with the CLCS in accordance with Article 76 (8) of UNCLOS (Judgment, para. 85), it would have been superfluous for the Court to examine — and reject — separately the "general formulation" proposed by Nicaragua. The only reason that the Court had to recall and reject the "general formulation" as distinct from Nicaragua's final submission I (3) was that the former claim relied solely on the existence of an extended continental shelf that overlapped with Colombia's 200-nautical-mile entitlement, and not on the delineation of its outer limits. However, Nicaragua did not prove to the Court the existence of this extended continental shelf, let alone did it delineate its outer limits.

28. Indeed, as summarized in paragraph 69 of the present Judgment, Nicaragua itself conceded that the Court rejected its final submission I (3) on the basis that it had failed to establish the existence of an extended continental shelf that overlapped with Colombia's 200-nautical-mile entitlement. In oral proceedings in the present case, Nicaragua stated that

> "si l'on veut à toute force admettre que la Cour a décidé quelque chose [in the 2012 Judgment], ce ne peut être que ceci : le Nicaragua n'a pas prouvé l'existence d'un chevauchement entre les zones maritimes lui revenant au-delà de la limite de 200 milles marins et celles sur lesquelles la Colombie a juridiction"[3].

29. The majority relies on three features of the Court's reasoning in the 2012 Judgment in support of its conclusion that

> "Nicaragua's claim could not be upheld . . . because the latter had yet to discharge its obligation, under paragraph 8 of Article 76 of UNCLOS, to deposit with the CLCS the information on the limits of its continental shelf beyond 200 nautical miles required by that provision and by Article 4 of Annex II of UNCLOS". (Judgment, para. 84).

These features are set out in paragraph 82 of the Judgment. None of them, however, provides support for the majority's view.

[3] CR 2015/29, p. 26, para. 23 (Pellet). English translation of the Registry: "Basically, if we want to insist that the Court decided something, it can only be this : Nicaragua had failed to prove the existence of an overlap between the maritime areas appertaining to it beyond the 200-nautical-mile limit and those over which Colombia has jurisdiction."

30. First, the majority notes that the 2012 Judgment contains no analysis of the geological and geomorphological evidence presented by Nicaragua to support its claim to an extended continental shelf. This fact, however, does not mean that the Court did not take that evidence into account in reaching the conclusion that Nicaragua failed to establish the existence of a continental margin that extends so far as to overlap with Colombia's 200-nautical-mile entitlement from its mainland coast. The Court may make a global analysis of the evidence and is not required to, and frequently does not, mention every piece of evidence it considered in reaching a particular conclusion.

31. Moreover, the fact that the Court referred to Colombia's submission that the information provided by Nicaragua was "woefully deficient", "rudimentary and incomplete" (*I.C.J. Reports 2012 (II)*, p. 667, para. 122) shows that the Court turned its mind to the probative value of the geographical and geomorphological data submitted by Nicaragua. The fact that the evidence presented to the Court was not referred to in a detailed manner in the Judgment does not necessarily lead to the conclusion that the Court did not proceed to evaluate this evidence.

32. Secondly, the majority argues that the Court could not have rejected Nicaragua's claim on the merits since it did not consider it necessary to determine the applicable legal standards to establish the existence of an extended continental shelf. However, the Court, in paragraph 118 of the 2012 Judgment, expressly declared Article 76 (1) of UNCLOS, which defines the legal concept of a continental shelf, to be reflective of customary international law and thus applicable between the Parties.

33. It was the failure of Nicaragua to prove that it had an extended continental shelf overlapping with Colombia's 200-nautical-mile entitlement within the meaning of Article 76 (1) of UNCLOS that led the Court to dismiss Nicaragua's final submission I (3). Moreover, the contradiction inherent in paragraph 82 of the Judgment should be highlighted. On the one hand, it is claimed that the Court did not consider it necessary to determine the legal standards applicable for Nicaragua to establish the existence of an extended continental shelf vis-à-vis Colombia, whilst, on the other hand, it is maintained that the Court — in the very same section of reasoning — established the procedural requirements incumbent on Nicaragua to claim an extended continental shelf.

34. The third feature of the Court's reasoning in the 2012 Judgment on which the majority relies is the alleged emphasis on the obligation incumbent on Nicaragua, as a party to UNCLOS, to submit information under Article 76 (8) on the limits of the continental shelf to the CLCS. The majority is wrong to assert that the Court "emphasize[d]" Nicaragua's failure to submit information to the CLCS as the basis for its conclusion not to uphold its claim. To put it simply, nowhere in the 2012 Judgment

did the Court state that it could not uphold Nicaragua's submission because of failure to submit information to the CLCS. The majority's reading of the non-fulfilment of that procedural requirement into the Court's conclusion in paragraph 129 is thus an addition to that paragraph.

35. In paragraph 83 of the present Judgment the majority further contends that its interpretation of the Court's conclusion in paragraph 129 of the 2012 Judgment is confirmed by the inclusion of the words "in the present proceedings" in the text of that paragraph, which "seem[s] to contemplate the possibility of future proceedings". As stated above (see paragraph 20), when the Court contemplates the possibility of parties returning to the Court following the delivery of a judgment, it does so expressly. The reference to "the present proceedings" in the *Territorial and Maritime Dispute* case did not leave the door open for Nicaragua to return to the Court with the same claim. Otherwise, all the previous judgments in which the Court referred to the "present proceedings" would be subject to repeat litigation. The phrase "present proceedings" is nothing more than a standard way of referring to the case at hand.

36. It must therefore be concluded that the failure of Nicaragua to prove the existence of an extended continental shelf that overlaps with Colombia's 200-nautical-mile entitlement constituted the very basis of the decision adopted by the Court in 2012 concerning delimitation. This is a major element of the Court's reasoning which laid the foundation for the operative clause to which *res judicata* attaches.

37. The Second Request in Nicaragua's Application in the present case asks the Court to adjudge and declare

> "[t]he principles and rules of international law that determine the rights and duties of the two States in relation to the area of overlapping continental shelf claims and the use of its resources, pending the delimitation of the maritime boundary between them beyond 200 nautical miles from Nicaragua's coast" (AN, para. 12).

38. Nicaragua's Second Request is a reformulation of the "general formulation" proposed by it in the second round of oral pleadings in the *Territorial and Maritime Dispute* case. To recall:

> "in the second round of oral argument, Nicaragua stated that it was 'not asking [the Court] for a definitive ruling on the precise location of the outer limit of Nicaragua's continental shelf'. Rather, it was 'asking [the Court] to say that Nicaragua's continental shelf entitlement is divided from Colombia's continental shelf entitlement by a delimitation line which has a defined course'. Nicaragua suggested that 'the Court could make that delimitation by defining the boundary in words such as 'the boundary is the median line between the outer

> edge of Nicaragua's continental shelf fixed in accordance with UNCLOS Article 76 and the outer limit of Colombia's 200-mile zone''. *This formula, Nicaragua suggested, 'does not require the Court to determine precisely where the outer edge of Nicaragua's shelf lies'.* The outer limits could be then established by Nicaragua at a later stage, on the basis of the recommendations of the Commission." (*I.C.J. Reports 2012 (II)*, p. 669, para. 128; emphasis added.)

In both cases, Nicaragua requests the Court, pending recommendations by the CLCS, to determine the existence of overlapping continental shelf entitlements without delimiting the precise course of the boundary. In the 2012 Judgment, the Court rejected Nicaragua's proposed "general formulation" on the basis that it had not established the existence of an extended continental shelf that overlapped with Colombia's 200-nautical-mile entitlement (*ibid.*, para. 129).

39. As with Nicaragua's First Request in the present case, the Second Request is barred by *res judicata*. In the 2012 Judgment, the Court decided that Nicaragua had not adduced sufficient evidence to allow it to adopt the "general formulation" for delimitation proposed in the second round of oral pleadings. It now tries to bring back the same claim, on the same grounds, against the same Party.

V. The Incoherence of the Procedural Requirement Introduced by the Majority

40. The previous sections have shown that Nicaragua's First and Second Requests in the present case are barred by the principle of *res judicata* and therefore should be rejected as inadmissible. In order to avoid this conclusion, the majority has read a procedural requirement into the 2012 Judgment according to which a coastal State is obliged to submit information to the CLCS under Article 76 (8) of UNCLOS as a prerequisite for the delimitation of extended continental shelf entitlements between Nicaragua and Colombia. The majority therefore frames submission of information to the CLCS under Article 76 (8) as a condition of admissibility.

41. The fact that Nicaragua submitted such information to the CLCS on 24 June 2013 means that the majority "accordingly considers that the condition imposed by it in its 2012 Judgment in order for it to be able to examine the claim of Nicaragua contained in the final submission I (3) has been fulfilled in the present case" (Judgment, para. 87).

42. The Court has stated that an objection to admissibility "consists in the contention that there exists a legal reason, even when there is jurisdic-

tion, why the Court should decline to hear the case, or more usually, a specific claim therein" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 456, para. 120).

43. In the present Judgment, the majority states that

> "Nicaragua was under an obligation, pursuant to paragraph 8 of Article 76 of UNCLOS, to submit information on the limits of the continental shelf it claims beyond 200 nautical miles to the CLCS. The Court held, in its 2012 Judgment, that Nicaragua had to submit such information *as a prerequisite* for the delimitation of the continental shelf beyond 200 nautical miles by the Court." (Judgment, para. 105; emphasis added.)

44. However, in the 2012 Judgment, the question of admissibility of Nicaragua's final submission I (3) was expressly raised by Colombia, which argued that the request to delimit an extended continental shelf was neither implicit in the Application of Nicaragua nor was it an issue that arose directly out of the subject-matter of the dispute (*I.C.J. Reports 2012 (II)*, p. 664, para. 107). Colombia hence argued that the new claim was inadmissible.

45. The Court rejected Colombia's objection to admissibility, stating that

> "[i]n the Court's view, the claim to an extended continental shelf falls within the dispute between the Parties relating to maritime delimitation and cannot be said to transform the subject-matter of that dispute. Moreover, it arises directly out of that dispute. What has changed is the legal basis being advanced for the claim (natural prolongation rather than distance as the basis for a continental shelf claim) and the solution being sought (a continental shelf delimitation as opposed to a single maritime boundary), rather than the subject-matter of the dispute. The new submission thus still concerns the delimitation of the continental shelf, although on different legal grounds . . .
>
> 112. *The Court concludes that the claim contained in final submission I (3) by Nicaragua is admissible*." (*Ibid.*, p. 665, paras. 111-112; emphasis added.)

46. When Nicaragua presented its final submissions in the previous case, on 1 May 2012, and when the Court delivered its Judgment in that case, on 19 November 2012, Nicaragua had not made a submission to the CLCS pursuant to Article 76 (8) of UNCLOS. The procedural requirement that the majority identifies as a "prerequisite" (Judgment, para. 105) was hence unfulfilled. Yet, the Court found Nicaragua's final submission I (3) to be admissible. Colombia did not argue that Nicaragua's claim was inadmissible because it had failed to fulfil a procedural require-

ment. However, the Court has the power to raise issues of admissibility *proprio motu* and, if necessary, dismiss claims that it considers to be inadmissible. It did not do this.

47. The Court had the opportunity to state in the 2012 Judgment that it considered submission of information to the CLCS under Article 76 (8) of UNCLOS to be a prerequisite for delimitation, and thus to declare Nicaragua's final submission I (3) inadmissible. The majority attempts to avoid confronting this fact by arguing that the Court adjudged Nicaragua's final submission I (3) to be admissible but did not continue to address the submission on the merits (Judgment, para. 72).

48. However, the majority does not explain what possible purpose would be served by declaring a claim to be admissible but not continuing to address it on the merits. Moreover, it does not explain how the Court, once it has declared a claim to be admissible, can refuse to address the claim on the merits. Indeed, this approach is at odds with the Court's jurisprudence, in which it has emphasized that "[t]he Court must not exceed the jurisdiction conferred upon it by the Parties, but it must also exercise that jurisdiction to its full extent" (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 23, para. 19).

49. This line of reasoning leaves the Court in a strange position. If one accepts the view of the majority in the current case, the Court should not, in the 2012 proceedings, have accepted Nicaragua's final submission I (3) as admissible and should not have proceeded to address the claim on the merits. On the other hand, if one accepts — as the Court did in 2012 — that Nicaragua's final submission I (3) was admissible, then logic dictates that a submission to the CLCS under Article 76 (8) of UNCLOS cannot be a prerequisite to adjudicate upon a request for delimitation of the extended continental shelf. The incoherence of the majority's position is thus plain for all to see.

50. Not only is the position of the majority at odds with the Court's previous decisions, but it also is inconsistent with the provisions of Article 76 of UNCLOS itself. Article 76 (8) may be divided into three limbs, each with the imperative *shall* in the English version of the Convention: information *shall* be submitted by the coastal State; the Commission *shall* make recommendations; and the limits established upon the basis of CLCS recommendations *shall* be final and binding. It is unclear why the majority considers that the first limb of this Article constitutes a prerequisite to delimitation whereas the other two limbs do not; clearly, there is no textual support for such a reading.

51. The majority, in relation to Colombia's fifth preliminary objection, draws a tenuous distinction between the different limbs of Article 76 (8), stating that

> "since the delimitation of the continental shelf beyond 200 nautical miles can be undertaken independently of a recommendation from

> the CLCS, the latter is not a prerequisite that needs to be satisfied by a State party to UNCLOS before it can ask the Court to settle a dispute with another State over such a delimitation" (Judgment, para. 114).

If delimitation can be effected without recommendations from the CLCS, it can certainly be effected also without submission of information to the CLCS. It is illogical to say that the mere submission of information to the CLCS pursuant to Article 76 (8) constitutes a precondition for delimitation, whereas the recommendations of the CLCS, which are based on such submission, and provided for under Article 76 (8) do not constitute a prerequisite for that purpose.

VI. The Purposes of Submission of Information under Article 76 of UNCLOS and Article 4 of Its Annex II

52. The only paragraph on which the majority could base its reading of the 2012 Judgment as containing a procedural requirement for the submission of information to the CLCS is paragraph 127. However, to do so would be a misunderstanding of the operation of Article 76 of UNCLOS. Paragraph 127 of the 2012 Judgment states that the "Preliminary Information" that Nicaragua submitted to the CLCS did not meet, by its own admission, the requirements for submission of information under Article 76 (8).

53. This finding is unsurprising and unexceptional: the submission of "Preliminary Information" is not designed to fulfil the requirements to submit information under Article 76 (8). Rather, the term "Preliminary Information" was first used in the decision of States parties to UNCLOS of 20 June 2008 (SPLOS/183), in which it was recognized that coastal States intending to claim a continental shelf could file "indicative" information as a means of fulfilling their obligation under Article 4 of Annex II to UNCLOS to submit "particulars" of prospective continental shelf claims to the CLCS within ten years of the entry into force of the Convention for that State[4]. This was a means of allowing States, in particular developing ones, which may lack the necessary technical capabilities, the possibility of complying with the "sunset clause" for claiming an extended continental shelf under UNCLOS, whilst providing them with the extra

[4] UNCLOS, Meeting of States Parties, *Decision regarding the workload of the Commission on the Limits of the Continental Shelf and the ability of States, particularly developing States, to fulfil the requirements of Article 4 of Annex II to the United Nations Convention on the Law of the Sea, as well as the decision contained in SPLOS/72, paragraph* (a). (SPLOS/183, para. 1 *(a)*.)

time required to complete the requisite geological and geomorphological surveys to prove the existence of an extended continental shelf.

54. According to that decision of the Meeting of States Parties:

> "Pending the receipt of the submission in accordance with the requirements of Article 76 of the Convention and with the Rules of Procedure and the Scientific and Technical Guidelines of the Commission, preliminary information submitted in accordance with subparagraph *(a)* above shall not be considered by the Commission." (SPLOS/183, para. 1 *(b)*.)

Thus, the purpose of the submission of the "Preliminary Information", being solely directed to "stop the clock" for States parties, is totally different and clearly distinguishable from the purpose of the submission of information required under Article 76 (8) of UNCLOS, which is aimed at obtaining recommendations from the CLCS.

55. The procedural requirement upon which the majority places great emphasis — the obligation to submit information to the CLCS according to Article 76 (8) of UNCLOS — is also conditional on the fulfilment of the "test of appurtenance", as set out in the Guidelines of the CLCS[5]. According to this test, a coastal State must first prove that it has a continental shelf entitlement that extends beyond 200 nautical miles before it is permitted — indeed, obliged — to delineate the outer limits of the shelf[6]. This test is based on Article 76 (4) *(a)* of UNCLOS, which provides that "the coastal State *shall* establish the outer edge of the continental margin *wherever* the margin extends beyond 200 nautical miles . . ."[7]. The obligation to delineate the outer limits of the continental shelf, and thus submit

[5] See further, Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf, 13 May 1999 (CLCS/11), point 2.2. The pertinence of the test was recognized by ITLOS in *Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment of 14 March 2012, para. 436.

[6] The CLCS Guidelines define the test of appurtenance as follows:

> "If either the line delineated at a distance of 60 nautical miles from the foot of the continental slope, or the line delineated at a distance where the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the slope, or both, extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, then a coastal State is entitled to delineate the outer limits of the continental shelf as prescribed by the provisions contained in Article 76, paragraphs 4 to 10." (CLCS Guidelines, point 2.2.8.)

[7] The French version of the text provides that "l'Etat côtier définit le rebord externe de la marge continentale, *lorsque* celle-ci s'étend au-delà de 200 milles marins . . . "; emphasis added.

information to the CLCS pursuant to Article 76 (8), is contingent on proof that an extended continental shelf appertains to the coastal State. In the words of the CLCS, if "a State does not demonstrate to the Commission that the natural prolongation [extends beyond 200 nautical miles]. . . [it does] not have an obligation to submit information on the limits of the continental shelf to the Commission"[8].

56. The Court rightly recognized that Nicaragua is bound by Article 76 of UNCLOS when claiming an extended continental shelf. But this does not mean that it is a prerequisite to submit information to the CLCS under Article 76 (8) in order to delimit overlapping continental shelf entitlements. Article 76 establishes a process whereby a coastal State delineates the outer limit of its continental shelf, according to the criteria laid down in paragraphs 4-7. It shows then to the other States parties how its delineation fits these rules through the submission of information to the Commission describing the scientific and technical basis of its delineation. It should be noted that information submitted to the CLCS pursuant to Article 76 (8) of UNCLOS will not necessarily be regarded as sufficient to establish the existence of an extended continental shelf.

57. The function of the CLCS is to examine the submission of the claimant State and to make recommendations to it on whether the description of its delineation meets the criteria laid down in Article 76. In this sense, the CLCS is a "legitimator", but coastal States are not only free to delineate their claimed extended continental shelf; they are actually expected to carry out their delineation before submitting the information regarding their claim to the CLCS for validation or legitimation, in other words, before sharing their claim with other States. In this context, it should be noted that States have concluded delimitation agreements between themselves without making a submission to the CLCS, or without receiving recommendations from it (see for example, Treaty between the Kingdom of Norway and the Russian Federation concerning Maritime Delimitation and Co-operation in the Barents Sea and the Arctic Ocean, 15 September 2010).

58. The overarching purpose for which a State has to make a submission to the CLCS is to obtain recommendations to validate its own delineation. It is therefore surprising that the majority should maintain that the submission of information, under Article 76 (8) of UNCLOS, was considered a prerequisite by the Court in its 2012 Judgment for acceding to Nicaragua's delimitation request, while concluding in the present Judgment that recommendations from the CLCS are "not a prerequisite that

[8] CLCS Guidelines, point 2.2.4.

needs to be satisfied by a State party to UNCLOS before it can ask the Court to settle a dispute with another State over . . . delimitation" (Judgment, para. 114).

VII. *Ne Bis in Idem* and the Exhaustion of Treaty Processes

59. Even if one were to accept the majority's interpretation of the 2012 Judgment, Nicaragua should not now be able to come before the Court for a second time to attempt to remedy the procedural flaw which supposedly precluded the Court from delimiting its allegedly overlapping extended continental shelf entitlement in 2012. Allowing such an action could be injurious to both the respondent State, which should be protected from repeat litigation, and the efficient operation of the judicial system for the settlement of international disputes.

60. The principle of *ne bis in idem* operates, like *res judicata*, to protect from the effects of repeat litigation. According to this principle, a repeat claim is inadmissible whether or not the issue is covered by the principle of *res judicata*. One cannot knock at the Court's door a second time with regard to a claim already examined by the Court on its merits. The fact that Nicaragua would now be able to present evidence that was not available to it during the judicial proceedings that led to the 2012 Judgment does not make the new claim less repetitive of the previous claim.

61. Moreover, in so far as the new Application represents a repetition of the previous claim, the issue of preclusion based on the exhaustion of treaty processes (in French, "épuisement des recours prévus dans le traité") may also be raised. In a similar vein to *res judicata* and *ne bis in idem*, this principle also operates to safeguard against the detrimental effects of repeat litigation. According to this principle, the renewed presentation of a claim previously examined by the Court may be considered inadmissible if that claim relies on the same treaty process as the basis of jurisdiction of the Court. This finds support in the Court's Judgment on preliminary objections in the *Barcelona Traction* case, in which the Court said:

> "It has been argued that the first set of proceedings 'exhausted' the Treaty processes in regard to the particular matters of complaint, the subject of those proceedings, and that the jurisdiction of the Court having once been invoked, and the Court having been duly seised in respect of them, the Treaty cannot be invoked a second time in order to seise the Court of the same complaints. As against this, it can be said that the Treaty processes are not in the final sense exhausted in respect of any one complaint until the case has been either prosecuted

> to judgment, or discontinued in circumstances involving its final renunciation — neither of which constitutes the position here [that is, in the *Barcelona Traction* case]." (*I.C.J. Reports 1964*, p. 26.)

Leaving aside the issue of discontinuance, which is not relevant to the present case, the Court referred to the fact that a case "has been . . . prosecuted to judgment".

62. In the present proceedings, Nicaragua not only brings the same claim as it did in the 2012 case, but it also does so on the same basis of jurisdiction; namely, Article XXXI of the Pact of Bogotá. As noted above, the claim was — to borrow the terminology of the Court in *Barcelona Traction* — "prosecuted to judgment". Nicaragua's Application in the present proceedings should thus be considered inadmissible on the basis that it has exhausted the treaty processes under the Pact of Bogotá.

VIII. Conclusion: the Authority of *Res Judicata* and the Protection of the Judicial Function

63. In this joint dissenting opinion, we have outlined why we have voted against subparagraph (1) *(b)* of the operative paragraph in the present Judgment and why we are of the view that the Court should have upheld Colombia's third preliminary objection related to *res judicata.*

64. In the *Application of the Genocide Convention* case, the Court outlined the purposes of the principle of *res judicata* as follows:

> "Two purposes, one general, the other specific, underlie the principle of *res judicata*, internationally as nationally. First, the stability of legal relations requires that litigation come to an end. The Court's function, according to Article 38 of its Statute, is to 'decide', that is, to bring to an end, 'such disputes as are submitted to it'. Secondly, it is in the interest of each party that an issue which has already been adjudicated in favour of that party be not argued again . . . Depriving a litigant of the benefit of a judgment it has already obtained must in general be seen as a breach of the principles governing the legal settlement of disputes." (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, pp. 90-91, para. 116.)

65. These purposes — finality of litigation and protection of the respondent from repeat litigation — protect both the operation of the legal system and those within it. A scenario in which the purposes of

res judicata are no longer served undermines the judicial function as well as the sound administration of justice.

66. By casting the rejection of Nicaragua's request for delimitation in the *Territorial and Maritime Dispute* case as a decision to which *res judicata* does not attach, the Court may be seen by some as being open to repeat litigation, which cannot be the case.

67. Nicaragua and Colombia have been embroiled in a long-running dispute for many years regarding their respective maritime entitlements. As the principal judicial organ of the United Nations, the Court is well placed to settle such disputes. But if it is to continue to be regarded as such, it cannot afford to be seen to allow States to bring the same disputes over and over again. Such a scenario would undercut the certainty, stability, and finality that judgments of this Court should provide.

(*Signed*) Abdulqawi A. YUSUF.
(*Signed*) Antônio Augusto CANÇADO TRINDADE.
(*Signed*) XUE Hanqin.
(*Signed*) Giorgio GAJA.
(*Signed*) Dalveer BHANDARI.
(*Signed*) Patrick L. ROBINSON.
(*Signed*) Charles N. BROWER.

SEPARATE OPINION OF JUDGE OWADA

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I. *Res Judicata*

A. The Definition and Scope of Res Judicata

1. I concur with the conclusions that the Court has reached in this case as contained in the operative clause *(dispositif)*. However, I wish to append to the Judgment my own separate opinion in order to clarify my own reasoning on the issue of *res judicata* and supplement a few salient points of law, which in my view have not been adequately addressed in the Judgment.

2. The present Judgment correctly points out that "the principle of *res judicata* . . . is a general principle of law which protects, at the same time, the judicial function of a court or tribunal and the parties to a case which has led to a judgment that is final and without appeal" (Judgment, para. 58). Needless to say, the prerequisite for the application of this principle of *res judicata* is, as defined in the famous dictum of Judge Anzilotti, the existence of three traditional elements, namely the identity of *"persona, petitum* [and] *causa petendi"* (*Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, dissenting opinion of Judge Anzilotti, p. 23). In the present case,

it is accepted that the existence of these essentially formal criteria has been satisfied, to the extent that the presence of these essential elements has not been questioned by the Parties and is therefore not at issue.

3. In my view, the more intrinsically important issue in the present case is whether the decision reached in the 2012 Judgment contains a "final and definitive determination by the Court" to which the effect of *res judicata* should attach. In other words, the issue is with the scope of the *res judicata*. It is generally accepted in the jurisprudence of national and international courts and tribunals that the effect of *res judicata* would accrue only to a final judgment of the Court. A final Judgment should refer to "a Court's final determination of the rights and obligations of the parties in a case" through which "an issue has been definitely settled by judicial decision" (*Black's Law Dictionary*, 9th ed., pp. 918, 1425). In the same vein, this Court has held that

> "[the] principle [of *res judicata*] signifies that the decisions of the Court are not only binding on the parties, but are final, in the sense that they cannot be reopened by the parties *as regards the issues that have been determined*" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 90, para. 115; emphasis added).

The necessary corollary of this is that "[i]f a matter has not in fact been determined, expressly or by necessary implication, then no force of *res judicata* attaches to it" (*ibid.*, p. 95, para. 126).

4. The Court has previously been faced with a situation somewhat similar to the present one when a question arose as to the proper scope of the *res judicata* of a particular judgment. In the *Asylum (Colombia/Peru)* case before the Court in 1950, the Colombian Government granted diplomatic asylum to a political refugee, Víctor Raúl Haya de la Torre, in its Embassy in Lima over the objections of the Peruvian Government. In its 1950 Judgment, the Court decided the general legal questions relating to the legality of this asylum raised by the Parties, while noting that "the question of the possible surrender of the refugee . . . was not raised either in the diplomatic correspondence submitted by the Parties or at any moment in the proceedings before the Court" (*Asylum (Colombia/Peru), Judgment, I.C.J. Reports 1950*, p. 280). Immediately thereafter, Colombia filed a request for interpretation under Article 60 of the Statute asking whether the Judgment required the surrender of the political refugee by the Government of Colombia. The Court in response to this request for interpretation of the previous Judgment did not provide an answer to this question, stating instead that "[t]he Court can only refer to what it declared in its Judgment in perfectly definite terms: this question was completely left outside the submissions of the Parties. The Judgment in no way decided it, nor could it do so." (*Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case (Colombia* v. *Peru), Judgment, I.C.J. Reports 1950*, p. 403.) Subsequently, Colombia insti-

tuted new proceedings in the *Haya de la Torre* case so as to resolve this issue. In the 1951 Judgment on this new case, the Court affirmed that: "the question of the surrender of the refugee was not decided by the Judgment [of 1950, and]. . . [t]here is consequently no *res judicata* upon the question of surrender" (*Haya de la Torre (Colombia* v. *Peru), Judgment, I.C.J. Reports 1951*, p. 80). According to the analysis by one learned writer, the 1950 Judgment exemplifies a situation in which "the problem was not that of the existence of a final judgment, but of the scope of the binding force of the decision. This judgment did not settle the dispute, for the simple reason that the submissions of the parties were insufficient for this purpose." (Shabtai Rosenne, *The Law and Practice of the International Court: 1920-2005, 2006*, Vol. III, 1603.) It could be argued that a fine distinction exists between this case and the present one, to the extent that the specific point at issue was "left outside" in the 1950 proceedings, but the essential point is that the submissions of the parties were insufficient in both cases to allow the Court to determine the dispute and the decision did not constitute *res judicata*.

5. The scope of the *res judicata* was also at issue in the merits phase of the *Genocide Convention (Bosnia and Herzegovina* v. *Serbia and Montenegro)* case, though with a markedly different outcome, which is also worthy of note here. In its 1996 Judgment on preliminary objections in that case, the Court rejected all of the preliminary objections on jurisdiction by the Respondent Yugoslavia (Serbia and Montenegro) and found the Application of the Applicant (Bosnia and Herzegovina) admissible, declaring that "the Court may now proceed to consider the merits of the case on that basis" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 622, para. 46). At the merits phase, however, the Respondent argued that its own lack of *jus standi* had not been adjudicated and that this precluded the Court from reaching a decision on the merits. The essence of this claim was that the Respondent was not a continuator of the Socialist Federal Republic of Yugoslavia and was therefore not a party to the Genocide Convention or the Statute of the Court when the proceedings were instituted — the position taken by the Court in its Judgment of 2004 in the *Legality of Use of Force (Serbia and Montenegro* v. *Belgium* et al.*)* cases. In the 2007 Judgment on the merits, the issue was whether that question had been disposed of in the 1996 Judgment. Styled as such, this issue related to the scope of the *res judicata* of the 1996 Judgment (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 101, para. 140).

6. Although the issue of *jus standi* had not been explicitly raised as an issue by the parties at the time of the 1996 Judgment, the Court in the

2007 Judgment took the position that it had been decided by the Court because such a determination on the standing of the Respondent was a necessary prerequisite to the Court's decision to reject the preliminary objections of the Respondent on jurisdiction *ratione personae*, *ratione materiae*, and *ratione temporis* (see for details, *I.C.J. Reports 2007(I)*, separate opinion of Judge Owada, p. 296, para. 33).

7. I refer to this case here because it presented a unique situation in which the Court apparently took the position that an issue that had *not* been raised by the parties nor expressly addressed in its previous Judgment *had in fact been decided* by the Court, despite a seemingly contradictory decision of the Court in the 2004 *Legality of Use of Force* cases. (It is clear that this precedent did not constitute *res judicata* for the 2007 case, though it could have had *stare decisis* implications for the 2007 issue (*Preliminary Objections, Judgment, I.C.J. Reports 2004 (III)*, p. 1337, para. 76).) The issue of the *jus standi* of the Respondent in the *Genocide Convention* case was thus determined to fall within the scope of *res judicata*. However, this finding should be regarded as a unique exception based on the specific structure of jurisdictional decisions.

8. These cases illustrate the complexity involved in determining what falls within the scope of *res judicata* in a preceding judgment. In the present case, the crucial issue for the Court in ruling upon the third preliminary objection of Colombia is therefore to determine whether or not there was a final and conclusive decision binding upon the Parties in the operative part of the 2012 Judgment read in the complex context surrounding this issue, to the extent that it relates to the claim of the Republic of Nicaragua concerning an extended continental shelf. In analysing this issue, the Court may take into account, if necessary, the reasoning of the *motif* as far as it is indispensable in understanding the *dispositif*. As the Court has declared: "[I]f any question arises as to the scope of *res judicata* attaching to a judgment, it must be determined in each case having regard to the context in which the judgment was given". (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 95, para. 125). It is thus my view that in order to answer this question, one must first delve into the context in which this newly reformulated claim of Nicaragua emerged in 2007, against which the relevant statement in the operative part in question came to be adopted. Only then can one correctly understand the relevant decision of the 2012 Judgment in its operative part (para. 251 (3)) and the reasoning of the Court underlying this decision on Nicaragua's maritime entitlement claim.

9. It is thus my conclusion on this methodological issue that only by examining the context in which the operative part of the 2012 Judgment was developed, as well as the reasoning of the Court and the overall structure of the Judgment, can one clarify the precise scope and the meaning of the 2012 Judgment and thus determine whether the claim presented

by Nicaragua in the present case is admissible or whether it is barred by the principle of *res judicata*.

B. The Background of the Court's Decision in Its 2012 Judgment on the Reformulated Claim of Nicaragua

10. In order to clarify this situation, it seems necessary in my view to recall the genesis of the present problem, which emanated from the evolving claim of Nicaragua. Nicaragua introduced a reformulated claim on the continental shelf after the Court's 2007 Judgment on preliminary objections, which now forms the basis of the third preliminary objection of Colombia.

11. In its original Application of 6 December 2001 in the case concerning the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, Nicaragua as Applicant stated that:

> "Accordingly, the Court is asked to adjudge and declare:
>
> . . . . . .
>
> *Second*, in the light of the determinations concerning title requested above, the Court is asked further to determine the course of the single maritime boundary between the areas of continental shelf and exclusive economic zone appertaining respectively to Nicaragua and Colombia, in accordance with equitable principles and relevant circumstances recognized by general international law as applicable to such a delimitation of a single maritime boundary." (*Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, Application of the Republic of Nicaragua, p. 8, para. 8.)

Nicaragua maintained the same formulation in its Memorial submitted on 28 April 2003 (*ibid.*, Memorial of the Republic of Nicaragua, pp. 265-267, para. 3.39).

12. However, Nicaragua suddenly changed its submissions in its Reply of 18 September 2009 to what came to be known as submission I (3). The final submissions of the Applicant, as presented orally at the conclusion of the oral proceedings held on 1 May 2012, thus expressed Nicaragua's claim as follows:

> "I. May it please the Court to adjudge and declare that:
>
> . . . . . .
>
> (3) The appropriate form of delimitation, within the geographical and legal framework constituted by the mainland coasts of Nicaragua and Colombia, is a continental shelf boundary dividing by equal parts the overlapping entitlements to a continental shelf of both Parties." (*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 636, para. 17.)

13. Colombia as Respondent lodged an objection to this, charging that this newly reformulated claim of Nicaragua "fundamentally changed the

subject-matter of the dispute which Nicaragua originally asked the Court to decide" and asserted that this claim was inadmissible (CR 2012/12, p. 44, para. 2 (Bundy)). It was contended, notably, that this radical change in the Applicant's position took its concrete form only in late 2007, more than six years after the original dispute had been submitted, ostensibly in connection with the 2007 Judgment of the Court on preliminary objections, and that this change radically transformed the nature of the claim *(Territorial and Maritime Dispute (Nicaragua* v. *Colombia) Preliminary Objections, Judgment, I.C.J. Reports 2007 (II))*.

14. In its 2012 Judgment, however, the Court decided to find admissible

> "the Republic of Nicaragua's claim contained in its final submission I (3) requesting the Court to adjudge and to declare that '[t]he appropriate form of delimitation, within the geographical and legal framework constituted by the mainland coasts of Nicaragua and Colombia, is a continental shelf boundary dividing by equal parts the overlapping entitlements to a continental shelf of both Parties'" (*I.C.J. Reports 2012 (II)*, p. 719, para. 251 (2)).

15. As a participating judge in this Judgment, I voted against this finding of the Court. As I stated in my dissenting opinion, my position was that

> "[t]he essence of the situation in the present case is that the Applicant attempted to *replace* [rather than reformulate] the original formulation of the claim submitted to the Court in its Application by a newly formulated, ostensibly different, claim relating to the existing dispute" (*ibid.*, dissenting opinion of Judge Owada, p. 722, para. 6).

16. The significant element of the Judgment of the Court on this point is that the Court decided that "[t]he new submission thus still concerns the delimitation of the continental shelf, although on different legal grounds" (*ibid.*, p. 665, para. 111). The logical conclusion stemming from this decision of the Court is therefore that, by accepting the position that Nicaragua's submission was admissible, the Court must be regarded as having taken the position that all of the issues contained in the newly reformulated claim would have to be squarely addressed on their merits in the Judgment.

C. What the Court Has Decided in Fact in Its 2012 Judgment

17. The Court can thus be seen to have accepted the newly reformulated claim of the Applicant as *procedurally admissible* in the 2012 Judgment, with its legal implication that the substance of the newly reformulated claim of Nicaragua should fall within the purview of its Judgment on the merits. The Court, however, could not, and did not in fact, examine the substance of Nicaragua's claim for an extended continental shelf on its merits. Indeed, the final text of the 2012 Judgment clearly reveals that the Court ultimately concluded that "it was not in a

position" at that stage of the proceedings to examine the substance of the merits of the claim (*I.C.J. Reports 2012 (II)*, p. 669, para. 129). I wish to raise and examine several reasons why it could not and did not in fact come to a final decision on the merits on this issue.

(i) The reasoning contained in Part IV of the Judgment

18. The position of the Court is apparent first of all in the reasoning contained in Part IV of the Judgment. The Court, having concluded in Part III that Nicaragua's claim for the delimitation of a continental shelf beyond 200 nautical miles was admissible, proceeded on this basis to its "[c]onsideration" of this claim (*ibid.*, p. 665). It is significant to note, however, that in embarking upon its "consideration" of this claim on the merits, the Court immediately proceeded to declare that it was turning "to the question whether it is in *a position to determine*" the continental shelf boundary proposed by Nicaragua (*ibid.*, p. 665, para. 113; emphasis added).

19. These introductory remarks would seem to signal that the Court was not necessarily prepared to enter into a thorough examination of the issues required in order to reach a final determination on the substantive merits. It is true that the Judgment introduced and laid out the arguments advanced by the Parties. However, it is clear that it did not engage in an independent analysis of these arguments. The Judgment recounted certain areas of agreement between the Parties as well as the principal arguments of Nicaragua related to the substance of the claim for an extended continental shelf (*ibid.*, pp. 666-667, paras. 119-121) and the arguments of Colombia in rebuttal (*ibid.*, pp. 667-668, paras. 122-124). Specifically, the Judgment recalled the claims asserted by the Parties with respect to: *(a)* the existence, as a matter of fact, of the extended continental shelf as a natural prolongation of the Nicaraguan mainland into the Caribbean Sea; *(b)* the applicability of the procedures of Article 76 of the Law of the Sea Convention; and *(c)* the methodology to be applied for the delimitation of the overlapping area of the continental shelf, with one based on the natural prolongation criterion and the other based on the distance criterion. However, the Court did not engage in an examination and analysis of these claims in order to reach its own conclusion on these concrete issues arising out of the argument of the Parties.

20. It is interesting to note that the Court's treatment of the claim of Nicaragua in the 2012 Judgment was not confined to a simple recitation of the arguments advanced by the Parties. Thus, the Judgment, based on the submission of Nicaragua in support of its claim for the delimitation of a continental shelf extending beyond 200 nautical miles, confined itself to confirming that there had not been any "case in which a court or a tribunal was requested to determine the outer limits of the continental shelf beyond 200 nautical miles", noting in particular that Nicaragua had itself failed to establish that any such precedents existed (*ibid.*, p. 668, para. 125).

21. It is obvious that for a claim such as the one at issue in this case, namely a claim concerning an entitlement to a continental shelf extending beyond 200 nautical miles, a number of complex facts and intricate legal standards must be examined and addressed in order to conclusively resolve the rights and duties at issue. A typical examination in this respect should entail, *inter alia*: *(a)* a detailed inspection of the geological and geomorphological features of the disputed area to establish the existence of overlapping entitlements of Nicaragua and Colombia; *(b)* the verification of the existence and delineation of the continental margin as claimed by Nicaragua; *(c)* the acceptability of a median line as the criterion for delimitation between Nicaragua (based on the natural prolongation principle) and Colombia (based on the distance principle) such as the one proposed by Nicaragua for the delimitation of the overlapping entitlements; *(d)* the applicability or non-applicability of Article 76 of the United Nations Convention on the Law of the Sea as a whole, covering the provisions contained in its paragraphs (4) to (9); and finally *(e)* the requirement *vel non* of the review by the Commission on the Limits of the Continental Shelf (CLCS) of such a claim preceding the delimitation by the Court.

22. However, in the 2012 Judgment, following a discussion of the arguments advanced by the Parties, and without further analysis of these points, the Court curtly concluded that it was "not in a position to delimit the continental shelf boundary between Nicaragua and Colombia, as requested by Nicaragua, even using the general formulation proposed by it" (*I.C.J. Reports 2012 (II)*, p. 669, para. 129). This pronouncement was made in the absence of any substantive analysis of the factual and legal issues that would have been necessary for resolving the claim of an entitlement. There exists only a brief reference to a factual element that "Nicaragua, in the present proceedings, has not established that it has a continental margin that extends [beyond two hundred nautical miles]", without any indication of the legal implication of this statement in the context of the burden of proof *(ibid.)*.

23. Seen in this way, the Court's reference to Nicaragua's obligation under Article 76 of UNCLOS should not, in my view, be seen as merely a procedural requirement. The reasoning of the Court instead makes clear that the condition of the submission of information to CLCS imposed by Article 76 is instead a substantive element that is fundamentally necessary in order for the Court to decide on the issues raised by the Parties. A delimitation cannot be effected in the absence of the existence of overlapping entitlements, which in this case requires the establishment by Nicaragua of its entitlement to a continental shelf extending beyond 200 nautical miles. This can and must be achieved by the submission of detailed information to the CLCS, which is not — as some might suggest — a mere procedural requirement.

24. In this situation, it is in my view impossible to draw from Part IV of the 2012 Judgment a far-reaching conclusion that the Court made a final

and binding decision on the merits that can be said to constitute *res judicata*. On the contrary, the Judgment proceeded to expressly declare that

> "In view of the above, the Court need not address any other arguments developed by the Parties, including the argument as to whether a delimitation of overlapping entitlements which involves an extended continental shelf of one party can affect a 200-nautical-mile entitlement to the continental shelf of another party." (*I.C.J. Reports 2012 (II)*, pp. 669-670, para. 130.)

It was on the basis of this reasoning that the Court stated in the operative part of the 2012 Judgment that "it cannot uphold the Republic of Nicaragua's claim contained in its final submission I (3)" reformulating the same conclusion as was made at the end of Part IV of the Judgment (*ibid.*, p. 719, para. 251 (3)).

(ii) The structure of the 2012 Judgment

25. Second, the position of the Court is apparent in the distinction that the Judgment makes between the Court's treatment of *(a)* Nicaragua's request for the delimitation of its continental shelf extending beyond two hundred nautical miles of its coast (Part IV), and *(b)* the delimitation of the maritime boundary between the overlapping entitlements emanating from Nicaragua's mainland and Colombia's islands (Part V) in the 2012 Judgment.

26. The structure of the 2012 Judgment — and particularly the separation and juxtaposition of the analysis and decisions contained in Parts IV and V — demonstrates that the Court did not make a final and definitive determination of the merits as far as Nicaragua's submission I (3) is concerned. As discussed above, in Part IV of the Judgment, the Court deliberately limited its examination of the issue to an analysis of the legal argumentation advanced by the Parties. In doing so, the Court not only avoided a substantive examination on its own of the claim on the merits, but also formally separated this part of its analysis from the more extensive examination of the claim relating to the delimitation of the relevant maritime area lying between the two opposing States contained in Part V of the Judgment.

27. This demonstrates a stark contrast in the treatment of the Court between the two distinctive categories of claims concerning the continental shelf covered in Parts IV and V of the Judgment. Part V, aptly entitled "Maritime Boundary", contains a comprehensive discussion of the delimitation of entitlements on the merits. It would seem that rather than addressing submission I (3) on its merits, which involved a delimitation of a maritime boundary in the form of a median line between the mainland coasts of the two Parties, the Court instead concerned itself only with the delimitation of a boundary between the overlapping entitlements of Nicaragua based on its mainland coast and of Colombia based on its islands

off the coast of Nicaragua. It has to be stressed that these two parallel claims of Nicaragua, classified as claims *(a)* and *(b)* above (para. 25), entail totally distinct geological and geomorphological features and required the Court to apply entirely different rules of customary international law.

28. In Part V, the Court did scrutinize the evidence presented by the Parties and drew the maritime boundary in accordance with the well-established jurisprudence of the Court relating to the delimitation of the continental shelf between States with overlapping entitlements, namely the three-step approach articulated in the case concerning the *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine)* (*Judgment, I.C.J. Reports 2009*, p. 89, para. 78). It is clear that the conclusion that the Court stated in operative paragraph 251 (4) of the 2012 Judgment is a final and binding decision of the Court, thus constituting *res judicata*. It seems equally clear that the statement of the Court in operative paragraph 251 (3), read together with the reasoning contained in Part IV, is not a conclusive determination of the subject-matter requested by Nicaragua in its submission I (3) and cannot be regarded as constituting *res judicata* (*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 719, para. 251 (3)).

29. In light of all of these considerations, one is bound to come to the conclusion that the Court deliberately divided these issues between Parts IV and V because it did not wish to engage in a substantive examination of the merits on Nicaragua's submission I (3) at that time.

(iii) The burden of proof

30. Finally, it might be suggested by some that the Court did decide on submission I (3) on the merits in the 2012 Judgment and that, in doing so, it rejected the claim on the ground that the Applicant failed to meet its burden of proof. It cannot be denied that in the strictly adversarial framework of litigation traditionally accepted by the Court — whether this is a commendable approach for the proceedings of the International Court of Justice is a different matter — the burden of proof, and thus the burden of risk, falls heavily on the shoulders of the Applicant *(onus probandi incumbit actori)* (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 71, para. 162). It can be accepted on this basis that the principle exists that it is the responsibility of the Applicant to substantiate its claim, such that the burden of proof plays an extremely important role, with the result that the failure of the Applicant to establish a single, crucial point can prove fatal under certain

circumstances to its cause of action. The question is whether, when examined in this complex context that I have tried to depict, the present case falls within the framework of this reasoning.

31. It is submitted that it is wrong to regard the issue of the burden of proof as such an essential element in the present case, when, as a matter of fact, the Court in the 2012 Judgment went no further than to observe that "Nicaragua, in the present proceedings, has not established that it has a continental margin that extends far enough to overlap with Colombia's 200-nautical-mile entitlement to the continental shelf" (*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 669, para. 129). To conclude, on the basis of such a curt statement of facts, that Nicaragua had failed in law to meet its heavy burden of proof is to my mind tantamount to "reading too much" into this dictum of the Judgment — particularly when this remark could legitimately be interpreted as support for the Court's view that it was, at that time, "not in a position" to proceed further to the merits of the claim in the absence of complete submissions to the CLCS. It would seem clear from this context that much more than the insufficiency or absence of evidence was at issue in the 2012 Judgment of the Court. It is for this reason that I take the view that the third preliminary objection of Colombia must be rejected.

D. Conclusion

32. In conclusion, when presented with a question about the binding force of a previous Judgment, the Court must

> "distinguish between, first, the issues which have been decided with the force of *res judicata*, or which are necessarily entailed in the decision of those issues; secondly any peripheral or subsidiary matters, or *obiter dicta*; and finally matters which have not been ruled upon at all" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 95, para. 126).

Although the 2012 Judgment of the Court may have created some confusion in the language it used in the *dispositif*, the context in which Nicaragua originally requested the delimitation of a continental shelf extending beyond 200 nautical miles, as well as the manner in which this claim was treated by the Court in the 2012 Judgment, leads me to the conclusion that the Court did not reach a final and definitive determination that would bind the Parties as *res judicata*. In light of this contextual background, it is my view that it is wrong to conclude in an automatic and facile manner that the Court disposed of Nicaraguan submission I (3) in the 2012 Judgment simply because of the statement in the *dispositif* that "[the Court] cannot uphold the Republic of Nicaragua's claim contained in its final submission I (3)", whether for the reason that Nicaragua failed

to provide sufficient evidence to substantiate its claim or for any other reason (*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 719, para. 251 (3)). The Court did not reject the claim on the merits.

II. The Opposability of UNCLOS by Colombia to Nicaragua

33. In addition to these points, I wish to touch upon an issue relating to the approach of the Court to the role of CLCS, which is especially relevant to the fifth preliminary objection of Colombia. Since I agree with the reasoning expressed by the Court in the present Judgment, this point may be somewhat otiose, but it is important to review this point as a matter of principle with respect to the applicable law in the present case. In its fifth preliminary objection, Colombia argues that Nicaragua's request for a delimitation on the basis of its entitlement to an extended continental shelf is inadmissible because Nicaragua has failed to secure the recommendations of the CLCS required by Article 76 of UNCLOS. The question is whether the obligations contained in Article 76 are opposable to Nicaragua on the part of Colombia, which is not a party to UNCLOS.

34. It is well established that, pursuant to Article 26 of the Vienna Convention on the Law of Treaties, "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith". A necessary corollary to this pronouncement, contained in Article 34 of the Vienna Convention, is the rule that "[a] treaty does not create either obligations or rights for a third State without its consent", or the principle of *res inter alios acta*. Even before the adoption of the Vienna Convention, this rule found expression in the jurisprudence of the Court. The Permanent Court of International Justice held that "[a] treaty only creates law as between the States which are parties to it; in case of doubt, no rights can be deduced from it in favour of third States" (*Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, p. 29). In the case concerning the *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, the Court was faced with the question as to whether Article 6 of the Geneva Convention on the Continental Shelf — and specifically the rules on delimitation of the continental shelf between the adjacent States — was opposable to the Federal Republic of Germany, which was not a party to the Convention. The Court observed that, because Germany had signed but not ratified the Geneva Convention, Article 6 "is not, as such, applicable to the delimitations involved in the present proceedings" and that the Convention "is not opposable to the Federal Republic [of Germany]" (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 27, para. 34

and p. 46, para. 83). In other words, a convention ratified by one State is not opposable to a third State.

35. In the present context, the Court is faced with a situation in which Colombia, a non-party to the Convention, seeks to invoke the provisions of Article 76 of UNCLOS on Nicaragua, which is a State party. Colombia appears to be claiming, without being a party to the Convention, that Nicaragua, a State party, is under the obligation to carry out the provisions of UNCLOS without being subject to its many obligations. Although Nicaragua is not a party to the Vienna Convention of the Law of Treaties, and though this Court has not previously affirmed the status of Article 34 of the Vienna Convention as reflecting a customary rule of international law, its previous jurisprudence supports the view that Colombia cannot invoke Article 76 as an argument opposable to Nicaragua.

36. Of course, there are other means by which a rule codified by an international agreement can be opposable to a State which has not ratified that agreement. That is to say that such a rule may be applied to and bind a third State when the rule at issue is a rule of customary international law. Thus the important question for the purpose of this case is whether the provisions of UNCLOS relied on by Colombia in its fifth preliminary objection, i.e., Article 76 in its entirety, could be opposable to Nicaragua.

37. Legally, it would be a totally different situation for the Court to prescribe as it did in its 2012 Judgment that Nicaragua as a party to the Convention has to carry out its obligation under these provisions of Article 76, in order for Nicaragua to establish that it indeed has an extended continental shelf which goes beyond 200 miles of its mainland coast and which may create overlapping entitlements to the continental shelf with Colombia, and ask Nicaragua to comply with its obligation before the Court can proceed further. In the 2012 Judgment, the Court identified this issue and stated that "since Colombia is not a party to UNCLOS, only customary international law may apply in respect to the maritime delimitation requested by Nicaragua", but did not go further than stating that "the definition of the continental shelf set out in Article 76, paragraph 1, of UNCLOS forms part of customary international law". It categorically stated that "it does not need to decide whether other provisions of Article 76 of UNCLOS form part of customary international law" (*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 666, paras. 114, 118).

38. On the basis of this logic, the present Judgment of the Court, which in my view represents an accurate assessment of the 2012 Judgment, proceeds to state that the Court in the 2012 Judgment did not reject Nicaragua's claim to an extended continental shelf on the merits, but instead found that it was "not in a position" to definitively decide this claim because of Nicaragua's failure to submit adequate information to the CLCS pursuant to Article 76, paragraph 8, of UNCLOS. In doing so, the Court in 2012 did not affirm that this provision stood as a customary rule

of international law, even though it had decided earlier in the 2012 Judgment that the applicable law was customary international law. While the Court referred to its dictum in the case concerning the *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)*, it involved a dispute between two States parties to UNCLOS and thus entailed the application of the treaty law. It is a different proposition for the Court to state that Nicaragua is bound by Article 76 of UNCLOS, as a party to the Convention, irrespective of whether Colombia is also a party. The Court, emphasizing that the Convention "is intended to establish 'a legal order for the seas and oceans'", did this and concluded that "[g]iven the object and purpose of UNCLOS, as stipulated in its Preamble, the fact that Colombia is not a party thereto does not relieve Nicaragua of its obligations under Article 76 of that Convention" (*I.C.J. Reports 2012 (II)*, p. 669, para. 126).

39. This can be accepted a correct statement of the law, as far as Nicaragua is concerned in its relationship with the Court. But when it comes to the question as to whether Colombia, as a State not a party to the Convention, can oppose Nicaragua in terms of the latter's non-compliance with the provisions of Article 76, this becomes an entirely different issue of applicable law. In any event, the important point is that, at the present stage of the proceedings, the Court is answering this question neither in an affirmative way nor in a negative way. While I concur with the reasoning of the Court in rejecting the fifth preliminary objection of Colombia, it appears to me there is yet another reason to reject this objection: the relevant provisions of Article 76 of UNCLOS are not opposable by Colombia to Nicaragua, unless Colombia can establish that the rules contained in Article 76 are rules of customary international law.

(Signed) Hisashi OWADA.

SEPARATE OPINION OF JUDGE GREENWOOD

Nature of res judicata *in international law — What creates a* res judicata *— Effects — Scope of the 2012 Judgment — Nature of Nicaragua's claim in relation to submission I (3) — Silence of the 2012 Judgment regarding Nicaragua's claims to a continental shelf more than 200 nautical miles from the mainland coasts of both Nicaragua and Colombia — Absence of any ruling by the Court on the merits of that claim — Whether Nicaragua's claim to a continental shelf overlapping with Colombia's entitlement to a continental shelf extending 200 nautical miles from Colombia's mainland coast is barred by* res judicata.

1. The closeness of the vote on Colombia's third preliminary objection shows that the issues presented by that objection have not been easy for the Court to resolve. For that reason, and because I have the misfortune to disagree with several of my colleagues, I have thought it right to set out in this separate opinion why I agree with the decision to reject Colombia's *res judicata* argument.

I. The Doctrine of *Res Judicata* in International Law

2. Although the doctrine of *res judicata* has its origins in the general principles of law (see the opinion of Judge Anzilotti in *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, p. 27, and Bin Cheng, *General Principles of Law as Applied by International Court and Tribunals*, 1953, pp. 336-372), it is now firmly established in the jurisprudence of the Court (see, in particular, *Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the* Land and Maritime Boundary between Cameroon and Nigeria (Cameroon *v.* Nigeria), Preliminary Objections *(Nigeria* v. *Cameroon), Judgment, I.C.J. Reports 1999 (I)*, p. 36, para. 12 and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, pp. 90-91, paras. 115-116). *Res judicata* is also well established in the case law of other international tribunals (see, e.g., the Final Award of the Arbitral Tribunal in the *Trail Smelter* case, 11 March 1941 (United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. III, pp. 1950-1951), where *res judicata* is described as "an essential and settled rule of international law").

3. In its Judgment in the *Bosnia* case, the Court explained the rationale for the principle of *res judicata* in the following terms:

> "Two purposes, one general, the other specific, underlie the principle of *res judicata*, internationally as nationally. First, the stability of legal relations requires that litigation come to an end. The Court's function, according to Article 38 of its Statute, is to 'decide', that is, to bring to an end 'such disputes as are submitted to it'. Secondly, it is in the interest of each party that an issue which has already been adjudicated in favour of that party be not argued again. Article 60 of the Statute articulates this finality of judgments. Depriving a litigant of the benefit of a judgment it has already obtained must in general be seen as a breach of the principles governing the legal settlement of disputes." (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, pp. 90-91, para. 116.)

4. It is therefore unnecessary to examine the not inconsiderable differences which exist between different national legal systems regarding the concept of *res judicata* (as to which, see Albrecht Zuener and Harald Koch, "Effects of Judgments: *Res Judicata*" in Mauro Cappelletti (ed.), *International Encyclopaedia of Comparative Law*, Vol. XVI, 2014, Chapter 9). It is the principle of *res judicata* in international law, in particular as developed in the jurisprudence of the Court, which has to be applied. As the Judgment in the present case makes clear, *res judicata* applies only where the parties, the object and the legal ground (i.e., the *personae*, the *petitum* and the *causa petendi*) are the same. However, the identity of these three elements is a necessary, but not a sufficient, condition for the application of *res judicata*. It is also essential that the matter at issue must have been decided in the earlier proceedings. As the Court stated in the *Bosnia* case: "If a matter has not in fact been determined, expressly or by necessary implication, then no force of *res judicata* attaches to it; and a general finding may have to be read in context in order to ascertain whether a particular matter is or is not contained in it." (*I.C.J. Reports 2007 (I)*, p. 95, para. 126.)

5. Once a decision of the Court has rendered a matter *res judicata*, the consequences are far-reaching. As between the parties to that decision, the matter is settled and may not be reopened in the Court or in any other international court or tribunal[1]. However, the effects are not confined to litigation. As the Court explained in the *Bosnia* case, the doctrine of *res*

[1] Indeed, a judgment of an international court or tribunal creates a *res judicata* which may not be reopened between the same parties in a national court (see, e.g., the judg-

judicata is a corollary of the rules in Articles 59 of the Statute, that judgments of the Court are binding on the parties, and Article 60, that they are final and without appeal. One consequence is that the effects of *res judicata* are substantive, rather than procedural. Since the decision on the point in issue is binding on the parties, neither party is entitled to call it into question as a matter of law. That is true of self-help measures, just as much as of litigation. Thus, if a court or tribunal, in a case between two States, determines that one of those States has no entitlement to a continental shelf in a particular area, international law does not permit that State thereafter to assert such an entitlement in that area vis-à-vis the other State party. As the French-Venezuelan Mixed Claims Commission put it, "a right, question, or fact *distinctly put in issue and directly determined* by a court of competent jurisdiction, as a ground of recovery, cannot be disputed" (*Company General of the Orinoco Case*, 31 July 1905 (United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. X, p. 276); original emphasis). That principle applies as much to a ruling on the burden of proof as to a ruling on law. If the legal entitlement claimed by a party is dependent upon the existence of facts the burden of proving which rests on that party, then a finding that that party has not discharged its burden of proof amounts to a determination of whether or not it has that entitlement. The question of entitlement (or the lack thereof) will thenceforth be *res judicata* between those parties.

6. That is precisely the effect, according to Colombia, of the Court's 2012 Judgment. Colombia maintains that the Court there decided that Nicaragua had failed to discharge its burden of proving that it had an entitlement to a continental shelf more than 200 nautical miles from the Nicaraguan mainland (Preliminary Objections of Colombia, para. 5.31). If that is correct, then the question of such entitlement is settled, between Nicaragua and Colombia, in perpetuity. Not only can Nicaragua not contest this issue with Colombia in these, or any subsequent, proceedings in the Court or any other competent tribunal, it cannot rely upon an assertion of an entitlement to a shelf beyond 200 nautical miles as the basis for alleging the illegality of Colombian conduct in the area in question or taking measures in response thereto. Such a judgment would not prevent Nicaragua from taking forward its submission to the Commis-

ment of the High Court in England in *Dallal* v. *Bank Mellat* (1986), QB 441; *ILR* (1985), Vol. 75, p. 151, which decided that a decision of the Iran-United States Claims Tribunal created a *res judicata* which precluded a claimant from pursuing in the English courts a claim which had been rejected by the Tribunal). It will, of course, be very rare that the parties in national proceedings will be the same as those in international proceedings, especially where the international proceedings take place between States.

sion on the Limits of the Continental Shelf ("CLCS"), since the CLCS process is about establishing the outer limits of the continental margin vis-à-vis all parties to UNCLOS. However, no outer limits to a continental shelf beyond 200 nautical miles from the Nicaraguan mainland which Nicaragua might establish — whether or not on the basis of any recommendations from the CLCS — could be opposable to Colombia. Since a judgment creates *res judicata* only as between the parties to the case in which that judgment is given, the 2012 Judgment could not prevent Nicaragua from asserting an entitlement to a continental shelf beyond 200 nautical miles against other neighbouring States. As between Nicaragua and Colombia, however, Nicaragua would have no scope for any such assertion.

II. The Scope of the 2012 Judgment

7. Strictly speaking, it is only the *dispositif* of a judgment which can have the force of *res judicata*. The relevant paragraph of the *dispositif* in the 2012 Judgment is paragraph 3, in which the Court unanimously found that "it cannot uphold the Republic of Nicaragua's claim contained in its final submission I (3)" (*I.C.J. Reports 2012 (II)*, p. 719, para. 251 (3)). In the present proceedings, both Parties have spent much of their time debating the precise meaning of the phrase "cannot uphold". Nicaragua maintains that it was of the utmost significance that the Court chose to use that term, rather than saying that it "rejects" submission I (3). For Nicaragua, that choice indicates that the Court was not making a decision on the merits in relation to the submission. Colombia, on the other hand, contends that "cannot uphold" is synonymous with "rejects". In support of that argument it invokes three judgments in which, it maintains, the Court used "cannot uphold" to mean "rejects" (*Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the* Continental Shelf (Tunisia/Libyan Arab Jamahiriya) *(Tunisia* v. *Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1985*, p. 192; *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*, p. 161; *Frontier Dispute (Burkina Faso/Niger), Judgment, I.C.J. Reports 2013*, p. 44).

8. The Court — rightly, in my opinion — has concluded that neither analysis of the 2012 *dispositif* is persuasive (see paragraph 74 of the Judgment). Nicaragua places far too much emphasis on a choice of words which cannot be said, in and of itself, to compel the conclusion that the Court did not make a determination on the merits. Colombia, on the other hand, is too quick to draw from the three judgments to which it refers the conclusion that the Court uses "cannot uphold" and "rejects" interchangeably. The most recent of those judgments, that in *Burkina Faso/Niger*, does not assist Colombia's argument. The reason why the Court

found that it could not uphold the relevant submissions of Burkina Faso was not that Burkina Faso had failed to establish a factual predicate for its claims but that there was no dispute between Burkina Faso and Niger on the section of the boundary to which those submissions related and thus the primary condition for the Court to exercise its judicial function was absent (*I.C.J. Reports 2013*, p. 71, para. 52). In the *Tunisia* v. *Libya* case, the Court used the phrase in the particular context of the interpretation of a previous judgment (*I.C.J. Reports 1985*, pp. 219-220, para. 50). *Oil Platforms* affords more support to Colombia's argument but still falls short of demonstrating that "cannot uphold" is necessarily to be equated with a rejection on the merits.

9. A more fruitful line of inquiry — which is pursued in the present Judgment — is to examine why the Court decided that it could not uphold submission I (3). In that submission, Nicaragua asked the Court to adjudge and declare that:

> "The appropriate form of delimitation, *within the geographical and legal framework constituted by the mainland coasts of Nicaragua and Colombia*, is a continental shelf boundary dividing by equal parts the overlapping entitlements to a continental shelf of both Parties." (Final submissions of Nicaragua, *I.C.J. Reports 2012 (II)*, p. 636, para. 17; emphasis added.)

The claim thus stated pitched Nicaragua's claim to an outer, or extended, continental shelf beyond 200 nautical miles from the Nicaraguan mainland coast against Colombia's entitlement to a continental shelf extending 200 nautical miles from the mainland coast of Colombia (see sketch-map No. 2, *ibid.*, p. 663).

10. In this context, it is important to understand the unusual geographical framework within which Nicaragua's claim was advanced. The mainland coasts of Nicaragua (in the west) and Colombia (in the east) face one another and are "significantly more than 400 nautical miles apart" (*ibid.*, p. 670, para. 132). Nicaragua's claim to an outer continental shelf extended eastwards from the line 200 nautical miles from the Nicaraguan mainland coast (at which the delimitation effected by the 2012 Judgment stopped; see *ibid.*, p. 683, para. 159 and p. 714, sketch-map No. 11) until it overlapped with the Colombian continental shelf and exclusive economic zone extending 200 nautical miles westwards from the Colombian mainland coast. It was this area of overlapping claims, within 200 nautical miles of the Colombian mainland coast, which submission I (3) invited the Court to divide between the Parties by effecting a delimitation based upon a division into equal parts (as is clear from sketch-map No. 2, *ibid.*, p. 663). However, that was not the only area in which the Nicaraguan claim to an outer continental shelf competed with Colombian claims. In the area between the line 200 nautical miles from the Nicaraguan mainland coast and the line 200 nautical miles from the Colombian mainland coast, Nicaragua's claim to an outer continental

shelf competed with Colombia's claims that the Colombian islands which lie to the west of the line 200 nautical miles from the Nicaraguan mainland coast are entitled to a continental shelf and exclusive economic zone extending 200 nautical miles from their east-facing coasts. Nicaragua's submission I (3) did not directly address that overlap.

11. The Court's conclusion regarding Nicaragua's submission I (3) is set out in paragraph 129 of the 2012 Judgment. It is the reasoning in this paragraph which indicates the scope of paragraph 3 of the *dispositif*. In paragraph 129, the Court states:

> "since Nicaragua, in the present proceedings, has not established that it has a continental margin that extends far enough to overlap with Colombia's 200-nautical-mile entitlement to the continental shelf, *measured from Colombia's mainland coast*, the Court is not in a position to delimit the continental shelf boundary between Nicaragua and Colombia, as requested by Nicaragua . . ." (*I.C.J. Reports 2012 (II)*, p. 669, para. 129; emphasis added).

In the present case, Colombia maintains that, in the 2012 Judgment, the Court determined that "Nicaragua had not established any continental shelf entitlement beyond 200 nautical miles from its baselines" and contends that "the Court concluded that there were no overlapping entitlements between the Parties situated more than 200 nautical miles from Nicaragua's baselines that could be delimited" (Preliminary Objections of Colombia, para. 5.31). On that basis, Colombia argues that the whole of Nicaragua's claim in the present proceedings is barred by the *res judicata* created by the 2012 Judgment.

12. That cannot be correct. Paragraph 129 of the 2012 Judgment is expressly limited to Nicaragua's claim to an outer continental shelf overlapping with "Colombia's 200-nautical-mile entitlement to the continental shelf, *measured from Colombia's mainland coast*" [emphasis added]. It says nothing whatsoever about Nicaragua's claim in the area lying more than 200 nautical miles from the Colombian mainland coast but within 200 nautical miles of the Colombian islands. Whatever effect paragraph 129 and, therefore, paragraph 3 of the *dispositif* may have in relation to the area within 200 nautical miles of the Colombian mainland coast (a matter considered below), the complete silence regarding the area more than 200 nautical miles from either mainland coast cannot be interpreted as a decision regarding Nicaragua's claims in that area. In the language of the *Bosnia* Judgment (quoted in paragraph 4, above), there is no determination to which the force of *res judicata* could attach in relation to those claims.

13. In the present proceedings, Nicaragua is clearly seeking a delimitation between its claims and those of Colombia in that area. In its Application, Nicaragua requests the Court to adjudge and declare "the precise course of the maritime boundary between Nicaragua and Colombia in the areas of the continental shelf which appertain to each of them beyond the boundaries determined by the Court in its Judgment of 19 November 2012" (Application, p. 8, para. 12). Since Colombia lodged its preliminary objections in the present case before Nicaragua had filed its Memorial (see paragraph 5 of the Judgment), the arguments on which Nicaragua bases this claim have yet to be developed. Nevertheless, it is plain from the terms of the passage quoted from the Application that this time Nicaragua is directly seeking a delimitation in all areas in which its claim to an outer continental shelf overlaps with Colombia's 200-nautical-mile entitlements, irrespective of whether those entitlements are measured from the Colombian mainland coast (in the east) or the coasts of Colombia's islands (in the west).

14. Accordingly, it seems to me plain that Colombia's third preliminary objection, based on the *res judicata* effect of the 2012 Judgment, should be rejected with regard to Nicaragua's claims in relation to the area lying more than 200 nautical miles from the Colombian mainland coast. On any analysis, the 2012 Judgment did not decide upon those claims.

15. That leaves the question whether the 2012 Judgment contained a decision regarding Nicaragua's claim to an outer continental shelf overlapping with "Colombia's 200-nautical-mile entitlement to the continental shelf, measured from Colombia's mainland coast" which has the force of *res judicata* and thus bars Nicaragua's claim in respect of this area. Colombia argues that the Court rejected Nicaragua's submission I (3) on the ground that Nicaragua had failed to discharge its burden of proving that it had a continental margin which extended to within 200 nautical miles of the Colombian mainland coast (Preliminary Objections of Colombia, para. 5.30). If that was indeed the case, then, for the reasons already discussed, the 2012 Judgment would amount to a finding that Nicaragua did not possess an entitlement to a continental shelf within 200 nautical miles of the Colombian mainland coast (see paragraph 6, above). That finding would have the force of *res judicata*.

16. Colombia's argument derives some support from the French text of paragraph 129 of the 2012 Judgment, the relevant part of which states that:

> "le Nicaragua n'ayant pas, dans la présente instance, apporté la preuve que sa marge continentale s'étend suffisamment loin pour chevaucher le plateau continental dont la Colombie peut se prévaloir sur 200 milles marins à partir de sa côte continentale, la Cour n'est pas en mesure de délimiter les portions du plateau continental relevant de chacune des Parties, comme le lui demande le Nicaragua . . ." (*I.C.J. Reports 2012 (II)*, p. 669, para. 129).

The statement in the English text that "Nicaragua has not . . . established" is thus rendered more starkly as "le Nicaragua n'ayant pas . . . apporté la preuve". Taken by itself, such a statement is capable of supporting Colombia's interpretation of the 2012 Judgment.

17. When the Court's statement is read in context, however, Colombia's case becomes less persuasive. A finding — especially on a central element of the case before the Court — that a party has failed to discharge its burden of proof must rest upon an analysis by the Court of the evidence adduced and a demonstration of why that evidence is insufficient. Although the Parties said much in their arguments in the 2012 proceedings about the evidence advanced by Nicaragua in support of its submission I (3), the Judgment discloses no analysis by the Court of the quality or persuasiveness of that evidence. If the Court was taking a decision that Nicaragua had not proved that it had a continental margin beyond 200 nautical miles — a decision which would have had the most important consequences for both Nicaragua and Colombia and their peoples — it is hardly to be believed that it would have done so without making any analysis of the evidence put before it or without revealing at least the results of that analysis in its Judgment. The Court was certainly aware of the arguments on that evidence — it summarizes them in paragraphs 119 to 124 of the Judgment — but in the reasoning of the Court, there is not a word about the persuasiveness of the data and other evidence relied upon by Nicaragua. The 2012 Judgment gives no indication of why the proof offered by Nicaragua was insufficient.

18. Nor does the 2012 Judgment give any indication of what it was that Nicaragua had to prove. Since Colombia was not a party to the 1982 United Nations Convention on the Law of the Sea ("UNCLOS"), the Court necessarily held that the applicable law was customary international law (*I.C.J. Reports 2012 (II)*, p. 666, para. 118). It concluded that the definition of the continental shelf contained in paragraph 1 of Article 76 of UNCLOS forms part of customary international law. That provision states:

> "The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance."

The Court thus accepted that customary international law, like UNCLOS, recognizes two distinct grounds for entitlement to a continental shelf, one based upon distance and the other upon the possession of a continental margin which constitutes a natural prolongation of the coastal State's land territory. To assert a claim to an area based upon the first ground, a State need only establish that the area claimed lies within 200 nautical miles of its baselines. Claims based upon the second ground are, however, rather more complicated. A State asserting such a claim in respect of a

particular area must demonstrate that it possesses a continental margin which constitutes a natural prolongation of its land territory and that the area in question falls within the outer limits of that continental margin. That is what Nicaragua was seeking to prove in 2012.

19. To ascertain whether or not Nicaragua had succeeded, however, would have required the Court to decide what are the criteria, under the applicable law, for determining the outer limits of the continental margin. The definition of the continental shelf in paragraph 1 of Article 76 gives no indication as to what those criteria might be. Paragraphs 3 to 6 of Article 76 lay down the criteria applicable to cases governed by UNCLOS. Since, however, the applicable law in the 2012 case was not UNCLOS but customary international law, those paragraphs would have been relevant to the case only if they reflected customary international law. Yet the Court considered that it had no need to decide whether or not the provisions of those paragraphs form part of customary international law. In paragraph 118 of the 2012 Judgment, the Court, after finding that the definition of the continental shelf in Article 76, paragraph 1, was part of customary international law, went on to say that:

> "At this stage, in view of the fact that the Court's task is limited to the examination of whether it is in a position to carry out a continental shelf delimitation as requested by Nicaragua, it does not need to decide whether other provisions of Article 76 of UNCLOS form part of customary international law." (*I.C.J. Reports 2012 (II)*, p. 666, para. 118.)

Nor did the Court consider whether customary international law contained any other criteria, distinct from those in paragraphs 3 to 6 of Article 76, for determining whether or not the continental margin of a State extends more than 200 nautical miles from its baselines. Yet if the Court was proceeding on the basis that it did not need to decide what criteria a State seeking to establish an entitlement to an outer continental shelf has to prove as a matter of customary international law, it could not have decided whether or not Nicaragua had satisfied those criteria.

20. Since the Court did not assess what Nicaragua had proved and did not decide what Nicaragua had to prove, I have come to the conclusion that the 2012 Judgment cannot be read as a finding on the evidence that definitively decided whether Nicaragua was entitled to a continental shelf which overlapped with Colombia's 200-nautical-mile entitlement measured from the Colombian mainland coast. I have therefore voted to reject Colombia's *res judicata* argument in its entirety.

21. Nevertheless, I see a distinction in the reasoning, though not in the result, between Colombia's argument regarding the Nicaraguan claims in the present case concerning the area lying more than 200 nautical miles from the Colombian mainland but within 200 nautical miles of the Colombian islands and those relating to the area within 200 nautical miles of the Colombian mainland coast. The conclusion that there is no

res judicata in relation to the area within 200 nautical miles of the Colombian mainland is based (as I have tried to demonstrate in paragraphs 17 to 19 of this opinion) on the way in which the Court determined what were the issues it had to decide and on the absence of any analysis of the Nicaraguan evidence. Those considerations are also pertinent to the issue of whether the 2012 Judgment created a *res judicata* which bars Nicaragua's claims relating to the area more than 200 nautical miles from the Colombian mainland but within 200 nautical miles of the Colombian islands. Yet with regard to that area, the fact that paragraph 129 is wholly silent about it provides an additional and distinct reason for rejecting the *res judicata* argument. Although I do not do so, it is possible to consider that reason conclusive and thus to reject the third preliminary objection only in respect of Nicaragua's claims in this area while upholding it in relation to the claims concerning the area within 200 nautical miles of the Colombian mainland. Indeed, one of my colleagues has come to just that conclusion. In these circumstances, it would have been much better if the Court had given separate rulings in respect of the application of *res judicata* in relation to Nicaragua's claims in these two areas. I regret that it has not done so.

(*Signed*) Christopher GREENWOOD.

DISSENTING OPINION OF JUDGE DONOGHUE

Scope and meaning of dispositive subparagraph (3) of the 2012 Judgment — Res judicata.

I. Introduction and Summary

1. In its third preliminary objection in this case, Colombia invoked the doctrine of *res judicata*, contending that the Judgment in *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)* (hereinafter the "*Nicaragua* v. *Colombia I*" or the "2012 Judgment" (*I.C.J. Reports 2012 (II)*, p. 624)) renders the claims in Nicaragua's present Application inadmissible. Today the Court rejects this contention and finds Nicaragua's First Request to be admissible (subparagraphs (1) *(b)* and (2) *(b)* of the *dispositif*). I submit this dissenting opinion because I believe that *res judicata* bars Nicaragua's First Request in part.

2. I consider that the Court determined in 2012 that Nicaragua had not proven that its continental shelf entitlement extended far enough to overlap with the 200-nautical-mile continental shelf entitlement "measured from Colombia's mainland coast" (hereinafter, "Colombia's mainland entitlement") (*Nicaragua* v. *Colombia I*, *I.C.J. Reports 2012 (II)*, p. 669, para. 129). This determination was essential to the Court's conclusion that it was not in a position to delimit continental shelf, as Nicaragua requested *(ibid.)*, and thus that it could not uphold Nicaragua's submission I (3) in that case (*ibid.*, p. 670, para. 131; p. 719, para. 251 (3)). Accordingly, this 2012 determination must be given *res judicata* effect. In *Nicaragua* v. *Colombia I*, Nicaragua made full use of the opportunity to prove its claim that its continental shelf entitlement extended far enough to overlap with Colombia's mainland entitlement. It failed to do so. This is precisely the sort of situation in which, for reasons of procedural fairness, the doctrine of *res judicata* applies.

3. On the other hand, the Court did not determine in 2012 whether Nicaragua had proven the existence or extent of any overlap between its continental shelf entitlement and the continental shelf entitlement gener-

ated by Colombia's islands (hereinafter, "Colombia's insular entitlement") in the area more than 200 nautical miles from Nicaragua's coast. Thus, to the extent that Nicaragua's First Request is based on a claim of any such overlap, the doctrine of *res judicata* does not pose an obstacle to admissibility.

4. According to today's Judgment, the Court decided in its 2012 Judgment that Nicaragua's delimitation claim could not be upheld because Nicaragua had not yet submitted to the Commission on the Limits of the Continental Shelf ("CLCS" or "Commission") information on the limits of its continental shelf beyond 200 nautical miles. Consistent with this conclusion, the two relevant subparagraphs of today's *dispositif* do not draw a distinction between the two areas of overlapping entitlement that I describe above. The unfortunate consequence is that my dissenting votes with respect to these two subparagraphs do not accurately reflect my views. My position in respect of Colombia's third preliminary objection is, in fact, a partial dissent. I set out below my interpretation of the 2012 Judgment, which is at odds with the interpretation in today's Judgment, and which gives rise to my partial dissent. In so doing, I recall my 2012 separate opinion (*I.C.J. Reports 2012 (II)*, p. 751), in which I addressed the very paragraphs of the 2012 Judgment that divide the Court today.

5. I also indicate in this opinion the reasons why I am unconvinced by the Court's interpretation of the 2012 Judgment.

II. The Question before the Court Today

6. Colombia's contention that the doctrine of *res judicata* renders Nicaragua's First Request inadmissible requires the Court to specify the meaning and scope of paragraph 251, subparagraph (3), of the 2012 Judgment (hereinafter, "dispositive subparagraph (3)"). If this cannot be determined from the text of the *dispositif* alone, "[i]n determining the meaning and scope of the operative clause of the original Judgment, the Court, in accordance with its practice, will have regard to the reasoning of that Judgment to the extent that it sheds light on the proper interpretation of the operative clause" (*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), Judgment, I.C.J. Reports 2013*, p. 306, para. 68). Although the contentions that the parties advance in a case cannot be determinative of the interpretation of a judgment, "[t]he pleadings and the record of the oral proceedings . . . are also relevant to the interpretation of the Judgment, as they show what evidence was, or was not, before the Court and how the issues before it were formulated by each Party" (*ibid.*, para. 69). A precise understanding of the meaning and scope of a judgment requires, in particular, the identification of each element of the reasoning that constitutes "a condition essential to the Court's decision" (*ibid.*, p. 296, para. 34, citing *Interpretation of*

Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13, p. 20). Thus, the Court today must identify the elements of the Court's 2012 reasoning that were essential to its 2012 decision that it could not uphold Nicaragua's submission.

7. Identification of these essential elements provides a basis to ascertain the points that were "determined, expressly or by necessary implication" by the Court's 2012 Judgment (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 95, para. 126), which must be given *res judicata* effect (see paragraph 60 of today's Judgment).

III. The Context for the 2012 Judgment

A. The Procedural Steps related to Establishment of the Outer Limits of the Continental Shelf

8. Because today's Judgment attaches singular importance to one step in the procedure for establishing the outer limits of the continental shelf that is contained in the United Nations Convention on the Law of the Sea ("UNCLOS"), I summarize here the three steps that apply to UNCLOS States parties, which are set out in Article 76, paragraph 8, of UNCLOS. First, a coastal State that intends to establish the outer limits of its continental shelf beyond 200 nautical miles of its coast is required to submit information regarding such limits to the CLCS. This document is usually called a "submission" (the term that I use today), although the 2012 Judgment sometimes refers to it as a "full submission". Secondly, the Commission makes recommendations regarding the outer limits to the coastal State. Thirdly, on the basis of the Commission's recommendations, the coastal State establishes the outer limits of its continental shelf. Such limits are final and binding.

9. Article 4 of Annex II to UNCLOS requires any submission to be made within ten years of entry into force of the Convention for a State party. In 2008, however, the UNCLOS States parties decided that this ten-year deadline could be met by a State's transmission to the Secretary-General of Preliminary Information indicative of the outer limits of the continental shelf beyond 200 nautical miles (UN doc. SPLOS/183, 2008; see also UN doc. SPLOS/72, 2001). Consistent with the 2012 Judgment, I refer to such a document as "Preliminary Information".

B Nicaragua's Submission I (3) and Colombia's Response

10. In *Nicaragua* v. *Colombia I*, Nicaragua's submission I (3) (hereinafter, "submission I (3)") requested the Court to adjudge and declare that:

"(3) The appropriate form of delimitation, within the geographical and legal framework constituted by the mainland coasts of Nicaragua and Colombia, is a continental shelf boundary dividing by equal parts the overlapping entitlements to a continental shelf of both Parties." (*I.C.J. Reports 2012 (II)*, p. 636, para. 17.) Nicaragua did not ask the Court to effect a delimitation in respect of any overlap of Nicaragua's entitlement with Colombia's insular entitlement in the area beyond 200 nautical miles of Nicaragua's coast. Instead, it asked the Court to enclave the Colombian islands of San Andrés and Providencia and Santa Catalina by giving them maritime entitlements of 12 nautical miles (submission I (4); see sketch-map No. 2 in *ibid.*, p. 663 and the separate opinion of Judge Donoghue, *ibid.*, p. 755, para. 13).

11. Nicaragua recognized in *Nicaragua* v. *Colombia I* that "[d]elimitation can only take place after one has decided what is the area that needs to be delimited" (CR 2012/9, p. 23, para. 10 (Lowe)) and thus that the first step in those proceedings was for the Court to determine the area of overlapping entitlement to continental shelf. The next step would be the delimitation of any area of overlap identified by the Court.

12. When maritime entitlements claimed by the parties correspond to their respective 200-nautical-mile zones, the Court can normally identify the area of overlapping entitlement through an exercise that is largely mechanical, on the basis of coastal geography. This is not the situation, however, when a delimitation claim is predicated on the applicant's asserted entitlement to continental shelf beyond 200 nautical miles from its coast, as was the case in *Nicaragua* v. *Colombia I*. In those circumstances, a court or tribunal is required, as a first step, to resolve the question of fact as to whether an overlap exists. Only if an overlap is found will the court or tribunal be in a position to proceed to the second step of delimitation.

13. Accordingly, as the 2012 Judgment notes, Nicaragua considered in that case that the existence of continental shelf "is essentially a question of fact" (p. 666, para. 119). Nicaragua did not question that a party bears the burden of proving the facts that it asserts (*Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia* v. *Greece), Judgment, I.C.J. Reports 2011 (II)*, p. 668, para. 72; *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 86, para. 68). It marshalled its evidence in an attempt to do so. Its Reply included a chapter entitled "The Continental Shelf in the Western Caribbean: The Geological and Geomorphological Evidence", as well as a series of technical annexes taken from the Preliminary Information that it had transmitted to the Secretary-General and other scientific data and evidence regarding the geology and geomorphology of the area in question. During two sessions of the oral proceedings, a geologist on Nicaragua's team presented evidence in support of

Nicaragua's assertion that its continental shelf entitlement overlapped with Colombia's mainland entitlement.

14. Nicaragua took the position that, if the natural prolongation of the coastal State's landmass extends beyond 200 nautical miles from its coast, that State has an entitlement to extended continental shelf "*ipso facto* and *ab initio*" (CR 2012/15, p. 17, para. 4 (Lowe)). Nicaragua pointed to Article 77, paragraph 3, of UNCLOS, which states that a coastal State's continental shelf entitlement does not depend on occupation or express proclamation. It emphasized that the Commission "has no role in establishing an entitlement to a continental shelf: it merely determines the precise location of the outer limits of a pre-existing entitlement" (*ibid.*, p. 19, para. 15 (Lowe)).

15. Colombia's primary response (see paragraph 19 below) was that Nicaragua's claim was inadmissible as a new claim. However, if the claim were found to be admissible, *quod non*, Colombia contended that the claim failed on the merits, both for legal and evidentiary reasons. As to the asserted legal defects, Colombia made two points. First, Colombia disagreed with Nicaragua's claim that entitlement of continental shelf exists "*ipso facto* and *ab initio*", stating that:

> "Article 76, coupled with the Commission's Rules of Procedure, makes it mandatory for a coastal State to make an extended continental shelf submission to the Commission, for the Commission to make recommendations on that submission, and for the coastal State then to establish the outer limits of its shelf 'on the basis of' the Commission's recommendations. Rule 45 stipulates that the coastal State *'shall'* submit particulars of its claims to the Commission. Nicaragua cannot be deemed to have established any rights to an extended continental shelf unless and until these steps are followed . . ." (*Nicaragua* v. *Colombia I*, Rejoinder of the Republic of Colombia, p. 141, para. 4.42.)

Thus, Colombia's position was that a coastal State that is a party to UNCLOS has no entitlement to extended continental shelf until the three steps set out in Article 76, paragraph 8, of UNCLOS are completed and the coastal State has established the outer limits based on Commission recommendations.

16. Colombia's second legal argument was that a State's entitlement to continental shelf based on the distance criterion always takes precedence over an extended continental shelf entitlement. Nicaragua disagreed on this legal point.

17. Turning to the evidence, Colombia had this to say: "Factually, the so-called 'evidence' that Nicaragua has adduced in its Reply is woefully deficient, and would not even begin to satisfy the Commission on the Limits of the Continental Shelf." (CR 2012/12, p. 53, para. 46 (Bundy).) To support this criticism of Nicaragua's evidence, Colombia emphasized Nica-

ragua's admissions as to the insufficiency of its evidence. To this end, Colombia called the Court's attention to the fact that Nicaragua had attached to its Reply technical annexes from the Preliminary Information that it had transmitted to the Secretary-General, but had not filed the Preliminary Information itself with the Court. Colombia informed the Court that Nicaragua's Preliminary Information itself (which is available on the Commission website) acknowledged that "some of the data and the profiles [contained therein] do not satisfy the exacting standards required by the CLCS for a full submission, as detailed in the Commission's Guidelines" (CR 2012/12, p. 56, para. 59 (Bundy); see also *ibid.*, p. 61, para. 81 (Bundy)). Colombia pointed to other admissions that appeared in the evidence that Nicaragua had submitted in the proceedings in *Nicaragua* v. *Colombia I*: "Nicaragua's technical annex to its Reply states that its foot-of-slope points 'should be treated as indicative only'. And it adds 'there are issues with the data quality in a few areas'." (*Ibid.*, p. 58, para. 65 (Bundy).)

18. As can be seen, therefore, the arguments of the Parties in *Nicaragua* v. *Colombia I* centred not on the methodology of delimitation, but on the question whether there was a basis in law and in fact for the Court to proceed to the step of delimitation.

IV. What Did the Court Decide in 2012?

19. In the 2012 Judgment, the Court took two decisions regarding Nicaragua's submission I (3). That submission was not a part of Nicaragua's Application; it appeared for the first time in Nicaragua's Reply. The Court first rejected Colombia's contention that the claim contained in submission I (3) was inadmissible because it was new (*Nicaragua* v. *Colombia I*, p. 719, para. 251 (2)). The reasoning in support of this decision appears in Section III of the 2012 Judgment, entitled "Admissibility of Nicaragua's Claim for Delimitation of a Continental Shelf Extending beyond 200 Nautical Miles". Section III concludes that the claim contained in submission I (3) is admissible (*ibid.*, p. 665, para. 112). The 2012 Judgment identifies no question of admissibility other than Colombia's objection to Nicaragua's new claim.

20. Section IV of the 2012 Judgment is entitled "Consideration of Nicaragua's Claim for Delimitation of a Continental Shelf Extending beyond 200 Nautical Miles". It contains the reasoning on which the Court bases its second decision on Nicaragua's submission, i.e., that the Court could not "uphold the Republic of Nicaragua's claim contained in its final submission I (3)" (*ibid.*, p. 719, para. 251 (3)). The structure of the Judgment and the absence of any indication that the Court was addressing an unspecified aspect of admissibility in Part IV therefore make clear that the Court's decision that it could not uphold Nicaragua's submission I (3) was a decision on the merits.

21. In the present case, each Party attached significance to the Court's use of the phrase "cannot uphold" to express its decision on the merits of submission I (3).

22. According to Nicaragua, in 2012 the Court neither ruled positively on Nicaragua's claim, nor rejected it. Instead, it "confine[d] itself, negatively, to 'not upholding' a submission — that is to say not ruling on it" (CR 2015/27, p. 39, para. 25 (Pellet)). However, Nicaragua did not identify any prior judgment in which the Court used the phrase "cannot uphold" to indicate that it would not rule on the merits of a claim that fell within its jurisdiction and was admissible.

23. Colombia's assertion was that the decision that the Court could not uphold Nicaragua's claim meant that the Court had rejected the delimitation requested in submission I (3). Colombia pointed to a series of judgments in which the Court used the phrases "cannot uphold" or "cannot be upheld" when it rejected a claim (see CR 2015/28, pp. 18-21, paras. 3-12 (Reisman)).

24. The judgments identified by Colombia undercut Nicaragua's suggestion that the Court used the phrase "cannot uphold" in dispositive subparagraph (3) in order to signal that it was not ruling on a claim. However, Colombia's contention that the Court rejected Nicaragua's delimitation claim in its entirety overlooks the fact that the Court in dispositive subparagraph (3) ruled on a claim with the two distinct steps described above (para. 12). The Court never proceeded to delimitation, so it cannot be understood to have "rejected" Nicaragua's proposed delimitation. Instead, the phrase "cannot uphold" indicates that Nicaragua's submission I (3) failed at the first of the two steps inherent in Nicaragua's claim; the Court was therefore not in a position to proceed to the second step of delimitation.

25. The question that divides the Court today is why the Court determined that it was not in a position to delimit as requested by Nicaragua, and thus decided that it could not uphold submission I (3). As the answer to this question cannot be found in the text of the *dispositif*, I turn now to my understanding of the reasoning that was essential to the Court's 2012 decision.

26. In the first paragraph of Section IV, the Court framed the question to be addressed as "whether it is in a position to determine 'a continental shelf boundary dividing by equal parts the overlapping entitlements to a continental shelf of both Parties' as requested by Nicaragua in its final submission I (3)" (*Nicaragua* v. *Colombia I*, p. 665, para. 113).

27. A court or tribunal is only "in a position" to effect a delimitation if the entitlements of the parties overlap (see *Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment of 14 March 2012, *ITLOS Reports 2012*

(hereinafter, *"Bangladesh/Myanmar"*), p. 105, para. 397). Thus, after indicating that customary international law governs the case (*Nicaragua* v. *Colombia I*, p. 666, para. 118), the 2012 Judgment turns to the Parties' positions in respect of the first step of Nicaragua's claim — the contention that Nicaragua's continental shelf entitlement overlaps with Colombia's mainland entitlement.

28. The Court's summary of Nicaragua's position begins with its factual claim — that the natural prolongation of its landmass, which it described as the "Nicaraguan Rise", overlaps with Colombia's mainland entitlement (*ibid.*, p. 666, para. 119). The Judgment notes that Nicaragua had transmitted Preliminary Information to the Secretary-General within the applicable ten-year period (*ibid.*, p. 667, para. 120).

29. The Judgment also lays out the ways in which Nicaragua sought to reassure the Court of the quality of its evidence, noting that, according to Nicaragua, the work needed to complete a submission to the Commission was "well advanced" and that it intended to acquire additional survey data in order to complete the information to be submitted to the Commission (*ibid.*, p. 667, para. 120). In addition, the 2012 Judgment recalls Nicaragua's assertion that it had "established the outer limit of its continental shelf beyond 200 nautical miles on the basis of available public domain datasets" *(ibid.)*.

30. When the Judgment turns to Colombia's position, the Court's summary captures that Party's view that the inadequacy of Nicaragua's evidence stood in the way of delimitation:

> "Colombia contends that Nicaragua's purported rights to the extended continental shelf out to the outer edge of the continental margin beyond 200 nautical miles have never been recognized or even submitted to the Commission. According to Colombia, the information provided to the Court, which is based on the 'Preliminary Information' submitted by Nicaragua to the Commission, is 'woefully deficient'. Colombia emphasizes that the 'Preliminary Information' does not fulfil the requirements for the Commission to make recommendations, and therefore Nicaragua has not established any entitlement to an extended continental shelf. That being the case, Colombia asserts that Nicaragua cannot merely assume that it possesses such rights in this case or ask the Court to proceed to a delimitation 'based on rudimentary and incomplete technical information'." (*Ibid.*, p. 667, para. 122.)

As can be seen in the Court's summary of Colombia's views, the deficiencies in Nicaragua's evidence were revealed, first, by the fact that the limits of its continental shelf had not been "recognized or even submitted" to the Commission and, secondly, because the Preliminary Information from which Nicaragua drew its evidence did not even meet the requirements for a submission to the Commission. According to Colombia, the

consequence of Nicaragua's "rudimentary and incomplete" evidence was that the Court could not proceed to delimitation.

31. Having summarized the Parties' positions, the 2012 Judgment then addresses the "jurisprudence" to which Nicaragua had referred (*Nicaragua* v. *Colombia I*, p. 668, para. 125). It begins with observations regarding the Judgment of ITLOS in *Bangladesh/Myanmar*, in which the Tribunal rejected the contention that it should not delimit areas of extended continental shelf. The Court first identifies circumstances that distinguished that case from the situation in *Nicaragua* v. *Colombia I* (e.g., ITLOS did not need to determine the outer limits of the continental shelf; the Bay of Bengal presents a unique situation; both States were parties to UNCLOS and had made submissions to the Commission). This enumeration of differences between the two cases might have suggested that the Court saw reasons not to proceed to delimitation in *Nicaragua* v. *Colombia I*, even though ITLOS had done so in *Bangladesh/Myanmar.* However, the discussion of *Bangladesh/Myanmar* closes with the observation that ITLOS had drawn a clear distinction between delimitation of continental shelf and delineation of its outer limits, a point that today's Judgment also embraces (para. 112). Taken as a whole, therefore, the Court's comments on *Bangladesh/Myanmar* suggest some openness to the delimitation of areas of extended continental shelf.

32. When the Court's review of jurisprudence moves from *Bangladesh/Myanmar* to its own 2007 Judgment in the case concerning *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)*, however, the Court's reasoning points in precisely the opposite direction. Quoting from that 2007 Judgment, the Court states that "any claim of continental shelf rights beyond 200 miles [by a State party to UNCLOS] must be in accordance with Article 76 of UNCLOS and reviewed by the Commission" (*Nicaragua* v. *Colombia I*, p. 669, para. 126, citing *I.C.J. Reports 2007 (II)*, p. 759, para. 319). The clear implication (about which my 2012 separate opinion expresses misgivings) is that the Court would hesitate to entertain an application seeking delimitation of areas of extended continental shelf in the absence of *review* by the Commission. (Today's Judgment, however, reaches the opposite conclusion in rejecting Colombia's fifth preliminary objection.) The Court then observes that the fact that Colombia is not a party to UNCLOS does not relieve Nicaragua of its obligations under Article 76 of UNCLOS (*Nicaragua* v. *Colombia I*, p. 669, para. 126.)

33. Following its observations on jurisprudence, the Court addresses the evidence that Nicaragua had provided to the Court. It notes that Nicaragua's Preliminary Information "by [Nicaragua's] own admission, falls short of meeting the requirements for information" specified in paragraph 8 of Article 76 of UNCLOS and that Nicaragua had provided the Court with annexes to the Preliminary Information and had indicated that the entire Preliminary Information was available on the Commission's website (*ibid.*, p. 669, para. 127). There was no reason for the Court

to probe the details of Nicaragua's evidence or Colombia's criticism thereof because the evidence that Nicaragua had presented to the Court was facially deficient. In the absence of Commission recommendations, the Court could not rely on the assessment of an expert body, as it has done in other cases (*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. 76, paras. 190-191). Nicaragua had admitted that the evidence that it had introduced in *Nicaragua* v. *Colombia I* fell short of what the Commission requires, and the Court attaches particular evidentiary importance to admissions adverse to a party (see, e.g., *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 43, para. 69; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 201, para. 61). Thus, Nicaragua's reliance in the proceedings in the 2012 Judgment on evidence from its Preliminary Information, and not from a submission, was among the reasons why the Court concluded that Nicaragua had failed to prove the facts that it asserted in the first step of its claim.

34. After addressing Nicaragua's evidence, the 2012 Judgment recalls that, at the hearing, Nicaragua had suggested that, rather than specifying the precise location of the outer limits of Nicaragua's continental shelf, the Court had the option of proposing a formula for delimitation, which could then be applied after Nicaragua has established the outer limits of its continental shelf based on Commission recommendations (*Nicaragua* v. *Colombia I*, p. 669, para. 128). Following its summary of Nicaragua's alternative proposal, the Court concludes its reasoning on the merits with respect to Nicaragua's submission I (3) as follows:

> "[S]ince Nicaragua, in the present proceedings, has not established [in French: *'n'ayant pas . . . apporté la preuve'*] that it has a continental margin that extends far enough to overlap with Colombia's 200-nautical-mile entitlement to the continental shelf, measured from Colombia's mainland coast, the Court is not in a position to delimit the continental shelf boundary between Nicaragua and Colombia, as requested by Nicaragua, even using the general formulation proposed by it." (*Ibid.*, p. 669, para. 129.)

35. Thus, having begun its consideration of Nicaragua's submission I (3) with the question whether it was "in a position" to determine a continental shelf boundary as requested by Nicaragua (*ibid.*, p. 665, para. 113), the Court answered that question in the above-quoted paragraph. As that paragraph indicates, in the proceedings in *Nicaragua* v. *Colombia I*, Nicaragua had not proven the facts on which its claim was predicated — that its continental shelf entitlement extended far enough to overlap with Colombia's mainland entitlement. This conclusion as to the first step of Nicaragua's claim led the Court to determine that it was "not in a position" to proceed to the second step — delimitation of the conti-

nental shelf boundary requested by Nicaragua — either through identification of a specific median line or through articulation of a formula. This reasoning was essential to the Court's decision that Nicaragua's submission I (3) could not be upheld.

36. In my 2012 separate opinion, I observed that the evidence presented by Nicaragua did not provide a sufficient factual basis for the Court to proceed to delimitation, and I expressed regret that the Court did not set out in its reasoning the specific inadequacies of Nicaragua's evidence (*I.C.J. Reports 2012 (II)*, p. 756, para. 17). In today's Judgment (para. 82), the Court points to the fact that the 2012 Judgment did not analyse the evidence to support its conclusion that the Court made no determination about that evidence in 2012. As noted above, however, the deficiencies in Nicaragua's evidence were obvious from the Parties' positions, without examination of the underlying geological and geomorphological facts. In addition, today's Judgment ignores the fact that, while the Court in some cases presents its own analysis of the evidence or legal positions presented by the parties, the Court's style of drafting (sometimes described as "laconic") often follows another pattern, in which party positions on a particular issue are summarized, followed only by a brief statement of the Court's conclusion on that issue (e.g., that the evidence fails to establish an asserted fact). I have expressed my own concerns about this drafting style in the past, noting in particular the obscurity of reasoning that can result from it (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, declaration of Judge Donoghue, p. 392, para. 9). However, there is nothing exceptional about the Court's use of this style in *Nicaragua* v. *Colombia I* to indicate the Court's conclusion that Nicaragua failed to establish the facts that it asserted.

37. (I also note that, during the proceedings in the present case, both Colombia (CR 2015/26, p. 31, para. 6 (Herdegen); CR 2015/28, pp. 43-44, paras. 17-23 (Bundy)) and Nicaragua (CR 2015/27, p. 41, para. 29; p. 44, para. 37 (Pellet); CR 2015/29, p. 25, para. 23; p. 26, para. 25; pp. 26-27, para. 27 (Pellet)) expressed the view that the Court had decided in 2012 that it could not uphold Nicaragua's submission for want of evidence. Of course, the Parties disagreed about whether this lack of evidence meant that Nicaragua's First Request in the present case was barred by the doctrine of *res judicata*.)

38. There is also nothing unusual in the fact that the Court in 2012 declined to address certain of the legal issues presented by the Parties, including the relationship between one State's extended continental shelf entitlement and another State's 200-nautical-mile zone and the question whether the various paragraphs of Article 76 of UNCLOS are part of customary international law (*Nicaragua* v. *Colombia I*, pp. 666-668, paras. 118, 121 and 123; pp. 669-670, para. 130). These legal questions had implications well beyond *Nicaragua* v. *Colombia I*. The Court would have had to

confront each of them in order to proceed to delimitation, but the facial inadequacy of Nicaragua's evidence meant that it was free to decline to address them. Once again, the Court's approach is entirely in line with its traditions of judicial drafting, pursuant to which it takes a flexible approach to the sequence in which it addresses questions presented by an application, which can obviate the need to decide questions of law not essential to settlement of the particular dispute before it.

39. Because the Court in its reasoning (*Nicaragua* v. *Colombia I*, p. 669, para. 129, quoted above in para. 34) referred only to Nicaragua's claim of an overlap with Colombia's mainland entitlement, I see no basis to conclude that the Court made a determination about the existence or extent of any overlap between Nicaragua's continental shelf entitlement in the area more than 200 nautical miles from its coast and Colombia's insular entitlement. This conclusion is consistent with Nicaragua's submissions in *Nicaragua* v. *Colombia I*.

V. The Implications of the Decision that the Court Could not Uphold Nicaragua's Submission I (3) *(Res Judicata)*

40. Today's Judgment recites the well-known requirements for the application of *res judicata* — same parties, object and legal ground. The Court also quite correctly observes that, in order to decide whether the doctrine of *res judicata* bars an application in a second case, the Court must determine whether and to what extent a claim was definitively settled in the first case, or, as the Court has stated elsewhere, whether "a matter has . . . been determined, expressly or by necessary implication" (see paragraph 7 above).

41. I do not take issue with the Court's summary of the law. My differences with the Court stem from my disagreement with the interpretation of dispositive subparagraph (3) of the 2012 Judgment advanced by the Court today.

42. In its 2012 Judgment, the Court "determined, expressly or by necessary implication", that Nicaragua had not established that its continental shelf extended far enough to overlap with Colombia's mainland entitlement and thus that the Court was not in a position to delimit. Under these circumstances, the doctrine of *res judicata* denies Nicaragua the opportunity to prove the same facts for a second time in a second case against the same respondent, in the hope that it will meet its burden of proof in the second case. Nicaragua took full advantage of the opportunity to prove the overlap of its entitlement with Colombia's mainland entitlement in *Nicaragua* v. *Colombia I*. In such a situation, it is unfair, and inconsistent with the sound administration of justice, to give a State a second chance to prove the same facts in a second case. Thus, the *res judicata* effect of the 2012 Judgment prevents Nicaragua from request-

ing a court anew to ascertain that its continental shelf entitlement overlaps with Colombia's mainland entitlement.

43. As the 2012 Judgment did not address the question whether there was an overlap between Nicaragua's entitlement and Colombia's insular entitlement in the area located more than 200 nautical miles from Nicaragua's coast, however, the Court did not make any determination on that issue. For that reason, there is no basis to apply the doctrine of *res judicata* in respect of any such overlap.

44. For these reasons, I consider that Nicaragua's First Request in the present case is inadmissible as to any overlap between Nicaragua's entitlement and Colombia's mainland entitlement (*res judicata* effect), but admissible as to any overlap between Nicaragua's entitlement and Colombia's *insular* entitlement in the area beyond 200 nautical miles of Nicaragua's coast (no *res judicata* effect).

45. Concerning the application of the doctrine of *res judicata* to the 2012 Judgment, I offer two final comments. First, the Court's determination that a party has failed to prove a particular fact that it alleged does not automatically prove the opposite fact. The Chamber of the Court recognized this in the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)*, wherein it observed that "the rejection of any particular argument on the ground that the factual allegations on which it is based have not been proved is not sufficient to warrant upholding the contrary argument" (*Judgment, I.C.J. Reports 1986*, p. 588, para. 65). In 2012, the Court did not make a determination, expressly or impliedly, as to the underlying geological and geomorphological facts in the area at issue. It neither decided that Nicaragua's entitlement did not overlap with Colombia's mainland entitlement, nor that Nicaragua had no entitlement beyond 200 nautical miles of its coast. It determined only that the evidence submitted by Nicaragua did not meet that Party's burden to prove that its continental shelf entitlement overlapped with Colombia's mainland entitlement. The doctrine of *res judicata* denies Nicaragua a second chance to meet its burden of proof in court, but it does not preclude Nicaragua from pursuing the delineation of the outer limits of its continental shelf within the framework of UNCLOS. Moreover, it remains open to the Parties, whether through negotiation or another agreed means of peaceful dispute settlement, to agree on the delimitation of any area of overlapping entitlement located more than 200 nautical miles from Nicaragua's coast.

46. Secondly, the Court's decision in 2012 that Nicaragua failed to meet its burden of proof in that case has no effect on third States.

VI. The Court's Interpretation of Dispositive Subparagraph (3)

47. According to today's Judgment, the Court decided in 2012 that it could not uphold Nicaragua's claim because Nicaragua "had yet to discharge its obligation, under paragraph 8 of Article 76 of UNCLOS, to deposit with the CLCS the information on the limits of its continental shelf beyond 200 nautical miles required by that provision and by Article 4 of Annex II of UNCLOS" (para. 84). I offer some observations on this conclusion, with which I disagree.

48. To support its conclusion that the Court in 2012 held that it would not delimit continental shelf in the absence of a submission to the CLCS, today's Judgment apparently relies on the statement in the 2012 Judgment that "the fact that Colombia is not a party [to UNCLOS] does not relieve Nicaragua of its obligations under Article 76 of that Convention" (*Nicaragua* v. *Colombia I*, p. 669, para. 126). This remark, which does not even mention the requirement of a submission, cannot explain today's interpretation. To be sure, given that Nicaragua apparently intends to establish the outer limits of its continental shelf beyond 200 nautical miles of its coast, it has obligations under UNCLOS. However, in 2012, Nicaragua had met those obligations, due to its transmission of Preliminary Information to the Secretary-General within the applicable ten-year period. Nicaragua's failure to make a submission was not a failure to "discharge its obligation" (Judgment, para. 84); it was one of several indicators of the facial inadequacy of Nicaragua's evidence.

49. Moreover, the obligation to make a submission to the Commission applies only to the process of delineating the outer limits of the continental shelf. UNCLOS imposes no obligation on a State party to make a submission to the Commission prior to seeking judicial or arbitral delimitation of continental shelf beyond 200 nautical miles of its coast. On the contrary, it draws a distinction between delimitation of a maritime boundary, on the one hand, and delineation of the outer limits of the continental shelf, on the other hand (Art. 76, para. 10, of UNCLOS; see also *Bangladesh/Myanmar*, pp. 107-108, paras. 406-410). The Court embraces that very distinction today (para. 112) when it concludes that the absence of Commission recommendations does not render inadmissible an application seeking delimitation of continental shelf in areas located more than 200 nautical miles from the applicant's coast.

50. Even assuming, *arguendo*, that there is a basis for the Court to condition its consideration of an application for delimitation on the completion of a particular phase in the UNCLOS process for the establishment of the outer limits of the continental shelf, the interpretation of the 2012 Judgment that is contained in today's Judgment fails. As noted above, the 2012 Judgment (pp. 668-669, para. 126) expressly links delimi-

tation of extended continental shelf not to a unilateral submission by the coastal State to the Commission, but rather to such a submission having been "reviewed" by the Commission, reprising a point that the Court had made in 2007. In my 2012 opinion (*I.C.J. Reports 2012 (II)*, p. 756, para. 18; p. 758, para. 25), I expressed the concern that this quotation suggested a generally-applicable bar on delimitation applications in the absence of Commission recommendations or the establishment of the outer limits on the basis of those recommendations. (For this reason, I am pleased that the Court today rejects Colombia's fifth preliminary objection, although I regret that the reasoning in Part VI of today's Judgment does not mention the apparent inconsistency between today's conclusion and statements that the Court made in 2007 and 2012.)

51. Had the Court decided in 2012 to impose a precondition on delimitation cases (submission to the Commission, according to today's Judgment), this precondition could not have been found in the law governing the dispute between the Parties, which was customary international law, not UNCLOS (to which Colombia is not a State party). It would have been a consequence of a judicial policy entirely of the Court's own making. If Nicaragua's failure to meet this precondition has been the reason for the Court's decision that it could not uphold submission I (3), one would have expected the 2012 Judgment not merely to quote without comment an earlier Judgment (in a case between two UNCLOS States parties) that expressly referred to a different precondition ("review . . . by the Commission"), but instead to set out its new approach (submission to the Commission as a precondition to delimitation) and the reasons for it. the 2012 Judgment, however, does nothing of the sort.

52. A final shortcoming in the interpretation of the 2012 Judgment that the Court sets out today is that the question whether any one of the procedural steps in the Commission process is a precondition to delimitation would be a matter of admissibility, not a question of the merits. This is clear from the Court's analysis today of Colombia's fifth preliminary objection, which the Court treats as a question of admissibility. Had the Court imposed a precondition at a different stage of the Commission proceeding (that of submission), the label of admissibility would also have applied. For the reasons set forth above (para. 20), however, the Court's 2012 decision that it could not uphold Nicaragua's claim was a decision on the merits, not a decision as to admissibility.

(*Signed*) Joan E. DONOGHUE.

DECLARATION OF JUDGE GAJA

Under "the definition of the continental shelf set out in Article 76, paragraph 1, of UNCLOS [which] forms part of customary international law" (*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 666, para. 118), a coastal State's entitlement to an extended continental shelf does not depend on an assessment by the Commission on the Limits of the Continental Shelf (CLCS). Thus, the basis of a claim concerning the delimitation of an extended continental shelf does not change because of a submission to the CLCS in respect of that shelf. However, with regard to the outer limits, one would conceivably face a situation that is new in relation to that existing before the submission once the CLCS made a recommendation for "the establishment of the outer limits of [the] continental shelf" under Article 76, paragraph 8, of UNCLOS and the coastal State acted upon it.

It is understandable that, when making recommendations on the establishment of the outer limits of the continental shelf, the CLCS has so far refrained from examining submissions concerning areas under dispute in the absence of "prior consent given by all States that are parties to such a dispute" (Art. 5 *(a)* of Ann. I to the Rules of Procedure adopted by the CLCS).

There may be cases where a delimitation involving an extended continental shelf could be effected without difficulty by the Court or an international tribunal pending the delineation of the outer limits of the continental shelf. One such case arguably concerned the delimitation between Bangladesh and Myanmar, where the International Tribunal for the Law of the Sea (ITLOS) found that it could make the delimitation by tracing a line with an arrow (*Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment of 14 March 2012, ITLOS, paras. 505 and 506 (6)). However, in most instances the delineation of the outer limits should come first, because it would otherwise be difficult to pursue the "equitable solution" required by Article 83 of UNCLOS. It would therefore be appropriate for the CLCS to modify its Rules of Procedure and consider submissions also when the delimitation is under dispute, an option left open by the Court (Judgment, para. 113). In any event, under Article 76, paragraph 10, of UNCLOS, the CLCS, when making recommendations on the establishment of the outer limits of the continental shelf, does so "without prejudice to the question of the delimitation of the

continental shelf between States with opposite or adjacent coasts" (see also Art. 9 of Ann. II to UNCLOS), and therefore irrespective of the existence of a dispute on delimitation.

(Signed) Giorgio GAJA.

DECLARATION OF JUDGE BHANDARI

1. In the present case, I have joined Vice-President Yusuf, as well as Judges Cançado Trindade, Xue, Gaja and Robinson in issuing a joint dissenting opinion that concludes the Court ought to have allowed Colombia's *third* preliminary objection in the instant case, in so far as Nicaragua's continental shelf claim is clearly barred by *res judicata*. The rationales underpinning that conclusion are fully canvassed in that joint dissenting opinion and therefore I shall not reference them herein.

2. However, I also wish to take the present opportunity to provide some brief comments with respect to Colombia's *fifth* preliminary objection, namely, that Nicaragua's failure to obtain a binding recommendation from the Commission on the Limits of the Continental Shelf (CLCS") prior to seeking relief before this Court in the present matter renders Nicaragua's claim inadmissible. While this conclusion may be somewhat moot in view of the position I have taken with my fellow dissenting colleagues regarding the doctrine of *res judicata*, I nevertheless feel compelled to explain why, in my view, Nicaragua's case should not proceed to the merits phase without receiving the recommendations of the Commission under the United Nations Convention on the Law of the Sea (UNCLOS).

3. Paragraph 8 of Article 76 of UNCLOS states:

> "Information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured shall be submitted by the coastal State to the Commission on the Limits of the Continental Shelf set up under Annex II on the basis of equitable geographical representation. *The Commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf. The limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding*." (Emphasis added.)

4. Moreover, in the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)* case, at paragraph 126 of the Judgment rendered 19 November 2012, this Court stated in relevant part as follows:

> "In the case concerning *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Hondu-*

ras), the Court stated that 'any claim of continental shelf rights beyond 200 miles [by a State party to UNCLOS] *must be in accordance with Article 76 of UNCLOS and reviewed by the [CLCS] established thereunder*' (*I.C.J. Reports 2007 (II)*, p. 759, para. 319). The Court recalls that UNCLOS, according to its Preamble, is intended to establish 'a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources'. . . Given the object and purpose of UNCLOS, as stipulated in its Preamble, *the fact that Colombia is not a party thereto does not relieve Nicaragua of its obligations under Article 76 of that Convention.*" (*I.C.J. Reports 2012 (II)*, pp. 668-669, emphasis added.)

Nicaragua's Case Should not Proceed Mainly for the Following Reasons

5. *First*, as I understand the present state of affairs, there is no *proof* on record in these proceedings that Nicaragua has in fact furnished complete and sufficient information and documentation to the CLCS to issue its recommendation. Thus, the possibility remains that at a future time the CLCS could request Nicaragua to supply additional or complementary evidence in support of its claim. Were this to be the case, the entire premise of the majority's conclusion that Nicaragua has now fully and faithfully complied with its obligations for receiving a CLCS recommendation would fail.

6. *Second*, even if I were to accept, *arguendo*, that the information supplied by Nicaragua to the CLCS is suitable for that Commission to eventually issue a recommendation, it is a plain and uncontested fact that the CLCS has not, as of yet, issued any such recommendation and we as a Court are not in a position to speculate as to when it might be in a position to do so.

7. *Third*, I would recall that the CLCS is a United Nations body that is specifically tasked with making binding recommendations on the very issue that has been put before us. Therefore, *as a matter of principle* and in keeping with my staunch belief in the need for interinstitutional comity between United Nations institutions, I believe it would be imprudent and disrespectful toward the CLCS to proceed toward the merits phase of Nicaragua's continental shelf claim without its recommendation.

8. *Fourth*, it is to be recalled that the CLCS is a specialized agency with a specific mandate to investigate and pronounce upon continental shelf

claims. The Commission consists of 21 members who are world-renowned experts in such relevant fields as geology, geophysics and hydrology. By contrast, the judges of this Court can lay claim to no such expertise, and consequently the Court would necessarily have to rely on the testimony of expert witnesses in order to resolve Nicaragua's continental shelf claim at the merits phase of these proceedings. Not only would this constitute a regrettably inefficient use of valuable Court resources, but the nature of the adversarial process dictates that the Parties would bring witnesses most likely to advance their respective and competing claims, whose opinions could very well be at odds with those of the expert members of the CLCS. This, in turn, could potentially lead to the uneasy situation wherein the CLCS and the Court reach incompatible conclusions regarding Nicaragua's continental shelf claim. Thus, *from a practical standpoint*, I am of the opinion that to allow Nicaragua's claim to proceed to the merits under these circumstances would be highly imprudent.

9. *Fifth*, recalling the dictum contained at paragraph 126 of the 2012 *Nicaragua* v. *Colombia* Judgment that "any claim of continental shelf rights beyond 200 miles . . . must be in accordance with Article 76 of UNCLOS *and reviewed by the [CLCS] thereunder*" (emphasis added), it is my considered opinion that for a claim to be "reviewed" by the CLCS under Article 76 of UNCLOS in the manner intended by this Court in that Judgment, the Commission must have issued its binding opinion. To conclude otherwise would allow for a rather loose reading of the requirement that claims be "reviewed" by the CLCS whereunder a party could satisfy this criterion by merely completing the perfunctory act of submitting certain paperwork to the CLCS before filing an application before this Court. In my respectful view, such a superficial standard would deprive the 2012 precedent that claims be "reviewed" by the CLCS of its intended meaning and violate the spirit of this process as intended by Article 76 (8) of UNCLOS.

10. *Sixth*, it is to be recalled that Nicaragua is signatory of the Convention on the Law of the Sea, and thus bound by Article 76 (8) of that treaty.

11. *Seventh*, it is to be recalled that under Article 60 of the Statute of the ICJ, "[t]he judgment [of the Court] is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party." Moreover, Article 61 (1) of the Statute of the ICJ states that

> "[a]n application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given,

unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence".

Also, Article 61 (4) imposes the further procedural requirement that "[t]he application for revision must be made at latest within six months of the discovery of the new fact". By attempting to relitigate the same claim regarding its continental shelf entitlement that was denied by this Court in the 2012 Judgment, Nicaragua is attempting to conduct a *de facto* appeal or revision of that Judgment, contrary to the express terms of Articles 60 and 61 of the Statute of the ICJ, which are intended to ensure that judgments of this Court are binding and not susceptible to disruption by being constantly reopened. I regret that the majority's decision to allow Nicaragua to attempt a *de facto* appeal or revision of the Court's 2012 Judgment threatens the credibility of the World Court and hence diminishes the sanctity and respect that will be afforded to its judgments in the years to come. Once a court with competent jurisdiction, such as the ICJ, decides a contentious matter, the principle of *res judicata* requires, as a matter of public policy, that the proceedings must be deemed to be finally resolved between the parties.

12. *Eighth*, allowing Nicaragua to approach this Court without a binding recommendation from the CLCS would render that Commission superfluous and without any true authority. Thus Nicaragua should be required to wait for the outcome that is pending before the CLCS before seising the Court. Only *after* receiving such an outcome should Nicaragua be allowed to approach this Court in search of the relief it seeks.

13. In sum, I see no good reason to allow Nicaragua to circumvent the review process of the CLCS that it is bound to comply with under UNCLOS. Setting aside momentarily my strong opposition to the majority's reasoning on the issue of *res judicata* as it pertains to Colombia's *third* preliminary objection, Nicaragua's claim should in any event be deemed inadmissible for failure to adhere to its treaty obligations and I would consequently find that Colombia's *fifth* preliminary objection ought to be upheld.

(*Signed*) Dalveer BHANDARI.

DECLARATION OF JUDGE ROBINSON

As set out in joint dissent, Colombia's third preliminary objection should be upheld — Declaration elaborates on a particular point of concern — The majority's interpretation results in the application of law in a way that overrides an elementary principle of the Law of Treaties — Rights and obligations under a treaty apply only in relation to other States parties unless also part of customary international law — Application of a treaty between a State party and a non-State party compromises the principles of sovereignty and equality — 2012 Judgment clear that customary international law applied between the Parties — Article 76 (8) of UNCLOS sets up a régime that is special, contractual and confined to States parties to UNCLOS — Majority invents a "condition" which results in application of treaty obligations between a State party and a non-State party — Incompatible with régime envisaged by Law of Treaties.

1. I have signed the joint dissent because, for the reasons set out therein, I am of the opinion that Colombia's third preliminary objection should be upheld. The Court "has already adjudicated" Nicaragua's request in *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)* (*Judgment, I.C.J. Reports 2012 (II)*, p. 624, hereinafter referred to as the "2012 Judgment") (see paragraph 47 of the Judgment) and Nicaragua's request is thus *res judicata*.

2. I write this declaration to elaborate further upon a particular concern that arises from today's Judgment, in which the majority embraces and applies dicta contained within the 2012 Judgment in such a way as to override an elementary principle of the Law of Treaties.

3. It is a foundational principle of the Law of Treaties that the rights and obligations under a treaty arise and apply only in relation to other States parties[1]. The obligations and rights do not apply to non-States parties unless either, the States parties intend this to be the case and the

[1] Sir Gerald Fitzmaurice in his Draft Report on Article 3 *(pacta tertiis nec nocent nec prosunt)* of the proposed Convention on the Law of Treaties said as follows: "1. By virtue of the principles *pacta tertiis nec nocent nec prosunt* and *res inter alios acta*, and also of the principle of the legal equality of all sovereign independent States . . . a State cannot in respect of a treaty to which it is not a party: *(a)* [i]ncur obligations or enjoy rights under the treaty . . .", Part II of the proposed second chapter (effects of treaties) on the effects of treaties in relation to third States with commentaries. Fifth Report of the Special Rapporteur, Sir Gerald Fitzmaurice, (12th session of the ILC, 1960), A/CN.4/130, *Yearbook of the International Law Commission*, 1960, Vol. II, pp. 75-76.

non-States parties consent[2], or the relevant rights and obligations also form part of customary international law[3].

4. Treaties are binding on States because they have so consented. This consent is an expression of the principles of sovereignty and equality of States[4]. In giving their consent, States agree to respect the obligations, and benefit from the corollary rights, vis-à-vis other States parties to the treaty. The Permanent Court of International Justice emphasized that: "[a] treaty only creates law as between the States which are parties to it; in case of doubt, no rights can be deduced from it in favour of third States"[5]. Therefore to apply a treaty between a State party and a non-State party compromises the principles of sovereignty and equality of States. The State party has not agreed to be bound by the treaty in its relationship with a non-State party.

5. This principle seems to have been overlooked in today's Judgment, where the majority reads the 2012 Judgment as imposing a "prerequisite" or a "condition", pursuant to Article 76 (8) of UNCLOS, for the delimitation of extended continental shelf entitlements between Nicaragua and Colombia.

6. In its analysis of the 2012 Judgment, paragraph 82 of today's Judgment reads:

> "[Paragraph 129 of the 2012 Judgment] must be read in the light of those preceding it in the reasoning of the 2012 Judgment
>
> . . . . . .
>
> Thirdly, what the Court did emphasize was the obligation on

[2] See, e.g., Articles 34-36 of the Vienna Convention on the Law of Treaties (VCLT). Article 34 emphasizes that "[a] treaty does not create either obligations or rights for a third State [a State not party to the treaty] without its consent". Article 35 states: "An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing." Article 36 states:

> "(1) A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.
>
> (2) A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty."

[3] Article 38 of the VCLT states: "Nothing in Articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such."

[4] *S.S. "Wimbledon", Judgments, 1923, P.C.I.J., Series A, No. 1*, p. 25: "the right of entering into international engagements is an attribute of State sovereignty".

[5] *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, p. 29. The French version reads: "Un traité *ne fait droit* qu'entre les Etats qui y sont parties; dans le doute, des droits n'en découlent pas en faveur d'autres Etats." (Emphasis added.)

> Nicaragua, as a party to UNCLOS, to submit information on the limits of the continental shelf it claims beyond 200 nautical miles, in accordance with Article 76, paragraph 8, of UNCLOS, to the CLCS. It is because, at the time of the 2012 Judgment, Nicaragua had not yet submitted such information that the Court concluded, in paragraph 129 that 'Nicaragua, in the present proceedings has not established that it has a continental margin that extends far enough to overlap with Colombia's 200-nautical-mile entitlement to the continental shelf, measured from Colombia's mainland coast'."

Paragraph 84 of today's Judgment continues:

> "It therefore follows that while the Court decided, in subparagraph 3 of the operative clause of the 2012 Judgment, that Nicaragua's claim could not be upheld, it did so because the latter had yet to discharge its obligation, under paragraph 8 of Article 76 of UNCLOS, to deposit with the CLCS the information on the limits of its continental shelf beyond 200 nautical miles required by that provision and by Article 4 of Annex II of UNCLOS."

And at paragraph 105:

> "Nicaragua was under an obligation, pursuant to paragraph 8 of Article 76 of UNCLOS, to submit information on the limits of the continental shelf it claims beyond 200 nautical miles to the CLCS. The Court held, in its 2012 Judgment, that Nicaragua had to submit such information as a prerequisite for the delimitation of the continental shelf beyond 200 nautical miles by the Court."

7. As set out in the joint dissent, I believe that this conclusion misconstrues the relevant paragraphs of the 2012 Judgment. The majority interprets the Court's findings in paragraphs 126 and 127 of the 2012 Judgment in such a way as to result in the application of law that is, in fact, inapplicable between the two Parties.

8. The Court stated quite directly in paragraph 118 of the 2012 Judgment that the applicable law in the case was customary international law, as Colombia was not a State party to UNCLOS. The Court then noted that it considered that the definition of the continental shelf set out in UNCLOS Article 76 (1) formed part of customary international law, and that, it "d[id] not need to decide whether other provisions of Article 76 of UNCLOS form[ed] part of customary international law".

9. Yet, in paragraph 126 of the 2012 Judgment, the Court seemed to forget its earlier determination that only customary international law applied in the case, when it discussed its dictum in *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)* that, "any claim of continental shelf rights

beyond 200 miles [by a State party to UNCLOS] must be in accordance with Article 76 of UNCLOS and reviewed by the Commission on the Limits of the Continental Shelf established thereunder" (*I.C.J. Reports 2007 (II)*, p. 759, para. 319).

Judge Donoghue, in her separate opinion to the 2012 Judgment, noted that she was "troubled that the Court . . . extend[ed] the reasoning of the 2007 *Nicaragua* v. *Honduras* Judgment to the present case, despite the fact that Colombia is not an UNCLOS State party and customary international law thus governs"[6].

10. In paragraph 126 of the 2012 Judgment, the Court went on to "recall" that "UNCLOS, according to its Preamble, is intended to establish 'a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources'". In the same paragraph, the Court went on to state that "[g]iven the object and purpose of UNCLOS, as stipulated in its Preamble, the fact that Colombia is not a party thereto does not relieve Nicaragua of its obligations under Article 76 of that Convention".

11. There is a flaw in this reasoning: Article 76 (8) of UNCLOS and the Commission's procedure in Annex 2 are obviously special, contractual and confined to States parties to UNCLOS. As noted by Judge *ad hoc* Cot in his declaration to the 2012 Judgment, Article 76 (8) institutes a specific procedure that is not accessible by non-States parties to UNCLOS and it is thus "difficult" to view Article 76 (8) as an expression of customary international law[7]. Many other treaties reflect a similar approach, whereby provisions contained in the treaty may mirror norms of customary international law, but particular procedural mechanisms established in respect of those provisions are peculiar to the treaty and States parties to that treaty; for example, generally, the rights set out in the International Covenant on Civil and Political Rights to which persons are entitled and the procedure by which persons may petition the Human Rights Committee alleging a breach of those rights[8]. Mark Villiger makes an interesting argument in this regard. He contends that customary international law rules must be "of an abstract nature, that is potentially regulatory of an abstract number of situations rather than concerning a

[6] *I.C.J. Reports 2012 (II)*, separate opinion of Judge Donoghue, p. 758, para. 26.

[7] *Ibid.*, declaration of Judge *ad hoc* Cot, p. 771, para. 19.

[8] For the procedure see the Optional Protocol to the International Covenant on Civil and Political Rights. See also the petition procedures established under other human rights treaties, for example, Article 44 of the American Convention on Human Rights, Article 34 of the European Convention on Human Rights ("The Court may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High

concrete situation"[9]. Villiger argues that norms of an organization directed at the workings of a specific body could not therefore become rules of customary international law. Such procedural rules are too "concrete". Though one may question whether Villiger's analysis is fully reflective of the range of potential characteristics of a rule of customary international law, there can be no doubt that the provision in Article 76 (8) of UNCLOS establishes a procedure that is only open to States parties to UNCLOS.

12. Further, the importance attached by the Court in paragraph 126 of the 2012 Judgment to the phrase it cites from the Preamble of UNCLOS is problematic. While it is true that the Preamble to a treaty forms part of the context for the purpose of the interpretation of that treaty, the Preamble of UNCLOS cannot, by itself, serve to override the principle that the provisions of a treaty are *res inter alios acta* for a non-State party unless they constitute customary international law. In other words, the rights and obligations under UNCLOS cannot be applied so as to benefit or adversely affect a non-State party. Therefore, obligations under UNCLOS are not opposable to Nicaragua in its relationship with Colombia, a non-State party, unless they form part of customary international law. Judge *ad hoc* Mensah also made this point in his declaration to the 2012 Judgment[10]:

> "I do not believe or agree that the special character of UNCLOS, as set out in its Preamble, makes the rights and obligations of States parties to UNCLOS fundamentally different from the rights and obligations of States parties under other treaties. Specifically, I do not subscribe to the view that the 'object and purpose of UNCLOS, as stipulated in its Preamble', in and by themselves, impose on parties to the Convention obligations vis-à-vis other States which have taken a conscious decision not to agree to be bound by that Convention."

13. It is noteworthy that the aim set out in the Preamble of UNCLOS — to create a world legal order for the seas and oceans — is *expressly* to be achieved with "due regard for the sovereignty of all States", a phrase omitted from paragraph 126 of the 2012 Judgment. The noble and laud-

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Contracting Parties undertake not to hinder in any way the effective exercise of this right.").

[9] Mark E. Villiger, *Customary International Law and Treaties,* Kluwer Law International, 2nd ed., 1997, p. 179.

[10] *I.C.J. Reports 2012 (II)*, declaration of Judge *ad hoc* Mensah, p. 765, para. 8.

able aim set out in the Preamble cannot be accomplished by disregarding or compromising the principle of State sovereignty. The principle of sovereignty is like a thread woven throughout the fabric of the legal order established by UNCLOS. The failure of the Court to take into account in its analysis the intended balance between the legal order and sovereignty results in the Court exaggerating the importance of the Preamble.

14. Delimitation of the continental shelf of a State party to UNCLOS and a non-State party to UNCLOS should be carried out on the basis of: (i) customary international law, which principally means, by virtue of Article 83 of UNCLOS, an obligation to effect the delimitation "in order to achieve an equitable solution", and also, that the definition contained in Article 76 (1) of UNCLOS is observed; and (ii) such other rules as the parties may agree to apply, for example, significantly, they could agree to apply the provisions of Articles 76 (2)-(7) (in relation to which there is no general agreement that they form part of customary international law). Delimitation of the continental shelf between States that are not parties to UNCLOS should be carried out on the basis of: (i) customary international law; and (ii) such other rules as the Parties may agree to apply.

15. The majority's decision today has interpreted the 2012 Judgment as deciding that the Court could not "uphold" Nicaragua's claim in 2012 because Article 76 (8) of UNCLOS created a "condition" that Nicaragua had to satisfy before the Court could proceed to delimit the continental shelf beyond 200 nautical miles. In paragraphs 86 and 87 of today's Judgment, the majority finds that as "Nicaragua states that on 24 June 2013 it provided the CLCS with 'final' information", the majority "accordingly considers that the condition imposed by it in its 2012 Judgment in order for it to be able to examine the claim of Nicaragua contained in the final submission I (3) has been fulfilled in the present case".

16. The disjointed logic of this interpretation is fully discussed in the joint dissent (see Section V of the joint dissent). Further, as discussed therein, why would the Court, in the 2012 Judgment, have explicitly determined that the law applicable between the parties was customary international law, and then, within the same section of reasoning, override this principle by applying as between the parties obligations under a treaty which do not form part of customary international law? This is inherently contradictory. The majority, by its invention of a procedural condition, applies treaty obligations in such a way as to create an asymmetrical relationship between Nicaragua and Colombia; a relationship to which neither State has consented. In so doing, the majority fails to accord due respect to the principles of sovereignty and equality between States.

17. It may be argued that the task before the Court today is simply to determine what the Court said in the 2012 Judgment in order to decide whether the question before it is *res judicata*, and not to consider the correctness of findings made in the 2012 Judgment. If a mistake was made in the 2012 Judgment, it is not for the Court to correct it at this juncture. Yet, in the circumstances of this case, the majority chooses the wrong interpretation, and it is not in a position to shrug off its responsibility for a conclusion that contravenes a fundamental principle of the law of treaties by saying that it is merely reciting what the 2012 Judgment actually said.

18. The result of this strange application of Article 76 (8) of UNCLOS is that Colombia, a non-State party, is accorded something that, in my view, is akin to a benefit under UNCLOS, since the provision, which does not mirror a rule of customary international law, has been enforced against Nicaragua in its relations with Colombia. This raises questions about the compatibility of the Court's approach with the régime envisaged by Articles 34-36 of the Vienna Convention on the Law of Treaties (Treaties and Third States)[11].

19. The joint dissent discusses concerning precedents that could be drawn from the majority's position. I submit this declaration to highlight one more: that the majority's interpretation today adopts a conclusion that runs roughshod over a fundamental principle of the Law of Treaties.

(Signed) Patrick ROBINSON.

[11] See footnote 2 above.

DECLARATION OF JUDGE *AD HOC* BROWER

Colombia's first preliminary objection — The Pact of Bogotá — Interpretation of Article LVI of the Pact of Bogotá — Guidance from travaux préparatoires *— The principle of* effet utile *— Articles LVIII and LIX of the Pact of Bogotá.*

1. While I am one of the seven Members of the Court who have issued a joint dissenting opinion vigorously opposing the Judgment's conclusion, reached only with the casting vote of the President due to the even, eight to eight, split of the Court on the issue, to reject Colombia's third preliminary objection *(res judicata)*, I have joined all of the other Members of the Court in concluding that, on balance, the Court does have jurisdiction over Nicaragua's Application under the Pact of Bogotá. I think it important, however, to explain the difficulties the Court necessarily has had in accepting Colombia's interpretation of the second paragraph of Article LVI of the Pact, particularly given the astronomical "black hole" of the virtually complete absence of useful guidance from any *travaux préparatoires* in respect of that paragraph.

2. The context for the Court's consideration of that paragraph was graphically given by Nicaragua itself when its counsel conceded, more than once, in the oral proceedings that that second paragraph is "superfluous, but . . . not ineffective", or, as Colombia characterized it succinctly, "superfluous but not useless". In other words, the only alternative to acceptance of Colombia's interpretation of that paragraph is that it has no meaning whatsoever other than, as the Court has agreed, to make clear out of an abundance of caution what in any event would be true. Of course just as nature abhors a vacuum, so, too, is the Court generally driven to attribute a meaning to each and every provision of a treaty, as required by the principle of *effet utile*.

3. The Court fortunately notes and discusses, though neither Nicaragua nor Colombia did, neither in their written submissions nor in the oral proceedings, Articles LVIII and LIX of the Pact, the first of which terminates eight earlier treaties as the Pact enters into force for parties to the Pact and any of those earlier instruments, and the second of which echoes the second paragraph of Article LVI: "The provisions of the foregoing Article [LVIII] shall not apply to procedures already initiated or agreed upon in accordance with any of the above-mentioned international instruments."

4. It could be argued from these two Articles, put alongside the entirety of Article LVI, that collectively they reflect an intention of the parties to the Pact that once the Pact would be denounced by a party, then, just as with Article LVIII's termination of the eight previous treaties, no new proceedings could be commenced. Further, since *Nottebohm* (*(Liechtenstein* v. *Guatemala), Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 111) confirmed definitively only in 1953, or five years after the conclusion of the Pact in 1948, that the Court's jurisdiction attaches upon the submission of an application and endures thereafter irrespective of the subsequent termination of the instrument on which such jurisdiction was based, it could be argued that the second paragraph of Article LVI had, when drafted in 1938 and when the Pact was adopted ten years later, the *effet utile* of making clear what had not yet been definitively established by *Nottebohm*, though this, too, perhaps could be regarded as being done out of an abundance of caution. In any event, the Court has not found any of this persuasive, fundamentally because of the complete absence of any indication in the very limited *travaux préparatoires* as to why that second paragraph was included.

5. All the Court could derive from those records was quite meagre fare. In 1937, the Director General of the Pan-American Union invited the Under Secretary of State of the United States to "consider the possibility of taking the initiative at the forthcoming Conference at Lima in recommending additions to the existing treaties of peace with the view of increasing their usefulness". On 15 November 1938, the United States responded positively, submitting a Draft Treaty for discussion at the conference in Lima to be held shortly thereafter. That draft did not include what is the second paragraph of Article LVI of the Pact. During the ensuing Lima conference itself, however, just one month after submission of that first draft, the United States submitted an amended second draft, which did include within the draft's denunciation provision this language: "Denunciation shall not affect any pending proceedings instituted before notice of denunciation is given."

6. Essentially the same language was retained throughout the various relevant conferences and versions of the Pact as it progressed to its conclusion ten years after first being introduced. At the last minute, at the 1948 conference that concluded the Pact of Bogotá, its Drafting Committee "decided that the best drafting possible would consist on [sic] replicating Article 16 of the 1929 Treaty [i.e., the General Convention of Inter-American Conciliation]", which it then did, adding, however, now for the first time as a separate second paragraph: "The denunciation will not have any effect on proceedings pending and initiated prior to the transmission of the respective notice."

7. Unfortunately, nowhere in the ten years between the United States' 1938 introduction of that language, which consistently was included, with

minor variations not affecting the substance, in each successive version of what became the Pact of Bogotá, and the Pact's conclusion in 1948 is there any record indicating why what became the second paragraph of the Pact's Article LVI was introduced and repeatedly accepted during the ten following years by all concerned. It clearly is due to the absence of any such guidance that the Court has felt constrained to prefer the interpretation of the paragraph in question as having the, albeit superfluous, *effet utile* of an abundance of caution to the rather more difficult *a contrario* inference for which Colombia has argued. This is all the more understandable considering Article 44 (1) of the Vienna Convention on the Law of Treaties, which provides that "[a] right of a party, provided for in a treaty . . ., to denounce . . . may be exercised only with respect to the whole treaty unless the treaty otherwise provides", a default rule which inherently has posed a further, and undeniably difficult, interpretive obstacle. In my view, though not arrived at without some hesitation, the Court's conclusion, everything considered, is not unreasonable, hence I have not found myself able to dissent from it.

(Signed) Charles N. BROWER.

DECLARATION OF VICE-PRESIDENT YUSUF

[Original English Text]

1. Under Article 80, paragraph 1, of the Rules of Court, two requirements must be met for the Court to be able to entertain a counter-claim at the same time as the principal claim, namely, that the counter-claim "comes within the jurisdiction of the Court" and, that it "is directly connected with the subject-matter of the claim of the other party".

2. The Court has expounded the second limb of this test — the requisite direct connection — in the previous cases that dealt with the admissibility of counter-claims. The Court has not, however, elaborated on what is meant by the first limb — "comes within the jurisdiction of the Court" — in the context of Article 80. This lack of clarification of the jurisdictional requirement may give the impression that jurisdiction must in all cases be assessed *de novo* for each counter-claim. This is of course the case if the title of jurisdiction invoked for the counter-claims differs from that of the principal claim. However, as I will try to explain in this declaration, there is no need to do so where counter-claims have the same title of jurisdiction as the principal claim. Consequently, it was also unnecessary for the Court to examine whether a dispute existed between the Parties in the present proceedings.

I. Jurisdiction under Article 80, Paragraph 1, of the Rules of Court

3. One of the principal points of disagreement between the Parties in this case relates to the jurisdiction required by Article 80. Colombia contended that jurisdiction under Article 80 means jurisdiction over the principal claim. In its view, "[s]ince the Court has found that it has jurisdiction over the main proceedings, jurisdiction is also established over the counter-claims". Nicaragua, on the other hand, argued that counter-claims are autonomous legal acts for which jurisdiction must be assessed *de novo*.

4. Nicaragua is correct that counter-claims have been characterized by the Court as "an autonomous legal act the object of which is to submit a new claim to the Court . . . [and] thus to widen the original subject-matter of the dispute by pursuing objectives other than the mere dismissal of the claim of the Applicant in the main proceedings" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bos-*

nia and Herzegovina v. *Yugoslavia), Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 256, para. 27).

5. The autonomous nature of counter-claims is, however, just one aspect of their character. As the Court emphasized in its Order on counter-claims in the *Bosnian Genocide* case, counter-claims are intimately linked to the procedure initiated by the principal claim:

> "[a counter-claim] is linked to the principal claim, in so far as, formulated as a 'counter' claim, it reacts to it . . . the idea is essentially to achieve a procedural economy whilst enabling the Court to have an overview of the respective claims of the parties and to decide them more consistently; and whereas the admissibility of the counter-claims must necessarily relate to the aims thus pursued and be subject to conditions designed to prevent abuse" (*ibid.*, pp. 256-257, paras. 27 and 30).

6. It is this second aspect of counter-claims — the intimate link with the principal claim — that allows the Court to achieve procedural economy by giving it a more thorough and detailed overview of all the facts relevant to the dispute that has been submitted to the Court. In this respect, the counter-claim is grafted onto the ongoing procedure that was initiated by the principal claim. One might say that counter-claims are functionally autonomous in that they are addressed separately from the principal claim, but that they are also incidental in that they must be affixed to the main proceedings.

7. In paragraph 67 of the present Order, the Court states that "[o]nce the Court has established jurisdiction to entertain a case, it has jurisdiction to deal with all its phases", including incidental proceedings, such as counter-claims. As the Court notes, the subsequent lapse of jurisdiction cannot deprive the Court of the jurisdiction already established. The Court then continues to assess whether the third and fourth counter-claims submitted by Colombia fall within the jurisdiction of the Court on the basis of Article XXXI of the Pact of Bogotá.

8. I agree with much of this reasoning. The scope of jurisdiction of the Court in any given case is established according to the limits set forth in the instrument that founds the jurisdiction of the Court. The Court only has jurisdiction to address disputes within those limits. It is therefore imperative for the Court, when examining the admissibility of counter-claims that purport to be based on the same title of jurisdiction as the principal claim, to ensure that those counter-claims fall within the scope of the jurisdiction thus prescribed (*Jurisdictional Immunities of the State (Germany* v. *Italy), Counter-Claim, Order of 6 July 2010, I.C.J. Reports 2010 (I)*, pp. 316-321, paras. 17-31). The Court does not, however, have to establish its jurisdiction over the counter-claims *de novo*.

II. The Court's Examination of the Existence of a Dispute

9. The Court did not follow, in my view, this line of reasoning to its logical conclusion. The jurisdiction of the Court, for which the existence of a dispute is a necessary condition, has already been established by the Court in its Judgment on preliminary objections. It is therefore unnecessary for the Court to examine whether a "dispute" exists between the Parties, as the Court did in the present case in relation to the third and fourth counter-claims. A dispute has already been found to exist and that is sufficient to establish the Court's jurisdiction. The Court's enquiry at this stage of proceedings should simply be limited to ascertaining whether the counter-claims fall within the bounds of the jurisdiction that the Court has already found to exist under the Pact of Bogotá, and whether the counter-claims are directly connected, in law and in fact, to the principal claims.

10. This conclusion is not only logical but is also judicious. The requirement that a counter-claim be directly connected with the principal claim allows the Court to hear arguments related to another aspect of the dispute over which it has already asserted jurisdiction, thus enabling the Court to adjudicate in a holistic manner on the dispute brought before the Court. This is one aspect of the procedural economy afforded by counter-claims to which the Court referred in its Order in the *Bosnian Genocide* case, cited in paragraph 5 above. The Court does not need to ascertain the existence of a dispute anew.

11. The Court has most commonly addressed counter-claims that purport to be based on the same title of jurisdiction as the principal claim (see e.g. *Jurisdictional Immunities of the State (Germany* v. *Italy), Counter-Claim, Order of 6 July 2010, I.C.J. Reports 2010 (I)*, p. 316; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Counter-Claims, Order of 29 November 2001, I.C.J. Reports 2001*, p. 678; *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Counter-Claim, Order of 10 March 1998, I.C.J. Reports 1998*, p. 203; and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 256). However, Article 80 does not preclude the invocation of a title of jurisdiction different from that of the principal claim. It is when the Court is faced with reliance on a different title of jurisdiction, and in that kind of scenario only, that it will have to address the question of jurisdiction over the counter-claims separately from the question of jurisdiction over the principal claim. In such a case, jurisdiction over the principal claim will not be decisive in terms of jurisdiction

over a counter-claim based on some other title, and the validity of the jurisdictional basis of the counter-claims must be assessed at the moment such counter-claims are brought to the Court.

(Signed) Abdulqawi A. YUSUF.

JOINT OPINION OF JUDGES TOMKA, GAJA, SEBUTINDE, GEVORGIAN AND JUDGE *AD HOC* DAUDET

Requirements for the admissibility of counter-claims — Jurisdiction over counter-claims and direct connection with claim of the applicant — Discretion of the Court to entertain counter-claim — Juridical nature of counter-claim — Counter-claim as independent claim — Sequence of consideration of the requirements for counter-claim — Lapse of title of jurisdiction prior to the submission of counter-claim — Judgment in Nottebohm *not relevant for counter-claims — Counter-claims not within subject-matter of the dispute as earlier determined by the Court — Court has no jurisdiction over counter-claims in the present case — Bad faith of the applicant not to be presumed — Good and efficient administration of justice.*

1. The Court has found the first and second counter-claims presented by Colombia to be inadmissible. We agree with this conclusion, albeit on a different ground. The third and fourth counter-claims of Colombia have been found by the Court to be admissible; we respectfully disagree. In our view, all four counter-claims made by Colombia are inadmissible because none of them falls within the jurisdiction of the Court, which is one of the requirements to be met in order that the Court may entertain them.

2. The relevant provision on counter-claims is contained in Article 80, paragraph 1, of the Rules of Court, the Statute of the Court remaining silent on this matter.

Article 80, paragraph 1, of the Rules of Court, in its current version[1] reads as follows: "The Court may entertain a counter-claim only if it

[1] This version has been in force since 1 February 2001. Article 80 of the 1978 Rules of Court originally stated that "[a] counter-claim may be presented provided that it is directly connected with the subject-matter of the claim of the other party and that it comes within the jurisdiction of the Court".

The first provision on counter-claims appeared in the original Rules of Court adopted by the Permanent Court of International Justice ("PCIJ") on 24 March 1922. It was included in Article 40, describing what should be contained in the written pleadings of the parties. It provided that

"Counter-cases [in today's terminology Counter-Memorials] shall contain . . .

comes within the jurisdiction of the Court and is directly connected with the subject-matter of the claim of the other party."

3. This provision thus stipulates two conditions which must be met in order for a counter-claim to be found "admissible" by the Court. A counter-claim has to "come[. . .] within the jurisdiction of the Court"[2], that is the first condition. At the same time a counter-claim must be "directly connected with the subject-matter of the claim of the other party"[3]. The requirements for admissibility of a counter-claim under Article 80 of the Rules of Court are thus cumulative (Order, para. 20; see also *Certain Activities Carried Out by Nicaragua in the Border Area*

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conclusions based on the facts stated; these conclusions may include counter-claims, in so far as the latter come within the jurisdiction of the Court."

No change was made to this provision in the Revised Rules of Court, adopted by the PCIJ on 31 July 1926. It was in the Rules of Court adopted on 11 March 1936 that the provision on counter-claims was separated from the provision on written pleadings and revised. The 1936 Rules of Court contained a separate article on counter-claims, Article 63, which was included in Subsection II entitled "Occasional Rules" ("Règles particulières"), and formed part of Section I — Procedure before the Full Court, that Section being itself contained in Heading II — Contentious Procedure. Article 63 provided:

> "When proceedings have been instituted by means of an application, a counter-claim may be presented in the submissions of the Counter-Memorial, provided that such counter-claim is directly connected with the subject of the application and that it comes within the jurisdiction of the Court. Any claim which is not directly connected with the subject of the original application must be put forward by means of a separate application and may form the subject of distinct proceedings or be joined by the Court to the original proceedings."

When the International Court of Justice adopted, on 6 May 1946, its Rules of Court, a separate article on counter-claims remained as Article 63 in Subsection II (Occasional Rules). The first sentence remained in substance the same as that contained in the 1936 Rules of Court, applied by the PCIJ. The second sentence was, however, modified as follows:

> "In the event of doubt as to the connection between the question presented by way of counter-claim and the subject-matter of the application the Court shall, after due examination, direct whether or not the question thus presented shall be joined to the original proceedings."

No change was made to this provision on counter-claims in the 1972 Rules of Court, it just became Article 68, still in Subsection II (Occasional Rules).

[2] This requirement was already spelled out in the 1922 Rules of Court, adopted by the PCIJ.

[3] This requirement was for the first time expressly provided in Article 63 of the 1936 Rules of Court of the PCIJ which formulated it as "provided that such counter-claim is directly connected with the subject of the *application*" (emphasis added). No change to this formulation was made in 1946, except that the subject became subject-matter. The formulation remained the same in the 1972 version of the Rules. It was only in the 1978 Rules that the formulation was changed into "provided that it is directly connected with the subject-matter of the *claim* of the other party" (emphasis added).

(Costa Rica v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Counter-Claims, Order of 18 April 2013, I.C.J. Reports 2013*, p. 210, para. 27).

4. However, the Court is under no obligation to entertain a counter-claim even if the two requirements are satisfied. The verb "may" in the text of Article 80, paragraph 1, of the Rules of Court ("The Court may entertain a counter-claim") indicates that the Court enjoys a certain measure of discretion[4] to refuse to deal with a counter-claim. It is true that the Court has never refused to entertain a counter-claim if it satisfied the two requirements. But one cannot exclude that in an exceptional situation, when dealing with a counter-claim would not serve the sound (proper) and effective administration of justice, the Court may decline to entertain such a counter-claim, leaving it open to the respondent to file a new application instituting separate proceedings against the applicant in the original (first) case.

5. The Court has in the past stated that "a counter-claim has a dual character in relation to the claim of the other party" elaborating that it is

> "independent of the principal claim in so far as it constitutes a separate 'claim', that is to say an autonomous legal act the object of which is to submit a new claim to the Court, and . . . at the same time, it is linked to the principal claim, in so far as, formulated as a 'counter' claim, it reacts to it" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 256, para. 27).

6. Leaving aside the rather infelicitous expression "principal claim", since Article 80 of the Rules of Court does not use it and there is no justification for distinguishing between claims which are "principal" and those which apparently are not, what is important in the Court's dictum is the fact that a counter-claim is *independent* of the claim of the other party and that it constitutes a *separate* claim. The fact that it reacts to the claim of the other party, so that it can be perceived as "linked" to that claim, does not make it subordinate to the latter. For that matter, a

[4] Judge *ad hoc* Lauterpacht expressed the view that "the Court enjoys a significant measure of discretion" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 284, para. 18, separate opinion of Judge *ad hoc* Lauterpacht). Vice-President Weeramantry in that same case stressed that "even if all these prior requisites are satisfied, joinder is not automatic . . . Whether that counter-claim *will* be *accepted* must still depend on the undoubted discretion of the Court as the master of its own procedure" (*ibid.*, p. 288, dissenting opinion of Vice-President Weeramantry, emphasis in the original).

counter-claim may survive even after the applicant has withdrawn its claim or claims. Under Article 89, paragraph 2, of the Rules of Court, the respondent may oppose the discontinuance of the proceedings.

7. The Court in the above-quoted Order observed that "a claim should normally be made before the Court *[doit normalement être portée devant le juge]* by means of an application instituting proceedings" (*I.C.J. Reports 1997*, p. 257, para. 30). It further explained why "it is permitted for certain types of claim to be set out . . . within the context of a case which is already in progress" *(ibid.)*. The purpose of allowing such a claim to be made "is merely in order to ensure better administration of justice, given the specific nature of the claims in question" and in relation to counter-claims "to achieve a procedural economy" *(ibid.)*. The French text of that Order, which is the authoritative text, describes the purpose of permitting counter-claims even more categorically — counter-claims are permitted "aux *seules fins* d'assurer une meilleure administration de la justice" (*ibid.*, emphasis added).

8. The Court, however, also warned that "the Respondent cannot use a counter-claim as a means of referring to an international court claims which exceed the limits of its jurisdiction as recognized by the parties" (*ibid.*, para. 31) and explained that "it is for that reason that paragraph 1 of Article 80 of the Rules of Court requires that the counter-claim 'comes within the jurisdiction of the Court'" *(ibid.)*.

9. The Court thus has to satisfy itself that the counter-claims come within its jurisdiction as recognized by the parties. The Court has done so in the present case but only in relation to the third and fourth counter-claims, having earlier concluded that the first and the second counter-claims lack a direct connection to the claims of Nicaragua.

10. The Court has reversed the order of consideration of the two requirements, provided for in Article 80, paragraph 1, of the Rules of Court. Although we accept that the Court, in examining these requirements, is not bound by the sequence in which they are set out in that Article (Order, para. 20, referring to the Court's pronouncement 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), Counter-Claims, Order of 18 April 2013, I.C.J. Reports 2013*, p. 210, para. 27), we consider that the more usual and logical approach is to start with consideration of the jurisdictional requirements. One may otherwise wonder what was the purpose of a lengthy exercise by the Rules Committee in 1999, resulting in the Court adopting, in 2000, amendments to Article 80. As far as paragraph 1 is concerned, the changes consisted, in part, in switching the order of the two requirements, starting with the jurisdictional

requirement and substituting "only if" for the previous "provided that".

11. In this case, in our view, it would have been more appropriate to start with a consideration of whether the Court possesses jurisdiction to adjudicate Colombia's counter-claims. We think that all four counter-claims are legally in the same position as far as the Court's jurisdiction is concerned. From this point of view, there is no difference between them.

12. The majority has, however, only determined that the Court has jurisdiction in relation to the third and fourth counter-claims. Having found the first and second counter-claims inadmissible for the lack of direct connection with the claims of Nicaragua, but not taking a position on whether they fall within the Court's jurisdiction, it left open the question whether Colombia may successfully bring these two claims before the Court by way of a new application. In our view, Colombia cannot do so, due to its denunciation of the Pact of Bogotá which, in accordance with Article LVI of the Pact, took effect on 27 November 2013. Since that date, the Pact of Bogotá ceased to be in force with respect to Colombia. Colombia not having accepted the Court's jurisdiction by a declaration under Article 36, paragraph 2, of the Statute of the Court, and not being any longer a party to the Pact of Bogotá, it cannot invoke any jurisdictional title as a basis for the Court's jurisdiction.

13. The Court has, in an expedient way, avoided the issue of its jurisdiction in respect of the first and second counter-claims made by Colombia. Had it considered that question, applying the same approach to the issue of its jurisdiction with regard to the third and fourth counter-claims, its conclusion would apparently have been that it has jurisdiction also over the first and second counter-claims which, however, are inadmissible because of the lack of direct connection with Nicaragua's claims. Such a conclusion by the Court on the existence of its jurisdiction in respect of the first and second counter-claims might have been perceived as an invitation to resubmit them by way of an application under Article 38 of the Rules of Court. But, as previously mentioned, such an application would have no prospects of success in view of the lack of any title of jurisdiction which Colombia could invoke.

14. This shows that the majority's approach to jurisdiction over Colombia's third and fourth counter-claims "is not free from legal difficulties" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 14, para. 18).

15. Even if one takes the view that the Court's jurisdiction, established at the date an application is filed, extends to the dispute between the parties, the counter-claims of Colombia in this case do not concern the same

dispute as that brought before the Court by Nicaragua in its Application. In the event that a counter-claim brings a new dispute, or widens the dispute already before the Court, and if the applicant raises an objection, the Court will have to ascertain whether there is a jurisdictional basis for the counter-claim. The Court has already determined in this case that the dispute between the Parties concerns "the alleged violations by Colombia of Nicaragua's rights in the maritime zones which, according to Nicaragua, the Court declared in its 2012 Judgment appertain to Nicaragua" (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 34, para. 79). None of the four claims presented by Colombia as counter-claims can be considered to be an aspect or part of the dispute brought by Nicaragua. Colombia's claims either widen the dispute or bring new disputes and therefore the Court lacks jurisdiction. In its 2016 Judgment, after recalling that

> "[t]he issues that the Parties identified for possible dialogue include fishing activities of the inhabitants of San Andrés, Providencia and Santa Catalina in waters that have been recognized as appertaining to Nicaragua by the Court, the protection of the Seaflower Biosphere Marine Reserve, and the fight against drug trafficking in the Caribbean Sea",

the Court noted that "the above-mentioned subject-matter for negotiation is different from the subject-matter of the dispute between the Parties" (*ibid.*, p. 38, paras. 97-98). The first three counter-claims concern those same issues, and thus, according to the 2016 Judgment, fall outside the subject-matter of the dispute of which the Court is seised. The fourth counter-claim also concerns a different dispute. The dispute regarding whether Colombia has violated Nicaragua's sovereign rights in its maritime zones is distinct from any dispute regarding whether Nicaragua, by adopting a system of straight baselines from which the breadth of the territorial sea is measured, has acted contrary to customary international law.

16. There is no reason for asserting that the jurisdiction of the Court over the identical claims of a party should depend on whether they are presented as counter-claims or separately, by means of an application, as claims, this second way being the manner in which — in the Court's view — they "should normally be made" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 257, para. 30).

17. In the present case, the Respondent uses a counter-claim "route" to bring before the Court claims which otherwise could not have been

successfully raised, since the Court would have had no jurisdiction to consider them on the merits subsequent to Colombia's termination of its acceptance of the Court's jurisdiction under the Pact of Bogotá with effect from 27 November 2013.

18. We do not find the majority's reliance on the Court's pronouncement in the *Nottebohm* case (Order, para. 67) appropriate. The Judgment in that case is inapposite to the issue of jurisdiction over counter-claims. That Judgment started a line of jurisprudence of the Court on the critical date for the establishment of its jurisdiction when proceedings are instituted by a unilateral application (see e.g. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 28, para. 36; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 445, para. 95; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 18, para. 33). The decisive issue, according to that jurisprudence, is the fact that the application "is filed at a time when the law in force between the parties entails the compulsory jurisdiction of the Court" (*Nottebohm (Liechtenstein* v. *Guatemala), Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 123).

19. The Court in the present Order (Order, para. 67) quotes the following passage from the Judgment in the *Nottebohm* case:

> "When an Application is filed at a time when the law in force between the parties entails the compulsory jurisdiction of the Court . . . the filing of the Application is merely the condition required to enable the clause of compulsory jurisdiction to produce its effects in respect of the claim advanced in the Application. Once this condition has been satisfied, the Court must deal with the claim; it has jurisdiction to deal with all its aspects, whether they relate to jurisdiction, to admissibility or to the merits. An extrinsic fact such as the subsequent lapse of the Declaration, by reason of the expiry of the period or by denunciation, cannot deprive the Court of the jurisdiction already established." *(Ibid.)*

However, in this passage, when the Court wrote that it must deal with the claim "[o]nce this condition has been satisfied", what is meant by "this condition" is not jurisdiction, as the majority implies when it reasons that "[o]nce the Court has established jurisdiction to entertain a case, it has jurisdiction to deal with all its phases" *(ibid.)*. What the Court referred to in 1953 by the expression "[o]nce this condition has been satisfied" was the fact that the Application was "filed at a time when the law in force between the parties entails the compulsory jurisdiction of the Court". In other words, the two declarations made under Article 36, paragraph 2, of the Statute were in force when the Application instituting proceedings

was submitted to the Court. It is in this context that the opinion of the Court that "[o]nce this condition has been satisfied . . . it has jurisdiction to deal with all its aspects [i.e. the claim's aspects], whether they relate to jurisdiction, to admissibility or to the merits" must be understood. It would be rather bizarre for the Court to deal with jurisdiction "once the Court has established jurisdiction to entertain a case" (Order, para. 67), as the majority seems to suggest.

20. The Court in the *Nottebohm* case did not have to deal with counter-claims and in fact said nothing that is of relevance for the interpretation of Article 80, paragraph 1, of the Rules of Court. Its dictum is clearly focused on the Application instituting proceedings and the claim contained therein. As the Court explained, "the filing of the *Application* is merely the condition required to enable the clause of compulsory jurisdiction to produce its effects in respect of *the claim advanced in the Application*" (*ibid.*, emphasis added). And the Court continued:

> "Once this condition has been satisfied [i.e. that an application was filed at a time when the law in force between the parties entailed the compulsory jurisdiction of the Court], the Court must deal with the *claim*; it has jurisdiction to deal with all *its* [i.e. the claim's] aspects, whether they relate to jurisdiction, to admissibility or to the merits." (*Ibid.*, emphasis added.)

No reference to counter-claims is made, nor can it be implied.

21. The majority — by failing to appreciate the context and circumstances in which the Court's dictum in the *Nottebohm* case was pronounced — takes the view that "the lapse of the jurisdictional title invoked by an applicant in support of its claims subsequent to the filing of the application does not deprive the Court of its jurisdiction to entertain counter-claims filed on the same jurisdictional basis" *(ibid.)*. How can a claim, in the form of a counter-claim, be brought on a nonexistent jurisdictional basis, nonexistent due to the fact that it has lapsed? This position of the majority clearly contradicts the view of the Committee for the Revision of the Rules of Court, when it retained the condition that a counter-claim "comes within the jurisdiction of the Court". As has been noted, the Committee had explained that this "phrase meant that a counter-claimant could not introduce a matter which the Court *would not have had jurisdiction to deal with had it been the subject of an ordinary application to the Court*"[5].

[5] Separate opinion of Judge Higgins in *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Counter-Claim, Order of 10 March 1998, I.C.J. Reports 1998*, p. 219 (emphasis in the original).

22. The majority in support of its conclusion,

> "notes that the opposite approach would have the disadvantage of allowing the applicant, in some instances, to remove the basis of jurisdiction after an application has been filed and thus insulate itself from any counter-claims submitted in the same proceedings" (Order, para. 67).

Two remarks can be made. First, this is a purely speculative consideration. Never, in the more than 95-year history of adjudication before the World Court, has any *applicant* terminated or allowed to lapse a title of jurisdiction it relied on when instituting proceedings during their pendency. To the contrary, there are a number of examples when it was the *respondent* which terminated its acceptance of the Court's jurisdiction because an application was filed (or was to be filed against it), or in the aftermath of the Court's judgment. In some other instances, States which appeared before the Court as respondents subsequently restricted the scope of their acceptance of the Court's jurisdiction. Secondly, it would be a wrong move on the part of an applicant "to remove the basis of jurisdiction after an application has been filed and thus insulate itself from any counter-claims" *(ibid.)*, because such an action would cast serious doubts on whether the applicant is pursuing the litigation in good faith. As the Court has stated on several occasions, bad faith of States is not to be presumed (see e.g. *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 267, para. 150; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 437, para. 101). It is therefore rather unfortunate that the majority, in an effort to support its conclusion, has simply forgotten what the Court said in the past.

23. The jurisdiction of the Court is based on the consent of the parties (see e.g. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 456, para. 120); it "exists only because and in so far as the parties have so desired" (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Counter-Claims, Order of 29 November 2001, I.C.J. Reports 2001*, p. 684, declaration of Judge *ad hoc* Verhoeven). Colombia withdrew its consent to the Court's jurisdiction with effect as of 27 November 2013. Almost three years later, on 17 November 2016, it brought before the Court some claims against Nicaragua, by way of counter-claims. It could hardly have complained if the Court dismissed all of them for lack of jurisdiction.

* * *

We finally note that the Court's decision does not contribute to the good and efficient administration of justice. Filing of counter-claims has already resulted in a one year delay of these proceedings. It is highly likely that this case, brought before the Court in 2013, will be heard and adjudicated only some seven years later.

(*Signed*) Peter TOMKA.
(*Signed*) Giorgio GAJA.
(*Signed*) Julia SEBUTINDE.
(*Signed*) Kirill GEVORGIAN.
(*Signed*) Yves DAUDET.

DECLARATION OF JUDGE CANÇADO TRINDADE

1. I have voted in favour of the adoption of the present Order (of 15 November 2017) in the case concerning *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)*, whereby the International Court of Justice (ICJ) has taken the proper course in respect of the four counter-claims, namely, finding the first and second inadmissible, and the third and fourth admissible. Having supported the present Order, there is one particular point to which I attribute special relevance and which I feel obliged to dwell upon a bit further, so as to leave on the records the foundations of my personal position thereon.

2. I thus deem fit to append to the ICJ's Order the present declaration, wherein I shall focus on such particular point, — dealt with in the Order in relation to the third counter-claim, — namely, that of the traditional fishing rights of the inhabitants of the San Andrés Archipelago. I do so in the zealous exercise of the international judicial function, seeking ultimately the goal of the *realization of justice*, ineluctably linked, as I perceive it, to the settlement of disputes.

3. As to other related points, such as the *rationale* and admissibility of counter-claims, the cumulative requirements of Article 80 (1) of the Rules of Court (jurisdiction and direct connection to the main claim), and the legal nature and effects of counter-claims, I have already dwelt upon in detail in my extensive dissenting opinion (paras. 1-179, esp. paras. 4-30) in the case of *Jurisdictional Immunities of the State (Germany* v. *Italy), Counter-Claim, Order of 6 July 2010, I.C.J. Reports 2010 (I)*, pp. 329-397). It is not my intention to reiterate herein the considerations I then presented; I find it sufficient only to refer to them, recalling one particular point I made on that occasion, seven years ago.

4. In my aforementioned dissenting opinion, I pointed out, *inter alia*, that, even though counter-claims are interposed in the course of the process, being thus directly connected to the main claim and integrating the factual complex of the *cas d'espèce* (and so giving an impression of being "incidental"), this does not deprive them of their *autonomous* legal nature (*ibid.*, p. 336, para. 17). Counter-claims are to be treated on the same footing as the original claims, in faithful observance of the *principe du contradictoire*, thus ensuring the procedural equality of the parties (*ibid.*, p. 342, para. 30). The original applicant assumes the role of counter-claim respondent *(reus in excipiendo fit actor)*.

5. In enlarging the factual complex of the case, counter-claims (together with claims) enable the ICJ to have a better knowledge of the dispute at issue that it has been called to adjudicate upon (*I.C.J. Reports 2010 (I)*, pp. 340-342, paras. 28-29). Yet, in the same dissenting opinion in the case of *Jurisdictional Immunities of the State*, in my examination of the jurisprudential and doctrinal developments on the matter, I observed that "the Court's practice in relation to counter-claims is still in the making" (*ibid.*, pp. 340-341, para. 28, and cf. pp. 333-341, paras. 9-28). In the search for the realization of justice, there is still much to advance in this domain.

6. For example, both claims and counter-claims require, in my perception, prior public hearings so as to obtain further clarifications from the contending parties (*ibid.*, pp. 342 and 389, paras. 30 and 154). In any case, the Court is not bound by the submissions of the parties; it is perfectly entitled to go beyond them, so as *to say what the law is (juris dictio)* (*ibid.*, p. 392, para. 162). In enlarging the factual context to be examined in the adjudication of a dispute, main claims and counter-claims provide elements for a more consistent decision of the international tribunal seized of them.

7. Almost eight decades ago, international legal doctrine was already apprehending the autonomous legal nature of counter-claims[1]. Counter-claims are not simply a defence on the merits; in requiring the same degree of attention as the main claims, the counter-claims assist in achieving the sound administration of justice *(la bonne administration de la justice)*. Nowadays, we are required to keep on cultivating the examination of the institute of counter-claims.

8. In the conclusions of my aforementioned dissenting opinion in the case of *Jurisdictional Immunities of the State (Germany* v. *Italy)* (2010), I observed that "[c]ounter-claims, as a juridical institute transposed from domestic procedural law into international procedural law, already have their history, but the ICJ's jurisprudential construction on the matter is still in the making" (*I.C.J. Reports 2010 (I)*, p. 390, para. 155). And I summed up:

> "The same treatment is to be rigorously dispensed to the original claim and the counter-claim as a requirement of the sound administration of justice *(la bonne administration de la justice)*. They are, both, autonomous, and should be treated on the same footing, with a strict observance of the *principe du contradictoire*. Only in this way the *procedural equality* of the parties (Applicant and Respondent, ren-

[1] Cf., e.g., D. Anzilotti, "La demande reconventionnelle en procédure internationale", 57 *Journal du droit international*, Clunet (1930), p. 876; R. Genet, "Les demandes reconventionnelles et la procédure de la Cour permanente de justice internationale", 19 *Revue de droit international et de législation comparée* (1938), p. 148.

dered Respondent and Applicant by the counter-claim) is secured." (*I.C.J. Reports 2010 (I)*, p. 389, para. 154.)[2]

9. Turning now to the particular point I purport to address in the present declaration, may I begin by observing that this is not the first time that, in a case of the kind, the ICJ takes into account, in an inter-State dispute, the basic needs and in particular the fishing rights of the affected segments of local populations, on both sides. May I recall three Court decisions over the last eight years, concerning, like the present one, Latin American countries: it is significant that attention has constantly been given to that issue in those cases, like in the present one concerning *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*.

10. Thus, it is not to pass unnoticed that, in its Judgment of 13 July 2009, in the case of the *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua)*, the ICJ upheld the customary right of subsistence fishing (*Judgment, I.C.J. Reports 2009*, p. 266, paras. 143-144, and cf. p. 265, paras. 140-141) of the inhabitants of *both* banks of the San Juan River[3]. After all, those who fish for subsistence are not the States, but the human beings struck by poverty. The Court thus turned its attention, beyond the strict inter-State dimension, to the affected segments of the local populations.

11. In its subsequent Judgment of 20 April 2010, in the case concerning *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*, the Court likewise took into account aspects pertaining to the affected local populations, and consultation with them. This is what I deemed fit to single out in my lengthy separate opinion (*Judgment, I.C.J. Reports 2010 (I)*, p. 193, para. 156), in which I pondered that, even in the inter-State mechanism of judicial settlement of disputes by the ICJ, it was considered necessary to go in its reasoning beyond the strict inter-State dimension, taking due account of the basic needs of the affected segments of the local population (*ibid.*, paras. 156-157), on both sides.

12. And I added, in the aforementioned separate opinion, that in both cases concerning Latin American countries, in Central America and in the southern cone of South America, respectively, attentive to the living conditions and public health of neighbouring communities,

> "the ICJ looked beyond the strictly inter-State dimension, into the segments of the populations concerned. The contending States, in

[2] Dissenting opinion reproduced in: *Judge A. A. Cançado Trindade — The Construction of a Humanized International Law — A Collection of Individual Opinions (1991-2013)*, Vol. II (International Court of Justice), Leiden, Brill/Nijhoff, 2014, pp. 1298-1369.

[3] The Court further recalled that the respondent State had commendably reiterated that it had "absolutely no intention of preventing Costa Rican residents from engaging in subsistence fishing activities" (*I.C.J. Reports 2009*, p. 265, para. 140).

> both cases, advanced their arguments in pursuance of their vindications, without losing sight of the human dimension underlying their claims. Once again, Latin American States pleading before the ICJ have been faithful to the already mentioned deep-rooted tradition of Latin American international legal thinking, which has never lost sight of the relevance of doctrinal constructions and the general principles of law." (*I.C.J. Reports 2010 (I)*, pp. 193-194, para. 158.)

13. More recently, in its Judgment of 27 January 2014 in the case concerning the *Maritime Dispute (Peru* v. *Chile)*, on the Pacific coast in South America, the ICJ, in assessing "the extent of the lateral maritime boundary" which the Contending Parties acknowledged existed in 1954, it made clear, *inter alia*, that it was itself "aware of the importance that fishing has had for the coastal populations of both Parties" (*Judgment, I.C.J. Reports 2014*, p. 44, para. 109). This third Judgment once again revealed that, despite the fact that the dispute was an inter-State one and the mechanism of peaceful judicial settlement is also an inter-State one, there is no reason to make abstraction of the needs of the affected persons in the reasoning of the Court, thus transcending the strict inter-State outlook.

14. Now, in the present case concerning *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*, opposing a Central American to a South American country, the point at issue again comes to the fore, and the ICJ, once again, takes due care to keep it in mind. Both Contending Parties, Nicaragua and Colombia, expressed concerns about the rights of their respective fishermen[4]; furthermore, both Colombia and Nicaragua seemed aware of the needs of each other's fishermen[5].

15. In the course of the written arguments of the Contending Parties[6] in the *cas d'espèce*, special attention was given to the fishermen from the local population of the Archipelago of San Andrés, Providencia and Santa Catalina ("*los pueblos raizales*", the Raizal people), in particular their traditional and historic fishing rights from time immemorial, and the fact that they are vulnerable communities, highly dependent on traditional fishing for their own subsistence.

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[4] Memorial of Nicaragua, of 3 October 2014, paras. 2.22 and 2.54; Counter-Memorial of Colombia, of 17 November 2016, paras. 1.2, 1.24, 3.3, 3.86, 3.94 and 7.5.

[5] Memorial of Nicaragua, paras. 2.54-2.56 and 4.20; Counter-Memorial of Colombia, paras. 1.12, 3.109 and 9.5; Written Observations of Nicaragua on the Admissibility of Colombia's Counter-Claims, of 20 April 2017, paras. 2.49 and 3.42-3.45; Written Observations of Colombia on the Admissibility of Its Counter-Claims, of 28 June 2017, paras. 2.72-2.73.

[6] Memorial of Nicaragua, paras. 2.54-2.55 and 4.20; Counter-Memorial of Colombia, paras. 1.7, 2.10, 2.53, 2.69, 2.81, 2.87, 3.3, 3.77, 3.94, 3.102 and 3.109; Written Observations of Nicaragua on the Admissibility of Colombia's Counter-Claims, paras. 2.49-2.50; Written Observations of Colombia on the Admissibility of Its Counter-Claims, paras. 3.52 and 4.3.

16. For its part, the ICJ, in the present Order, has addressed the issue in its own considerations as to the cumulative requirements of admissibility of counter-claims, set forth in Article 80 (1) of the Rules of Court, i.e., as to their *direct connection* (to the principal claim), and as to *jurisdiction*. The Court's considerations pertain to the third counter-claim concerning the fishing rights of the local inhabitants of the Archipelago of San Andrés. In this respect, the ICJ notes that the facts relied upon by both Parties relate to the same time period, the same geographical area, and are of the same nature "in so far as they allege similar types of conduct of the naval forces of one Party vis-à-vis nationals of the other Party", engaged on "fishing in the same waters" (Order, para. 44).

17. The Court ponders that the Contending Parties,

> "are pursuing the same legal aim by their respective claims since they are both seeking to establish the responsibility of the other by invoking violations of a right to access and exploit marine resources in the same maritime area" (*ibid.*, para. 45).

The ICJ, accordingly, concludes that there is a direct connection, in fact and in law, between Colombia's third counter-claim and Nicaragua's principal claims (*ibid.*, para. 46), and finds that the third counter-claim is admissible (*ibid.*, para. 78).

18. In sequence, in its considerations on jurisdiction, the ICJ again dwells upon the traditional fishing rights of the inhabitants (artisanal fishermen) of the San Andrés Archipelago (*ibid.*, paras. 72 and 75). The Court observes that, since its Judgment of 19 November 2012 in the case concerning *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, senior officials of the Contending Parties have

> "exchanged public statements expressing their divergent views on the relationship between the alleged rights of the inhabitants of the San Andrés Archipelago to continue traditional fisheries, invoked by Colombia, and Nicaragua's assertion of its right to authorize fishing in its EEZ [exclusive economic zone]" (*ibid.*, para. 72).

The ICJ then, at last, finds that this third counter-claim "is admissible as such and forms part of the current proceedings" (resolutory point A (3) of the *dispositif*).

19. As can be seen, the present case concerning *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*, opposing two Latin American countries, brings to the floor rights of States together with rights of individuals, artisanal fishermen seeking to fish, for their own subsistence, in traditional fishing grounds. This once again shows that in the inter-State *contentieux* before the ICJ, one cannot make abstraction of the rights of individuals (surrounded by vulnerability).

20. The human factor has, in effect, marked presence in all four aforementioned cases concerning Latin American countries. In my perception, this is reassuring, bearing in mind that, after all, in historical perspective, it should not be forgotten that the State exists for human beings, and not vice versa. Whenever the substance of a case pertains not only to States but to human beings as well, the human factor marks its presence, irrespective of the inter-State nature of the *contentieux* before the ICJ[7], and is to be taken duly into account by it, as it has done in the aforementioned Latin American cases. It is, furthermore, to be duly reflected in the Court's decision.

21. Moreover, Latin American international legal doctrine has always been attentive also to the fulfilment of the needs and aspirations of peoples (keeping in mind those of the international community as a whole), in pursuance of superior common values and goals[8]. Furthermore, it has likewise always remained attentive to the importance of general principles of international law, reckoning that conscience *(recta ratio)* stands well above the "will", faithfully in line with the longstanding jusnaturalist international legal thinking.

22. Latin American international legal doctrine has remained aware that, in doing so, it rightly relies on the perennial lessons and legacy of the "founding fathers" of international law, going back to the flourishing of the *jus gentium (droit des gens)* in the sixteenth and seventeenth centuries. The *jus gentium* they conceived was for everyone, – peoples, individuals and groups of individuals, and the emerging States[9]. Solidarity

[7] Cf. A. A. Cançado Trindade, "La Presencia de la Persona Humana en el Contencioso Interestatal ante la Corte Internacional de Justicia", *Liber Amicorum: In Honour of a Modern Renaissance Man — G. Eiríksson* (eds. J. C. Sainz-Borgo *et al.*), New Delhi — India/San José C.R., Ed. O. P. Jindal University/Ed. University for Peace, 2017, pp. 383-411.

[8] A. A. Cançado Trindade, "The Contribution of Latin American Legal Doctrine to the Progressive Development of International Law", 376 *Recueil des cours de l'Académie de droit international de La Haye* (2014), pp. 19-92, esp. pp. 90-92; and cf. A. A. Cançado Trindade, "Los Aportes Latinoamericanos al Derecho y a la Justicia Internacionales", *Doctrina Latinoamericana del Derecho Internacional*, Vol. I (eds. A. A. Cançado Trindade and A. Martínez Moreno), San José/C.R., IACtHR, 2003, pp. 37-38, 40, 45, 54 and 56-57; A. A. Cançado Trindade, "Los Aportes Latinoamericanos al Primado del Derecho sobre la Fuerza", *Doctrina Latinoamericana del Derecho Internacional*, Vol. II (eds. A. A. Cançado Trindade and F. Vidal Ramírez), San José/C.R., IACtHR, 2003, pp. 42-44.

[9] Association Internationale Vitoria-Suarez, *Vitoria et Suarez — Contribution des théologiens au droit international moderne*, Paris, Pedone, 1939, pp. 169-170; A. Truyol y Serra, "La conception de la paix chez Vitoria et les classiques espagnols du droit des gens", A. Truyol y Serra and P. Foriers, *La conception et l'organisation de la paix chez Vitoria et Grotius*, Paris, Libr. Philos. J. Vrin, 1987, pp. 243, 257, 260 and 263; A. Gómez Robledo, "Fundadores del Derecho Internacional — Vitoria, Gentili, Suárez, Grocio", *Obras — Derecho*, Vol. 9, Mexico, Colegio Nacional, 2001, pp. 434-442, 451-452, 473, 481, 493-499, 511-515 and 557-563; A. A. Cançado Trindade, "*Totus Orbis*: A Visão Universalista e Pluralista do *Jus Gentium*: Sentido e Atualidade da Obra de Francisco de Vitoria", 24 *Revista da Academia Brasileira de Letras Jurídicas* — Rio de Janeiro (2008), No. 32, pp. 197-212.

marked its presence in the *jus gentium* of their times, as it does, in my view, also in the new *jus gentium* of the twenty-first century[10].

23. This is not the first time that I make this point within the ICJ. After all, the exercise of State sovereignty cannot make abstraction of the needs of the populations concerned, from one country or the other. In the present case, the Court is faced, *inter alia*, with artisanal fishing for subsistence. States have human ends, they were conceived and gradually took shape in order to take care of human beings under their respective jurisdictions. Human solidarity goes *pari passu* with the needed juridical security of boundaries, land and maritime spaces. Sociability emanated from the *recta ratio* (in the foundation of *jus gentium*), which marked presence already in the thinking of the "founding fathers" of the law of nations *(droit des gens)*, and ever since and to date, keeps on echoing in human conscience.

(Signed) Antônio Augusto CANÇADO TRINDADE.

[10] A. A. Cançado Trindade, *International Law for Humankind — Towards a New* Jus Gentium, 2nd rev. ed., Leiden/The Hague, Nijhoff/the Hague Academy of International Law, 2013, pp. 1-726.

SEPARATE OPINION OF JUDGE GREENWOOD

1. I have voted against the decision that the fourth counter-claim submitted by Colombia is admissible and, while I have voted with the majority in respect of the third counter-claim, my reasoning differs in certain respects from that in the Order. In this opinion, I shall endeavour briefly to explain the reasons for those differences.

2. According to Article 80, paragraph 1, of the Rules of Court, "[t]he Court may entertain a counter-claim only if it comes within the jurisdiction of the Court and is directly connected with the subject-matter of the claim of the other party". The two requirements laid down in the paragraph are cumulative. They are also distinct. There is, however, an important relationship between them which is not fully reflected in the present Order.

3. With regard to the requirement that the counter-claim "comes within the jurisdiction of the Court", the first issue raised by the present case is whether, as Colombia asserts, it is sufficient that the Court had jurisdiction over the principal claim at the time the Application was filed and that the counter-claim comes within the scope of the relevant jurisdictional instrument, or whether, as maintained by Nicaragua, it has to be established that the Court would have jurisdiction at the date that the counter-claim was filed had that counter-claim been brought on that day as a principal claim in a fresh application.

4. The issue is important in the present case, because the Pact of Bogotá, on which Nicaragua bases the jurisdiction of the Court over its principal claim, ceased to be in force between Colombia and Nicaragua on 27 November 2013, one day after Nicaragua filed its Application and nearly three years before Colombia presented its counter-claims. In its Judgment on preliminary objections of 17 March 2016 (*I.C.J. Reports 2016 (I)*, p. 3), the Court held that it had jurisdiction with regard to most of Nicaragua's principal claims, although not its claim that Colombia had violated the obligation not to use, or threaten to use, force. Neither Party has suggested a basis of jurisdiction other than the Pact of Bogotá.

5. The text of Article 80, paragraph 1, gives no clear indication regarding the date at which jurisdiction in respect of a counter-claim must be established. Nor has the matter come before the Court on any previous occasion. In its Judgment on preliminary objections in *Nottebohm* in

1953, however, the Court made an important statement of principle regarding the effects of a lapse in the basis for jurisdiction after the filing of an application. According to the Court,

> "When an Application is filed at a time when the law in force between the parties entails the compulsory jurisdiction of the Court . . . the filing of the Application is merely the condition required to enable the clause of compulsory jurisdiction to produce its effects in respect of the claim advanced in the Application. Once this condition has been satisfied, the Court must deal with the claim; it has jurisdiction to deal with all its aspects, whether they relate to jurisdiction, to admissibility or to the merits. An extrinsic fact such as the subsequent lapse of the Declaration, by reason of the expiry of the period or by denunciation, cannot deprive the Court of the jurisdiction already established." (*Nottebohm (Liechtenstein* v. *Guatemala), Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 123.)

This statement was not about counter-claims (there were none in that case). The context was a Guatemalan argument that the Court lacked jurisdiction, because Guatemala's declaration accepting the jurisdiction of the Court had lapsed after the filing of the Application. Nevertheless, the basis on which the Court rejected Guatemala's argument is significant. As the Court explained, the filing of the Application, on a date when there is a basis for jurisdiction between the parties, is "the condition required to enable the clause of compulsory jurisdiction to produce its effects in respect of the claim advanced in the Application" and, once that condition is satisfied, the Court must deal with "all aspects" of the claim.

6. The question is what is meant by all the aspects of the claim. The Court in *Nottebohm* referred only to jurisdiction, admissibility and merits. Yet, as a matter of principle, the jurisdiction to deal with the claim itself must also embrace jurisdiction to deal with incidental proceedings, such as a request for provisional measures of protection (which may be made by either party). Like the majority of the Court, I consider that it also embraces jurisdiction to deal with a counter-claim. Although a counter-claim is an autonomous legal act, it is one which must have a direct connection with the subject-matter of the principal claim and is dealt with in Section D of the Rules of Court, entitled "incidental proceedings".

7. When a State exercises its right to file an application with the Court, it undertakes an action which, as the Court explained in *Nottebohm*, enables the jurisdictional instrument on which that State relies to produce its legal effects, and to continue to produce those legal effects irrespective of any subsequent lapse in, or change to, that jurisdictional basis. One of the effects which is produced is that the applicant is exposed to the possibility of a counter-claim by the respondent. In my opinion, that exposure continues whether or not the title of jurisdiction on which the applicant relied when it filed its application lapses or otherwise changes.

8. To hold otherwise, as Nicaragua has suggested, would change the very nature of a counter-claim. Instead of being an incidental step — autonomous but nevertheless possessing a direct connection with the principal claim — in the main proceedings, it would become a separate proceeding, linked to the principal claim only by a form of truncated joinder.

9. Moreover, the interpretation of Article 80 urged by Nicaragua risks producing considerable unfairness. Nicaragua filed its Application in the present case on the eve of the expiry of the Pact of Bogotá as a basis for jurisdiction between itself and Colombia. In Nicaragua's view, the fact that the Pact ceased to be in force between the two States on the following day does not affect the jurisdiction of the Court over all aspects of Nicaragua's claim but does operate to prevent any responsive counter-claim by Colombia. It is true that Colombia would have had only itself to blame for that situation; the Pact had ceased to have effect between Colombia and Nicaragua because Colombia had chosen to denounce it in November 2012 and that denunciation had taken effect on 27 November 2013. However, on Nicaragua's argument, the same consequences would have followed if it had been Nicaragua which had denounced the Pact but had nevertheless filed its Application on the last possible day. A reading of Article 80 of the Rules which would allow an applicant State that withdrew its acceptance of the jurisdiction of the Court immediately after filing an application to gain all the benefits of the *Nottebohm* principle with regard to its claims while avoiding the possibility of being subjected to a counter-claim permits a fundamental distortion of the principle of equality between the parties.

10. I am therefore in full agreement with the decision of the Court on the first jurisdictional issue. Where I differ is regarding the Court's treatment of the second jurisdictional issue in the case.

11. It is, of course, well established that a counter-claim must satisfy the various requirements, such as limitations *ratione temporis* and *ratione materiae*, in the relevant jurisdictional instrument. The Italian counter-claim in *Jurisdictional Immunities of the State (Germany* v. *Italy), Counter-Claim, Order of 6 July 2010, I.C.J. Reports 2010 (I)*, p. 310, was held inadmissible because it failed to satisfy the temporal requirements in the 1957 European Convention for the Peaceful Settlement of Disputes. In the present case, the Court has engaged (in paragraphs 69-76 of the Order) in a careful analysis of whether the third and fourth counter-claims concerned disputes of a juridical nature (as required by Article XXXI of the Pact) and whether each was a dispute which, in the opinion of the Parties, could not be settled by direct negotiations (as required by Article II of the Pact).

12. It is at this point, however, that the Court fails, in my opinion, properly to appreciate the relationship between the requirement of jurisdiction and the requirement that there be a direct connection between the counter-claim and the subject-matter of the principal claim. With regard to Colombia's third counter-claim, that direct connection seems to me to be of the closest possible kind. In effect, the subject-matter of the claim and the subject-matter of the counter-claim are one and the same. They arise out of the same dispute. Since the Court has already held, in its Judgment of 17 March 2016, that this dispute existed at the time the Application was filed (*I.C.J. Reports 2016 (I)*, pp. 31-34, paras. 67-79) and that it was one which the Parties did not contemplate settling by direct negotiations (*ibid.*, pp. 37-39, paras. 92-101), to examine these questions again in the present Order seems to me unnecessary and somewhat artificial. In reaching that conclusion, I am in no way suggesting that the Court can generally assume that if the requirements for jurisdiction laid down in the relevant jurisdictional instrument have been satisfied in respect of the principal claim, then they are met in respect of the counter-claim. That would plainly be wrong, as the analysis in *Jurisdictional Immunities* demonstrates. All I am saying is that, where the direct connection between the subject-matter of the claim and a counter-claim is as close as it is with the third counter-claim in this case, the analysis of the jurisdictional requirements in the context of the principal claim may make it unnecessary to engage in a separate analysis of the same requirements with regard to that counter-claim. Whether that is so will depend upon the specific requirements in the relevant jurisdictional instrument and the nature of the connection enjoyed by the counter-claim with the subject-matter of the principal claim.

13. Turning to the fourth counter-claim, I regret that I cannot agree with the Court's finding that this counter-claim is directly connected with the subject-matter of the principal claim (Order, para. 53). The Court finds such a direct connection in the fact that, while the principal claim concerns respect for Nicaragua's rights in the exclusive economic zone (EEZ), the counter-claim concerns the extent of that EEZ. It is true that a use of straight baselines which encloses a substantial amount of maritime space as internal waters may have the effect of pushing further out to sea the outer limit of the coastal State's EEZ, although Nicaragua denies that this is the case here (a matter on which it is both unnecessary and inappropriate to comment). However, the status of the area in which the incidents that lie at the heart of Nicaragua's claim and Colombia's third counter-claim are said to have taken place would not be affected by any decision regarding Nicaragua's baselines. I agree that there is a dispute between Colombia and Nicaragua regarding the latter's decree establishing a system of straight baselines, but that dispute is entirely separate and distinct from the dispute which has given rise to the princi-

pal claim and the third counter-claim and, in my opinion, the required connection between Colombia's fourth counter-claim and the subject-matter of the principal claim has simply not been made out. I have therefore voted against paragraph A (4) of the *dispositif*.

(*Signed*) Christopher GREENWOOD.

SEPARATE OPINION OF JUDGE DONOGHUE

Article 80, paragraph 1, of the Rules of Court — Jurisdiction over counter-claims — Termination of the title of jurisdiction taking effect after the filing of the Application but before the submission of counter-claims — Consequence of such termination on the scope of the Court's jurisdiction.

1. Article 80, paragraph 1, of the Rules of the Court provides: "The Court may entertain a counter-claim only if it comes within the jurisdiction of the Court and is directly connected with the subject-matter of the claim of the other party."

2. I consider that the Court has jurisdiction over Colombia's counter-claims only to the extent that each counter-claim falls within the dispute that was the subject-matter of Nicaragua's Application. As I do not believe that the first and second counter-claims meet this requirement, I find them to be inadmissible and have voted in favour of operative paragraphs 82 (A) (1) and 82 (A) (2). The third counter-claims falls within the scope of the dispute that was the subject-matter of Nicaragua's Application and the conditions of jurisdiction contained in the Pact of Bogotá have been met. The Court has jurisdiction over that counter-claim, which is directly connected to the subject-matter of Nicaragua's claims against Colombia. I therefore have voted in favour of operative paragraph 82 (A) (3). The fourth counter-claim falls outside the scope of the dispute that is the subject-matter of Nicaragua's Application and thus is outside of the Court's jurisdiction. On that basis, I have voted against operative paragraph 82 (A) (4). I submit this separate opinion to set out the reasons for these conclusions.

3. Article LVI of the Pact of Bogotá provides that the Pact "may be denounced upon one year's notice". Colombia denounced the Pact on 27 November 2012. On 26 November 2013, Nicaragua filed the Application in the present case. One day later, the Pact of Bogotá ceased to be in force between the Parties. Thereafter, Colombia presented four counter-claims in its Counter-Memorial.

4. According to Colombia, because the Pact of Bogotá was in force between the Parties as of the date of Nicaragua's Application, the Court has jurisdiction over its counter-claims. Nicaragua, on the other hand, maintains that the "critical date" is the date on which the counter-claims were presented to the Court, which took place after termination of the Pact of Bogotá as between the Parties.

5. Thus, both Parties take an all-or-nothing approach to the question of the Court's jurisdiction over Colombia's counter-claims, focusing on the date to be used in determining the Court's jurisdiction. Neither Party convinces me.

6. By becoming parties to the Pact of Bogotá, both Colombia and Nicaragua consented broadly to the Court's jurisdiction. Their shared consent to the Court's jurisdiction came to an end, however, when Colombia's termination of the Pact of Bogotá took effect. After that date, neither State could file an application relying on the Pact as the title of jurisdiction. In particular, had Colombia made its claims against Nicaragua in an application filed after the termination of the Pact of Bogotá had taken effect, the Pact would not have provided a basis for the Court's jurisdiction. Nonetheless, according to Colombia, the Court should approach its jurisdiction over the counter-claims as if there had been no change in Colombia's consent to the Court's jurisdiction.

7. The approach urged by Nicaragua is also problematic. An applicant that terminates a title of jurisdiction immediately after filing an application could prevent the respondent from making any counter-claim in the case. If instead (as is the case here) it is the respondent that notifies its intention to terminate a title of jurisdiction, the applicant could cut off the ability of the respondent to file a counter-claim, however closely linked to the applicant's claims, by filing the application just before the termination of the title of jurisdiction takes effect.

8. Although the *Nottebohm* case did not involve a counter-claim, I find the reasoning that the Court followed there to be instructive in determining the scope of the Court's jurisdiction over Colombia's counter-claims.

9. In the *Nottebohm* case, the respondent argued that the Court lacked jurisdiction over the case because the respondent's optional clause declaration had lapsed after the application was filed. The Court rejected this argument, stating that

> "[w]hen an Application is filed at a time when the law in force between the parties entails the compulsory jurisdiction of the Court . . . the filing of the Application is merely the condition required to enable the clause of compulsory jurisdiction to produce its effects in respect of the claim advanced in the Application. Once this condition has been satisfied, the Court must deal with the claim; it has jurisdiction to deal with all its aspects, whether they relate to jurisdiction, to admissibility or to the merits. An extrinsic fact such as the subsequent lapse of the Declaration . . . cannot deprive the Court of the jurisdiction already established." (*Nottebohm (Liechtenstein* v.

Guatemala), Preliminary Objection, Judgment, I.C.J. Reports 1953, p. 123.)

10. Both in the *Nottebohm* case and in the present case, the Parties had given their consent to the Court's jurisdiction through a title of jurisdiction that was broad, *ratione materiae*, was in force as between the Parties on the date of the application and conferred jurisdiction upon the Court with respect to "disputes" between States. Here, as in the *Nottebohm* case, the subsequent lapse of the title of jurisdiction (the Pact of Bogotá) did not deprive the Court of the jurisdiction that was established by the filing of the application. But what is the scope, *ratione materiae*, of the jurisdiction that is established by a State's application?

11. Applying the Court's approach, when a State acts to terminate a title of jurisdiction, the Court nonetheless retains jurisdiction over any claim by that State that falls within the scope of that title of jurisdiction, *ratione materiae*, so long as the claim is presented in the form of a counter-claim in response to an application filed before the title of jurisdiction terminated. This conclusion ignores a central insight of the *Nottebohm* case — that it is the application that enables a title of jurisdiction to produce its effect, which cannot be vitiated by the subsequent lapse of the title of jurisdiction.

12. Nicaragua's Application did not have the effect of establishing in all respects the Court's jurisdiction under the Pact of Bogotá. It enabled the title of jurisdiction to produce its effect only with respect to the subject-matter of the dispute presented by the Application. After the termination of the Pact of Bogotá, the Court retained jurisdiction only to that extent. Thus, when Colombia submitted its counter-claims, the Court's jurisdiction *ratione materiae* was limited to claims fitting within the subject-matter of the dispute presented in Nicaragua's Application. Because of this jurisdictional limitation, the present case is unlike most cases, in which counter-claims directly connected to the applicant's claim may "widen the original subject-matter of the dispute" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 256, para. 27).

13. To determine whether the Court has jurisdiction over Colombia's counter-claims, it is necessary, first, to identify the subject-matter of the dispute presented in Nicaragua's Application over which the Court established its jurisdiction and then to consider whether each counter-claim fits within that subject-matter.

14. The subject-matter of a dispute is not identical to the claims that appear in the application. As the Court has repeatedly stated,

> "[i]t is for the Court itself . . . to determine on an objective basis the subject-matter of the dispute between the parties, that is, to 'isolate the real issue in the case and to identify the object of the claim' (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 262, para. 29; *Nuclear Tests (New Zealand* v. *France), Judgment,*

> *I.C.J. Reports 1974*, p. 466, para. 30). In doing so, the Court examines the positions of both parties, 'while giving particular attention to the formulation of the dispute chosen by the [a]pplicant' (*Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 448, para. 30; see also *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 848, para. 38)." (*Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015 (II)*, p. 602, para. 26.)

15. In identifying the subject-matter of the dispute presented by Nicaragua's Application and over which the Court established its jurisdiction, I consider the Application and the pleadings of the Parties. I also take account of the Court's Judgment of 17 March 2016.

16. Nicaragua's Application states that its dispute with Colombia "concerns the violations of Nicaragua's sovereign rights and maritime zones declared by the Court's Judgment of 19 November 2012 and the threat of the use of force by Colombia in order to implement these violations" (Application of Nicaragua, p. 4, para. 2). In 2016, however, the Court concluded that the dispute between the Parties did not extend to the alleged violations of the obligation not to use or threaten the use of force (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 33, para. 78).

17. Nicaragua appends to its Application and its Memorial various statements made by President Santos in the wake of the 2012 Judgment, whereby he "reject[ed]" the Court's delimitation (Application of Nicaragua, p. 28 (Annex 1)) and indicated that Colombia would not apply the Judgment until a treaty protecting the rights of Colombians is concluded (*ibid.*, p. 54 (Annex 9)). According to Nicaragua, Colombia has violated Nicaragua's rights in the maritime zones that appertain to Nicaragua pursuant to the 2012 Judgment by establishing an "Integral Contiguous Zone" which overlaps with Nicaragua's exclusive economic zone as delimited by the Court. Nicaragua also alleges incidents of enforcement and harassment by Colombia against vessels operating in Nicaragua's exclusive economic zone in the area around the Luna Verde Bank and complains of the issuance of "fishing licenses and marine research authorizations to Colombians and nationals of third States operating in" Nicaragua's exclusive economic zone (*ibid.*, pp. 12-20, paras. 10-15; Memorial of Nicaragua, pp. 26-51, paras. 2.11-2.52).

18. In its 2016 Judgment, the Court concluded that it had jurisdiction, pursuant to the Pact of Bogotá, to adjudicate the "dispute regarding the alleged violations by Colombia of Nicaragua's rights in the maritime

zones which, according to Nicaragua, the Court declared in its 2012 Judgment appertain to Nicaragua" (*I.C.J. Reports 2016 (I)*, p. 42, para. 111 (1) *(b)*; p. 43, para. 111 (2)). As the Court noted in 2016, after the 2012 Judgment, senior officials of the Parties spoke of a possible treaty or agreement. However, for Nicaragua, negotiations were to be "restricted to the modalities or mechanisms for the implementation" of the boundary established in the 2012 Judgment, whereas Colombia sought a treaty "*that establishes the boundaries*" (*ibid.*, p. 38, para. 98).

19. In speaking of a possible agreement, the two Presidents also addressed the particular question of fishing by Colombians in waters lying on Nicaragua's side of the boundary, but they did so in different terms. For example, in one of the statements that Nicaragua appends to its Application, President Santos is quoted as stating:

> "I have given peremptory and precise instructions to the Navy; the historical rights of our fishermen are going to be respected no matter what. No one has to request permission to anybody in order to fish where they have always fished." (Application of Nicaragua, p. 38 (Annex 6).)

Nicaragua also points to a statement in which President Santos is reported to have said that "his Government would 'not rule out any action' to defend Colombia's rights, especially those of the inhabitants on the island of San Andrés and surrounding archipelago" (Memorial of Nicaragua, p. 351 (Annex 25)).

20. These statements are to be compared with those attributed by Nicaragua to its President, who reportedly stated that Nicaragua is "not denying the right to fish to any sister nation, to any peoples" and that, within the framework of an agreement or treaty recognizing the delimitation of the Court,

> "Nicaragua will authorize [Colombian] fisheries in that area, where they have historically practiced fisheries, both artisanal and industrial fisheries, in that maritime area, in that maritime space, where even before the ruling by the Court, the permit was granted by Colombia and now, the permit is granted by Nicaragua" (*ibid.*, p. 360 (Annex 27)).

21. Thus, the statements on which Nicaragua has relied indicate that Colombia asserted that certain of its inhabitants maintained the "right" to fish without Nicaraguan authorization, whereas Nicaragua asserted the prerogative to "authorize" fisheries by Colombians, in maritime areas attributed to Nicaragua by the Court. As Nicaragua has stated in responding to Colombia's counter-claims, the dispute that it submitted in its Application "concerns Colombia's violations of Nicaragua's exclusive sovereign rights and jurisdiction as determined by the Court in 2012" (Written Observations of Nicaragua on the Admissibility of Colombia's Counter-Claims, p. 20, para. 2.33).

22. Taking into account the Application, the Parties' pleadings and the Court's 2016 Judgment, I therefore conclude that the subject-matter of the dispute is whether Nicaragua's rights in the maritime zones appertaining to it by virtue of the 2012 Judgment are exclusive to Nicaragua as a coastal State, as Nicaragua maintains, or are subject to limitations indicated by the actions and statements of Colombia.

23. I consider next whether Colombia's counter-claims fit within the subject-matter of the dispute.

24. *Colombia's first and second counter-claims.* Colombia bases its first two counter-claims on alleged conduct that it characterizes as "activities of predatory fishing by Nicaraguan vessels that . . . threaten the marine environment" (Counter-Memorial of Colombia, Vol. I, p. 247 para. 8.11). Most of the incidents on which these counter-claims are based allegedly took place in the maritime area around the Luna Verde Bank, an area which is part of both the Seaflower Biosphere Reserve and the Seaflower Marine Protected Area (*ibid.*, p. 251, para. 8.17). The first counter-claim alleges "Nicaragua's violation of its duty of due diligence to protect and preserve the marine environment of the Southwestern Caribbean Sea". Colombia's second counter-claim, which it describes as a "logical consequence of the first one" is that Nicaragua has violated "its duty of due diligence to protect the right of the inhabitants of the San Andrés Archipelago, in particular the Raizales, to benefit from a healthy, sound and sustainable environment" in the same maritime area around the Luna Verde Bank (*ibid.*, pp. 243-244, para. 8.2).

25. These two counter-claims do not appear to fall within the subject-matter of the dispute presented by Nicaragua's Application. In making these claims, Colombia does not counter Nicaragua's assertion that its rights in its exclusive economic zone are exclusive, nor does it invoke as a basis for these claims the series of incidents that, according to Nicaragua, violate those rights. Instead, it presents in its Counter-Memorial another set of alleged incidents that, according to Colombia, support its claim that Nicaragua has failed to meet certain duties that Nicaragua has in the area around the Luna Verde Bank.

26. *Colombia's third counter-claim.* In support of its third counter-claim, Colombia asserts that some residents of the San Andrés Archipelago engage in "artisanal" fishing in areas that are located within maritime areas allocated to Nicaragua by the Court, or are located within areas that appertain to Colombia, but that are reached by transiting areas appertaining to Nicaragua (*ibid.*, p. 75, para. 2.90; p. 300, para. 9.24). Colombia maintains that there exists a "local customary right" for these residents of the Archipelago to fish in maritime zones appertaining to Nicaragua "without having to request an authorization", and that Nicaragua has infringed these rights (*ibid.*, pp. 152-154, paras. 3.109 and 3.112).

27. As noted earlier, Nicaragua has supported its Application by invoking statements of Colombia's President asserting certain rights to fishing by Colombian nationals in waters appertaining to Nicaragua, whereas Nicaragua has maintained that it has the exclusive right to authorize activities in its exclusive economic zone. Colombia's third counter-claim, which claims that no Nicaraguan authorization is required for fishing by Colombians who are engaged in "artisanal" fishing, therefore fits within the dispute that is the subject-matter of Nicaragua's Application. The third counter-claim is within the jurisdiction, *ratione materiae*, that was established by the filing of Nicaragua's Application, notwithstanding the termination of the title of jurisdiction after the Application was filed.

28. The Parties have also addressed two conditions of the Court's jurisdiction — the existence of a dispute and the precondition contained in Article II of the Pact of Bogotá, requiring that the "controversy . . . in the opinion of the parties, cannot be settled by direct negotiations".

29. The above-cited statements of the Presidents of both States make clear the Parties' held opposing views on the question whether the inhabitants of the Colombian islands have a right to fish in maritime areas allocated to Nicaragua by the 2012 Judgment without Nicaraguan authorization, and that each Party was aware of the position of the other (see *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, pp. 32-33, para. 73; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016 (II)*, p. 850, para. 41).

30. With respect to the negotiation precondition, as the Court noted in the 2016 Judgment, there were indications that both Parties were willing to discuss the issue of fishing by the inhabitants of the Colombian islands (*I.C.J. Reports 2016 (I)*, p. 38, para. 97). However, the Parties' overall approaches to a possible agreement diverged. It appears that Colombia was seeking an agreement establishing maritime boundaries and protecting the historical rights of Colombian fishermen whereas Nicaragua was considering an agreement based on the maritime boundary already established by the Court and authorizing fishing activities by Colombian fishermen. Given that the overall dispute concerning the violation of the maritime zones as delimited by the Court could not be settled by negotiation (*ibid.*, pp. 38-39, paras. 100-101), it cannot be said that the Parties considered that there was a possibility of resolving through negotiation their differences regarding the particular question of fishing by Colombian nationals in waters appertaining to Nicaragua pursuant to the 2012 Judgment.

31. I therefore consider that the Court has jurisdiction over the third counter-claim. For the reasons set out in the Order, the third counter-

claim is "directly connected with the subject-matter" of Nicaragua's claims against Colombia. The third counter-claim is thus admissible.

32. *Colombia's fourth counter-claim.* Colombia's fourth counter-claim concerns

> "Nicaragua's straight baselines decree which extended its internal waters, territorial sea, contiguous zone, EEZ and continental shelf, in violation of international law and of Colombia's sovereign rights and jurisdiction" (Written Observations of Colombia on the Admissibility of its Counter-claims, p. 77, para. 3.62).

The exclusive rights of a coastal State that Nicaragua invokes in its Application, which Colombia allegedly violated, are neither predicated on nor affected by Nicaragua's assertion of straight baselines. Regardless of whether Nicaragua's straight baselines are applied, both the area around the Luna Verde Bank (where the incidents cited by Nicaragua allegedly occurred) and Colombia's "Integral Contiguous Zone" overlap with Nicaragua's exclusive economic zone. These areas are simply too far from Nicaragua's land territory to fall within its territorial sea, even using Nicaragua's straight baselines. It therefore appears that the fourth counter-claim does not fit within the subject-matter of the dispute presented in Nicaragua's Application. For this reason, the Court lacks jurisdiction over the fourth counter-claim. (I do not express any view here about Nicaragua's statement that its 200-nautical-mile limit would be the same whether measured from its asserted straight baselines or from normal baselines (Written Observations of Nicaragua on the Admissibility of Colombia's Counter-Claims, p. 46, para. 3.49), as the accuracy of this statement and the legality of Nicaragua's straight baselines are not matters to be decided today.)

(Signed) Joan DONOGHUE.

DISSENTING OPINION OF JUDGE *AD HOC* CARON

Disagreement with holding of inadmissibility by the Court of Colombia's first and second counter-claims — Direct connection in fact or in law of Colombia's first and second counter-claims.

Direct connection in fact — Subject-matter of the claim — Colombia's Integral Contiguous Zone established by Presidential Decree 1946 of 9 September 2013 is a core part of the factual complex underlying Nicaragua's claim — Factual complex underlying Colombia's first and second counter-claims are the same facts that led to issue of the Decree.

Direct connection requirement — Disagreement that direct connection must exist both in fact and in law — Connectedness need only exist in fact or in law — Parties legal aims are connected as Nicaragua requests the revocation of the 1946 Presidential Decree while Colombia's first and second counter-claims aim to validate the motivations which underlay the issue of the said Decree.

Range of factors for admissibility of counter-claims — Court's unique role in the peaceful settlement of disputes — Disagreement that the counter-claim and claim must rely on the same legal principles or instruments.

I. Introduction

1. The Court in its Order of 15 November 2017 finds admissible two of the four counter-claims submitted by Colombia. The Court, referring to Article 80 of the Rules of Court, indicates that the admissibility of a counter-claim presents both a jurisdictional requirement and a direct connection requirement. I concur in much of the Court's Order and in particular concur in the Court's discussion of the jurisdictional requirement as it applies in this proceeding. I disagree with the Court's discussion of the direct connection requirement in two respects.

2. First, I respectfully dissent from the Court's holding that there is not a direct connection, either in fact or in law, between Colombia's first and second counter-claims and the subject-matter of Nicaragua's principal claims and that such counter-claims are as a result inadmissible.

3. Second, and more fundamentally I write separately to further the Court's articulation of the principles that animate its direct connection requirement. Although counter-claims have long been an aspect of the Court and its Rules, it is only in the past few decades that they have been

submitted in numbers. It remains timely to revisit the principles that motivate the Court's exercise of its measure of judgment.

II. Evaluating the Direct Connection Requirement in respect of the First and Second Counter-Claims

1. The Court's Statement of the Direct Connection Requirement

4. Article 80, a construction of the Court rather than a provision of its Statute, provides in relevant part that a counter-claim may be entertained "only if it . . . is directly connected to the subject-matter of the claim of the other party". This "direct connection" requirement has been described as the "spinal column of the counter-claim law and practice" that makes it possible to distinguish between claims that are incidental and those that are separate and require separate proceedings[1]. The Court has given shape to the direct connection requirement in Article 80 through its decisions in a number of cases.

5. The Court has stated that the requirement can be evaluated both in fact and in law[2]. In examining the connection in fact, the Court has identified as factors whether the facts relied upon by each party relate to the same geographical area and the same time period as well as whether the facts relied upon are of the same nature in that they allege similar types of conduct. In the *Application of the Genocide Convention (Bosnia and Herzegovina* v. *Yugoslavia)* case, the Court refers to the factual inquiry in total as whether the respective claims rest on facts that form "part of the same factual complex"[3].

6. As to the connection in law, the Court has identified as factors

> "whether there is a direct connection between the counter-claim and the principal claim in terms of the legal principles or instruments relied upon, as well as whether the applicant and respondent were

[1] Robert Kolb, *The International Court of Justice* (Hart Publishing, 2013), p. 659.

[2] See e.g. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 258, para. 33:

> "Whereas the Rules of Court do not define what is meant by 'directly connected'; whereas it is for the Court . . . to assess whether the counter-claim is sufficiently connected to the principal claim, taking account of the particular aspects of each case; and whereas, as a general rule, the degree of connection between the claims must be assessed both in fact and in law[.]"

[3] *Ibid.*, para. 34. The phrase "factual complex" has been used in numerous cases since *Application of the Genocide Convention*.

considered as pursuing the same legal aims by their respective claims" (paragraph 25 of the Court's Order).

7. Although Article 80 requires a direct connection to the subject-matter of the claim of the opposing party, the Court not infrequently examines instead whether there exists a direct connection to the claim omitting Article 80's specific reference "to the subject-matter" of the claim. Inclusion of the phrase "to the subject-matter" is significant as it suggests a focus more on the dispute before it, rather than the legal shape given to that dispute by the applicant in formulating its claim.

8. It has been recognized by several observers of the Court that the multiplicity of different factors identified by the Court is indicative of the room the Court has to the exercise of a measure of judgment. Shabtai Rosenne in examining the Court's practice writes of the direct connection requirement that:

> "lack of rigidity is a feature of the manner in which States and the Court approach counter-claims. Some difficulty, indeed, is seen in extracting any general principles from these cases, unless it be that each case is to be treated on its merits."[4]

It bears emphasis that the Court's statements that it "has taken into consideration *a range of factors* that could establish a direct connection" and done so "taking account of the particular aspects of each case" acknowledges that the Court exercises its measure of judgment on a case-by-case basis (paragraphs 22-23 of the Court's Order; emphasis added). This is significant because it indicates that the Court's analysis is — in my opinion wisely — not easily reduced to a set of factors to be mechanically applied. Although the mentioned factors are identified in the Court's Order, it is difficult to assess which factors are or should be more important than others, and, more fundamentally, what principle or principles lead to the identification of the factors and their relative importance. The question of animating principles is discussed in Part 3 of this opinion.

9. It suffices for now to observe that the Court's reasoning involves a measure of judgment that makes difficult criticism of the Court's holding that there is not a direct connection, in fact or in law, as regards the first and second counter-claims. Judge Schwebel in the context of the Court applying a law that involves equitable considerations observed that:

> "Despite the extent of the difference between the line of delimitation which the Chamber has drawn and the line which my analysis

[4] Shabtai Rosenne, *The Law and Practice of the International Court. 1920-1996*, Vol. III, 3rd ed., 1997, p. 1276. Sean Murphy writes that applying the direct connection requirement is "more of an art than a rigid science", Sean Murphy, "Counter-claims Article 80 of the Rules", *The Statute of the International Court of Justice: A Commentary*, A. Zimmermann *et al.*, eds., 2012, 2nd ed., p. 1010.

> produces, I have voted for the Chamber's Judgment. I have done so . . . because I recognize that the factors which have given rise to the difference between the lines are open to more than one legally — and certainly equitably — plausible interpretation . . . On a question such as this, the law is more plastic than formed, and elements of judgment, of appreciation of competing legal and equitable considerations, are dominant."[5]

Likewise, the case-by-case measure of judgment exercised by the Court in its assessment of whether a direct connection exists allows for a range of appreciation of the directness of the connection. In this sense, I dissent because I believe it is important to explain why, in exercising that same measure of judgment, I reach a different conclusion. The existence of a measure of judgment allows for a range of views, but not any view. The exercise of a measure of judgment is not without limits; to be respected, its exercise needs be practiced and refined through the articulation of reasons. In the following section, I summarize the Court's explanation of its measure of judgment as regards the first and second counter-claims and why I reach a different conclusion.

2. The Direct Connection of the First and Second Counter-Claims to Subject-Matter of the Principal Claims

10. The Court's discussion of the direct connection of the first and second counter-claims to the subject-matter of the principal claims is succinct. As described by the Court at paragraph 35, the first counter-claim is based on "Nicaragua's alleged breach of a duty of due diligence to protect and preserve the marine environment of the Southwestern Caribbean Sea" and the second counter-claim is based on "Nicaragua's breach of its alleged duty of due diligence to protect the right of the inhabitants of the San Andrés Archipelago, in particular the Raizales, to benefit from a healthy, sound and sustainable environment."

11. Evaluating the first and second counter-claims in terms of their connection in fact to the subject-matter of the principal claims, the Court concludes that they both "essentially relate to the same geographical area that is the focus of Nicaragua's principal claims" (Order, para. 36). The Court makes no mention of whether the same time period is involved (although it does so with regard to the third counter-claim), in all likelihood because there is no question that the same period is involved. The Court describes the various types of conduct that Colombia alleges Nicaragua to be engaged in (namely, Nicaragua's alleged failure to curb pri-

[5] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984*, p. 357, separate opinion of Judge Schwebel.

vate Nicaraguan predatory fishing and destruction of the marine environment) and finds it distinct from the types of Colombian conduct complained of by Nicaragua (namely, Colombia's alleged interference with Nicaragua's exclusive sovereign rights and jurisdiction in Nicaragua's exclusive economic zone). The Court concludes that "the nature of the alleged facts underlying Colombia's first and second counter-claims and Nicaragua's principal claims is different" (Order, para. 37).

12. Evaluating the first and second counter-claims in terms of their connection in law, the Court finds the legal principles or instruments relied upon to be different inasmuch as Colombia points to the rules of customary international law and instruments relating to the protection of the marine environment, while Nicaragua points to the customary international law rules relating to the law of the sea as reflected in Parts V and VI of UNCLOS. The Court likewise finds the legal aims to be different inasmuch as Colombia seeks to have Nicaragua act to protect and preserve the marine environment, while Nicaragua seeks to have Colombia not interfere with Nicaragua's sovereign rights and jurisdiction in the same area (Order, para. 38).

13. The Court's reasoning, confident as it is, illuminates the malleability of such a range of factors and thus the measure of judgment that is present.

14. The Court correctly finds the types of conduct involved to be factually different, even though both types of conduct result in alleged breaches of mirror obligations in the very same area. Colombia's affirmative actions complained of by Nicaragua allegedly seek to, among other things, preserve and protect the marine environment, while Nicaragua's omissions complained of by Colombia allegedly permit predatory fishing and destruction of the marine environment. The Court correctly finds the legal principles or instruments relied upon to be different, even though they all relate to the oceans and to the obligations and responsibilities of States in the very same oceanic area. The Court finds the legal aims to be different, even though both Colombia and Nicaragua seek to clarify mirror obligations of each other for the very same oceanic area.

15. Recalling the language of Article 80, the Court, in exercising its measure of judgment, is instructed to inquire into the direct connection of the counter-claim with the subject-matter of the opposing claim. But what is the subject-matter of Nicaragua's claim?

16. As a unilateral legislative act may itself be part of a factual complex, a central aspect of the subject-matter of Nicaragua's claim and the factual complex underlying it is Colombia's Integral Contiguous Zone established by its Presidential Decree 1946 of 9 September 2013. The Court's Order notes at paragraph 12 that Nicaragua in this proceeding

seeks the revocation of "laws and regulations enacted by Colombia, which are incompatible with the Court's Judgment of 19 November 2012 including the provisions in the Decrees 1946 of 9 September 2013. . ." Indeed, in paragraph 70 of its Judgment of 17 March 2016 referring to "Colombia's proclamation of an 'Integral Contiguous Zone'", the Court observed that "the Parties took different positions on the legal implications of such action in international law".

17. Given that the existence of Presidential Decree 1946 is an explicit target of Nicaragua's Application and a core part of the factual complex underlying its claim, it is critical for a direct connection analysis to recognize that the factual complex underlying the first and second Colombian counter-claims consists of the very same facts that led in significant part to the issuance of the Decree. Indeed, the preamble to Decree 1946, which indicates Colombia's motivations for its issuance, in relevant part and with my emphasis added, states:

> "Considering
>
> . . . . . .
>
> That in conformity with customary international law as regards the contiguous zone, States may exercise sovereign rights and jurisdiction and control in the areas of security, drug trafficking, *environmental protection*, fiscal and customs matters, immigration, health and other matters.
>
> That the extension of the contiguous zone of insular territories conforming the Western Caribbean has to be determined, specifically of those insular territories that conform the San Andrés, Providencia and Santa Catalina Archipelago, so that the orderly management of the Archipelago and its maritime spaces may be guaranteed thereby ensuring *protection of the environment and natural resources* and maintenance of comprehensive security and public order.
>
> That the Colombian State is *responsible for the preservation of the Archipelago's ecosystems which are fundamental to the ecological equilibrium of the area and in order to preserve its inhabitants' historic, traditional, ancestral, environmental and cultural rights, and their right to survival*."[6]

In this sense, Presidential Decree 1946 is a dramatically clear intersection of the factual complex underlying both the subject-matter of Nicaragua's claim, and Colombia's first and second counter-claims. In my opinion, therefore the first and second counter-claims are directly connected to the subject-matter of the claim of Nicaragua.

[6] The English translation of Presidential Decree 1946 of 9 September 2013 reprinted in Memorial of Nicaragua, Annex 9, 3 October 2014, pp. 157-159.

18. But what of the inquiry into the direct connection in law? First, it must be stressed that Article 80 in requiring a direct connection does not demand that it exist in both fact and law. Rather, in my opinion, the connection need exist only in fact or law. Indeed, in the context of municipal litigation involving issues of sovereign immunity, the International Law Commission in Article 9 (counter-claims) of its Draft Articles on Jurisdictional Immunities of States and Their Property, adopted in 1991, indicates that codification of the subject leads to either a factual or legal connection being a sufficient direct connection:

> "A State instituting a proceeding before a court of another State cannot invoke immunity from the jurisdiction of the court in respect of any counter-claim arising out of the same legal relationship or facts as the principal claim."[7]

Second, the legal aim of the Parties as regards Presidential Decree 1946 also establishes a direct connection in law in that Nicaragua's claim requests the Court to order the revocation of Presidential Decree 1946, while the first and second Colombian counter-claims aim to validate and potentially satisfy the motivations that underlay the issuance of Presidential Decree 1946.

19. Thus, in my exercise of a measure of judgment, I find the first and second Colombian counter-claims to have a direct connection to the subject-matter of the claims of Nicaragua. Turning to the principles that animate the requirement of a direct connection as well as the factors identified by the Court only serves to reinforce this conclusion.

III. Principles Animating Considerations regarding the Admissibility of Counter-Claims

20. What principles animate the Court's reasoning into the admissibility of counter-claims? How do the various factors mentioned by the Court in its Order further such principles? Do such principles emphasize some factors more than others? Although the Court does not mention such principles in the present Order, it has done so previously. In the following section, this opinion reviews the principles that the Court has so far identified and what those principles suggest as to the exercise of a measure of judgment.

21. The Court has in several decisions identified principles that animate its thinking concerning the admissibility of counter-claims and the range of factors that inform the assessment of whether a direct connection exists. I would suggest that at least five principles have been voiced by the Court.

[7] *Yearbook of the International Law Commission*, 1991, Vol. II (Part Two), p. 30.

22. First, the Court on several occasions has mentioned that counter-claims can promote "procedural economy". If the question is whether a counter-claim (an autonomous legal act within the jurisdiction of the Court) should be heard as a separate case or as a counter-claim, then one clear principle animating the Court's approach is that such a counter-claim should be a part of the same case if admitting it serves to promote procedural economy. Although this is not explicitly indicated by the Court, presumably such procedural economy includes both the Court's limited resources as well as the resources of the parties. Second, a related principle, often stated by the Court alongside procedural economy, is that of avoiding inconsistent results which can follow from the fragmented consideration of connected aspects of the same dispute in separate cases before the Court.

23. Both of these animating principles are mentioned in the Court's discussion of counter-claims in the *Application of the Genocide Convention* case. The Court writes:

> "whereas, as far as counter-claims are concerned, the idea is essentially to achieve a procedural economy whilst enabling the Court to have an overview of the respective claims of the parties and to decide them more consistently"[8].

24. Between the principles of procedural economy and avoidance of inconsistent results, I would regard the latter as the more compelling for a court such as the International Court of Justice where the cases are of great public significance. Arriving at what is perceived as a sound decision for such cases is, in my opinion, more compelling than arriving at a decision in an efficient manner. One may hope to accomplish both, but if one must choose in the context of a very significant case, then I would choose the avoidance of inconsistent results as such a result would, among other things, undermine the influence of the decision.

25. Third, the Court has referred to the sound administration of justice although that phrase is not unpacked in any detail and may simply be a succinct means of referring to procedural economy and the avoidance of inconsistent results. Fourth, the Court, less clearly and less consistently, has suggested that a further principle is the applicant's right to present its case as it has chosen and that the possibility of counter-claims should not derail the applicant's effort to have its claims adjudicated. This principle may reflect the general aversion to abuse of process and may be more properly viewed as a part of the objective of sound administration of justice.

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[8] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 257, para. 30.

26. The third and fourth principles arguably are present in the *Application of the Genocide Convention* case where the Court writes that

> "the Respondent cannot use [the means of counter-claim] either to impose on the Applicant any claim it chooses, at the risk of infringing the Applicant's rights and of compromising the proper administration of justice"[9].

27. These four principles in all likelihood animate the reasoning of all courts regarding counter-claims. But while these principles are common to all courts of which I am aware, there is a fifth that is unique to this Court.

28. The final principle reflects the Court's unique role in the peaceful settlement of international disputes. Article 33 (1) of the United Nations Charter provides that

> "[t]he parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice".

The judicial resolution of the dispute presented is only one of the various methods listed and there is little doubt that the drafters of the Charter had the International Court of Justice in mind when referring to judicial settlement. It is not clear, however, that legal analysis necessarily offers the most enduring solutions to complex disputes. The reality is that complex international disputes resist resolution. The complexity of such disputes is manifest in the fact that even views as to what is at dispute are often very different for the various participants involved. It should be no surprise that a State, in constructing its application to the Court, will form its case from its perspective of the dispute. But in accepting that proposition, we need also accept that the Court may be presented with only a partial description of a complex matter. For this reason, I do not find it necessarily significant whether the counter-claim and claim rely on the same legal principles or instruments. Certainly, reliance on the same legal instrument furthers the principles of procedural economy and avoidance of inconsistent results. But there is no reason to expect that a counter-claim involving the same factual complex approaches the dispute from the same perspective or that, in its legal expression, it must rely on the very same instruments[10]. Indeed, to the extent that the Court seeks to more fully appreciate the complexity of the dispute before it, the Court should expect as often as not that different principles or instruments will

[9] *I.C.J. Reports 1997*, pp. 257-258, para. 31.

[10] See A. D. Renteln, "Encountering Counterclaims", *Denver Journal of International Law and Policy*, Vol. 15, 1986-1987, pp. 392-393.

be relied upon. In this sense, counter-claims involving the same factual complex allow the Court to appreciate and address the dispute more comprehensively thereby furthering the objective of peaceful resolution of disputes. S. Murphy writes:

> "International disputes that cannot be resolved through diplomacy are often complicated, with potentially valid claims by both sides. By being flexible in its procedure, the Court recognizes such complexity, and opens the door for considering the dispute in its broadest factual and legal context, thereby allowing a more comprehensive and just solution."[11]

IV. Concluding Observation

29. A dispute is viewed differently not only by the States involved, but also by the citizenry of those States. The Preamble to the Constitution of UNESCO wisely observes that since international disputes begin in the minds of men, "it is in the minds of men that defences of peace must be constructed". Similarly, international disputes before the Court are not merely legal disagreements between governmental officials, but rather are in most cases also disputes that reside in the minds of the people of both States. And it is in the minds of the people of both States that the meaningful resolution of significant international disputes is to be gained. It is true that not all viewpoints will win a court case, but a diversity of views as to what is truly at issue in a dispute can be recognized.

30. The Court's admission of the third and fourth counter-claims contributes to a fuller consideration of the international dispute presented in this proceeding and to the possibility for a long-term peaceful resolution of that dispute. For reasons detailed above, in my opinion, the admission of the first and second counter-claims would have done likewise.

(Signed) David D. Caron.

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[11] Sean Murphy, "Amplifying the World Court's Jurisdiction through Counter-Claims and Third-Party Intervention", *George Washington International Law Review*, Vol. 33, 2000, p. 20.