Corrigé
Corrected

CR 2015/28

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2015

Public sitting

held on Wednesday 7 October 2015, at 4 p.m., at the Peace Palace,

President Abraham presiding,

in the case concerning **Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua *v.* Colombia)**

Preliminary Objections

VERBATIM RECORD

ANNÉE 2015

Audience publique

tenue le mercredi 7 octobre 2015, à 16 heures, au Palais de la Paix,

sous la présidence de M. Abraham, président,

en l'affaire relative à la **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

COMPTE RENDU

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

Présents : M. Abraham, président
M. Yusuf, vice-président
MM. Owada
Tomka
Bennouna
Cançado Trindade
Greenwood
Mmes Xue
Donoghue
M. Gaja
Mme Sebutinde
MM. Bhandari
Robinson
Gevorgian, juges
MM. Brower
Skotnikov, juges *ad hoc*

M. Couvreur, greffier

The Government of Nicaragua is 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 English Bar, 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 University Paris Ouest, Nanterre-La Défense, former member and former 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), University Paris Ouest, Nanterre-La Defense,

Ms Gimena González,

as Assistant Counsel;

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

as Administrator.

Le Gouvernement du Nicaragua est représenté par :

S. Exc. M. Carlos José Argüello Gómez, ambassadeur de la République du Nicaragua auprès du Royaume des Pays-Bas,

comme agent et conseil ;

M. Vaughan Lowe, Q.C., membre du barreau d'Angleterre, professeur émérite de droit international, Oxford University, membre de l'Institut de droit international,

M. Alex Oude Elferink, directeur de l'Institut néerlandais du droit de la mer et professeur de droit international maritime, Université d'Utrecht,

M. Alain Pellet, professeur émérite de l'Université Paris Ouest, Nanterre-La Défense, ancien membre et ancien président de la Commission du droit international, membre de l'Institut de droit international,

M. Antonio Remiro Brotóns, professeur de droit international de l'Universidad Autónoma de Madrid, membre de l'Institut de droit international,

comme conseils et avocats ;

M. César Vega Masís, ministre adjoint des affaires étrangères et directeur des affaires juridiques, de la souveraineté et du territoire au ministère des affaires étrangères,

M. Walner Molina Pérez, conseiller juridique au ministère des affaires étrangères,

M. Julio César Saborio, conseiller juridique au ministère des affaires étrangères,

comme conseils ;

M. Edgardo Sobenes Obregon, conseiller à l'ambassade du Nicaragua au Royaume des Pays-Bas,

Mme Claudia Loza Obregon, premier secrétaire à l'ambassade du Nicaragua au Royaume des Pays-Bas,

M. Benjamin Samson, doctorant au Centre de droit international de Nanterre (CEDIN), Université Paris Ouest, Nanterre-La Défense,

Mme Gimena González,

comme conseils adjoints ;

Mme Sherly Noguera de Argüello, consul général de la République du Nicaragua,

comme administrateur.

The Government of Colombia is represented by:

H.E. Ms María Ángela 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 Helvetic Confederation,

as Co-Agent;

Mr. W. Michael Reisman, McDougal Professor of International Law at Yale University, 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 English Bar, 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 and Special Rapporteur of the International Law Commission, President of the Latin American Society of International Law,

Dr. h.c. Matthias Herdegen, Director of the Institute of International Law and Institute for Public 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 OPCW, 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,

Le Gouvernement de la Colombie est représenté par :

S. Exc. Mme María Ángela Holguín Cuéllar, ministre des affaires étrangères,

Mme Aury Guerrero Bowie, gouverneur de l'archipel de San Andrés, Providencia et Santa Catalina,

S. Exc. M. Francisco Echeverri Lara, ministre adjoint chargé des affaires multilatérales, ministère des affaires étrangères,

comme représentants de l'Etat ;

S. Exc. M. Carlos Gustavo Arrieta Padilla, ancien juge au conseil d'Etat colombien, ancien *Procurador General de la Nación* de Colombie et ancien ambassadeur de la Colombie auprès du Royaume des Pays-Bas,

comme agent ;

S. Exc. M. Manuel José Cepeda Espinosa, ancien président de la Cour constitutionnelle de Colombie, ancien délégué permanent de la Colombie auprès de l'UNESCO et ancien ambassadeur de la Colombie auprès de la Confédération helvétique,

comme coagent ;

M. W. Michael Reisman, professeur de droit international à l'Université de Yale, titulaire de la chaire McDougal, membre de l'Institut de droit international,

M. Rodman R. Bundy, ancien avocat à la Cour d'appel de Paris, membre du barreau de New York, cabinet Eversheds LLP, Singapour,

sir Michael Wood, K.C.M.G., membre du barreau d'Angleterre, membre de la Commission du droit international,

M. Tullio Treves, membre de l'Institut de droit international, conseiller principal en droit international public, cabinet Curtis, Mallet-Prevost, Colt & Mosle LLP, Milan, professeur à l'Université de Milan,

M. Eduardo Valencia-Ospina, membre et rapporteur spécial de la Commission du droit international, président de l'association latino-américaine de droit international,

M. Matthias Herdegen, docteur *honoris causa*, directeur de l'Institut de droit international et de l'Institut de droit public de l'université de Bonn,

comme conseils et avocats ;

S. Exc. M. Juan José Quintana Aranguren, ambassadeur de la République de Colombie auprès du Royaume des Pays-Bas, représentant permanent de la Colombie auprès de l'OIAC, ancien représentant permanent de la Colombie auprès de l'Office des Nations Unies à Genève,

S. Exc. M. Andelfo García González, ambassadeur de la République de Colombie auprès du Royaume de Thaïlande, professeur de droit international, ancien ministre adjoint des affaires étrangères,

Mme Andrea Jiménez Herrera, conseiller à l'ambassade de la République de Colombie au Royaume des Pays-Bas,

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, LL.M., 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.

Mme Lucía Solano Ramírez, deuxième secrétaire de l'ambassade de la République de Colombie au Royaume des Pays-Bas,

M. Andrés Villegas Jaramillo, coordonnateur du groupe chargé des affaires portées devant la CIJ au sein du ministère des affaires étrangères,

M. Giovanny Andrés Vega Barbosa, groupe chargé des affaires portées devant la CIJ au sein du ministère des affaires étrangères,

Mme Ana María Durán López, groupe chargé des affaires portées devant la CIJ au sein du ministère des affaires étrangères,

M. Camilo Alberto Gómez Niño, groupe chargé des affaires portées devant la CIJ au sein du ministère des affaires étrangères,

M. Juan David Veloza Chará, troisième secrétaire, groupe chargé des affaires portées devant la CIJ au sein du ministère des affaires étrangères,

comme conseillers juridiques ;

le contre-amiral Luis Hernán Espejo, marine colombienne,

le capitaine de vaisseau William Pedroza, bureau des affaires internationales, marine colombienne,

le capitaine de frégate Hermann León, direction générale des affaires maritimes et portuaires, marine colombienne,

M. Scott Edmonds, cartographe, International Mapping,

M. Thomas Frogh, cartographe, International Mapping,

comme conseillers techniques ;

Mme Charis Tan, avocat et *solicitor* (Singapour), membre du barreau de New York, *solicitor* (Angleterre et pays de Galles), cabinet Eversheds LLP, Singapour,

M. Eran Sthoeger, LL.M., faculté de droit de l'Université de New York,

M. Renato Raymundo Treves, LL.M., collaborateur, cabinet Curtis, Mallet-Prevost, Colt & Mosle LLP, Milan,

M. Lorenzo Palestini, doctorant à l'Institut de hautes études internationales et du développement de Genève,

comme assistants juridiques.

Le PRESIDENT : Veuillez vous asseoir. L'audience est ouverte. La Cour se réunit aujourd'hui pour entendre le second tour de plaidoiries de la Colombie. Je donne à présent la parole à sir Michael Wood.

Sir Michael WOOD:

FIRST PRELIMINARY OBJECTION: ARTICLE LVI OF THE PACT OF BOGOTÁ

1. Mr. President, Members of the Court, it is once again an honour to address you in the presence of Her Excellency, la Señora María Ángela Holguín Cuéllar, Minister for Foreign Affairs of the Republic of Colombia. I also welcome the presence of the Honourable Señora Aury Guerrero Bowie, the Governor of the Archipelago of San Andrés, Providencia and Santa Catalina.

2. The order of speakers in Colombia's second round will be as follows. It will come as no surprise that I shall address Colombia's first objection to jurisdiction, based on Article LVI of the Pact of Bogotá.

Professor Herdegen will then deal with the non-existence of an alleged "continuing jurisdiction".

Professor Reisman will follow with our objection to jurisdiction based on the *res judicata* principle.

Professor Treves will then deal with our objection to the admissibility of Nicaragua's claim to delimitation of the continental shelf beyond 200 nautical miles.

I shall then address Nicaragua's second request.

Mr. Bundy will then make some concluding remarks, and the Agent of Colombia will read out Colombia's final submissions.

3. Mr. President, Members of the Court, in this first statement, I will respond to what Professor Remiro Brotóns said yesterday concerning Colombia's first objection to jurisdiction. I can be brief.

4. Nicaragua's argument concerning Article LVI has, finally, become a little clearer, towards the end of two weeks of hearings. It can be stated very simply.

5. According to Nicaragua, the second paragraph of Article LVI only concerns procedures instituted before the transmission of the notification of denunciation and it says that they continue after the expiration of the one-year period of notice.

6. According to Nicaragua, the second paragraph has nothing to say about procedures initiated after such transmission. Procedures initiated after the transmission of the notification of denunciation also continue, according to Nicaragua, by virtue of the combined effect of Articles XXXI and LVI, first paragraph. On Tuesday Professor Remiro claimed that "it was in the first paragraph that one could read '*très clairement et nettement*' that the consent [given in Article XXXI] continues to produce its effects during the one-year period of notice"[1]. The second paragraph, again according to Professor Remiro, "concerns situations in which the delay of a year could expire in the middle of a procedure already initiated" [2]. But this would be all the more likely to happen in the case of procedures initiated during the year, yet the drafters, according to Nicaragua, did not address these procedures in the text, and it follows that they are not protected. With great respect, Professor Remiro's argument is scarcely intelligible.

7. On its reading, Nicaragua is forced once again to concede that the drafters did not need to include the second paragraph, and that the second paragraph is "superfluous"[3]. In an effort to explain how such a provision, which as we have seen was deliberately added to the negotiating text in 1938[4], and maintained in all subsequent drafts[5], could have an *effet utile*, Nicaragua yesterday was reduced to repeating its mantra, now apparently Aristotelian, that "paragraph two of Article LVI is therefore superfluous but not useless"[6].

8. The hollowness of Nicaragua's argument on Article LVI is manifest. Try as they may, on their reading, they cannot give any rational explanation for the inclusion of the second paragraph or explain its purpose.

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[1]CR 2015/27, pp. 21-22, para. 10 (Remiro Brotóns).

[2]*Ibid.*

[3]CR 2015/25, p. 19, para. 6 (Remiro Brotóns).

[4]Preliminary Objections of Colombia (POC), Vol. I, paras. 3.39-3.46; CR 2015/26, pp. 27-28, para. 34 (Wood); CR 2015/22, p. 29, paras. 52-53 (Wood); CR 2015/24, pp. 17-18, paras. 27-29 (Wood).

[5]POC, Vol. I, paras. 3.48-3.53; CR 2015/26, p. 28, para. 35 (Wood).

[6]CR 2015/27, pp. 24-25, para. 20 (Remiro Brotóns).

9. Professor Remiro variously accused Colombia of ignoring the first paragraph of Article LVI and the Pact's Article XXXI[7], or of interpreting the second paragraph so that it "collided" [« *en collision* »] with the first paragraph and with Article XXXI[8]. Not so. It is Nicaragua who reads the first paragraph in isolation. They did so again on Tuesday[9]. Colombia has not ignored the other provisions of the Pact. We dealt with the first paragraph and with Article XXXI fully in our written pleadings[10], and last week[11], and again, albeit briefly, on Monday[12].

10. But since Professor Remiro as well as the Nicaraguan Agent[13] have once again relied upon a few words, taken out of context, from Article XXXI, "so long as the present ***T***reaty is in force", let me briefly recall what I said last week. I then pointed out that Nicaragua had avoided citing the relevant clause in full. The clause states that the jurisdiction exists "*without the necessity of any special agreement* so long as the present Treaty is in force". The purpose of this clause is to emphasize that consent to the jurisdiction of the International Court of Justice under the Pact does not require a *compromis*. The purpose of the clause is not to override the ordinary meaning of Article LVI. It is clear that the words "so long as the present ***T***reaty is in force" mean, and can only mean, for so long as the relevant provisions of the Pact are in force in accordance with their terms[14]. The specific temporal limitations on the initiation of new procedures are to be found in Article LVI, not in the general statement of the obligation to submit to the compulsory jurisdiction of the Court under Article XXXI.

11. Mr. President, the general terms of the treaty-based consent to jurisdiction under Article XXXI cannot override the express terms of Article LVI, which specifically addresses the effect of transmitting the notification of denunciation, and of its second paragraph in particular, which specifically deals with the position of procedures for the peaceful settlement of disputes

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[7]CR 2015/25, pp. 19-20, para. 2 (Remiro Brotóns).

[8]*Ibid.*, p. 21, para. 8 (Remiro Brotóns).

[9]*Ibid.*, pp. 19-20, para. 2 (Remiro Brotóns).

[10]POC, Vol. I, paras. 3.8-3.22.

[11]CR 2015/22, pp. 25-27, paras. 36-45; CR 2015/24 pp. 10-11, paras. 9-10 (Wood).

[12]CR 2015/26, pp. 24-26, paras. 21, 27-31 (Wood).

[13]CR 2015/27, pp. 11-12, para. 8 (Argüello Gómez).

[14]CR 2015/22, p. 28, para. 48 (Wood).

following such transmission. Paragraph 2 is the *lex specialis*; it is the only provision dealing with the effect of denunciation on pending procedures, whether procedures before the Court under Chapter IV or under other chapters, and it only saves those initiated prior to the transmission of the notification[15]. For present purposes, Article LVI is the governing provision, not Article XXXI[16].

12. Professor Remiro once again tried to argue that, on Colombia's interpretation, nothing would be left of the Pact during the one-year's notice. I do not think it is necessary to repeat what we have said on this in writing[17], and last week[18]. I must, however, point out that on Tuesday Professor Remiro once again distorted what we had said. He misrepresented the Pact, in particular its Chapter I, and overlooked the fact that many of its provisions contain general obligations unconnected with the procedures spelt out in its Chapters II to V. For example, he omitted to read out the key passage from Article II, to which I had drawn particular attention last week. Article II actually concludes with the words "or, alternatively, such special procedures as, in their opinion, will permit them to arrive at a solution"[19]. This reference to "special procedures" clearly concerns procedures other than those under Chapters II to V. Professor Remiro also did not respond to what Colombia said about the continuing effect of the provisions of Chapters II to V on procedures initiated prior to the transmission of the notification[20], or the fact that States found it entirely possible to separate the procedures found in those Chapters from the other Chapters at the Pact when they made reservations[21]. There is, we say, a clear distinction between procedures under Chapters II to V and other important provisions of the Pact.

13. Mr. President, I shall not return to the *travaux préparatoires*. I note, however, that Professor Remiro continues to insist on one sentence from the Rapporteur in 1948[22], a sentence which does not bear the meaning he attributes to it. At the same time, he completely ignores all

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[15]CR 2015/24, pp. 11-12, para. 12 (Wood).

[16]CR 2015/22, p. 28, paras. 47 (Wood).

[17]POC, Vol. I, paras. 3.5-3.8 and App. to Chap. 3 (Pact of Bogotá).

[18]CR 2015/22, pp. 21-23, paras. 14-23 (Wood); CR 2015/24, pp. 15-16, paras. 21-25 (Wood).

[19]CR 2015/24, p. 16, para. 24 (Wood)

[20]*Ibid.*, p. 16, para. 25 (Wood).

[21]*Ibid.*

[22]CR 2015/27, pp. 25-26, para. 23 (Remiro Brotóns).

that went before, including Article 22 of the 1902 Treaty[23], which I showed you on Monday**,** and the amendment introduced in 1938[24].

14. Mr. President, Members of the Court, that concludes what I have to say at this stage. I thank you and I would request that you invite Professor Herdegen to the podium.

Le PRESIDENT : Merci. Je donne à présent la parole au professeur Herdegen.

Mr. HERDEGEN: Je vous remercie, Monsieur le président.

SECOND PRELIMINARY OBJECTION: THE JUDGMENT OF 19 NOVEMBER 2012 DID NOT RESERVE TO THE COURT A "CONTINUING JURISDICTION"

1. Mr. President, Members of the Court, yesterday, Nicaragua tried to bolster its reliance on what it considers "continuing jurisdiction" by linking it with the *res judicata* question. Nicaragua leaves the legal basis for this kind of jurisdiction in a cloud of semi-inherent, semi-expressed powers and strained inferences from what the Court should have said or might have meant in 2012. It suffices to recall a few elementary principles of jurisdiction to cut through this conceptual fog: first, jurisdiction rests on consent and not on the Applicant's interest in adjudication; second, jurisdiction, in order to be retained for a fresh application, must be expressly reserved by the Court, in clear and unambiguous terms.

The objections against "continuing jurisdiction" and the objection based on *res judicata* are entirely separate

2. Nicaragua's Agent[25] yesterday mixed "continuing jurisdiction" with the absence of *res judicata* and, though less explicitly, my distinguished colleague Professor Pellet[26] followed a similar approach. However, the absence of any kind of "continuing jurisdiction" is not contingent on *res judicata* nor does *res judicata* depend on the absence of a consensual title to jurisdiction, as Nicaragua must be well aware.

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[23]POC, Vol. I, paras. 3.35-3.36; CR 2015/26, p. 24, para. 20.

[24]POC, Vol. I, paras. 3.39-3.46; CR 2015/26, pp. 27-28, para. 34 (Wood); CR 2015/22, p. 29, paras. 52-53 (Wood); CR 2015/24, pp. 17-18, paras. 27-29 (Wood).

[25]CR 2015/27, p. 12, para. 9; p. 13, para. 15 (Argüello Gómez).

[26]CR 2015/27, pp. 30ss, paras. 10ss (18) (Pellet).

The consensual basis of jurisdiction

3. Yesterday we have heard very little from Nicaragua about the normative basis of the Court's jurisdiction — and we have heard nothing at all about consent to jurisdiction. Nicaragua tries nothing less than to detach the Court's powers from their consensual roots. Its pleadings thus leave jurisdiction entirely up in the air. At least, with Professor Pellet's pleadings[27], Nicaragua seems to have abandoned its previous strong reliance on "inherent jurisdiction"[28]. Instead, Nicaragua now, unconvincingly, relies on the rather unremarkable statement in Article 38 (1) of the Statute, now on screen, that the Court's function is "to decide . . . such disputes as are submitted to it"[29]. This is an inspired attempt to discover a new basis of jurisdiction. However, Article 38 of the Statute has nothing to do with jurisdiction. That is dealt with in other provisions of the Statute, especially in Article 36. Article 38 does not grant, but presupposes jurisdiction. Likewise, the "quality of the Court as judicial organ"[30] invoked by Nicaragua is not a very helpful formula. We are not talking about the Tribunal de grande instance de Strasbourg whose jurisdiction is statutory, but about the International Court of Justice whose source of jurisdiction is and remains consent.

Only an express reservation can carry jurisdiction over to new proceedings

4. As I explained on Monday[31], after a judgment on the merits only an express reservation can have the result that there is jurisdiction for a new stage of the same proceedings or even, wholly exceptionally, for entirely new proceedings. Nicaragua is mistaken when it tries somehow to establish a similarity between the present proceedings and Colombia's list of three cases where jurisdiction may be preserved[32].

5. Nicaragua not only ignores that in *Territorial and Maritime Dispute* the Court did not reserve jurisdiction. It boldly asserts that the Court's decision that it cannot uphold Nicaragua's claim as to an extended continental shelf has the same effect as an unilateral commitment of the

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[27]CR 2015/27, p. 33, para. 17 (Pellet).

[28]WSN, paras. 3.9-3.16.

[29]CR 2015/27, p. 27, para. 3 (Pellet).

[30]CR 2015/27, p. 33, para. 17 (Pellet).

[31]CR 2015/26, p. 33, para. 13 (Herdegen).

[32]CR 2015/27, p. 33, para. 17 (Pellet).

Respondent in the *Nuclear Tests* which makes the dispute disappear[33]. However, in its 2012 Judgment, the Court did not even consider making a similar reservation as it did in *Nuclear Tests* — and there is no plausible reason why it should have done so.

Reservation by the Court always defines the scope of retained jurisdiction in clear terms

6. In the Court's case law, the reservation of jurisdiction is always express. It was always unambiguous in clearly determining the object and the conditions of the jurisdiction retained. You can see this on the screen in the identical paragraphs 60 and 63 of the two *Nuclear Tests* cases[34]: "*if the basis of this Judgment were to be affected, the Applicant could request an examination of the situation in accordance with the provisions of the Statute*". This is a clear and unambiguous reservation.

7. And you can see a clear reservation in the *dispositif* in *Armed Activities on the Territory of the Congo*[35], now also on screen.

Mr. President, these two instances suffice to show how a reservation must be formulated in order to preserve and maintain jurisdiction.

8. It is obvious why the reservation of jurisdiction must not only be express, but must also leave no doubt whatsoever as to the conditions which trigger preserved jurisdiction and the scope of jurisdiction retained. Legal certainty and legal stability impose this clarity.

9. Failing such clarity about the reservation of jurisdiction, even the slightest doubt about the reading of a judgment could enable a dissatisfied litigant to invoke jurisdiction over new proceedings, despite the other party's withdrawal of consent. Virtually every judgment based on burden of proof which leaves one side or the other dissatisfied could become a new source of litigation, at one party's choosing. Doubts about retained jurisdiction would become an instrument of harassment, of vexatious litigation. This explains why the Court has never even considered some kind of "continuing jurisdiction" without an express reservation.

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[33]CR 2015/27, pp. 33-34, paras. 16-18 (Pellet).

[34]*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 272, para. 60; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 477, para. 63; emphasis added.

[35]*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, pp. 281, 282, para. 345.

Conclusion

10. Nicaragua's attempt to revive the case which the Court finally closed in November 2012 recalls the stratagem of Baron von Münchhausen of pulling himself out of a swamp by his own hair. Like Münchausen's stratagem, Nicaragua's perpetual jurisdiction is and should remain in the imaginative realm of innovative constructs.

11. Mr. President, the Court has never allowed that insufficient substantiation of a claim be turned into an instrument of lasting harassment of the other party. Legal certainty and legal stability must also defeat Nicaragua's attempt to revive the case which was terminated in November 2012. These principles have always prevailed in the Court's case law. Only once in its history, I repeat, this Court retained jurisdiction for new proceedings, with an express reservation and under most exceptional, almost unique, conditions.

12. Mr. President, I thank the Members of the Court for their courtesy and ask you to invite Professor Reisman to continue Colombia's pleadings.

Le PRESIDENT : Merci, Monsieur le professeur. Je donne à présent la parole au professeur Michael Reisman.

Mr. REISMAN: Merci, Monsieur le président.

THIRD PRELIMINARY OBJECTION: *RES JUDICATA*

1. Mr. President, Members of the Court, I appreciate the opportunity to appear before you again to comment this time on the arguments which Agent and counsel for Nicaragua have mounted against the *res judicata* effect of your 2012 Judgment which bars Nicaragua's 2013 Application.

2. ***Mr. President,*** Nicaragua invents a novel concept of *res judicata*. It attributes to the Court the requirement for *res judicata* "that the issue presented in the latter case must *truly* have been decided in the prior case"[36]. Yesterday, Nicaragua's Agent said the "*causa petendi* must have

[36]Written Statement of Nicaragua (WSN), para. 4.9.

been disposed of 'finally' and 'for good'"[37]. Professor Pellet said that the dispute must be "completely resolved . . . and that it is not yet determined"[38].

3. Mr. President, the issue was "'truly' and 'finally' decided" when the Court said that I (3) "cannot be upheld"[39]. It was "determined". The Court's language is entirely consistent with its practice. Professor Pellet said yesterday that the Court has used the formula "cannot be upheld" in its *dispositif* on only two occasions. With respect, the Court has availed itself of the words "cannot be upheld" in a significant number of previous cases, in many of which the Court was unequivocally rejecting a claim. The translations into French have varied but many are identical to the translation in *Territorial and Maritime Dispute*. The examples are easily multiplied, but a few will readily illustrate the Court's practice. On the screen, you see some of the cases in which you have used "cannot be upheld" to decide on and dispose of claims that had been brought before you.

4. I would like to review some of them with you. In its 1985 *Tunisia* v. *Libya Shelf* Judgment, which is at tab 6 in your folders, the Court rejected several of Tunisia's submissions using the phrase "cannot be upheld" twice in the *dispositif*[40] in rejecting Tunisia's Application for Revision. And the Court~~, at tab 7,~~ also rejected the United States ~~claim a~~ "plea of collective self defence"[41] in the 1986 Judgment in *Nicaragua* v. *United States*, using the English phrase "cannot be upheld"[42]. In *Cameroon* v. *Nigeria*, which is at tab 8, the Court rejected Nigeria's argument that title to territory had never passed in the light of certain requirements of domestic law by concluding that the "argument on this point . . . cannot be upheld"[43].

5. Indeed, the Court has resorted to the same locution to reject arguments that lie at the centre of the parties' disputes. In addition to the passage which my friend Professor Pellet

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[37]CR 2015/27, p. 12, para. 10 (Argüello).

[38]CR 2015/27, pp. 32-33, para. 14 (Pellet).

[39]*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 719, para. 251.

[40]*Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case Concerning the* Continental Shelf (Tunisia/Libya Arab Jamahiriya) *(Tunisia* v. *Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1985*, p. 230, paras. B.3 and D.3.

[41]*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 27, para. 34.

[42]*Military and Paramilitary Activities in and Against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 123, para. 238.

[43]*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 401, para 197, p. 452, para. 318.

mentioned yesterday in *Oil Platforms*, which is at tab 9, the Court rejected both States's claims for reparations and one of the parties' jurisdictional objections using the English "cannot be upheld", and it used it four times in paragraphs 99, 115, 123 and 124[44]. And in the *Avena* Judgment, which is at tab 10, the Court rejected a number of the United States arguments as well as Mexico's substantive contention that the "exclusionary rule" of American criminal procedure is a general principle of international law by using the phrase "cannot be upheld"[45].

6. In your 2005 Judgment in the Benin/Niger *Frontier Dispute*, which is at tab 11, a Chamber of the Court rejected Benin's argument that a century-old decree by the Governor-General of West Africa set the course of a river boundary between countries by simply concluding that the "argument . . . cannot be upheld"[46]**.** ***A***nd in the same year, the Court used the phrase "cannot be upheld" *five* times to reject various objections and counter-claims in the Judgment disposing of the case concerning *Armed Activities on the Territory of the Congo*[47], at tab 12.

7. At tab 13, the Court used the phrase "cannot be upheld" and its inverse to finally decide — one way or the other — three of the objections to admissibility advanced by the Respondent in the *Diallo* case. The Court's 2007 Judgment rejected two contentions regarding admissibility using the phrase "cannot be upheld"[48], but accepted the third because, as the Court wrote, it was "well founded and must be upheld"[49].

8. In *Jurisdictional Immunities* ~~***of 2012***~~, at tab 14, the Court said that "In the present case . . . it will not uphold the last of Germany's submissions."[50] In *Certain Questions of Mutual Assistance in Criminal Matters* ~~***of 2008***~~, at tab 15, ***the Court*** said that "it does not uphold the sixth and seventh

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[44]*Oil Platforms (Islamic Republic of Iran* v *United States of America), Judgment, I.C.J. Reports 2003*, p. 208, para. 99; p. 213, para. 115; p. 218, paras. 123-124.

[45]*Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004*, p. 46, para. 74 and p. 61 para. 127.

[46]*Frontier Dispute (Benin/Niger), Judgment, I.C.J. Reports 2005*, p. 122, para. 56.

[47]*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 255, para. 254; p. 267, para. 296; p. 268, para. 301; p. 269, para. 304 and p. 276, para. 331.

[48]*Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 607, para. 67 and p. 610, para. 75.

[49]*Ibid.*, p. 616, para. 94.

[50]*Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012 (I)*, p. 154, para. 138.

final submissions of Djibouti"[51]. Even in the Preliminary Objections Judgment in *Territorial and Maritime Dispute*, at tab 16, the prior case ***of*** this proceeding, the Court said that it "cannot uphold the first preliminary objection raised by Colombia in so far as it concerns the Court's jurisdiction as regards the question of sovereignty over the maritime features . . ."[52]

9. Mr. President, three final examples confirm that the Court's refusal to "uphold" a claim is used to express a final decision. In the Judgment in *Dispute regarding Navigational and Related Rights* between Costa Rica and Nicaragua, at tab 17, you decided, on the merits, that Nicaragua's flag requirements did not impede Costa Rica's right of free navigation, stating that Costa Rica's "claim . . . cannot be upheld"[53]. And in your Judgment of 2011, in the *Application of the Interim Accord* case between FYROM and Greece, at tab 18, you disposed of no fewer than five of the parties' arguments with the English phrase "cannot be upheld"[54]. In *Qatar* v. *Bahrain*, at tab 19, the Court held that "[f]or all these reasons, the Court concludes that the first submission made by Bahrain cannot be upheld, and that Qatar has sovereignty over Zubarah"[55].

10. Nor is this form of language unique to the International Court of Justice. The Permanent Court of Justice in the fascinating case in *Free Zones of Upper Savoy and the District of Gex*, at tab 20, held:

> "The French argument, according to which the Court, in settling all the questions involved by the execution of Article 435 of the Treaty of Versailles, enjoys the same powers and the same freedom of judgment and decision as France and Switzerland would themselves enjoy in negotiating an agreement, cannot be upheld."[56]

11. Mr. President, Members of the Court, can Nicaragua seriously contend that all of these cases in which the Court or its predecessor expressed its decision in the terms "cannot be upheld"

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[51] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, p. 244, paras. 197.

[52] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 863, para. 97.

[53] *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua) Judgment, I.C.J. Reports 2009*, p. 263, paras. 52 and 132.

[54] *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. 658, para. 34; p. 659, para. 38; p. 661, para. 44; p. 663, para.54 and p. 665, para. 60.

[55] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001*, p. 69, para. 97.

[56] *Free Zones of Upper Savoy and the District of Gex, Judgment, 1932, P.C.I.J., Series A/B, No. 46*, p. 153.

are still "undecided" or "undetermined", and, not being *res judicata*, are open for relitigation for the same *persona*, *petitum* and *causa petendi*? It is an absurd proposition.

12. It is clear that the Court, to use Nicaragua's word, "truly" decided the issue in I (3) in stating that it "*Finds* that it cannot uphold the Republic of Nicaragua's claim contained in its final submission I (3)."[57]

13. Now, Nicaragua's effort to find the deep meaning in the words *"the Court is not in a position to uphold"*, and a reason there for denying the *res judicata* effect is also unavailing. "Not in a position" says no more than that the facts and arguments adduced by Nicaragua do not enable the Court to uphold its claim.

14. Yesterday, Professor Pellet quotes the reference in the 2012 Judgment to the words "in the present proceedings" and submits that they indicate that the Court was reserving its jurisdiction for another phase[58]. But both Parties have noted the Court's practice when it wishes to reserve its jurisdiction for a later phase. As a singularly important matter of jurisdiction, the Court has always indicated that it was quite conscious of what it was doing and was appropriately explicit and reason-based about such a consequential matter. There is no precedent for the innocuous words "in the present proceedings" to carry the weighty jurisdictional message which Nicaragua wishes to read in them. Professor Pellet put it neatly but in the wrong connection: such a major decision would hardly be conveyed in a whisper. Indeed, even in *Nicaragua* v. *United States*, in which the Court expressly reserved its jurisdiction for a second phase, the Court, far from whispering, clearly specified the subject-matter of the phase which did not include the United States plea for collective self-defence. The Court had rejected that in the first phase, where it had stated that it could not be upheld.

15. Nicaragua has also tried to portray the decision not to "uphold" its I (3) claim as a "non decision". But the Court itself characterized it as a decision. In paragraph 132 of the 2012 Judgment, the Court referred to its decision not to uphold Nicaragua's I (3) claim and it said:

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[57]*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II),* p. 719, para. 251.

[58]CR 2015/27 p. 41, para. 29 (Pellet).

"In light of the *decision* it has taken regarding Nicaragua's final submission I (3) (see paragraph 131 above) . . ."[59]

16. It is important to note that that decision not to uphold Nicaragua's I (3) claim did not come "out of the blue"; it was the culmination of a process of reasoning which involved some ten previous decisions in the Judgment, all of which led logically and inexorably to this decision:

(a) First, in paragraph 112 of the Judgment, the Court concluded, and hence decided, that Nicaragua's claim, as contained in final submission I (3) was admissible.

(b) Second, in paragraph 126 of the Judgment, the Court determined the law applicable to Nicaragua's I (3) claim and decided that, even though Colombia is not a party to UNCLOS, Nicaragua, as a party, is obliged to comply with its obligations under Article 76.

(c) Third, in the first part of paragraph 129 of the Judgment, the Court decided that Nicaragua had not established that it had a continental margin extending far enough to overlap with Colombia's continental shelf.

(d) Fourth, in the last part of paragraph 129, the Court decided that it was not in a position to delimit the continental shelf between the two countries, as requested by Nicaragua, even using the general formulation proposed by it.

(e) Fifth, in paragraph 130, the Court decided ~~***that***~~, as a consequence of the above-mentioned decision, ***that*** it did not have to address other arguments of the parties, including the question of whether the extended continental shelf trumps the legal continental shelf of another country.

(f) Sixth, in paragraph 131 of the Judgment, the Court concluded that Nicaragua's submission I (3) could not be upheld.

(g) Seventh, in paragraph 132 of the Judgment, as mentioned a moment ago, the Court determined that "[i]n light of the *decision* it has taken regarding Nicaragua's final submission I (3) . . . [t]here is . . . an overlap between Nicaragua's entitlement to a continental shelf and exclusive economic zone extending to 200 nautical miles from its mainland coast and adjacent islands and Colombia's entitlement to a continental shelf and exclusive economic zone derived from the islands over which the Court has held that Colombia has sovereignty".

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[59] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 670, para. 132 ; emphasis added.

(h) Eighth, in paragraph 151, the Court determined that, "[i]n view of the Court's decision regarding Nicaragua's claim to a continental shelf on the basis of natural prolongation", the relevant Colombian coast was thus "confined to the coasts of the islands under Colombian sovereignty".

(i) Ninth, in paragraph 155, the Court decided to define the relevant area "in the light of its *decision* regarding Nicaragua's claim to a continental shelf beyond 200 nautical miles" (emphasis added). In other words, it decided to exclude from the relevant area any area beyond 200 miles, because Nicaragua's submission I (3) could not be upheld.

(j) Tenth, in paragraphs 163, 164 and 165, the Court decided that the relevant area cannot extend beyond the point at which the entitlements of both parties overlap and, therefore, the relevant area could not extend more than 200 miles from Nicaragua. Accordingly, in paragraph 159, the Court determined that the relevant maritime area "extends from the Nicaraguan coast to a line in the east 200 nautical miles from the baselines from which the breadth of Nicaragua's territorial sea is measured".

(k) Eleventh, in paragraph 250 of the Judgment, the Court stated "[t]he consequence of [its] Judgment is that the maritime boundary between Nicaragua and Colombia throughout the relevant area has now been delimited as between the Parties". Furthermore, the Court observed that "the Judgment does not attribute to Nicaragua the whole of the area which it claims and, on the contrary, attributes to Colombia part of the maritime spaces in respect of which Nicaragua seeks a declaration regarding access to natural resources. In this context, the Court considers that Nicaragua's claim is unfounded."

(l) And, of course, in the *dispositif*, the Court decided to find admissible Nicaragua's I (3) claim and then find that it could not uphold it and, finally, and as a consequence of all of the above sequential considerations, the Court decided to establish a single maritime boundary delimiting the continental shelf and the exclusive economic zone of Nicaragua [and Colombia].

Mr. President, I apologize for trying your patience and repeating your own Judgment to you but the point is that this was not by any stretch of the imagination a non-decision!

17. Yet yesterday, the Agent stated: "The Court did not reject Nicaragua's *petitum* to an extended continental shelf. It simply said it could not 'uphold' Nicaragua's claims contained in its

final submission."[60] It should be clear now after that detailed review that this is a game of words. There is no intelligible difference between this Court's "finding" in its 2012 Judgment that Nicaragua had failed to prove an essential predicate of its claim to an overlapping continental shelf and what this Court has elsewhere called a "decision" or "determin[ation]" to which the "force of *res judicata* attaches". Simply put, a "finding" that a claim cannot be upheld is, *ipso facto*, a "determination" that the claim cannot be upheld. The Court's determination as to claim I (3) in Nicaragua's final submission in the previous case is, accordingly, *res judicata*.

18. Ambassador Argüello stated yesterday: "Nicaragua does not attempt to deny that there certainly was a decision by the Court on all the issues submitted to it in 2012 but the point is that the decision did not reject Nicaragua's claim."[61] The first part of the Agent's statement is, in itself, an admission that the issue was raised by Nicaragua and the Court made a decision; it was just not the one that Nicaragua was hoping for. Professor Pellet's "non-decision" is, *pace* the Agent, a decision. And, according to Professor Pellet, the reason for what he calls the "non-decision" was ~~***[paragraph 29]***~~ "insuffisance de preuve", a different view from that expressed by the Agent yesterday [paragraph 6]. But if Professor Pellet is correct, the *Genocide* case holds that "[t]he Statute provides for only one procedure in such an event: the procedure under Article 61 which, . . . must be rigorously applied"[62].

19. The second part of the Agent's statement which I just read, asserting that the decision "did not reject Nicaragua's claim" is — as is now clear — inconsistent with the text of the Judgment and, wholly apart from the language of the Judgment, evidence that this was the understanding within the Court is to be found in the opinions of two of the judges in the 2012 Judgment. Judge Owada joined Judge Donoghue in the Court's 2012 Judgment in describing the Court's decision with respect to Nicaragua's claim I (3) as a "reject[ion]." Judge Owada's own dissenting opinion described the Court's 2012 Judgment as "arriving at the conclusion that this claim had to be rejected"[63]. Judge Donoghue's separate opinion "express[ed] . . . misgivings about

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[60]CR 2015/27, p. 12, para. 11 (Argüello).

[61]*Ibid.*, p. 13, para. 14 (Argüello).

[62]*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. 92, para. 120.

[63]*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II);* dissenting opinion of Judge Owada, p. 729, para. 25.

the reasons given by the Court for its rejection of . . . [the] Nicaraguan submission . . . I (3)."[64] If the Court's judgment intended, *sub silentio*, to leave its resolution of Nicaragua's submission I (3) for another day, it was not the understanding of those judges.

20. I must pause, Mr. President, to correct the misimpression conveyed in Nicaragua's written submission to the effect that *res judicata* is simply an anti-contradiction rule, i.e., the "touchstone" of *res judicata* is simply that the doctrine bars relitigating an issue if "the issue raised in later proceedings would 'contradict' the finding in an earlier determination"[65]. That, Mr. President, is a tortured reading of a snippet of the 2007 *Genocide* Judgment. After elaborating the general principles of *res judicata* to which I have already referred and Professor Pellet also adduced for you yesterday, the Court paused in its exegesis to explain why it is sometimes permissible to "deal[] with *jurisdictional* issues after having delivered a judgment on jurisdiction"[66]. The Court explained that it had twice entertained jurisdictional objections at "late stage[s]"; those inquiries did not "contradict the finding of jurisdiction made in [an] earlier judgment"[67]. This conclusion simply illustrated the Court's approach to the finality of its decisions disposing of *preliminary* objections to *jurisdiction*, and does not support the contention that the Court's *final* judgments can be reopened at any time provided that the new prayer for relief does not "contradict" the Court's operative judgment.

21. But, in any event, Nicaragua's prayer, if granted in this case, *would* contradict the 2012 Judgment, and in multiple ways. Not only would it contradict the Court's final judgment that Nicaragua did not establish its claim, but it could also draw the Court's delimitation judgments in the first proceedings into conflict with its judgments in these proceedings: the identification of relevant coasts, the definition of the relevant area, base points, provisional lines, and disproportionality analysis would all be in limbo. Paragraph 155 of the Court's 2012 Judgment, for example, declares that the Court would define the "relevant . . . area . . . in the light of its *decision* regarding Nicaragua's claim to a continental shelf beyond 200 nautical miles" (emphasis added).

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[64] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II);* dissenting opinion of Judge Donoghue, p. 751, para. 2.

[65] WSN, p. 45, para. 4.29.

[66] *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. 96, para. 128; emphasis added.

[67] *Ibid.*

22. Which brings me ***Mr. President*** to Nicaragua's second request. It is *res judicata* on *at least two grounds*: first, inextricably linked to its first request, which is *res judicata*, no basis remains for the second request. But even if Nicaragua's second request were deemed to be separate, it is barred by *res judicata* on its own grounds for, although the words are changed, it was argued for by Nicaragua in *Territorial and Maritime Dispute*, as I explained on Monday. Professor Lowe's attempt to change the wording again made evident that the second request presupposes what Nicaragua did not demonstrate in the previous proceedings and, thus, what the Court did not uphold in the 2012 Judgment. Even if one were to assume *arguendo* that the second request is new and different, it would, if accepted, contradict the foundation of the Court's Judgment in 2012: Nicaragua had not established its claim to a continental shelf beyond 200 miles from its baselines. Does Professor Lowe's explanation of the need for the second request — that acceding to it would avoid future conflict — mean that Nicaragua intends to press, even to the point of conflict, a claim which the Court did not uphold in 2012?

23. Yesterday, Professor Pellet proposed to you a novel theory of the Court's jurisdiction and its jurisdictional "mission". He said that "Article 38 of your Statute gives you a mission to resolve, in conformity with international law, the disputes which are submitted to you. [. . .] if a dispute is submitted to you, you are not called on to resolve it imperfectly, incompletely or partially"[68]. And in paragraph 14, he explained that "when seised of a dispute, the Court is aware of the obligation to resolve it completely"[69]. Not only do the implications of this proposition drain *res judicata* of all meaning, they demonstrate rather dramatically precisely why *res judicata*, as developed by the Court, is so central as part of the ensemble of norms that are critical to its functioning. Imagine a case in which State A alleges that it is entitled to an island occupied by State B for a long period. The Court concludes that it has jurisdiction over the matter and that it is admissible, but that State A has failed to adduce evidence that it is entitled to the island and, on that basis, the claim "cannot be upheld". Two years later, State A returns, proclaiming that, while it does not have new evidence "as such", the Court had not "truly" decided the matter but had only said that it could not uphold A's claim and that the Court's "mission" is to resolve a dispute "completely". The Court,

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[68]CR 2015/27, p. 31, para. 11 (Pellet).

[69]*Ibid.*, p. 32-33, para. 11 (Pellet)

rejecting B's objection based on *res judicata* and adopting Nicaragua's theory of *res judicata*, allows State A to reargue its case. Again, the Court concludes that State A has failed to adduce evidence establishing that it is entitled to the island. Two years later . . . and so *ad infinitum.* The "interests of the stability of legal relations" that this Court has been careful to protect are put in jeopardy by the proposition developed yesterday by Professor Pellet.

24. Now, let me be candid. The reason why my friend Professor Pellet has devised this creative interpretation is, of course, to get rid of the principle of *res judicata*. And were it accepted, it would do just that. But the problem with his concept of the Court's "mission" is that it strips the Court of the distinctive procedures that make it a court: procedural rules and burden of proof and the consequences of failing to discharge it. Courts do not have their own investigative agencies. Without the necessary information provided by a claimant which can be tested in adversarial procedure by the respondent, a court is unable to determine the facts, in a non-capricious fashion, to which it can then apply law. Because the mission of the International Court of Justice, as a judicial organ, is to decide in accordance with law, its character may sometimes require it to acknowledge the limits of the judicial function and, like all courts, sometimes find its prior judgment *res judicata*. That is the situation here and it is neither unfair nor immoral: the Court has already afforded Nicaragua every opportunity in the prior case to prove its claim. Nicaragua failed, whether because of lack of merit of the claim or because of mismanagement of the case. The failure was not Colombia's fault; it was Nicaragua's fault. But be that as it may, the Court, as a court, has rendered its decision which is *res judicata*.

25. Nicaragua has claimed that it is a little State and, as such, should be accorded special consideration. But the judicial process, by contrast to the political arena, is an equalizer. And, in fact, Nicaragua is an experienced, serial participant in the Court's procedures. Like every other claimant, it is obliged to prepare its case carefully and to make its best effort. If it fails, it cannot hail the same respondent to Court for the same case, again and again.

26. Now in cases in which there is no adverse party, it may be different. If your son or daughter fails his or her driving test, they can come back again and again until they pass; the patience — and resources — of that motor vehicle department may be infinite. But the

International Court of Justice, in exercising its contentious jurisdiction, is not The Hague's Motor Vehicle Bureau and that is not the meaning of *res judicata* at international law.

27. In its Application, Nicaragua admits that it had already "sought a declaration from the Court describing the course of the boundary of its continental shelf throughout the area of the overlap between its continental shelf entitlement and that of Colombia"[70]. It wants to do it again. During the 11 years of the prior proceedings, Nicaragua had ample opportunity to provide the evidence required to substantiate its claim. As the Nicaraguan Agent said yesterday, Nicaragua thought it had done so. Nicaragua admits that, with respect to the 2001 Application, it had submitted "Preliminary Information to the Commission on the Limits of the Continental Shelf on 7 April 2010"[71]. During the long proceedings that followed, it took the view that, with that information, it had established the legal and factual basis of its claim. Its Application acknowledges that the "Court considered that Nicaragua had not then established that it has a continental margin that extends beyond 200 nautical miles from [its] baselines"[72]. Mr. President, that is precisely the point. Nicaragua did not meet its burden of proof then and as a consequence the Court did not uphold Nicaragua's claim. Nicaragua cannot come back and take another shot at the same claim which the Court had decided it could not uphold. That is the essence of *res judicata*.

28. The doctrine of *res judicata* means that when a party seises a court with a claim for relief, that party must make its strongest showing or risk losing that claim in a final and binding judgment disposing of the case. But that is the balance achieved by the general principle of *res judicata* and by the Court's careful policing of the requirements for an Article 61 application for revision of its judgments. The Court's interest in the stability of legal relations and the general principle of *res judicata* oblige a party that applies to the Court to mount its most vigorous and most effective effort to discharge its burdens of proof. If it fails, it is barred from second tries.

29. The Court is an adjudicative body whose decisions, under its contentious jurisdiction, are *res judicata*; as such, they foreclose bringing the same claim again against the same respondent.

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[70] Application, p. 2, para. 4.

[71] *Ibid.*

[72] *Ibid.*

In effect, Nicaragua is really proposing that the Court reconstitute itself henceforth as a non-adversarial administrative agency, whose refusal to respond favourably to an application because of insufficient evidence, performance or information does not bar the applicant from trying to repair the information — or performance — deficit and reapplying again and again and again. But the Court is a court, indeed, the principal judicial organ of the United Nations, and a model for courts; as such, its judgments are binding and final. The effort by Nicaragua to bring the same case again is in violation of the principle of *res judicata*, is unfair and vexatious to Colombia and depreciates the dignity of the finality of judgments of this Court. The Court should deny jurisdiction and dismiss Nicaragua's Application.

30. Mr. President, Members of the Court, I thank you for your courteous attention and request that you invite Professor Treves to address you.

Le PRESIDENT : Merci, Monsieur le professeur. Je donne maintenant la parole au professeur Treves.

Mr. TREVES:

FIFTH PRELIMINARY OBJECTION: OBJECTION TO ADMISSIBILITY OF NICARAGUA'S FIRST REQUEST

Mr. President, Members of the Court, it is an honour to plead again before you and to do so on behalf of the Republic of Colombia.

1. My task today is to reply to the arguments raised yesterday on behalf of Nicaragua by Ambassador Argüello and by Professor Oude Elferink against Colombia's preliminary objection to admissibility of Nicaragua's first request. This objection is submitted as an alternative to the preliminary objections to jurisdiction illustrated by my colleagues.

2. The content of this objection, although summarized in paragraph 7.2 of Colombia's preliminary objections as stating that "Nicaragua's First Request is inadmissible because of Nicaragua's failure to secure the requisite CLCS recommendation"[73], is spelled out in paragraph 7.15 of Colombia's preliminary objections, which counsel for Colombia quoted in full in

[73]POC, Vol. I, para. 7.2.

his pleading on Monday[74]. In this paragraph it is stated that inadmissibility depends on that "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"[75].

3. The "conditions for determining the extension of the outer edge" of the continental shelf are to be verified on the basis of the data mentioned in Article 76, paragraph 4, of UNCLOS. They concern "the legal entitlement of a coastal State to delineate the outer limits of the continental shelf"[76] mentioned in the CLCS's "Test of appurtenance". When speaking of "entitlement" in the context of the pleadings in support of Colombia's preliminary objection to admissibility, I refer to "the legal entitlement of a coastal State to delineate the outer limits of the continental shelf"[77]. Such legal entitlement consists in the fact that the shelf is the natural prolongation of the land territory beyond 200 miles, as defined in Article 76, especially paragraph 4, of UNCLOS, a fact that the coastal State must demonstrate to the CLCS.

4. Counsel of Nicaragua insists on that entitlement has nothing to do with delineation of the outer limit of the continental shelf and that the CLCS is only competent on the latter[78]. But how can the external limit be delineated unless the legal entitlement to do so has been established?

5. It is true that the "basis of entitlement" to the continental shelf is, as stressed by ITLOS in *Bangladesh* v. *Myanmar*, "sovereignty over the land territory"[79]. Still, there is a difference between the consequences of entitlement to the continental shelf within and outside the 200-nautical-mile line. Within 200 miles the sovereign rights of the coastal State are automatic: as stated in Article 77, paragraph 3, of UNCLOS, they "do not depend on occupation, effective or notional, or on any express proclamation". This is not entirely the case for the continental shelf beyond 200 miles. It requires its "establishment" by the coastal State at the conclusion of the procedure — which includes as an intermediate step the CLCS recommendations — set out in

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[74]CR 2015/26, p. 58, para. 1 (Treves).

[75]POC, Vol. I, para. 7.15; emphasis added.

[76]CLCS/11, 13 May 1999, para. 2.2.2.

[77]*Ibid.*

[78]CR 2015/27, p. 46, para. 4 (Oude Elferink).

[79]*Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, ITLOS, Judgment of 14 March 2012, para. 409.

Article 76, paragraph 8. Only this prerequisite makes the sovereign rights of the coastal State and the consequent outer limits "final and binding"[80].

6. The particular requirements of the "legal entitlement . . . to delineate"[81] are easily explained considering that the general acceptance of the extension of the continental shelf beyond 200 nautical miles was only recognized at the Third United Nations Conference on the Law of the Sea once severe legal and scientific prerequisites were adopted in Article 76 for verifying the existence of certain conditions, once criteria for avoiding excessive extension of the claimed shelves were agreed, also in Article 76, and once provisions for revenue sharing through payments and contributions by the coastal States were adopted in Article 82.

7. The role of the CLCS is thus confirmed. It is the body to which States parties to UNCLOS have delegated the determination of the entitlement to delineate, and the delineation of, the outer limit of the continental shelf to which coastal States must conform if they wish the outer limit of their shelf to be "final and binding", namely as opposable to all States parties as the 200-mile portion of the shelf.

8. The members of the Commission may be "technical people" as underlined by Ambassador Argüello[82]. Their role is nonetheless essential for a process that has a significant legal impact: that of establishing the outer limits of the continental shelf.

9. Colombia relies on *Nicaragua* v. *Honduras*, in which the Court stated that the delimitation line it had drawn "without specifying a precise endpoint" along a certain azimuth cannot "be interpreted as extending more than 200 nautical miles from the baselines from which the breadth of territorial sea is measured" and that "any claim of continental shelf rights beyond 200 miles must be in accordance with Article 76 of UNCLOS and reviewed by the Commission on the Limits of the Continental Shelf"[83].

10. Nicaragua's counsel dismisses this statement of the Court. Professor Oude Elferink states that parties in that case had not presented any argument on the relationship between the

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[80]UNCLOS, Art. 76 (8).

[81]CLCS/11, 13 May 1999, para. 2.2.2.

[82]CR 2015/27, p. 14, para. 17 (Argüello).

[83]*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II),* p. 759, para. 319, referred to by counsel of Colombia in CR 2015/26, p. 63, para. 22 (Treves).

function of the Commission and that of courts and tribunals in relation to the delimitation of continental shelf boundaries, and that the Court did not "address the question whether the Court could have delimited the continental shelf beyond 200 nautical miles in the absence of recommendations of the CLCS"[84]. This brings Nicaragua's counsel to qualify the statement of the Court as a *dictum*, and a *dictum* that "can be said to be prudent"[85].

11. This reference to prudence may be read to mean that the Court, although not being required to take a position, did so in order to give guidance to States for further occasions. The reference might also be read as a respectful way of saying that the statement was not a fully pondered one. But this reading would become in any case unfounded in light of the fact that the Court considered it useful to repeat it in 2012[86]. An *obiter dictum*, when repeated, becomes a doctrine. But the statements of the Court were not intended to be *dicta*. They are statements of the law.

12. This repeated statement of the law is the position of the Court and [Colombia] relies on it.

13. The International Tribunal for the Law of the Sea (ITLOS) in 2012[87] (followed by the Annex VII Arbitral Tribunal in 2014[88]) has decided to delimit the continental shelves of the parties beyond 200 nautical miles of their coasts. Nicaragua would wish the Court to follow the example of these decisions in the present case.

14. In the opinion of Colombia, the Court's present view of the law, as stated in *Nicaragua* v. *Honduras* and repeated in *Nicaragua* v. *Colombia*, is the correct one and there is no reason to change it. If, however, *quod non*, the Court were to wish to abandon its position and follow ITLOS and the Annex VII Arbitral Tribunal by effecting a delimitation of the continental shelf beyond 200 miles in the absence of a recommendation of the CLCS, the present case would not be the appropriate occasion.

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[84]CR 2015/27, p. 47, para. 7 (Oude Elferink).

[85]*Ibid.*

[86]*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 669, para. 126.

[87]*Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, ITLOS, Judgment of 14 March 2012.

[88]*Bay of Bengal Maritime Boundary Arbitration (Bangladesh/India)*, Award, 7 July 2014.

15. In the *Bangladesh* v. *Myanmar* case ITLOS admitted that "it would have been hesitant to proceed with the delimitation of the area beyond 200 nm had it concluded that there was significant uncertainty as to the existence of a continental margin in the area in question"[89].

16. The Tribunal was able to overcome its hesitation because of the consideration that "the Bay of Bengal presents a unique situation, as acknowledged in the course of negotiations at the Third United Nations Conference on the Law of the Sea[90]" — and as underlined in Monday's pleading by counsel of Colombia.[91]

17. No argument has been raised in the present case about an alleged "unique situation" which would make it comparable to that of the Bay of Bengal.

18. Nicaragua insists, nonetheless, that in the present case delimitation would be possible even in the absence of the CLCS recommendations because "the evidence is overwhelming and incontrovertible that Nicaragua's physical shelf extends beyond 200 [nautical] miles, and overlaps with Colombia's 200-[nautical]-mile shelf"[92]. Nicaragua's Agent comes back for the second time in the same page on the same theme holding that "the evidence shows beyond question that Nicaragua's shelf extends beyond [200 nautical miles]"[93].

19. In Colombia's view there is no such overwhelming and incontrovertible evidence. The situation is not different from that prevailing when the Court adopted its 2012 Judgment and stated that the preliminary information submitted by Nicaragua, "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'"[94]. In the present case, Nicaragua has made a submission to the CLCS, but it admits that with that submission it is "not seeking to rely on new geological and geomorphological facts as such"[95]. If there are no new geological and

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[89]*Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, ITLOS, Judgment of 14 March 2012, para. 443.

[90]*Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, ITLOS, Judgment of 14 March 2012, para. 444.

[91]CR 2015/26, p. 62, para. 20 (Treves).

[92]CR 27/2015, p. 14, para. 17 *(a)* (Argüello).

[93]*Ibid.*, p. 14, para. 17 *(b)* (Argüello).

[94]*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 669, para. 127.

[95]WSN, para. 4.33.

geomorphological facts, how can the materials submitted be overwhelming and incontrovertible evidence?

20. The arguments put forward in Colombia's written and oral pleadings based on that the present case concerns a question of delimitation between States with opposite coasts and not a lateral delimitation, show an additional difficulty the Court might encounter were it to decide to proceed to delimitation in the absence of the CLCS recommendation. They remain valid for the aspects (the prevailing aspects it would seem) of the present case in which delimitation between opposite coasts is sought.

21. In sum, in the present case there is no reason for the Court to abandon — as Nicaragua would like it to do — the doctrine it embraced in 2007 and in 2012 and follow the ITLOS and the Annex VII Tribunal.

22. Mr. President, Members of the Court, it must be added that the argument concerning the "practical impasse" — as Professor Oude Elferink calls it[96] — should not be followed by the Court as a good reason to consider admissible the request for delimitation in the absence of the CLCS recommendation.

23. Colombia confirms that in its view the "impasse" is the

> "intended result of a legal régime based on an important international legal principle, namely, that the coastal State's right to determine the external limit of its continental shelf cannot be exercised if it impinges upon the claims of another State"[97].

In certain circumstances, such as those prevailing in the Bay of Bengal cases, there may be a possibility of overcoming the impasse, but this is not the case in the present proceedings.

24. In the present proceedings the "impasse" was caused by objections made by other Caribbean States before Colombia. Costa Rica's objection is of 15 July 2013[98]; Jamaica's objection is of 12 September 2013[99] and Colombia's comes only third, on 24 September 2013[100]. Only Panama's objection was presented a few days later on 30 September 2013[101]. Nicaragua

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[96]CR 2015/27, p. 45, para. 3; p. 51 (Oude Elferink).

[97]CR 2015/26, p. 62, para. 18 (Treves).

[98]POC, Vol. II, Ann. 19.

[99]*Ibid.*, Ann. 20.

[100]*Ibid.*, Ann. 22.

[101]*Ibid.*, Ann. 23.

seems to forget that the blocking of the CLCS process would have been a fact even in the absence of Colombia's objection, as it is due also to the objection of three other Caribbean States: Costa Rica[102], Panama[103] and Jamaica[104]. Thus, as remarked on Monday[105], the Nicaraguan submission and its application in the present case raise concerns of an entire region as evidenced by the joint Notes of 23 September 2013 and ***of*** February 2014[106]. The objections of the above-mentioned Caribbean States show that, in their view, the process leading to the CLCS recommendations and eventually to the establishment of Nicaragua's continental shelf limits beyond 200 nautical miles from its coast is more disruptive of regional balance and peace than the status quo.

25. Ambassador Argüello laments that "it is most ironic, and unjust, that Colombia, as a non-party to UNCLOS, should be able to create this situation" — namely to block the examination of Nicaragua's submission by the CLCS[107]. In fact this possibility is more relevant for a non-party than for a party. For the non-party State, the process of establishment of outer limits of the continental shelf on the basis of the CLCS recommendations presents the risk that ***a*** limit of the shelf impinging on its legitimate claims — including its claim to a 200-nautical-mile shelf — be adopted as final and binding for all States parties to UNCLOS. While certainly the limit would not be binding for the non-party State, this State would find itself in a difficult situation which it can avoid by raising its objection, while States parties would, in any case, benefit of the reciprocal effect of "final and binding" determinations as regards their own shelf.

26. Finally, Nicaragua has not explained how the admissibility objection raised by Colombia requires, if not rejected outright, to be considered of a non-exclusively preliminary character. Counsel for Colombia recalled on Monday the orientation of the Court to consider, at least in principle, that "a party raising preliminary objections is entitled to have these objections answered at the preliminary stage of the proceedings"[108] and that the "merits" of a delimitation case concern

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[102]POC, Vol. II, Ann. 19 and Ann. 24.

[103]*Ibid.*, Ann. 23 and Ann. 25.

[104]*Ibid.*, Ann. 20.

[105]CR 2015/26, p. 62, paras. 18-19 (Treves).

[106]POC, Vol. II, Ann. 21 and Ann. 26.

[107]CR 2015/27, p. 14, para. 17 *(c)* (Argüello).

[108]*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 852, para. 51.

facts and legal principles relating to the drawing of a maritime boundary that do not need to be examined to decide the preliminary objection submitted by Colombia[109]. As in *Bolivia* v. *Chile*, the Court has "all the facts necessary"[110] to rule on this objection.

27. Counsel of Nicaragua argues that

> "the question how the absence of final and binding limits may impact on the delimitation methodology to be adopted by the Court where the delimitation of the boundary between the mainland coasts of Nicaragua and Colombia is concerned is a matter that should be fully argued during the merits phase of this case"

and that "it should not be addressed at this stage of the proceedings"[111]. This is not an argument to support the view that the Colombian objection is not of an exclusively preliminary character.

Mr. President, Members of the Court, I thank you for your kind attention and patience.

Mr. President, may I ask you to call my colleague Sir Michael Wood?

Le PRESIDENT : Merci, Monsieur le professeur. Je passe à présent la parole à sir Michael Wood.

Sir Michael WOOD:

NICARAGUA'S SECOND REQUEST

1. Thank you, Mr. President. Mr. President, Members of the Court, I shall now address Nicaragua's second request. At the outset, I should make it clear that Colombia's preliminary objections on *ratione temporis*, on so-called **"**continuing jurisdiction**"** and on *res judicata* apply to the whole of the case, that is, to both of the requests in Nicaragua's Application.

2. Professor Treves set out our position on the second request on Monday[112]. I shall not repeat what he said. My task is to respond to what Professor Lowe said in his brief intervention yesterday.

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[109]CR 2015/26, p. 64, para. 29 (Treves).

[110]*Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Preliminary Objections, Judgment of 24 September 2015*, p. 19, para. 53.

[111]CR 2015/27, p. 54, para. 22 (Oude Elferink).

[112]CR 2015/26, pp. 57-67 (Treves).

3. As Members of the Court will have noted, the second request is intimately connected with the first one. Indeed, it is difficult to see that it has a separate existence. That is clear from the way Nicaragua described the dispute in its Application:

> "The dispute concerns the delimitation of the boundaries between, on the one hand, the continental shelf of Nicaragua . . . and on the other hand, the continental shelf of Colombia."[113]

It is clear that the dispute submitted to the Court by Nicaragua, according to Nicaragua itself, is a maritime delimitation dispute.

4. The Application continues:

> "Nicaragua requests the Court to: (1) determine the *precise course* of the boundary of the continental shelf . . . and (2) indicate the rights and duties of the two States in relation to the area of overlapping claims and the use of its resources *pending the precise delimitation* of the line of the boundary." [Emphasis added.]

5. Professor Lowe bravely yesterday tried to reconcile Nicaragua's two requests, but he was not terribly convincing. It seems clear that Nicaragua has only included the second request, because it recognizes the weaknesses of the first.

6. Nicaragua's second request is hardly self-explanatory, as Professor Lowe all but conceded yesterday, when he attempted to clarify it. Nicaragua apparently considers that the second request serves to clarifying the rights and obligations of the Parties in what Nicaragua asserts are overlapping continental shelf claims, and apparently does so regardless of the Court's decision on jurisdiction over Nicaragua's first request[114].

7. But Mr. President, there are flaws in Nicaragua's position on jurisdiction and admissibility over its second request whatever scenario one considers.

8. First, let us assume that the Court finds that it has no jurisdiction over Nicaragua's first request, because it lacks jurisdiction under the Pact of Bogotá and because there is no "continuing jurisdiction". In that situation, the Court must equally lack jurisdiction in respect of the second request.

9. If the Court accepts that the question of delimitation beyond 200 nautical miles from Nicaragua's coast is *res judicata*, then this would likewise encompass the second request. It would

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[113] ***Application, para. 2.***

[114] CR 2015/27, pp. 56, 57, paras. 4 and 8 (Lowe).

mean that all questions of maritime delimitation before this Court have been decided and no issues remain pending. In this situation, too, the second request would be irrelevant; it would lack any object, given that Nicaragua has not established a continental shelf entitlement beyond 200 nautical miles. This is equally the case if Nicaragua's first request is found to be inadmissible for the reasons Professor Treves explained.

10. On the other hand, if the Court were to find that it has jurisdiction over the first request, *quod non*, the Court would then proceed to decide the case on the merits. And in doing so the Court would decide any delimitation issues pending between the Parties, again rendering the second request without object.

11. Mr. President, Members of the Court, that is all straightforward and self-evident. Nevertheless, yesterday Professor Lowe sought to avoid these obvious conclusions by engaging in some remarkable — but with respect — entirely theoretical speculation.

12. Professor Lowe clarified to the Court, and to Colombia, that the second request is intended to be relevant whether or not the Court proceeds to delimit the continental shelf beyond 200 nautical miles[115]. Professor Lowe sought to persuade you that there may well remain areas of overlapping claims between the Parties that the Court will leave undecided[116]. He referred to scenarios of competing maritime entitlements or when the Court refrains from identifying the end point of the delimitation line because of the rights of third States[117].

13. Professor Lowe gave the example of a delimitation that is not final because the edge of the continental margin has yet to be defined[118]. Such a suggestion is contrary to the need for certainty and stability in maritime delimitation. Indeed, Mr. President, Nicaragua may already be signalling to the Court that if it prevails on jurisdiction and its request for a further delimitation is later accepted, it may still proceed to initiate NICOL IV, NICOL V and so on. Where will it all

[115]CR 2015/27, p. 56, paras. 4, 8, 10-11, 18 (Lowe).

[116]*Ibid.*, pp. 56-57, paras. 4-8 (Lowe).

[117]*Ibid.*, p. 56, paras. 5-6 (Lowe).

[118]*Ibid.*, p. 56, para. 5 (Lowe).

end? The answer must be that it ended on the day of your Judgment, on 19 November 2012, when you "exercise[d] your jurisdiction to the full extent"[119].

14. In that Judgment, as in other maritime delimitation cases, the Court delimited the maritime boundary so as to settle with finality the dispute between the parties in its entirety.

15. Mr. President, Members of the Court, when you delimit a maritime boundary, you do exactly that, you delimit the boundary. As opposed to a situation where a temporary régime, such as one established by provisional measures, is applicable, no pending issues remain for the Court to determine once it has delimited the boundary.

16. The various possibilities alluded to by Professor Lowe were, with respect, wholly theoretical. The second request does not concern any actual current dispute between the Parties, and is thus without object. It is not, with respect, your function, in the present case between two parties, to set out in the abstract the rights and obligations of States around the world who may believe that they have overlapping maritime claims or entitlements.

17. Mr. President, Members of the Court, as you know, other Caribbean States have objected to Nicaragua's CLCS submission. Nicaragua's second request is asking you to determine the rights and obligations in maritime zones in which third parties have indicated an interest.

18. Professor Lowe admitted that many of the questions he raised were "all obviously matters for the merits"[120]. That is equally the case with his reference to the provisional measures prescribed by the distinguished Special Chamber of the International Tribunal for the Law of the Sea in *Ghana/Côte d'Ivoire*[121]. That case was, of course, totally different from the present one. The parties were both parties to UNCLOS. They expressly agreed that the Chamber had jurisdiction; they clearly had overlapping claims. The Chamber was acting under its undoubted jurisdiction. To prescribe provisional measures pending its judgment on the merits, in circumstances where the conditions for provisional measures clearly existed. The Chamber's Provisional Measures Order is simply not relevant to the present proceedings. The issue before the Court today is jurisdiction and/or admissibility, nothing more. The Court clearly lacks jurisdiction

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[119] ***Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012 (II), p. 671, para. 136.***

[120] CR 2015/27, p. 58, para. 13 (Lowe).

[121] *Ibid.*, para. 14 (Lowe).

to adjudicate Nicaragua's second request, or must find it inadmissible for the reasons we have set out. This, Mr. President, is also clearly a matter that can be decided at the present stage, since the Court has all the information it needs to do so.

19. Mr. President, before I conclude, I must make one final point. On Tuesday the Agent of Nicaragua showed on the screen an extract from a map that may be found on the website of Colombia's National Agency of Hydrocarbons (ANH)[122]. He did not show the whole map on the screen, and the legend was not legible in the version included in the folders[123]. Although the version of this map currently on the website is dated 30 July 2015, the areas to which the Agent of Nicaragua drew attention in fact appeared on earlier versions of the map, way back to March 2009 — well before your 2012 Judgment. But in any event, there are no existing licenses in the areas concerned. In fact, as the legend indicates, the only two blocks that have been awarded in 2010 to contractors for exploration — CAYOS 1 and CAYOS 5 — were suspended in 2011 before any contracts had been signed. Moreover, on 1 October 2011, President Santos stated that there would be no exploration nor exploitation of oil and gas around San Andrés. The areas around San Andrés are not part of any public offering for the exploration and exploitation of hydrocarbons.

20. To summarize, Mr. President, by determining the maritime boundary as between the Parties in 2012, this Court has finished its role with respect to the dispute between the Parties. This is the case if the Court rejects jurisdiction on the first request. It is also the case if the Court were to proceed to a further delimitation — contrary to our submissions. On any basis, the second request is theoretical and without object.

21. Mr. President, Members of the Court, that concludes what I have to say, and I request that you invite Mr. Bundy to the podium.

Le PRESIDENT : Merci. Je donne à présent la parole à M. Bundy.

Mr. BUNDY: Merci, Monsieur le président.

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[122]CR 2015/27, pp. 16-17, para. 22. The map may be found on the ANH website at: http://www.anh.gov.co/en-us/Asignacion-de-areas/Documents/2m_tierras_Ingles_300715.pdf; last visited 6 Oct. 2015.

[123]Tab 5 of Nicaragua's judges' folders, 6 Oct. 2015.

CONCLUDING REMARKS

1. Mr. President, Members of the Court, it falls to me once again to present a few closing remarks on Colombia's preliminary objections, before Colombia's Agent presents the final submissions.

The Pact of Bogotá

2. Let me first address Colombia's objection *ratione temporis* with respect to the Pact of Bogotá. I know there has been a lot of debate on that issue, but there is just one aspect of the issue I would like to draw to the Court's attention in response to arguments presented by Nicaragua yesterday.

3. Professor Remiro asserted with some indignity that the notice of denunciation of the Pact sent by Colombia's Foreign Minister to the Secretary General of the OAS was "an absurdity" because it only referred to the second paragraph of Article LVI without making reference to the first paragraph[124]. And for his part, Nicaragua's Agent argued that "it would be most useful for State parties to the Pact that the Court eliminated any possible interpretation of that Article that would strip paragraph 1 of any real meaning"[125].

4. Well, apart from the fact, contrary to what Professor Remiro said that the Foreign Minister's letter referred to Article LVI as a whole in its first paragraph, there is another key fact that undermines Nicaragua's contentions. That concerns the conduct of the parties to the Pact in connection with the two denunciations that have thus far been made.

5. You will recall that El Salvador denounced the Pact on 24 November 1973, stating that the denunciation would take effect as from the date of the notification. And no party to the Pact voiced the slightest disagreement with that position. And similarly, not one party to the Pact voiced any disagreement with the terms in which Colombia's denunciation was made in 2012. It only came up belatedly in Nicaragua's Application.

6. That practice is significant. Professor Remiro claims that neither Nicaragua nor any other State party to the Pact was obliged to react, although he cites no authority for that proposition[126].

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[124]CR 2015/27, p. 20, para. 5 (Remiro Brotóns).

[125]*Ibid.*, pp. 11-12, para. 8 (Argüello).

[126]CR 2015/27, p. 22, para. 13 (Remiro Brotóns).

But the silence of the parties to the Pact is relevant in so far as it shows that they had no problem with either El Salvador's or Colombia's interpretation. To borrow the words from the Court's Judgment in the *Temple* case: "the circumstances were such as called for some reaction, within a reasonable period"[127]. Here, there was none. That scarcely supports the argument that it would be a service for the State parties to the Pact were the Court to eliminate an interpretation — Colombia's interpretation — that those States have never expressed any objection to.

Continuing jurisdiction and *res judicata*

7. I turn next to the question whether the Court's jurisdiction in the prior case continues and the issue of *res judicata*.

8. On Nicaragua's "continuing jurisdiction" argument, I can be brief. There is no basis in the Statute of the Court, its jurisprudence, or the 2012 Judgment for the Court to somehow exercise a continuing jurisdiction over either of Nicaragua's claims.

9. We are not in the situation that the Court faced in *Gabčíkovo-Nagymaros*, we are not in a situation where in 2012 in its Judgment, the Court reserved a further phase of the proceedings for a subsequent stage and we are not confronted with the very unique circumstances that were present in the *Nuclear Tests* case.

10. Yesterday, Professor Pellet acknowledged that Nicaragua is requesting in this case the same kind of delimitation in areas lying more than 200 miles from its coast as it did in the case decided in 2012. According to my opponent, this fact is sufficient to establish that the present case is the resumption and continuation of the case commenced in 2001[128].

11. One tactic that counsel employed to support his argument was based on a sketch-map of the delimitation that appears in the Judgment. That is sketch-map No. 11 and it is on the screen and in tab 21.

12. Counsel pointed to the dashed yellow line on the map indicating, as the legend says, the "[a]pproximate eastern limit of the relevant area". He contrasted that line with the solid red line

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[127] *Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment, I.C.J. Reports 1962*, p. 23.

[128] CR 2015/27, p. 29, para. 6 (Pellet).

showing the maritime boundary established by the Court[129]. The impression counsel tried to create is that the use of the yellow line showed that the area beyond that line remains to be delimited.

13. I would suggest that that fundamentally misrepresents the nature of the yellow line. The Court explained the position, it explained why the yellow line appears as it does at paragraph 237 of its Judgment: "As the Court has explained (paragraph 159 above), since Nicaragua has yet to notify the baselines from which its territorial sea is measured, the precise location of end-point A cannot be determined and the location depicted on sketch-map No. 11 is therefore approximate."[130]

14. The same applies to end-point B. That is why the yellow line connecting the two points is dashed, because Nicaragua never supplied its baselines. It in no way signified that the area beyond that line somehow remained to be delimited in a subsequent phase of the case or, much less, in a new case.

15. But the heart of Nicaragua's argument is that the Court did not have sufficient information in 2012 to enable it to delimit the area beyond 200 miles from Nicaragua's baselines, that the matter thus remains open, that now Nicaragua can "demonstrate" it has an entitlement to an extended continental shelf based on its 2013 submission to the CLCS, and that it should therefore be given another chance to argue its case for delimitation in that area.

16. That is the line of argument that is unsustainable. As counsel for Nicaragua observed yesterday, in the prior case the Court considered that Nicaragua had not adduced all the elements of proof necessary to support its claim with respect to its continental margin beyond 200 nautical miles[131]. According to Professor Pellet, it was because the Court was insufficiently informed that the Court deliberately avoided taking a decision[132].

17. Mr. President, any failure of Nicaragua to adduce the proof necessary to support its claims and submission I (3) was entirely its own fault. Why should Colombia be forced to litigate the same claim again because Nicaragua could not prove its case the first time around?

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[129] *Ibid.*, pp. 41-42, para. 31 (Pellet).

[130] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II),* p. 713, para. 237.

[131] CR 2015/27, p. 31, para. 10 (Pellet).

[132] *Ibid.*, p. 30, para. 9 (Pellet).

18. We know that Nicaragua instituted the prior case in 2001. Over the next eleven years, it obviously had every opportunity to submit evidence to back up its claims. But what did Nicaragua do?

19. In 2003, it filed its Memorial. In that pleading, Nicaragua stated the following — and you can see it on the screen and at tab 22: "The relevance of geology and geomorphology. The position of the Government of Nicaragua is that geological and geomorphological factors have no relevance for the delimitation of a single maritime boundary within the delimitation area."[133]
Now, in a several-hundred-page Memorial with scores of annexes, that is the sum total of what Nicaragua said about the relevance of geology and geomorphology.

20. That remained Nicaragua's position until it filed its Reply in 2009, six years later. So, to the extent there was a lack of evidence for Nicaragua's claim to a continental shelf lying more than 200 nautical miles from its coast, Nicaragua need look no further than the position it took for the first eight years of the case.

21. We all know that Nicaragua changed its claim in the Reply. The key fact, as I explained on Monday, is that in the Reply Nicaragua filed technical evidence with respect to its new claim for an extended continental shelf which it asserted — both in the Reply and again during the oral hearings — demonstrated its entitlement.

22. Yesterday, Professor Oude Elferink repeated the claim that at no point Colombia challenged the factual and geomorphological evidence of the continuity of the sea-bed of the Nicaraguan Rise as the natural prolongation of Nicaragua's territory[134]. Mr. President, I dealt with this on Monday; the assertion is wrong. When Colombia said in 2012 that it challenged everything about Nicaragua's new continental shelf claim, it meant what it said and it is backed up by the record. Quite simply, Nicaragua had not proved its case on entitlement.

23. But the Court does not need take my word for it. It was the Court itself that stated at paragraph 129 of its Judgment that Nicaragua had not established that it had a continental margin that extends far enough to overlap with Colombia's 200-nautical-mile entitlement. That statement was the essential basis for the Court's holding in the *dispositif* that submission I (3) cannot be

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[133] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, Memorial, Vol. I, p. 215, para. 3.58.

[134] CR 2015/27, p. 50, para. 14 (Oude Elferink).

upheld. So, I ask again, why should Nicaragua be afforded another chance to try to establish what it could not prove in the prior case?

24. Well, say our opponents, what has changed since the Judgment is that Nicaragua has made a submission to the CLCS. But, here, Nicaragua gets into a hopeless tangle.

25. On the one hand, Professor Oude Elferink says that Nicaragua now has established the location of the outer limits of its continental shelf beyond 200 miles based on its new submission[135]. At the same time, Nicaragua tells your Court in its Written Statement that it "is not seeking to rely on new geological and geomorphological facts as such"[136]. If Nicaragua is not relying on new facts, how has the situation changed since 2012, when the Court said that Nicaragua had not established its entitlement? The answer to that question can be filed under Professor Pellet's "Sounds of Silence" because Nicaragua has no response.

26. If, on the other hand, Nicaragua is relying on new facts — or wants to rely on new facts — then I repeat that this is tantamount to a request to revise the Judgment without meeting the requirements for the admissibility of such a request. If an applicant, having failed to sustain its burden of proof in a case, can simply reapply to the Court for a second chance to prove its claim, this would render the Statute's very strict requirements for revision under Article 61 — requirements that ***have*** never been met before — superfluous.

27. Mr. President, Members of the Court, the Court's ruling on Nicaragua's extended continental shelf claim in its 2012 Judgment is, and should be, *res judicata* in so far as it relates to Nicaragua's claims in this case. Colombia should not be forced to re-litigate the same claim.

28. Let me also recall that Nicaragua itself affirmed in the Executive Summary of its 2013 submission to the CLCS — and you will see it at tab 23 and on the screen — "there are no unresolved land or maritime disputes related to this submission". Now yesterday, the Agent tried to explain this away by saying that Nicaragua considered that there were no maritime disputes because the submission was made without prejudice to the question of the delimitation[137]. With

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[135]CR 2015/27, p. 14, para. 17 *(a)* and p. 50, para. 14 (Oude Elferink).

[136]WSN, para.4.33.

[137]CR 2015/27, p. 17, para. 25 (Argüello).

respect, that is both a non-sequitur and it is contrary to the Rules of Procedure of the CLCS. Let us look at those rules.

29. Paragraph 2 *(a)* of Annex I to the Rules of Procedure — and I stress these are rules, not guidelines — provides that:

> "In case there is a dispute in the delimitation of the continental shelf between opposite or adjacent States, or in other cases of unresolved land or maritime disputes, related to the submission, the Commission shall be: *(a)* Informed of such disputes by the coastal States making the submission."

30. It follows that Nicaragua was under an obligation to inform the Commission if there was an unresolved maritime dispute relating to the submission. Nicaragua was aware of this obligation. In paragraph 8 of its Executive Summary, Nicaragua said that it was informing the Commission, in accordance with paragraph 2 *(a)* of Annex I to the Commission's Rules, that there are no unresolved land or maritime disputes. Now, that is what Nicaragua formally said to the Commission and said to the international community as a whole. Nicaragua should not only be held to its word; what it said was correct, at least as far as Colombia is concerned. The maritime boundary had been fully and finally delimited by the Court's 2012 Judgment, which has the force of *res judicata*, and Nicaragua should not now be permitted to blow hot and cold.

31. Mr. President, it only remains for me to say a few words about Nicaragua's second request, which Sir Michael addressed a few moments ago.

32. Obviously with its second request, Nicaragua must establish the Court's jurisdiction to entertain that request, either on the basis of the Pact of Bogotá or under its theory of "continuing jurisdiction". For the reasons we have explained, there is no jurisdiction under either — and this applies equally to both requests.

33. If the Court holds that there is no jurisdiction *ratione temporis* under the Pact, and that Nicaragua's notion of a "continuing jurisdiction" is unfounded, then that disposes of the second request. The Court would not even have to reach Colombia's other preliminary objections; it would lack jurisdiction *tout court*.

34. If, on the other hand, the Court were to decide that it is not barred from exercising jurisdiction as a result of Colombia's denunciation of the Pact, it would still lack jurisdiction because of the *res judicata* effect of the Court's Judgment on Nicaragua's submission I (3), and the

consequences of that fact for its requests in this case. In short, Nicaragua would have had its day in court, and it would not be entitled to re-litigate a claim to a continental shelf lying more than 200 nautical miles and a delimitation of that shelf vis-à-vis Colombia.

35. Professor Lowe's contention that, even if the Court has no jurisdiction to adjudicate Nicaragua's first request, it would still have jurisdiction over its second request, is, with respect, untenable. Counsel's argument was that the Parties would continue to face uncertainty and that the area east of the 200-mile limit would still be pending[138]. That is not the case and it is not the point. Nicaragua would still not have established any entitlement to a shelf beyond 200 miles. And, that being the case, it would have no legal standing on which it could request the establishment of an interim régime applicable to both Parties. It is not enough for counsel to say that Nicaragua would have a claim to the area. Any State can claim maritime areas on paper. But such claims would be entirely hollow unless the State could show that it has a legal entitlement that overlaps with that of another State. That would not be the case if Nicaragua's first claim is dismissed for lack of jurisdiction.

36. The status of Nicaragua's submission before the CLCS does not change the equation. Nicaragua suggested that Colombia, as a non-party to UNCLOS, had no right to block the consideration of Nicaragua's submission[139]. But even if this is correct, which it is not, it would not make any difference. For, as Professor Treves explained a few moments ago, the fact remains that Jamaica, Panama and Costa Rica, all of which are parties to UNCLOS, have not consented to the Commission's consideration of Nicaragua's submission. So, any so-called "impasse" cannot be laid on Colombia's doorstep.

37. In sum, Mr. President, Members of the Court, Colombia believes it has shown why the Court lacks jurisdiction over both of Nicaragua's requests, and why Nicaragua's contentions to the contrary are not, at the end of the day, supportable.

38. With that, Mr. President, I have come to the end of my intervention, and I thank the Court of its attention and I would ask if you would be good enough to call upon Colombia's Agent. Thank you very much.

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[138]CR 2015/27, p. 56, para. 7 (Lowe).

[139]*Ibid.*, p. 10, para. 4 (Argüello).

Le PRESIDENT: Merci. Je donne à présent la parole à l'agent de la Colombie, S. Exc. M. Carlos Gustavo Arrieta. Excellence, vous avez la parole.

Mr. ARRIETA: Je vous remercie, Monsieur le président.

1. Mr. President, Members of the Court, by now Colombia's counsel and Advocates have rebutted in a clear and convincing manner Nicaragua's attempts to reply to the arguments presented by Colombia in its preliminary objections and in the statements made by its Co-agent and by counsel during these hearings.

2. I will then briefly refer to some considerations made by our esteemed colleague Carlos Argüello yesterday.

3. *First*, and above all, we cannot accept Nicaragua's Agent's position when he says that "the fact that it [Colombia] has come to the Court to say to the Court that it should back away from deciding these cases is no particular sign of respect in the light of the most flagrant statements by the highest authorities of Colombia with relation to its 2012 Judgment"[140]. That is simply not true. On the contrary, no matter what was said immediately after the November 2012 decision, which, as we have explained before, was and still is a source of major concern in our country, for all our people but especially for raizal communities which were cut from their ancestral habitat, Colombia has come to this Court because it respects it. And we have requested the Court to declare that it lacks jurisdiction because international law and your own jurisprudence unavoidably lead to this conclusion; and we believe in you.

4. *Second*: even though this matter has been addressed by Colombia's counsel and Advocates, especially by Professor Reisman and Mr. Bundy, I wish to underline once more that Colombia is not in any way responsible for the alleged impasse that causes so much concern to our Nicaraguan friends. We cannot forget that all this has been created by Nicaragua and is due exclusively to its own past conduct. Agent Argüello even recognized this, in a full and sincere, and I must say valiant, manner, when, in his opening speech, he said: "Nicaragua only became aware until the Judgment was read on 19 November 2012 that, in spite of the fact that Colombia was not a party to the UNCLOS, the Court expected Nicaragua to go through the process of submitting its

[140]CR 2015/27, p. 10, para. 3 (Argüello).

claim to the CLCS."[141] Mr. Argüello could not have been more clear: Nicaragua was not aware of its own obligations under UNCLOS in this respect, all of which were abundantly clear even before Nicaragua started proceedings against Colombia, and, even more, before Nicaragua presented its claim for an outer continental shelf. And that, Mr. President, and the impasse that was generated because of it, cannot be Colombia's fault, by Nicaragua's own admission.

5. Finally, Mr. President, with respect to President Santos's speech regarding the continental shelf, which seems to concern so much the other side, Colombia just wants to clarify that, as it was shown, it is a distortion of what the President said, but we wish to underline that this is a merits issue which should not and cannot be debated at this stage.

6. With these considerations in mind, I have the honour formally to read Colombia's final submissions, which are as follows:

> "For the reasons set forth in our 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."

7. A copy of the written text of Colombia's final submissions is now being communicated to the Court and transmitted to the Agent of Nicaragua.

8. Mr. President, Members of the Court, before I conclude let me express, on behalf of all the members of the Colombian delegation, our thanks to you, Mr. President, and to the Members of the Court, for your attention and for the efficient manner in which these proceedings have been prepared and conducted. We are very grateful to all concerned: to the Registrar and his staff, to the interpreters, to the translators and to all those who have worked so hard behind the scenes to make these hearings possible. And, of course, our thanks and our appreciation to the courteous manner in which the Agent and the delegation of Nicaragua have argued this case.

9. Mr. President, Members of the Court, this concludes Colombia's case. Thank you very much.

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[141] *Ibid.*, p. 11, para. 6 (Argüello).

Le PRESIDENT : Merci, Monsieur l'agent.

La Cour prend acte des conclusions finales dont vous venez de donner lecture au nom de la Colombie. Le Nicaragua présentera son second tour de plaidoiries après demain, le vendredi 9 octobre, à 10 heures.

L'audience est levée.

L'audience est levée à 18 heures.

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