SEPARATE OPINION OF JUDGE GREENWOOD

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

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

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

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

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

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

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

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

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

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

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

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

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

II. The Scope of the 2012 Judgment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(*Signed*) Christopher GREENWOOD.