INTERNATIONAL COURT OF JUSTICE

QUESTION OF THE DELIMITATION OF THE CONTINENTAL SHELF BETWEEN NICARAGUA AND COLOMBIA BEYOND 200 NAUTICAL MILES FROM THE NICARAGUAN COAST

(NICARAGUA V. COLOMBIA)

WRITTEN STATEMENT OF THE REPUBLIC OF NICARAGUA TO THE PRELIMINARY OBJECTIONS OF THE REPUBLIC OF COLOMBIA

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CHAPTER 1. INTRODUCTION

1.1 The Republic of Nicaragua filed an Application on 16 September 2013 concerning the delimitation of the continental shelf between Nicaragua and Colombia beyond 200 nautical miles. The case was entered as the *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia).* By Order of 9 December 2013 the Court fixed 9 December 2014 and 9 December 2015 as the time limits for the Memorial and Counter Memorial of Nicaragua and Colombia respectively. Colombia filed preliminary objections to Nicaragua's Application on 14 August 2014.The Order of the Court of 19 September 2014 fixed 19 January for the filing of Nicaragua's Written Statement regarding Colombia's preliminary objections. This Written Statement is filed pursuant to the said Order and within the time limit fixed by the Court.

1.2 In its Application Nicaragua requested the Court to adjudge and declare:

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

1.3 Nicaragua based the jurisdiction of the Court on Article XXXI of the American Treaty on Pacific Settlement (Pact of Bogotá or the Pact) of 30 April 1948. Additionally, Nicaragua also submitted that the subject-matter of its Application remains within the jurisdiction of the Court established in the case

concerning the *Territorial and Maritime Dispute* (*Nicaragua* v. *Colombia*), on which Judgment was delivered on 19 November 2012.

1.4 With regards to the Pact of Bogota, there are no relevant reservations in force made by either Nicaragua or Colombia. On 27 November 2012 Colombia gave notice that, in accordance with Article LVI of the Pact, it denounced it as of that date. Colombia alleges that its notice of denunciation was of immediate effect with respect to any new applications brought against it after that date and therefore that the Court is barred from adjudicating the present case. Additionally, Colombia also refutes the Court's inherent jurisdiction to decide this case and alleges that Nicaragua's claims are *res judicata* and constitute an attempt to appeal and revise the 2012 judgment.

1.5 Colombia has not only presented preliminary objections to the jurisdiction of the Court but has also claimed that Nicaragua's requests are inadmissible, among other things, because the Court cannot adjudicate on them because the Commission on the Limits of the Continental Shelf (CLCS) has not made the requisite recommendation on Nicaragua's claim of an extended continental shelf.

1.6 This Written Statement is divided into the following chapters:

1.7 Chapter 2 will reply to Colombia's first objection to the jurisdiction of the Court and will demonstrate that Colombia's strained reading of Article LVI of the Pact of Bogota militates against the object and purpose of the Pact (the settlement of disputes efficiently and definitively), the principle of good faith and does not conform to the rules of treaty interpretation.

1.8 Chapter 3 is in response to Colombia's second objection to the inherent jurisdiction of the Court. It will be shown that the Court has an inherent jurisdiction to decide on the present dispute and that this jurisdiction is

complementary and can be used in the alternative to that based on the Pact of Bogota.

1.9 Chapter 4 deals with Colombia's third and fourth preliminary objection respectively claiming that Nicaragua's case is *res judicata* and that it constitutes an attempt to appeal and revise the 2012 Judgment. This chapter analyses the relevant Court's jurisprudence on *res judicata* and establishes that the subject-matter of the present case has not been previously decided by the Court and does not constitute either *res judicata*, and hence that it is not and could not be an attempt to appeal or revise the 2012 Judgment.

1.10 Chapter 5 addresses Colombia's fifth preliminary objection regarding the inadmissibility of Nicaragua's requests due to the lack of a prior recommendation by the CLCS. It will be shown that Colombia's hypothesis has no legal basis in the Law of the Sea or in general international law, and that the absence of action by the CLCS does not prevent the Court from deciding this case, nor can this Judgment affect any future decision by the CLCS.

1.11 Finally, this pleading concludes with Nicaragua's Submissions.

CHAPTER 2. THE PACT OF BOGOTÁ

2.1 Both Nicaragua and Colombia signed the American Treaty on Pacific Settlement (Pact of Bogotá) on 30th April 1948. Nicaragua ratified the Pact on 21st June 1950 and deposited its instrument of ratification on 26th July of the same year with no relevant reservation to this case. Colombia ratified the Pact on 14th October 1968 and deposited its instrument of ratification on 6th November of the same year with no reservations.

2.2 On 27 November 2012 Colombia gave notice that it denounced the Pact claiming "an immediate and full effect with regard to any procedures that any Party might want to initiate subsequent to the transmission of the notification, that is, 27 November 2012"[1].

I. Applicable Law

2.3 The jurisdiction of the Court in this case is based on Article XXXI of the Pact of Bogotá. This provision reads as follows:

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

[1] Preliminary Objections, pp. 23-24, para. 2.44. (hereinafter PO)

2.4 As to the denunciation of the Pact of Bogotá, Article LVI provides:

> "The present Treaty shall remain in force indefinitely, but may be denounced upon one year's notice, at the end of which period it shall cease to be in force with respect to the state denouncing it, but shall continue in force for the remaining signatories. The denunciation shall be addressed to the Pan American Union, which shall transmit it to the other Contracting Parties.
>
> The denunciation shall have no effect with respect to pending procedures initiated prior to the transmission of the particular notification"[2].

II. Colombia's Position

2.5 Colombia contends that the Court lacks jurisdiction under the Pact of Bogotá *ratione temporis* because Nicaragua's Application was filed after the transmission to the General Secretariat of the Organization of American States (OAS). (successor of the Pan American Union) of Colombia's notice of denunciation of the Pact "as of today" (27 November 2012)[3]. Colombia asserts that according to the notice given and pursuant to the text of the second paragraph of Article LVI of the Pact, the notice of denunciation "did have an immediate and full effect with regard to any procedures that any Party might want to initiate subsequent to the transmission of the notification, that is, 27 November 2012"[4].

[2] *See* the text of the Pact of Bogotá in its four authentic languages (Spanish, English, French and Portuguese) in Annex 18 of Colombia's PO. (hereinafter the Pact)
[3] PO, p. 27, para. 3.1, 3.3.
[4] PO, pp. 23-24, para. 2.44.

III. Nicaragua's Position

2.6 Nicaragua considers that the application of Articles 31-33 of the Vienna Convention on the Law of Treaties, which reflect customary international law[5], to Article LVI of the Pact of Bogotá leads to exactly the opposite conclusion from that drawn by Colombia.

2.7 Colombia position is wrong because it fails to take into account the relationship between Article XXXI and Article LVI, and the effect of this relationship on Applications filed within one year of a denunciation of the Pact.

2.8 Under Article XXXI of the Pact, the Parties "recognize, in relation to any other American State (Party) the jurisdiction of the Court as compulsory *ipso facto*, without the necessity of any special agreement so long as the present Treaty is in force".

2.9 Article LVI, first paragraph, in turn, declares that the Pact shall remain in force indefinitely and acknowledges that the Parties have the faculty of denouncing it "upon one year's notice, at the end of which period it shall cease to be in force with respect to the State denouncing it".

2.10 Thus, by virtue of Article LVI, the Pact remained 'in force' for Colombia until one year after Colombia gave notice of its denunciation. And according to Article XXXI Colombia's acceptance of the compulsory jurisdiction of the Court remained effective "for so long as the present Treaty (i.e. the Pact) is in force", that is, until one year after Colombia's denunciation.

2.11 Indeed, the Court itself has recognized that a State's consent to compulsory jurisdiction under Article XXXI of the Pact of Bogotá "remains

[5] PO, p. 35, para. 3.14.

valid *ratione temporis* for as long as that instrument itself remains in force between those States".[6]

2.12 Notice of Colombia's denunciation was given on 27 November 2012. Hence, under Article LVI's express terms, the Pact remained in force for Colombia until 27 November 2013. And hence, because Article XXXI provides that Colombia's declaration remained in force "so long as the present Treaty is in force", that declaration was necessarily in force at all times prior to 27 November 2013.

2.13 Therefore, between 27 November 2012 and 27 November 2013 there was nothing to prevent Nicaragua from filing an Application with the Court and thereby establishing the Court's jurisdiction. Colombia's acceptance of the Court's compulsory jurisdiction was valid *ratione temporis* on 16 September 2013, when Nicaragua's Application was filed. It is a principle well recognized in the Court's jurisprudence that once properly seised, (at the date of the filing of an Application), the Court's jurisdiction continues independently of any changes that may occur in relation to the bases of that jurisdiction[7].

2.14 This interpretation fits perfectly with the rule codified in Article 31 of the Vienna Convention on the Law of Treaties (VCLT), according to which a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

2.15 Nicaragua's interpretation of Article LVI corresponds to the object and purpose of the Pact (the settlement of disputes efficiently and definitively) and

[6] See *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 84, para. 34.
[7] *See Nottebohm case (Preliminary Objections), Judgment of November 18th, 1953, I.C.J. Reports 1953*, pp. 111, 122-123; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, pp. 28-29, para. 36.

the principle of good faith. The Pact of Bogotá is a treaty, as indicated in its title, "on pacific settlement". "It is moreover quite clear from the Pact", the Court once observed, "that the purpose of the American States in drafting it was to reinforce their mutual commitments with regard to judicial settlement"[8].

IV. Colombia's Avoidance of Article XXXI and Strained Reading of Article LVI

2.16 Colombia arrives at its erroneous conclusion – that its denunciation of the Pact had immediate effect in regard to Nicaragua's Application – by ignoring the relationship between Article XXXI and Article LVI, and by then giving an artificial interpretation to Article LVI that completely contradicts Article XXXI. Colombia invokes, in support of its argument, the second paragraph of Article LVI, which provides that: "The denunciation shall have no effect with respect to pending procedures initiated prior to the transmission of the particular notification". It should be plain, however, that this language cannot defeat the Court's jurisdiction under Article XXXI and the first paragraph of Article LVI.

2.17 There is nothing in the second paragraph of Article LVI that negates the effectiveness of Colombia's acceptance of the Court's compulsory jurisdiction under Article XXXI for "so long as the present Treaty is in force". Nor is there anything in Article LVI, second paragraph that negates the provision in Article LVI, first paragraph (which immediately precedes the sentence upon which Colombia apparently relies) that it is not until one year after a notice of denunciation is given (in this case, until 27 November 2013) that the Treaty "shall cease to be in force with respect to the state denouncing it (in this case,

[8] The Court reproduced literally the intervention of the Colombian delegate at the meeting of Committee III of the Conference, held on 27 April 1948, explaining that the sub-committee which had prepared the draft took the position "that the principal procedure for the peaceful settlement of conflicts between the American States had to be judicial procedure before the International Court of Justice" (*Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988,* p. 90, para. 46).

Colombia)". Thus, there is nothing in the one-sentence second paragraph of Article LVI to challenge the conclusion that Colombia's obligation under Article XXXI was in effect on 16 September 2013, when Nicaragua's application was filed. To read the language otherwise, as Colombia apparently does, would not only be illogical, and not in keeping with the plain text, but would also be in direct contradiction of the other provisions of the Pact quoted above, to wit, Article XXXI and LVI, first paragraph; and this would be inconsistent with the rules of treaty interpretation set forth in Articles 31 to 33 of the VCLT.

2.18 On the other hand, the second paragraph of Article LVI cannot apply to expressions of consent under Article XXXI because the acceptance of the jurisdiction of the Court are not "pending procedures". These expressions of will under Article XXXI are binding undertakings made by the Parties, which are self-contained and became fully perfected international obligations immediately upon ratification of the Pact and its entry into force. They were completed acts, and their legal consequences took effect at that time. There was nothing "pending" about them. They do not constitute the "pending procedures" to which the final paragraph of Article LVI applies.

2.19 Besides, the second paragraph of Article LVI does not address "pending procedures" initiated after a notice of denunciation has been circulated. Nor does it define "pending procedures". It merely states that some procedures, i.e., those initiated *prior* to the notice, would *not* be affected. Colombia's *a contrario* reading of the paragraph[9] cannot stand against the express language of Articles XXXI and LVI, first paragraph, which ensure the effectiveness of Colombia's acceptance of the Court's compulsory jurisdiction for twelve months after notification has been given.

[9] Actually, Colombia proposes the Court to endorse the principle *inclusio unius, exclusio alterius*, although it takes care not to mention it. *See* PO of Colombia, p. 38, para. 3.20.

2.20 Colombia contends that its interpretation of the second paragraph of Article LVI assures its *effet utile* and avoids a result that would be 'manifestly absurd or unreasonable'[10]. It is just the opposite. The first paragraph of Article LVI is there, clearly affirming that the Pact "may be denounced upon one year's notice, at the end of which period it shall cease to be in force with respect to the state denouncing it". If Colombia's interpretation of this paragraph (declaring unconditionally that the Pact shall be in force one year from the date of the notification of the decision to denounce it), were to be followed, it is that paragraph that would become useless, without *effet utile*, a result 'manifestly absurd or unreasonable'. The *effet utile* of the second paragraph of Article LVI, according to Colombia, implies effectively disposing of the general rule established in the first paragraph.

2.21 Colombia is aware of the weakness of its manoeuvre. It attempts to insulate the one-sentence second paragraph of Article LVI from the annoying first paragraph, which contradicts Colombian argument, and it tries to "harmonize" them by proposing that the first paragraph concerns the provisions of the Pact *other than* the settlement procedures while the second paragraph is applicable to those settlement procedures. That interpretation would leave alive only the 'procedures' initiated before the giving of notice of denunciation of the Pact and still pending at the date on which denunciation takes effect.[11]

2.22 Colombia unconvincingly strives to minimize the body of provisions in the Pact that are covered by the first paragraph of Article LVI. But it makes no sense to devote the principal rule (in Article LVI, first paragraph) on the effects of the denunciation to those provisions that are peripheral to the main purpose of the Pact, while leaving the second paragraph to govern the effects of the most

[10] PO, pp. 35-36, para. 3.15.
[11] PO, pp. 34-39, para. 3.13-3.22

important issues, namely, the settlement procedures, which are the Pact's *raison d'être*, covering 41 of its 60 Articles[12].

2.23 Can it be argued convincingly that the first paragraph of Article LVI was created in order to preserve the application of Articles I-VIII and L-LX of the Pact for a year after the giving of notice of denunciation? Is it credible that all the other provisions of the Pact –, that is, the settlement procedures – were intended to be subject to an exception created obliquely by Article LVI second paragraph, of such extensive application that it would eclipse the general rule set out in Article LVI first paragraph (as well as negate the language of Article XXXI)? Most of Articles I-VIII and L-LX, by their very nature, have nothing to do with the denunciation clause. An interpretation such as the one Colombia now proposes would be incompatible with the principle of good faith. The Pact of Bogotá, which Bogotá now denounces, is, as indicated in its title, a treaty "on pacific settlement" and its object and purpose includes the creation of stable expectations about the availability of recourse to the Court and the specified settlement procedures.

2.24 Underlining the distinction between the acceptance of the jurisdiction of the Court through unilateral declarations made under Article 36 (2) of the Statute and the acceptance of such jurisdiction by the States Parties in the Pact of Bogotá, former President Eduardo Jiménez de Aréchaga wrote :

> "8. Unilateral declarations made under Article 36 (2) of the Statute without time limits may be withdrawn a reasonable time after giving notice on such intention, and new reservations may be introduced at will. *On the other hand, the relationship created by Article XXXI has significant legal differences from the normal regime of the optional clause. As to withdrawal, the Pact of Bogotá, once accepted by an American State, it continues in force indefinitely, and may be denounced*

[12] Articles IX to XLIX of the Pact.

> *only by giving one year's notice, remaining in force during all that period (Article LVI of the Pact of Bogotá). This means that the withdrawal of the acceptance of compulsory jurisdiction as soon as the possibility of a hostile application looms in the horizon has been severely restricted" (*emphasis added)[13].

2.25 In short, in contradiction with the recognized rules of treaty interpretation, the Colombian interpretation of Article LVI of the Pact deprives its first paragraph of content. As the Court recalled, the principle of effectiveness has an important role in the law of treaties and in the jurisprudence of the Court[14]. Any interpretation that would render part of a disposition superfluous or diminish its practical effects is to be avoided[15].

2.26 Moreover, in no part of the Pact is it said that the decision to denounce the Pact shall have immediate effects. Such a suggestion would work against the ordinary meaning of the words considered in their own context, taking into account the object and purpose of the Pact and the principle of good faith.

2.27 Colombia calls the attention to the fact that no State -including Nicaragua- advanced any objection at the time nor subsequently within the framework of the O.A.S., to the terms or mode of Colombia's behaviour[16]. But neither Nicaragua, nor any other Bogotá Pact Contracting Party, was obliged to object expressly to the Colombian statement giving notice of its decision to denounce the Pact in order to avoid what Colombia erroneously argues are the

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[13] E. Jiménez de Aréchaga, "The Compulsory Jurisdiction of the International Court of Justice under the Pact of Bogotá and the Optional Clause", *International Law at a Time of Perplexity: Essays in honour of Shabtai Rosenne*, Martinus Nijhoff, 1989, pp. 356-357.

[14] *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Merits, Judgment, I.C.J. Reports 1994,* p. 23, para. 47, pp. 25-26, para. 51-52; *Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 455, para. 52.

[15] *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion of 8 June 1960, I.C.J. Reports 1960,* pp. 159-171; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v, Russian Federation) Preliminary Objections, Judgment, I.C.J. Reports 2011*, pp. 125-126, para. 133-134.

[16] PO, p. 25, para. 2.46; p. 45, para. 3.32.

consequences of that notice. Instead, Nicaragua's response has been to exercise the right acknowledged by Articles XXXI and LVI to file an Application against Colombia within the stipulated period before the Colombian denunciation became effective.

2.28 Nicaragua's interpretation of the second paragraph of Article LVI, according to which that paragraph does not vary or create an exception to the rule established by the first paragraph of Article LVI, is more consistent with: 1) the denunciation clauses adopted by the treaties on the same matter, constituting the Pan-American *acquis*[17]*;* and 2) the denunciation clauses adopted in other multilateral treaties, universal and regional. If anything is revealed by the list of treaties referred to by Colombia to support its cause, it is that all the clauses mentioned – without exception – declare the continuing application of the treaty for a period of three, six or twelve months after notification of the denunciation[18].

2.29 Colombia resorts to relying on declarations accepting the compulsory jurisdiction of the Court under Article 36.2 of the Statute to show that some of

[17] Treaty on Compulsory Arbitration of 29 January 1902, Article 22: "(if) any of the signatories wishes to regain its liberty, it shall denounce the Treaty, but the denunciation will have effect solely for the Power making it, and then only after the expiration of one year from the formulation of the denunciation. When the denouncing Power has any question of arbitration pending at the expiration of the year, the denunciation shall not take effect in regard to the case still to be decided"; General Treaty of Inter-American Arbitration of 5 January 1929, Article 9: "(this) Treaty shall remain in force indefinitely, but it may be denounced by means of one year's previous notice at the expiration of which it shall cease to be in force as regards the Party denouncing the same, but shall remain in force as regards the others signatories". *See* Article LVIII of the Pact disposing the Pact as successor of a series of treaties, the General Treaty of 1929 among them.

[18] Colombia observes that: "A comparison between the language of the second paragraph of Article LVI and denunciation provisions in some other multilateral treaties involving dispute settlements procedures also reveals that it is not unusual for treaties to separate the effect of denunciation in general from the effect on procedures available under the treaty" (PO of Colombia, p. 41, para. 3.24). Nevertheless the treaties Colombia mentions as examples (pp. 41-44, para. 3.25-3.28) play more against than in favour of its position. All the clauses honour the procedures instituted before the denunciation takes effect and in all cases the denunciation takes effect one year, six or three months after the notification. There is not a single case of immediate effect to a denunciation clause.

them include clauses of termination with immediate effects.[19] Colombia's reliance is inappropriate, considering the terms of these declarations, which, unlike the Pact of Bogota, expressly allowed for termination with immediate effect , and having regard to the difference between them and the basis of jurisdiction established by the Pact. This fundamental difference was clearly observed by the Court more than twenty-five years ago.

2.30 In the case concerning *Border and Transborder Armed Actions (Nicaragua v. Honduras)* the Court rejected the interpretation proposed by Honduras and observed that:

> "…Even if the Honduran reading of Article XXXI be adopted, and the Article be regarded as a collective declaration of acceptance of compulsory jurisdiction made in accordance with Article 36, paragraph 2, it should be observed that that declaration was incorporated in the Pact of Bogota as Article XXXI. Accordingly, it can only be modified in accordance with the rules provided for in the Pact itself. Article XXXI nowhere envisages that the undertaking entered into by the parties to the Pact might be amended by means of a unilateral declaration made subsequently under the Statute, and the reference to Article 36, paragraph 2, of the Statute is insufficient in itself to have that effect.
>
> The fact that the Pact defines with precision the obligations of the parties lends particular significance to the absence of any indication of that kind. The commitment in Article XXXI applies *ratione materiae* to the disputes enumerated in that text; it relates *ratione personae* to the American States parties to the Pact; it remains valid *ratione temporis* for as long as that

[19] PO, pp. 39-41, para. 3.23.

> instrument itself remains in force between those States"[20].

2.31 By contrast with a denunciation under the optional clause of Article 36(2) of the Statute, which is a purely unilateral matter, the effects of the denunciation of the Pact of Bogotá under Article XXXI are determined by the treaty rules – Article LVI of the Pact in the present case. A denunciation not complying with the rules therein is ineffective.

2.32 The point was reiterated by former President Jiménez de Aréchaga in his article *The Compulsory Jurisdiction of the International Court of Justice,* where he wrote:

> "
> 6. Despite these apparent analogies between Article XXXI of the Pact of Bogotá and Article 36 (2) and 36 (3) of the Statute, the *Yearbook* of the Court does not list Article XXXI among the declarations recognizing as compulsory the jurisdiction of the Court. On the contrary, it lists the Pact of Bogotá among 'other instruments governing the jurisdiction of the Court'. This is a correct classification, because Article XXXI of the Pact of Bogotá, despite its terminology, falls in substance within paragraph 1 of Article 36 of the Statute, referring to treaties and conventions in force, and not under paragraphs 2, 3 and 4 of Article 36.
>
> 7. This is so because Article XXXI has the legal effect of 'contractualizing', that is to say, of transforming among the American States which are Parties to the Pact, the loose relationship which arises from the unilateral declarations under 36 (2), into a treaty relationship. This treaty relationship thus acquires, between those States, the binding force and stability which is characteristic of a conventional link, and not the regime of the optional clause. In this way, the Latin American States which

[20] *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988,* p. 84, para. 34.

> have accepted the Pact of Bogotá have established, in their mutual relations, and in view of the close historical and cultural ties between the compulsory jurisdiction of the Court on much stronger terms than those resulting from the network of declarations made under Article 36 (2) of the Statute. This is confirmed by two main features of the optional clause regime: the possibility of withdrawals and of new reservations"[21].

V. Colombia's Unavailing Recourse to the *Travaux Préparatoires*

2.33 According to Colombia the *travaux préparatoires* of the Pact of Bogotá confirm its interpretation of Article LVI[22]. Colombia traces the origin of the second paragraph of Article LVI back to a U.S. draft presented during the Eighth American International Conference, held in Lima (9 to 27 December 1938)[23]. Colombia relates how the draft advanced from one version to another, with minor formal modifications, and resulted in the last draft of the Inter-American Juridical Committee, dated 18 November 1947, which was taken as the basis of the discussion in the IX Inter-American Conference of Bogotá[24]. There

[21] E. Jiménez de Aréchaga, "The Compulsory Jurisdiction of the International Court of Justice under the Pact of Bogotá and the Optional Clause", *International Law at a time of perplexity: Essays in honour of Shabtai Rosenne*, Martinus Nijhoff, 1989, pp. 356-357.
[22] PO, pp. 46-58, para. 3.33-3.53.
[23] PO, pp. 49-52, para. 3.39-3.45. According to the last sentence of Article XXII of a US project of 16 December 1938: "Denunciation shall not affect any pending proceedings instituted before notice of denunciation is given".
[24] PO, pp. 52-55, para. 3.46-3.49.

Article XXVI, paragraph 3, of the project[25] became Article LVI of the Pact, with a text slightly modified by the Drafting Committee[26].

2.34 However, there is no element in this story that endorses the Colombian understanding of the second paragraph of Article LVI of the Pact. The provision is there in the text of the Pact: but no one seems to have taken any particular notice of it or asked or commented about its meaning. There was no debate in the Commission, nor any explanation of the reasons behind the wording or Article LVI in the reports attached to the drafts. This is a very surprising situation if its purpose was, as Colombia contends, radically to modify the scope of the denunciation clauses that were traditional in the Inter-American system.

2.35 No mention of this provision can be discovered in the reports of the Committee, nor in the minutes of the Conference. The only line reference to Article LVI is attributed to the Mexican delegate, Sr. Enríquez, *Rapporteur* of the Third Commission (on Disputes Settlement and Collective Security), who explained to the members of the Coordination Commission the features of the draft. He told his audience that Article LVI was taken from the General Treaty of Inter American Arbitration, of 5 January 1929[27].

2.36 Article 9 of that 1929 Treaty provides: "(this) Treaty shall remain in force indefinitely, but it may be denounced by means of one year's previous notice at the expiration of which it shall cease to be in force as regards the Party

[25] Article XXVI, paragraph 3: "The present Treaty shall remain in effect indefinitely, but it may be denounced by means of notice given to the Pan American Union one year in advance, at the expiration of which it shall cease to be in force as regards the Party denouncing the same, but shall remain in force as regards the other signatories. Notice of denunciation shall be transmitted by the Pan American Union to the other signatory governments. Denunciation shall not affect any pending proceedings instituted before notice of denunciation is given".

[26] PO of Colombia, pp. 55-57, para. 3.50-3.52: "The denunciation will not have any effect on proceedings pending and initiated prior to the transmission of the particular notification".

[27] IX Conferencia Internacional Americana, Bogotá, Colombia, Marzo 30-Mayo 2 de 1948, *Actas y Documentos*, vol. II, MRE de Colombia, Bogotá, 1953, p. 541. The Rapporteur incurs a *lapsus linguae* mentioning Article 16, instead of Article 9, which is the last one of the 1929 Treaty.

denouncing the same, but shall remain in force as regards the others signatories". Nothing more, nothing less.

2.37 The Pact of Bogotá was the successor of the 1929 Treaty[28]. Any addition to this text must be interpreted as a corollary of the rule, unless an explicit intention to the contrary could be proved. Colombia fails to do so. The 1929 Treaty, like the Pact of Bogota, plainly specifies that the Treaty remains in full force for one year after denunciation. In the case of the Pact of Bogota, that necessarily means that Article XXXI remained in full force, as between Colombia and Nicaragua, for a full year after Colombia's denunciation. That is, until 27 November 2013.

2.38 In conclusion, Article LVI, second paragraph, cannot negate the jurisdiction of the Court based on Article XXXI before twelve full months have passed since the date of denunciation. Nicaragua's Application, filed on 16 September 2013, thus vests the Court with jurisdiction.

[28] *See* Article LVIII of the Pact of Bogotá.

CHAPTER 3. THE COURT'S JURISDICTION ON THE BASIS OF THE 2001 APPLICATION

3.1 The very particular circumstances of the case are such that the Court can – and should – exercise its jurisdiction on an additional ground based on its inherent jurisdiction, which comes as a complement to Article XXXI of the Pact of Bogotá.[29]

3.2 In its 2007 Judgment concerning the Preliminary Objections raised by Colombia in the case concerning the *Territorial and Maritime Dispute* introduced by Nicaragua, the Court unanimously rejected "the objection to its jurisdiction in so far as it concerns the maritime delimitation between the Parties" and found that it had "jurisdiction, on the basis of Article XXXI of the Pact of Bogotá, to adjudicate upon the dispute concerning the maritime delimitation between the Parties."[30] However, in the 2012 Judgment it declined to exercise jurisdiction with regards to the maritime delimitation beyond 200 miles from Nicaragua's coast in view of the situation prevailing at the time of the Judgment (I); but this situation, which was the basis for the 2012 Judgment has now changed and the Court may and must fully exercise its jurisdiction (II). In doing so, the Court will not interpret or revise its previous Judgment: it will simply draw the consequences of its own previous decision (III).

I. In its 2012 Judgment the Court declined to exercise its jurisdiction to its full extent

3.3 As a consequence, in its Judgment of 19 November 2012, the Court expressed the view that

[29] *See* PCIJ, Judgment, 4 April 1939, *The Electricity Company of Sofia*, Series A/B, No. 77, p. 76.
[30] ICJ, Judgment, 13 December 2007, *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Reports 2007*, pp. 875-876, paras. 142 (1) (c) and (3) (b).

> "the claim to an extended continental shelf falls within the dispute between the Parties relating to maritime delimitation and cannot be said to transform the subject‑matter of that dispute. Moreover, it arises directly out of that dispute",[31]

3.4 Then, it concluded

> "that the claim contained in final submission I (3) by Nicaragua is admissible. The Court further note[d] that in deciding on the admissibility of the new claim, the Court is not addressing the issue of the validity of the legal grounds on which it is based."[32]

3.5 However,

> "(2) By fourteen votes to one, [the Court]
>
> *Finds* admissible the Republic of Nicaragua's claim contained in its final submission I (3) requesting the Court to adjudge and declare that '[t]he appropriate form of delimitation, within the geographical and legal framework constituted by the mainland coasts of Nicaragua and Colombia, is a continental shelf boundary dividing by equal parts the overlapping entitlements to a continental shelf of both Parties'
>
> […and]
>
> (3) Unanimously,
>
> *Finds* that it cannot uphold the Republic of Nicaragua's claim contained in its final submission I (3)."[33]

[31] ICJ, Judgment, 19 November 2012, *Territorial and Maritime Dispute (Nicaragua v. Colombia), Reports 2012*, p. 665, para. 111.
[32] *Ibid*., p. 665, para. 112.
[33] *Ibid*., p. 719, para. 251(2) and (3). In its third Submission, Nicaragua had "requested the Court to define 'a continental shelf boundary dividing by equal parts the overlapping entitlements to a continental shelf of both Parties'." (*ibid*., p. 664, para. 106).

3.6 The cautious terminology adopted by the Court deserves to be noted. Contrary to the usual formula in comparable circumstances[34] including in sub-paragraphs (4), (5) and (6) of the *dispositif* of the 2012 Judgment,[35] it does not "reject" Nicaragua's final submission I (3), which it carefully and expressly declared admissible; it simply finds that "it cannot uphold" this claim. Thus in paragraph 131 of the Judgment: "The Court concludes that Nicaragua's claim contained in its final submission I (3) *cannot be upheld*."[36]

3.7 The reason for this is explained in paragraph 129 of the Judgment:

> "129. However, since Nicaragua, in the present proceedings, has not established that it has a continental margin that extends far enough to overlap with Colombia's 200 nautical mile entitlement to the continental shelf, measured from Colombia's mainland coast, the Court is not in a position to delimit the continental shelf boundary between Nicaragua and Colombia, as requested by Nicaragua, even using the general formulation proposed by it."[37]

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[34] *See* e.g.: I.C.J., Judgment, 20 November 1950, *Colombian-Peruvian asylum case*, *Reports 1950*, p. 288; Judgment, 5 February 1970, *Barcelona Traction, Light and Power Company, Limited*, *Reports 1970*, p. 51, para. 103; Judgment, 20 July 1989, *Elettronica Sicula S.p.A. (ELSI)*, *Reports 1989*, p. 81, para. 137(3); Judgment, 12 November 1991, *Arbitral Award of 31 July 1989*, *Reports 1991*, p. 75, para. 69(1); Judgment, 5 December 2011, *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia* v. *Greece)*, *Reports 2011*, p. 693, para. 170(3) or Judgment, 3 February 2012, *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)*, *Reports 2012*, p. 155, para. 139(5).

[35] Where the Court "*Decides* that the line of the single maritime boundary delimiting the continental shelf and the exclusive economic zones of the Republic of Nicaragua and the Republic of Colombia shall follow geodetic lines connecting the points with co‑ordinates :…" (ICJ, Judgment, 19 November 2012, *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, *Reports 2012*, p. 719, para. 251 (4)); "*Decides* that the single maritime boundary around Quitasueño and Serrana shall follow,…" (p. 720, para. 251 (5); and "*Rejects* the Republic of Nicaragua's claim contained in its final submissions requesting the Court to declare that the Republic of Colombia is not acting in accordance with its obligations under international law…" (p. 720, para. 251 (6)).

[36] I.C.J., Judgment, 19 November 2012, *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, *Reports 2012*, p. 670, para. 131 – italics added.

[37] *Ibid.*, p. 669, para. 129.

3.8 In other words, the Court has not rejected this particular Nicaraguan claim; it has not simply *upheld* it *in this Judgment*, thus recognizing that the issue – as submitted by Nicaragua in its Application – is still pending between the Parties. In this respect, it can also be noted that in paragraph 112 of its Judgment the Court expressly indicated "that in deciding on the admissibility of the new claim, the Court *is not addressing the issue* of the validity of the legal grounds on which it is based."[38] Nowhere else in the Judgment is a *decision* made on the maritime delimitation between the Parties beyond 200 nautical miles.

II. The basis for the Judgment having changed, the Court now may and must exercise its jurisdiction to its full extent

3.9 As the Court recalled in several circumstances, it "possesses an inherent jurisdiction"[39];

> "Such inherent jurisdiction […] derives from the mere existence of the Court as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded."[40]

3.10 Being a court of justice, the ICJ has an inherent duty to "exercise that jurisdiction to its full extent".[41] And it would be disingenuous to argue that no provision in the Rules or the Statute of the Court confirms such inherent jurisdiction since as a matter of definition "inherent jurisdiction" is not explicitly

[38] *Ibid.*, p. 664, para. 112 – italics added.
[39] I.C.J., Judgment, 20 December 1974, *Nuclear Tests (Australia* v. *France), Reports 1974*, pp. 259-260, para. 23; *(New-Zealand v. France), ibid.*, p. 463, para. 23. *See* also Judgment, 2 December 1963, *Case concerning the Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections*, *Reports 1963*, p. 29 or Advisory Opinion, 1 February 2012, *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization*, *Reports 2012*, p. 30, para. 46.
[40] *(Australia* v. *France), ibid.*, pp. 259-260, paras. 22-23; *(New-Zealand v. France), ibid.*, p. 463, para. 23. *See* also: I.C.J., Judgment, 2 December 1963, *Northern Cameroons (Cameroon* v. *United Kingdom)*, Separate Opinion of Judge Fitzmaurice, *Reports 1963*, p. 103.
[41] I.C.J., Judgment, 19 November 2012, *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Reports 2012*, p. 671, para. 136. *See* also e.g.: Judgment, 3 June 1985, *Continental Shelf (Libyan Arab Jamahiriya/Malta), Reports 1985*, p. 23, para. 19.

provided for, but it stems from the very nature of the ICJ as a court of law and is implied in the texts determining the jurisdiction of the Court.

3.11 Based on such inherent jurisdiction, in the *Corfu Channel* case, "the Court has arrived at the conclusion that it has jurisdiction to assess the amount of the compensation" which was owed by Albania to the United Kingdom during further proceedings on this subject.[42] And this was decided precisely because, in a way similar to the insufficiency of the evidence offered by Nicaragua in the present case, the Albanian Government had "not yet stated which items, if any, of the various sums claimed it contest[ed], and the United Kingdom Government ha[d] not submitted its evidence with regard to them."[43]

3.12 Leaving aside interpretation and revision, there exists, as Colombia recognizes, a "third […] exceptional case, for example, one in which non-compliance with a respondent's unilateral commitment – which, in the Court's view, has caused the object of the dispute to disappear – will affect the very 'basis' of the Court's Judgment. That was the situation confronted by the Court in the *Nuclear Tests* cases."[44]

3.13 In its 1974 Judgments in the *Nuclear Tests* cases, the Court observed that "[o]nce the Court has found that a State has entered into a commitment concerning its future conduct it is not the Court's function to contemplate that it will not comply with it."[45] It is therefore on the understanding that France would respect its commitments that the Court found that the claims of Australia and New Zealand "no longer ha[d] any object" and "that the Court [was] therefore not called upon to give a decision thereon"[46]. But the Court had made clear "that if

[42] I.C.J., Judgment, 9 April 1949, *Corfu Channel case, Reports 1949*, p. 26.
[43] *Ibid*.
[44] PO, p. 68, para. 4.7.
[45] *See* I.C.J., Judgment, 20 December 1974, *Nuclear Tests (Australia* v. *France), Reports 1974*, p. 272, para. 60; *(New Zealand* v. *France), ibid.*, p. 477, para. 63.
[46] *Ibid. (Australia*), p. 272, para. 62, *(New-Zealand)*, p. 478, para. 65.

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…"[47] And it is on this basis that, in 1995, the Court dismissed New-Zealand's "Request for an examination of the situation" since it considered in that case that

> "the basis of the Judgment delivered on 20 December 1974 in the *Nuclear Tests (New Zealand v. France) case* has not been affected; […] the 'Request for an Examination of the Situation' submitted by New Zealand on 21 August 1995 does not therefore fall within the provisions of paragraph 63 of that Judgment; and […] that Request must consequently be dismissed."[48]

3.14 Indeed, in the present case, the Court had not expressly envisaged "an examination of the situation" in its Judgment of 19 November 2012. However, the issue is not whether the Court made a formal "reservation" of the nature of paragraph 63 in the *Nuclear Tests* Judgment (in *New-Zealand* v. *France*). The relevant questions are different: on what basis did the Court make this declaration and what reasons prompted the Court to make that "reservation"? How are the answers to these question applicable in the present case? In effect, the possibility of an examination of the situation in the *Nuclear test* cases was not *created* by paragraph 63 of the 1974 New-Zealand Judgment: in this passage the Court implicitly refers to a general principle that the commitments taken by a Party appearing before the Court are presumed to be respected. Thus, when the Court finds that it has jurisdiction to decide on a dispute submitted to it and that the Application is admissible, this implies that the Parties: (i) have accepted that the

[47] *Ibid. (Australia*), p. 272, para. 60, *(New-Zealand)*, p. 477, para. 63.
[48] I.C.J., Order, 22 September 1995, *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case, Reports 1995*, pp. 306, para. 65.

dispute be settled by the Court in its entirety; and (ii) commit themselves to comply with the Judgment.[49]

3.15 The present case is particularly concerned with the first aspect.[50] It is undeniable that, in its 2012 Judgment, the Court decided that it was seized of the issue of the delimitation of the continental shelf beyond 200 nautical miles:

> "In the Court's view, the claim to an extended continental shelf falls within the dispute between the Parties relating to maritime delimitation and cannot be said to transform the subject‑matter of that dispute. Moreover, it arises directly out of that dispute. What has changed is the legal basis being advanced for the claim (natural prolongation rather than distance as the basis for a continental shelf claim) and the solution being sought (a continental shelf delimitation as opposed to a single maritime boundary), rather than the subject‑matter of the dispute. The new submission thus still concerns the delimitation of the continental shelf, although on different legal grounds."[51]

3.16 As a consequence,

> "112. The Court concludes that the claim contained in final submission I (3) by Nicaragua is admissible. The Court further notes that in deciding on the admissibility of

[49] *See* P.C.I.J., Judgment, 17 August 1923, S.S. "Wimbledon", Series A, No. 1, p. 32; I.C.J., Judgment, 20 December 1974, *Nuclear Tests (Australia v. France), Reports 1974*, p. 272, para. 60; (*New Zealand v. France*), *ibid*., p. 477, para. 63; I.C.J., Judgment, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Reports 1984, pp. 437-438, para. 101 or I.C.J., Judgment, 10 December 1985, *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), Reports 1985*, p. 229, para. 67.

[50] While the second aspect is more particularly relevant in the case concerning *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)* (*see* Colombia's Preliminary Objections dated 19 December 2014).

[51] I.C.J., Judgment, 19 November 2012, *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Reports 2012*, p. 665, para. 111.

> the new claim, the Court is not addressing the issue of the validity of the legal grounds on which it is based."[52]
>
> This is an important statement since: (i) it shows that the delimitation of the extended continental shelf was part of the dispute submitted to the Court and for which it had jurisdiction; and (ii) it confirms that the Court has not decided on the merits of this part of the case.[53]

3.17 As recalled above[54] and as the Court itself reiterated in the 2012 Judgment: "As the Court held in the Continental Shelf (Libyan Arab Jamahiriya/Malta) case, '[t]he Court must not exceed the jurisdiction conferred upon it by the Parties, but it must also exercise that jurisdiction to its full extent' (*Judgment, I.C.J. Reports 1985*, p. 23, para. 19)."[55]

3.18 In the present case, the Court did not uphold Submission I (3) of Nicaragua because it considered that Nicaragua had not completely fulfilled all required formalities. It stated that, "[g]iven the object and purpose of UNCLOS [United Nations Convention on the Law of the Sea], as stipulated in its Preamble, the fact that Colombia is not a party thereto does not relieve Nicaragua of its obligations under Article 76 of that Convention."[56] and it then observed:

> "that Nicaragua submitted to the Commission only 'Preliminary Information' which, by its own admission, falls short of meeting the requirements for information on the limits of the continental shelf beyond 200 nautical

[52] *Ibid.*, para. 112; *see* also in the *dispositif* paras. 251 (2) and (3), quoted above at para. 3.5.
[53] *See* para. 3.3 above.
[54] *See* para. 3.9 above.
[55] I.C.J., Judgment, 19 November 2012, *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Reports 2012*, p. 671, para. 136; *see* also e.g.: I.C.J., Judgment, 18 November 1953, *Nottebohm case (Preliminary Objection), Reports 1953*, p. 122; I.C.J., Judgment, 26 February 2007, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Reports 2007*, p. 90, para. 116 ; or ICSID, *Compañia de Aquas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, *ICSID Review–FILJ*, 2003, p. 135, para. 112.
[56] *Reports 2012*, p. 669, para. 126.

> miles which 'shall be submitted by the coastal State to the Commission' in accordance with paragraph 8 of Article 76 of UNCLOS (see paragraph 120 above). Nicaragua provided the Court with the annexes to this 'Preliminary Information' and in the course of the hearings it stated that the 'Preliminary Information' in its entirety was available on the Commission's website and provided the necessary reference."[57]

3.19 The Court thus invited Nicaragua to complete its submission to the CLCS.

3.20 As explained in more details in Chapter 5 of these Observations, Nicaragua accepted the invitation and took the necessary steps to comply with the Court's requirement:

> "On 24 June 2013, the Republic of Nicaragua submitted to the Commission on the Limits of the Continental Shelf, in accordance with Article 76, paragraph 8, of the Convention, information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of its territorial sea is measured in the southwestern part of the Caribbean Sea.
>
> […]
>
> Upon completion of the consideration of the Submission, the Commission will issue recommendations pursuant to Article 76 of the Convention."[58]

3.21 Therefore, in accordance with the Court's Judgment, Nicaragua has now submitted the necessary information to the CLCS in accordance with paragraph 8 of Article 76 of the United Nations Convention on the Law of the Sea (UNCLOS)

[57] *Ibid.*, para. 127.
[58] CLCS, Notification, 1 July 2013, "Receipt of the Submission made by the Republic of Nicaragua to the Commission on the Limits of the Continental Shelf", doc. CLCS.66.2013.LOS, p. 1.

and the Court is now in a position to completely and definitively settle the dispute between Nicaragua and Colombia brought by Nicaragua in 2001.

3.22 Recourse by the Court to its inherent power to completely settle the disputes submitted to it is all the more crucial because Colombia has proclaimed its firm intention to avoid its obligation to peacefully settle its dispute with Nicaragua. Thus, it observes in its Preliminary Objections:

> "This request seems to be an attempt to induce Colombia to engage in a discussion based on the assumption that there are overlapping continental shelf claims beyond 200 nautical miles from Nicaragua's coasts. Colombia declines to engage in such discussion, and wishes, at the outset, to state that in its view there are no overlapping claims beyond 200 nautical miles from the baselines of Nicaragua. Whether there are or not, Nicaragua had its opportunity to present its case and failed. The issue has been definitively decided by the Judgment of 19 November 2012 and is *res judicata*."[59]

3.23 Nicaragua deals with the non-issue of *res judicata* in Chapter 4 below. For the rest, what results from Colombia's position as expressed in the above quotation is that it squarely refuses to resort to any means for definitively settling its dispute with Nicaragua concerning the delimitation of the Parties' respective continental shelf beyond 200 nautical miles from Nicaragua's coast; and it goes so far as to deny the existence of any dispute between the Parties on this issue. Yet, it cannot have it both ways and contend at one and the same time that there was no dispute on this point and that this same point has been settled as *res judicata*.

3.24 Moreover, by declining to even engage in a discussion concerning this still pending issue, Colombia is in breach of its peremptory obligation to settle its "international disputes by peaceful means in such a manner that international

[59] PO, p. 169, para. 7.26.

peace and security, and justice, are not endangered." in accordance with Articles 2(3) and 33 (1) of the Charter. In its Judgment of 27 June 1986, the Court firmly recalled this

> "further principle of international law, one which is complementary to the principles of a prohibitive nature examined above, and respect for which is essential in the world of today: the principle that the parties to any dispute, particularly any dispute the continuance of which is likely to endanger the maintenance of international peace and security, should seek a solution by peaceful means. Enshrined in Article 33 of the United Nations Charter, which also indicates a number of peaceful means which are available, this principle has also the status of customary law."[60]

3.25 Colombia's refusal to definitely settle its dispute with Nicaragua as to the delimitation of their respective maritime spaces, together with threatening to use force in case Nicaragua would endeavour to enforce its rights,[61] makes it particularly indispensable for the Court to exercise its inherent function to fully settle the dispute between the two States concerning their respective continental shelf. This is also in line with the commitment taken by Colombia when it accepted the jurisdiction of the Court to accept such a full settlement. The ICJ has therefore an inherent power to examine the situation in view of Colombia's calling into question the very basis of its previous Judgment.

3.26 Therefore, if the Court were to find that it has no jurisdiction on the basis of the Pact of Bogotá, which is relied on by Nicaragua as a basis of jurisdiction in the present case, as a consequence of the denunciation of the Pact by Colombia, that denunciation would not constitute an obstacle to the presentation of the

[60] I.C.J., Judgement, 27 June 1986, *Military and Paramilitary Activities in und against Nicaragua (Nicaragua v. United States of America), Reports 1986*, p. 145, para. 290.
[61] *See* the Memorial of Nicaragua in the case concerning the Question of the Delimitation of the continental shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan coast, 3 October 2014, pp. 70-78.

claims set forth by Nicaragua in its Application in the present case, due to the inherent power the Court possesses to completely settle the disputes submitted to it and for which it still holds jurisdiction.

III. Nicaragua's request is not a request for interpretation

3.27 To be clear and for the avoidance of any doubt: Nicaragua does not request an interpretation by the Court of its Judgment of 2012 under Article 60. The present dispute is *not* "a difference of opinion or views between the parties as to the meaning or scope of a judgment rendered by the Court"[62]. Therefore, the object of Nicaragua's Application is *not* "to obtain clarification of the meaning and the scope of what the Court has decided with binding force, [but] to obtain an answer to questions not so decided" [63] and which the Court has found admissible.[64]

3.28 Nor does Nicaragua ask the Court to reaffirm what it has already decided in its 2012 Judgment: this is *res judicata* and Article 59 of the Statute imposes upon Colombia an unconditional duty to comply without restriction or undue delay. And Nicaragua would have nothing to gain in asking the Court to simply repeat what it has already very clearly decided. Nicaragua requests the Court to

[62] I.C.J., Judgment, 11 November 2013, *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)* (Cambodia v. Thailand), para. 33, quoting Request for Interpretation of the Judgment of 15 June 1962 in the *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand*), Provisional Measures, Order of 18 July 2011, *I.C.J. Reports 2011* (II), p. 542, para. 22).

[63] I.C.J., Judgment, 27 November 1950, *Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case (Colombia v. Peru), Reports 1950*, p. 402. *See* also Judgment, 25 March 1999, *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), *Reports 1999* (I), pp. 36-37, para. 12, and Judgment, 11 November 2013, *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)* (Cambodia v. Thailand), para. 55.

[64] I.C.J., Judgment, 19 November 2012, *Territorial and Maritime Dispute (Nicaragua v. Colombia), Reports 2012*, p. 665, para. 112 and p. 719, para. 251(2).

exercise to its full extent the jurisdiction which it recognized itself to hold in accordance with the Pact of Bogotá in 2001 and to delimit the continental shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan coast. Such inherent power constitutes an alternative basis for its jurisdiction in the present case.

3.29 The submissions of the present chapter are limited to the following:

- that the Court has jurisdiction to decide the maritime boundary between the Parties beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured;

- that, since the Court has not rejected Nicaragua's submissions in this respect in its 2012 Judgment nor decided on them this element of the dispute is not *res judicata*;

- that, therefore, the Court has remained seized of the issue;

- that it has an inherent jurisdiction to finally decide on this part of the dispute; and

- that this basis for the jurisdiction of the Court in the present case, does not substitute for the basis constituted by Article XXXI of the Pact of Bogotá but complements it and can be used in the alternative.

CHAPTER 4. NICARAGUA'S CLAIMS ARE NOT BARRED BY *RES JUDICATA*

4.1 Colombia's third preliminary objection is that the Court lacks jurisdiction because Nicaragua's claims in this case ostensibly constitute *res judicata*. As Colombia sees it: "Since the Court in its Judgment of 19 November 2012 upheld the admissibility of Nicaragua's I(3) claim [concerning the delimitation of the continental shelf beyond 200 M] but did not uphold it on the merits, Nicaragua's Application of 16 September 2013 is barred by the doctrine of *res judicata*."[65]

4.2 Colombia is mistaken. The bar imposed by *res judicata* – literally, "that which has been adjudicated" – applies only to matters that were actually decided in an earlier case. Yet, the Court's November 2012 Judgment distinctly did *not* decide the question presented in this case; namely, where is the continental shelf boundary between Nicaragua and Colombia in the area beyond 200 M from Nicaragua's baselines? To the contrary, the Court specifically declined to make that determination, finding that it was not in a position to effect the requested delimitation at that time.

4.3 The plain wording of the Court's November 2012 Judgment underscores the limited and conditional nature of its prior determination. At paragraph 129, the Court stated: "[S]ince 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*

[65] PO of Colombia, para. 5.4.

continental shelf boundary between Nicaragua and Colombia, as requested by Nicaragua".[66]

4.4 On this basis, and this basis alone, the Court concluded that "Nicaragua's claim contained in its final submission I (3) cannot be upheld."[67] This same formulation is echoed in the *dispositif*, in which the Court "[f]inds that it cannot uphold the Republic of Nicaragua's claim contained in its final submission I (3)."[68]

4.5 Accordingly, since the issue this case presents has *not* previously been decided, *res judicata* poses no bar to the Court's jurisdiction.

4.6 The balance of this Chapter is divided into three sections. Section I reviews the Court's jurisprudence on *res judicata* for purposes of correcting critical omissions from Colombia's discussion of the applicable law, and making clear when the doctrine does and does not apply. Section II applies the law to the November 2012 Judgment and shows that *res judicata* has no application in this case. Finally, Section III addresses and disposes of Colombia's fourth preliminary objection, which argues that this case is an impermissible attempt to appeal and revise the Court's November 2012 Judgment. The fourth preliminary objection fails for the same reasons as Colombia's argument about *res judicata*; that is, it assumes the issues in this case were previously decided with binding force. As will be shown in the balance of this Chapter, they were not.

[66] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012*, p. 669, para. 129 (emphasis added).
[67] *Ibid.*, p. 670, para. 131.
[68] *Ibid.*, p. 719, para. 251(3).

I. *Res Judicata* Applies Only to Issues That Have Actually Been Decided

4.7 Colombia's treatment of the law begins with the statement that "[*r*]*es judicata* bars reopening a judgment in circumstances in which there is an identity between 'the three traditional elements … *persona*, *petitum*, *causa petendi*'."[69] It then proceeds to show how, in Colombia's view, these three elements of the doctrine are satisfied.[70] In focusing exclusively on the *persona*, *petitum* and *causa petendi* requirements, however, Colombia bypasses the most fundamental condition for the application of *res judicata*: that the issue in dispute have previously been decided. Stated differently, while the *persona*, *petitum* and *causa petendi* requirements are necessary to the application of *res judicata*, they are not sufficient. Even if they are satisfied, *res judicata* does not apply unless the question raised in a subsequent case has been disposed of "finally" and "for good".[71]

4.8 This basic rule is evident from the plain language of the first case Colombia cites in its discussion of the law: *Interpretation of Judgments Nos. 7 and 8 Concerning the Case of The Chorzów Factory* (*Germany v. Poland*). In that case, Germany requested the PCIJ to rule that its earlier decision precluded Poland from acting to remove from the land registers the name of the Oberschlesische Stickstoffwerke A.-G. as owner of the Chorzów factory. The Court upheld the German contention, stating:

> "The Court's Judgment No. 7 is in the nature of a declaratory judgment, the intention of which is to ensure

[69] PO, para. 5.35 (citing Interpretation of Judgments Nos. 7 and 8 Concerning the Caw of The Chorzów Factory (Germany v. Poland), PCIJ Series A. No. 13, Judgment No. 11 of 16 December 1927, p. 20).
[70] *Ibid*., paras. 5.41-5.70.
[71] *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (New Application: 1962), Judgment, I.C.J. Reports 1964*, p. 6, 20; ROBERT KOLB, THE INTERNATIONAL COURT OF JUSTICE (2013), p. 761.

> recognition of a situation at law, once and for all and with binding legal force between the Parties; *so that the legal question thus established cannot again be called into question* insofar as the legal effects ensuing therefrom are concerned."[72]

To be barred from "again be[ing] called into question," the "legal question" must therefore have been "established," or answered. When it has not been, *res judicata* does not apply.

4.9 Perhaps the most thorough discussion of the scope and purpose of the doctrine appears in the Court's 2007 Judgment in the *Genocide Case* (*Bosnia and Herzegovina v. Serbia and Montenegro*), which presented the question of the *res judicata* effect of the Court's jurisdictional determinations made in its earlier 1996 Judgment on Preliminary Objections. In analysing whether *res judicata* applied, the Court underscored the requirement that the issue presented in the latter case must truly have been decided in the prior case.

4.10 In the opening paragraphs of the relevant section of the Judgment, the Court stated that the

> "principle [of *res judicata*] signifies that the decisions of the Court are not only binding on the Parties, but are final, in the sense that they cannot be reopened by the parties *as regards the issues that have been determined*, save by procedures, of an exceptional nature, specially laid down for that purposes [in Articles 59 and 60 of the Statute of the Court]."[73]

[72] PO, para. 5.36 (emphasis added) (citing Interpretation of Judgments Nos. 7 and 8 Concerning the Caw of The Chorzów Factory (Germany v. Poland), PCIJ Series A. No. 13, Judgment No. 11 of 16 December 1927, p. 20).

[73] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 51, para. 115 (emphasis added).

4.11 In discussing the application *vel non* of the doctrine to its 1996 Judgment on jurisdiction, the Court observed that "if any question arises as to the scope of *res judicata* attaching to a judgment, it must be determined in each case having regard to the context in which the judgment was given."[74] Critically, the Court then stated:

> "For this purpose, in respect of a particular judgment it may be necessary to distinguish between, first, the issues which have been decided with the force of *res judicata*, or which are necessarily entailed in the decision of those issues; secondly any peripheral or subsidiary matters, or obiter dicta; and finally matters which have not been ruled upon at all. … *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."[75]

4.12 In his Separate Opinion in the *Genocide Case*, Judge Owada emphasized that in applying the *res judicata* rule, "it is indeed essential that we avoid an automatic application of the rule and try to determine the scope of what has been decided as *res judicata* in the concrete context of the case".[76]

4.13 The *Haya de la Torre* case presents a useful demonstration of the rule that even closely related issues *not* actually determined in one case remain amenable to adjudication in another. *Haya de la Torre* had been preceded by the *Asylum* case in which the Court determined that the asylum Colombia granted to Mr. Haya de la Torre was contrary to the provisions of the 1928 Havana Convention. In the subsequent *Haya de la Torre* case, Colombia asked the Court to adjudge and declare that the Court's prior judgment did not require it to surrender Mr.

[74] *Ibid.*, p. 56, para. 125 (citation omitted).
[75] *Ibid.*, p. 56, para. 126 (emphasis added).
[76] *Ibid.*, Separate Opinion of Judge Owada, p. 290, para. 15. *See also ibid.*, Joint Dissenting Opinion of Judges Ranjeva, Shi and Koroma, p. 267, para. 3 (stating: "simply put, *res judicata* applies to a matter that has been adjudicated and decided. A matter that the Court has not decided cannot be qualified as *res judicata*").

Haya de la Torre to Peruvian authorities, notwithstanding the fact that the Court had already determined that the asylum was illegal.

4.14 In its Judgment, the Court looked to its Judgment in the *Asylum* case and determined that the question of whether or not Colombia was obliged to surrender Mr. Haya de la Torre to Peru

> "was not submitted to the Court and *consequently was not decided by it*. It is not therefore possible to deduce from the Judgment of November 20th [1950] any conclusion as to the existence or non-existence of an obligation to surrender the refugee. In these circumstances, the Court is not in a position to state, merely on the basis of the Judgment of November 20th, whether Colombia is or is not bound to surrender the refugee to the Peruvian authorities."[77]

4.15 The Court therefore proceeded to address the question of the legal consequences flowing from its prior determination of the irregularity of the asylum granted to Mr. Haya de la Torre.[78]

4.16 As will be shown in the next section of this Chapter, the circumstances of this case are analogous. As in *Haya de la Torre*, the question presented here (namely, the location of the continental shelf boundary between Nicaragua and Colombia in the area beyond 200 M from Nicaragua's baselines) was not decided in the Court's November 2012 Judgment. And also as in *Haya de la Torre*, it is impossible to deduce from the November 2012 Judgment any conclusions as to the location of that boundary. *Res judicata* therefore imposes no bar to Nicaragua's claims in this case.

[77] *Haya de la Torre Case, Judgment, I.C.J. Reports 1951*, p. 79.
[78] *Ibid*., pp. 80-83.

II. The Court Did Not Previously Decide the Questions Presented in This Case

4.17 In arguing that *res judicata* bars Nicaragua's claims in this case, Colombia expends the majority of its energy recapitulating the Parties' earlier argumentation on the issues concerning delimitation beyond 200 M from Nicaragua's baselines.[79] It describes in great detail the sequence and evolution of the written pleadings, as well as the content of the arguments at the oral hearings (largely between Professor Lowe and Mr. Cleverly on behalf of Nicaragua, and Mr. Bundy on behalf of Colombia). Colombia's devotion to these issues is, with respect, misplaced. What the Parties argued in the *Territorial and Maritime Dispute* is beside the point on the critical issue here: whether or not the Court *decided* the issues concerning the delimitation of the continental shelf boundary beyond 200 M from Nicaragua's coast in its November 2012 Judgment.

4.18 On that dispositive issue, Colombia is notably more reserved. With respect to what the Court decided in response to the arguments with which it was presented – what "*res*" was in fact "*judicata*" – Colombia largely confines itself to the contention, echoed in several different paragraphs, that "[s]ince the Court in its Judgment of 19 November 2012 upheld the admissibility of Nicaragua's I(3) claim [concerning the delimitation beyond 200 M] but did not uphold it on the merits, Nicaragua's Application of 16 September 2013 is barred by the doctrine of *res judicata*."[80]

4.19 With this studied turn of phrase, Colombia seeks to elide the key distinction between deciding a claim on the merits, on the one hand, and what the Court actually did in declining to "uphold" Nicaragua's earlier claim, on the other.

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[79] PO, para. 5.6-5.26.

[80] *Ibid*., para. 5.4. *See also ibid*. Argument Heading 5(C)(2), at p. 101 ("The Court did not uphold Nicaragua's I(3) claim on the merits"); para. 5.34 ("Thus the Court, by deciding that the claim was admissible and not upholding it on the merits … produced a *res judicata*.").

An examination of the November 2012 Judgment makes plain that the Court's decision not to "uphold" Nicaragua's claim did not, in fact, entail a determination of Nicaragua's request to delimit the continental shelf beyond 200 M on the merits.

4.20 As noted, the *dispositif* of the November 2012 Judgment states that the Court "cannot uphold the Republic of Nicaragua's claim contained in its final submission I(3)".[81] The Court's use of the phrase "cannot uphold" is itself telling. The Court did not "reject" Nicaragua's submission; nor did it use other wording indicative of a substantive determination of Nicaragua's claims. In particular, the Court did not decide that Nicaragua has no continental shelf rights beyond 200 M, or that, as a consequence, no basis exists for a delimitation in that area between Nicaragua and Colombia.

4.21 Moreover, read against the backdrop of the Court's clearly expressed reasoning, it is evident that the Court's decision not to "uphold" Nicaragua's claim was not intended to dispose of the question concerning the existence of the Parties' continental shelf rights beyond 200 M from Nicaragua's coast, or the location of the Parties' continental shelf boundary in that area "finally" or "for good".[82] To the contrary, the Court specifically declined to make any such determination because Nicaragua had not yet made its final submission to the Commission on the Limits of the Continental Shelf ("CLCS").

4.22 The Court began its analysis by addressing whether Nicaragua's claim for delimitation of a continental shelf extending beyond 200 M was admissible. As Colombia correctly observes, it concluded that the claim was indeed admissible.[83]

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[81] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012*, p. 718, para. 251(3).
[82] *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (New Application: 1962), Judgment, I.C.J. Reports 1964*, p. 6, 20; ROBERT KOLB, THE INTERNATIONAL COURT OF JUSTICE (2013), p. 761.
[83] PO, para. 5.27.

At the same time, the Court made it clear that in deciding the issue of admissibility, it was "not addressing the issue of the validity of the legal grounds on which it is based".[84]

4.23 The Court then turned to the question *not* of the location of the continental shelf boundary, or even the principles applicable in making that determination, but rather "whether it [was] in a position to determine 'a continental shelf boundary dividing by equal parts the overlapping entitlements to a continental shelf of both Parties' as requested by Nicaragua".[85] Because of the circumscribed nature of the question that the Court posed – that is, whether it was "in a position to determine" the Parties' overlapping entitlements in the continental shelf – it specifically refused to decide certain other questions the Parties had addressed in their written and oral submissions. Regarding their disagreement as to the nature and content of the rules governing the entitlements of coastal States to a continental shelf beyond 200 M, for example, the Court stated: "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".[86]

4.24 The Court ultimately concluded that it was not in a position to determine the continental shelf boundary between the Parties as requested by Nicaragua. In so finding, the Court first noted that the information Nicaragua had submitted to the CLCS was "only Preliminary Information" which "falls short of meeting the requirements for information on the limits of the continental shelf beyond 200 M

[84] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012*, p. 665, para. 112.
[85] *Ibid.*, p. 665, para. 113.
[86] *Ibid.*, p. 666, para. 118.

which 'shall be submitted by the coastal State to the Commission' in accordance with paragraph 8 of Article 76 of UNCLOS".[87]

4.25 The Court then determined that "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".[88]

4.26 The Court further underscored the circumscribed nature of its ruling by stating that, in view of its decision that it was not in a position to delimit the continental shelf boundary, it "*need not address* any other arguments developed by the Parties, including the argument as to whether a delimitation of overlapping entitlements which involves an extended continental shelf of one party can affect a 200-nautical-mile entitlement to the continental shelf of another party".[89]

4.27 The Court thus made it abundantly clear that it had not decided whether Nicaragua has continental shelf rights beyond 200 M that overlap with Colombia's continental shelf rights emanating from its mainland coast, nor the location of any continental shelf boundary between the Parties in that area, nor even the general rules applicable to the delimitation. The Court concluded only that in that particular proceeding, it could not resolve that dispute. Colombia is therefore plainly incorrect when it asserts that each of the grounds Nicaragua states for its claims in the present case "was decided in the Court's Judgment of 19 November 2012".[90]

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[87] *Ibid.*, p. 669, para. 127. As Nicaragua noted in its Application, it submitted its final information to the Commission on the Limits of the Continental Shelf on 24 June 2013. Application, para. 5.
[88] *Ibid.*, p. 669, para. 129 (emphasis added).
[89] *Ibid.*, pp. 669-670, para. 130 (emphasis added).
[90] PO, para. 5.41.

4.28 In the end, the Court's language from the *Genocide Case* provides perhaps the clearest demonstration of the fact that *res judicata* does not apply here. In the process of rejecting Respondent Serbia and Montenegro's arguments based on cases in which the Court had addressed jurisdictional issues even after having delivered a previous judgment on jurisdiction, the Court stated:

> "The essential difference between the cases mentioned in the previous paragraph and the present case is this: the jurisdictional issues examined at a late stage in those cases were such that *the decision on them would not contradict the finding [] made in the earlier judgment*. … By contrast, *the contentions of the Respondent in the present case would, if upheld, effectively reverse the 1996 Judgment*; that indeed is their purpose."[91]

4.29 The touchstone for determining whether or not *res judicata* applies is thus whether a decision on the issue raised in a later proceeding would "contradict" the finding in an earlier determination; that is, whether a finding in favour of the party pressing the claim would effectively "reverse" the earlier judgment. That is plainly not the case here. A decision on Nicaragua's claims in the current proceedings would not contradict the Court's findings in the November 2012 Judgment; nor would a decision upholding Nicaragua's contentions effectively reverse that Judgment. *Res judicata* therefore does not bar the Court's jurisdiction.

4.30 Colombia's *res judicata* argument is not assisted by its effort to enlist the *Haya de la Torre* case to its aid. As Colombia purports to see it, that case actually helps it because the key fact that allowed the subsequent litigation to proceed was allegedly that Peru had not raised the relevant issue – namely, whether Colombia was obligated to surrender Mr. Haya de la Torre to Peruvian authorities – in the

[91] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 96, para. 128 (emphasis added).

prior *Asylum* case.[92] Yet, the plain language of the Court's opinion refutes Colombia's argument by making clear that this was not the decisive point. Rather, the critical fact was that the issue had not previously been decided. According to the Court, the relevant "question was not submitted to the Court and *consequently not decided by it*."[93] To be sure, the Court did state that the question raised was "new," but this merely explained why no prior decision had been rendered; it was not itself the reason *res judicata* did not apply.[94] Here too the question presented has not previously been decided.

4.31 In this respect, the situation presented here is analogous to Nicaragua's request for US$370 million representing the minimum valuation of direct damages in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*). In its 1986 Judgment on the merits, the Court determined that, based in part on the fact that Nicaragua had not established an entitlement to the requested amount with "certainty and precision", it "does not consider that it can acceded at this stage to the request [made by] Nicaragua."[95] Nevertheless, the Court's determination did not preclude Nicaragua from establishing its claim to damages with the requisite certainty and precision at a subsequent phase of the proceedings.[96] The result should be the same here.

4.32 Neither is Colombia assisted by its argument that Nicaragua is somehow impermissibly seeking "to circumvent the doctrine of *res judicata*"[97] by relying on

[92] PO, para. 5.53.
[93] *Haya de la Torre Case, Judgment, 1951, I.C.J. Reports 1951*, p. 80. Later in the same paragraph, the Court stated "the question of the surrender of the refugee was not decided by the Judgment of November 20th. … There is consequently no *res judicata* upon the question of surrender." *Ibid.*
[94] *Ibid.*, p. 79.
[95] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment, I.C.J. Reports 1986*, p. 143, para. 285.
[96] *Ibid*., para. 292(15).
[97] PO, para. 5.78.

"new geological and geomorphological facts".[98] In making this argument, Colombia misrepresents the realities of the situation in two significant respects. *First*, Nicaragua does not rely on new information to avoid the application of *res judicata*. For the reasons already amply explained, *res judicata* simply has no application to this case; there is therefore no question of Nicaragua seeking "to circumvent" it.

4.33 *Second*, Nicaragua is not seeking to rely on new geological and geomorphological facts as such. To the contrary, what has changed since the Court's November 2012 Judgment is that on 24 June 2013 Nicaragua fulfilled its procedural obligation under UNCLOS Article 76(8) to make its submission to the CLCS concerning the precise location of the outer limits of its continental margin. That submission indisputably satisfies the Commission's informational requirements as contained in its Scientific and Technical Guidelines, and shows definitively that Nicaragua has a continental margin that overlaps with Colombia's 200-nautical-mile entitlement to the continental shelf. The Court will therefore now have all the information it requires to exercise its mandate to settle disputes.

4.34 The conclusion that *res judicata* is inapplicable to Nicaragua's claims in this case is still further confirmed by reference to the purposes of the doctrine. As the Court has explained:

> 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

[98] *Ibid.*, para. 5.77.

> interest of each party that an issue which has already been adjudicated in favour of that party be not argued again."[99]

4.35 Permitting Nicaragua to press its claims, and rejecting Colombia's preliminary objection, would be entirely consistent with both of these purposes. In contrast, accepting Colombia's *res judicata* plea would seriously undermine these same goals. With respect to the first – fostering stable legal relations by deciding disputes – the fact is, as discussed above, that the Court did not previously decide the dispute now before it. To the contrary, it was left open. As such, it continues to present an obstacle to stable legal relations between Nicaragua and Colombia, which remain sharply divided on the merits of the question concerning their respective, and in Nicaragua's view overlapping, entitlements in the continental shelf beyond 200 M from Nicaragua's coast. Without action by the Court, the dispute will continue to fester and impede stable legal relations between the two States.

4.36 With respect to the second purpose *res judicata* serves – the interests of the party in whose favour an issue has already been adjudicated in having that issue not be argued again – the same points apply. The issue has *not* been adjudicated in favour of either Nicaragua or Colombia; it remains unanswered. The Parties' interest in having their dispute disposed of "finally" and "for good", and in having a secure and durable solution, therefore predominates.

4.37 For all these reasons, Colombia's third preliminary objection must be rejected.

[99] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 90, para. 116.

III. This Case Is Neither an Appeal Nor a Request for Revision of the November 2012 Judgment

4.38 Colombia's fourth preliminary objection is that the current case represents an impermissible attempt to appeal and revise the November 2012 Judgment, and that the Court is therefore without jurisdiction. Colombia is mistaken. This aspect of Colombia's submission is little more than a repackaged version of its *res judicata* argument. It therefore fails for precisely the same reasons articulated above: the issues presented in this case were not decided by the November 2012 Judgment. What was undecided cannot be "appealed" or "revised". Nicaragua's Application therefore cannot fairly be read to request either one.

4.39 The fallacy of Colombia's fourth preliminary objection is evident from the very first paragraph of the argument, in which Colombia states its predicate. Concerning the 2012 Judgment, Colombia says: "[The Court] did, however, effect a full and final delimitation of the maritime boundary between the Parties, including the continental shelf and the exclusive economic zone." [100] As demonstrated above, this is plainly false. Although the Court did delimit the maritime boundary *within* 200 M of Nicaragua, it made no determination with respect to the continental shelf boundary *beyond* 200 M. There is, moreover, nothing in the Judgment to even suggest that the Court considered that it had in any way decided the entire course of the Parties' maritime boundary, and completely resolved the dispute before it.

4.40 To the contrary, the Court made it clear that the question of the delimitation beyond 200 M from Nicaragua's baselines remained unanswered. To the elements of the November 2012 Judgment discussed already above, still more can be added. In particular, after deciding that it was not in a position to delimit in the area beyond 200 M, the Court then turned to the delimitation that it was in a

[100] PO, para. 6.1

position to effect in Section V of its Judgment. The manner in which it introduced the issue it was deciding is telling:

> "In light of the decision it has taken regarding Nicaragua's final submission I(3) (see paragraph 131 above), the Court must consider what maritime delimitation it is to effect. *Leaving out of account any Nicaraguan claims to a continental shelf beyond 200 nautical miles* means that there can be no question of determining a maritime boundary between the mainland coasts of the Parties, as these are significantly more than 400 nautical miles apart. There is, however, 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 …."[101]

4.41 The significance of the phrase "[l]eaving out of account any Nicaraguan claims to a continental shelf beyond 200 nautical miles" is self-evident. Having previously determined that it was "not in a position" to delimit in that area, the Court carefully set the issue to one side (by leaving it "out of account") and proceeded to effect only the delimitation it was in a position to do. In so doing, it made no substantive determination on the merits of the issue and left it open for determination in subsequent proceedings.

4.42 Since, contrary to Colombia's core contention, the November 2012 Judgment did not "effect a full and final delimitation of the maritime boundary between the Parties," and, in particular, did not decide the issue of the continental shelf boundary beyond 200 M from Nicaragua's baselines, there is no relevant decision Nicaragua could even arguably be said to be seeking to appeal or revise.

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

4.43 In light of the above, Colombia's specific arguments about Nicaragua's ostensible effort (1) to appeal the November 2012 Judgment, and (2) to revise it can be disposed of promptly.

4.44 With respect to Colombia's argument that Nicaragua impermissibly seeks to appeal the 2012 Judgment, Colombia itself makes it emphatically clear that this contention stands or falls together with its assertion that the November 2012 Judgment decided the issues in this case with the force of *res judicata*. It states: "By trying to re-litigate matters that have been decided with the force of *res judicata*, Nicaragua is actually trying to appeal the Court's Judgment."[102] Yet, as explained earlier in this Chapter, the issues presented in this case were distinctly *not* previously "decided with the force of *res judicata*." That being the case, there is no binding decision Nicaragua might be said to be appealing.

4.45 With respect to Colombia's argument that Nicaragua is seeking to revise the November 2012 Judgment, much the same can be said. Colombia asserts: "Nicaragua's Application purports to adduce a new fact, or facts, which purportedly justify the Court revising its 2012 Judgment in which it had effected a full and final delimitation of the maritime boundary between the Parties."[103] But, of course, that is not true. As shown, the Court neither effected "a full and final delimitation of the maritime boundary between the Parties", nor made any other binding determinations with respect to the continental shelf boundary beyond 200 M from Nicaragua's baselines. Accordingly, there is no relevant decision the revision of which Nicaragua could need to seek.

4.46 For these reasons, Colombia fourth preliminary objection must be rejected together with its third. Because the Court's 2012 Judgment did not produce a *res judicata*, there is nothing for Nicaragua to either appeal or ask the Court to revise.

[102] PO, para. 6.13.
[103] *Ibid*., para. 6.19.

CHAPTER 5. ADMISSIBILITY

5.1 Nicaragua's Application of 16 September 2013 contains two requests. Paragraph 12 of the Application reads as follows:

> "12. Nicaragua requests the Court to adjudge and declare:
>
> *First:* The precise course of the maritime boundary between Nicaragua and Colombia in the areas of the continental shelf which appertain to each of them beyond the boundaries determined by the Court in its Judgment of 19 November 2012.
>
> *Second :* The principles and rules of international law that determine the rights and duties of the two States in relation to the area of overlapping continental shelf claims and the use of its resources, pending the delimitation of the maritime boundary between them beyond 200 nautical miles from Nicaragua's coast."

5.2 As an alternative to its submission concerning the Court's jurisdiction in respect of Nicaragua's Application, Colombia objects to the admissibility of both the first and the second requests in Nicaragua's Application.[104] As the Court put it in the *Oil Platforms* case

> "Objections to admissibility normally take the form of an assertion that, even if the Court has jurisdiction and the facts stated by the applicant State are assumed to be correct, nonetheless there are reasons why the Court should not proceed to an examination of the merits."[105]

5.3 That is the character of Colombia's Preliminary Objections concerning admissibility.

[104] PO, ch. 7.
[105] *I.C.J. Reports 2003*, 161 at para. 29.

5.4 Colombia's submission on admissibility has two components. Colombia says that *if the Court finds that it has jurisdiction* [106]

> "7.2 Nicaragua's First Request is inadmissible because of Nicaragua's failure to secure the requisite CLCS recommendation.
>
> 7.3 Nicaragua's Second Request is inadmissible as a consequence of the inadmissibility of its first request. Even considering the second request independently of the first, it would also be inadmissible because, if it were to be granted, the decision of the Court would be inapplicable and would concern a non-existent dispute."

5.5 It is axiomatic that the burden of establishing Colombia's submission that the Court, which *ex hypothesi* has jurisdiction over Nicaragua's Application, should not exercise its jurisdiction lies upon Colombia: *actori incumbit probatio*.[107] The plea of inadmissibility is distinct from the plea that the Court lacks jurisdiction;[108] and the Party putting forward a plea of inadmissibility must persuade the Court that it is right to apply the relevant legal principles to the case before it so as to lead to the result which that Party advocates, rather than the result that the other Party advocates. In this respect it is like other submissions on the law advanced by a party in support of its case, and it is unlike submissions on

[106] PO, paragraph 7.1, fn 265.

[107] *See,* e.g., *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*, p. 43 at p. 128 paragraph 204: "...it is well established in general that the applicant must establish its case and that a party asserting a fact must establish it." Cf., Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals*, (Cambridge, 1987), pp. 326-335; J Pauwelyn, 'Evidence, Proof and Persuasion in WTO Dispute Settlement', *Journal of International Economic law 1 (1998), 227-258;* C Brown, *A Common Law of International Adjudication*, (2007), pp. 92-95.

[108] *See* Sir G Fitzmaurice, *The Law and Procedure of the International Court of Justice*, vol. II, p. 439. Referring to *Ambatielos (Merits) Judgment, I.C.J. Reports 1953*, p.10, at 22-23 and *Nottebohm case (Preliminary Objection), Judgment, I.C.J. Reports 1953,* p. 111 at p. 122.

questions of jurisdiction, which are for the Court itself to consider and settle regardless of the submissions of the Parties.[109]

I. Admissibility pending a recommendation by the CLCS

5.6 Colombia's first submission is that, assuming that the Court has jurisdiction over the question of the existence and limits of Nicaragua's continental shelf, the Court should nonetheless not examine the merits of Nicaragua's Application because of Nicaragua's failure as yet to secure the requisite CLCS recommendation.

5.7 As a reason why the Court should not proceed to an examination of the merits in this case, Colombia's submission is (A) based upon a *non sequitur*, (B) leads to a practical impasse, and (C) is in any event a matter for the merits phase rather than a preliminary objection.

A. *The* non sequitur

5.8 The *non sequitur* is evident. Paragraphs 7.4 to 7.23 of Colombia's Preliminary Objections paraphrase the UNCLOS provisions on the competence of the Commission on the Limits of the Continental Shelf and include the assertion that

> "The ICJ cannot consider the Application by Nicaragua because the CLCS has not ascertained that the conditions for determining the extension of the outer edge of Nicaragua's continental shelf beyond the 200-nautical mile line are satisfied and, consequently, has not made a recommendation."[110]

[109] *See*, e.g., *Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 432, at p. 450, para. 37.
[110] PO, paragraph 7.15.

5.9 Colombia offers no persuasive reasoning to explain why the fact that the CLCS has a *limited* (and essentially advisory) competence – in the words of UNCLOS Article 76(8), the competence to "make recommendations to coastal States on matters related to the establishment of the *outer limits* of their continental shelf" (emphasis added) – should entail the inadmissibility as a matter of international law of Nicaragua's Application to the International Court in this case. It offers no reason why the International Court of Justice should be obliged to step aside and wait on action by the CLCS before hearing Nicaragua's Application.

5.10 Colombia's submission is contrary to legal principle. As a matter of customary international law, clearly and repeatedly affirmed in the case-law of this Court, the rights of a coastal State over the continental shelf are inherent. They exist *ipso facto* and *ab initio*.[111] In the words of the Court in the *Aegean Sea Continental Shelf* case,

> "... legally a coastal State's rights over the continental shelf are both appurtenant to and directly derived from the State's sovereignty over the territory abutting on that continental shelf. ..... This emerges clearly from the emphasis placed by the Court in the *North Sea Continental Shelf* cases on "natural prolongation" of the land as a criterion for determining the extent of a coastal State's entitlement to continental shelf as against other States abutting on the same continental shelf *(I.C.J. Reports 1969,* pp. 31 et seq.)... As the Court explained in the above-mentioned cases, the continental shelf is a legal concept in which "the principle is applied that the land dominates the sea" *(I.C.J. Reports 1969,* p. 51, para. 96); and it is solely by virtue of the coastal State's sovereignty over the land that rights of exploration and exploitation in the continental shelf can attach to it, *ipso jure,* under international law. In short, continental shelf rights are

[111] *I.C.J. Reports 1969,* p. 3 at p. 23 para. 19.

> legally both an emanation from and an automatic adjunct of the territorial sovereignty of the coastal State."[112]

5.11 As a matter of customary international law Nicaragua has rights over its continental shelf now, and has had such rights continuously since the time before it acceded to the UNCLOS; and nothing in the UNCLOS purports, directly or indirectly, to remove those rights.

5.12 In so far as the UNCLOS has any effect upon the exercise of a State's pre-existent rights under customary international law, it does so in limited terms. This is clear from the plain words of UNCLOS Article 76. Paragraphs (1) to (6) of UNCLOS Article 76 define a State's continental shelf which is, in the words of Article 76(1), the "natural prolongation of its land territory to the outer edge of the continental margin". UNCLOS Article 77(3), reflecting the rule of customary international law on *ipso facto* and *ab initio* appurtenance, stipulates that the rights of the coastal State over its continental shelf "do not depend on occupation, effective or notional, or on any express proclamation." The rights that Nicaragua has over its continental shelf it has automatically, *ipso jure*, by operation of law.

5.13 Nicaragua has an obligation under UNCLOS Article 76(8) to submit certain information on its continental shelf to the CLCS. The obligation to submit information to the CLCS is an ancillary obligation, and there is no suggestion that the existence or maintenance of a coastal State's inherent continental shelf rights is in any way dependent upon its fulfilment.

5.14 The CLCS is concerned only with the precise location of the outer limit of the continental shelf. It does not grant or recognise the rights of a coastal State to its shelf; nor is it empowered to delimit boundaries in the shelf. Its sole role is to confirm the location of the outer limit of the shelf. This role is defined in the

[112] *Aegean Sea Continental Shelf case, I.C.J. Reports 1978,* p. 3, para. 86.

UNCLOS. UNCLOS Article 76(7) stipulates that the coastal State must delineate the outer limit of its continental shelf beyond 200 nautical miles from its baselines, and must do so by means of straight lines not exceeding 60 nautical miles in length and connecting fixed points defined by coordinates of latitude and longitude. The conditions that the fixed points must satisfy are set out in UNCLOS Articles 76(4) and (5):

> "4. (a) For the purposes of this Convention, the coastal State shall establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by either:
>
> (i) a line delineated in accordance with paragraph 7 by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope; or
>
> (ii) a line delineated in accordance with paragraph 7 by reference to fixed points not more than 60 nautical miles from the foot of the continental slope.
>
> (b) In the absence of evidence to the contrary, the foot of the continental slope shall be determined as the point of maximum change in the gradient at its base.
>
> 5. The fixed points comprising the line of the outer limits of the continental shelf on the seabed, drawn in accordance with paragraph 4 (a)(i) and (ii), either shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 nautical miles from the 2,500 metre isobath, which is a line connecting the depth of 2,500 metres."

5.15 The CLCS reviews the data submitted by each coastal State and makes appropriate recommendations to the submitting State. [113] An improper delineation

[113] For an example concerning Ireland, *see* the Recommendations by the CLCS at http://www.un.org/depts/los/clcs_new/submissions_files/submission_irl.htm ..

of the shelf's outer limits giving a coastal State an excessively wide shelf would benefit that State at the expense of the international community as a whole, which is the beneficiary of the provisions by which UNCLOS implements the principle that the seabed beyond the limits of national jurisdiction is the 'common heritage of mankind'.[114] The role of the CLCS is to protect the international community from such excessive shelf claims. However, its recommendations are not binding on the submitting State. If a State disagrees with the recommendations, it may make a revised or new submission to the CLCS.[115]

5.16 Only outer limits established by a coastal State "on the basis of" recommendations of the CLCS are "final and binding" limits, according to UNCLOS Article 76(8). The Court decided in its Judgment of 19 November 2012 that continental shelf outer limits that are not based upon CLCS recommendations concerning the outer limits do not have a "final and binding" quality, even as regards a State that is not a party to UNCLOS.[116]

5.17 The "final and binding" quality of the outer limits of the continental shelf (as opposed to the boundaries in the shelf between opposite of adjacent States, which are no concern of the CLCS) depends upon action by the CLCS. In contrast, nothing in the UNCLOS suggests that the actual existence of rights over the continental shelf and its resources depends upon the prior establishment of a "final and binding" boundary, any more than the existence of sovereignty over land territory depends upon the final and binding determination of a land boundary. Prior to the making of a CLCS recommendation and the setting of outer limits for the continental shelf based upon it, it may be uncertain which of two (or more) States has rights over any particular area; but that is not at all the same as

[114] UNCLOS Article 136 and Part XI, *passim*.
[115] UNCLOS Annex II, Article 8.
[116] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012*, p. 624 at p. 669, para. 126.

saying that neither State has *any* such rights until the 'final and binding' determination is made.

5.18 Further, a CLCS recommendation cannot prejudice matters relating to the delimitation of continental shelf boundaries between Nicaragua and Colombia. The recommendations relate only to the outer limits of the continental shelf, which separate the continental shelf under national jurisdiction from the international seabed area.[117] The recommendations do not, and as a matter of law cannot, relate to the maritime boundaries between adjacent or opposite States.

5.19 UNCLOS itself stipulates that

> "The actions of the [CLCS] shall not prejudice matters relating to the delimitation of boundaries between States with opposite or adjacent coasts."[118]

5.20 Rule 46 of the Rules of the CLCS repeats that point; and Annex I to the Rules requires that in relation to submissions made by States in respect of disputed areas the CLCS shall be "[a]ssured by the coastal States making the submission to the extent possible that the submission will not prejudice matters relating to the delimitation of boundaries between States."[119] The intention appears to be precisely to avoid submissions to the CLCS becoming obstacles to the settlement of maritime boundaries. This risk is further avoided by the CLCS practice of not considering submissions relating to areas that are in dispute.[120]

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[117] *See* the statement by the Kenyan delegate to UNCLOS III at UNCLOS III, OR, vol. II, p. 161, paragraph 17. Cf., S N Nandan and S Rosenne, *United Nations Convention on the Law of the Sea 1982. A Commentary*, vol. II, p. 847.

[118] UNCLOS Annex II, Art. 9. It is unclear how Colombia thinks [Preliminary Objections paragraph 7.16, 7.17] that the extent or limits of each States entitlement could be determined by the CLCS.

[119] Rules of Procedure of the CLCS, Annex I, para. 2(b).

[120] Paragraph 5 (a) of Annex I to the Rules of Procedure of the Commission on the Limits of the Continental Shelf provides that the Commission will not "consider and qualify" submissions

5.21 The Court considered that at the time of its 2012 Judgment Nicaragua had not submitted all of the information sought by the CLCS. The Court determined that, for this reason, it was not in a position to delimit the continental shelf boundary between Nicaragua and Colombia.[121] Nicaragua has now submitted all of the necessary information to the CLCS. Nicaragua has taken all possible steps to remove the obstacles that the Court considered to stand in the way of it reaching a decision on delimitation. Nicaragua respectfully submits that it is now entitled to secure its inherent an pre-existing rights under international law to the continental shelf and to have its boundary with Colombia in the shelf determined by the Court.

5.22 Moreover, while Colombia may not concede the legal consequences of the facts, it has not at any stage challenged the factual and geomorphological evidence of the continuity of the seabed as the natural prolongation of Nicaragua's territory. It is completely obvious from maps and data relating to the seabed in the area, and is a fact that is not questioned, that the seabed extends from the Nicaraguan coast in this way. There is no significant uncertainty on this matter. In the Bangladesh / Myanmar *Maritime Delimitation* case, the ITLOS said that it "would have been hesitant to proceed with the delimitation of the area beyond 200 nautical miles had it concluded that there was significant uncertainty as to the existence of a continental margin in the area in question"[122] There was not; and the ITLOS did proceed with the delimitation, holding that "[i]n view of uncontested scientific evidence regarding the unique nature of the Bay of Bengal and information submitted during the proceedings, the Tribunal is satisfied that there is a continuous and substantial layer of sedimentary rocks extending from Myanmar's

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where a land or maritime dispute exists unless all States that are parties to the dispute have given their prior consent.

[121] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012*, para. 129.

[122] ITLOS Judgment of 14 March 2012, para. 443.

coast to the area beyond 200 nm."[123] There is similarly no significant uncertainty in the present case. Moreover, at the merits stage of the present case, Nicaragua would be free to supply even further expert and scientific evidence that its continental shelf extends well beyond 200 nautical miles, and if the Court had any doubt, it could appoint its own technical expert(s) to verify the geomorphology of the Western Caribbean seabed.

5.23 Colombia's argument does not address these points. Rather, in paragraphs 7.4 – 7. 11 of its Preliminary Objections, Colombia proposes a novel legal doctrine: that the continental shelf rights of a State in Nicaragua's position are an "inherent but inchoate right" that can be transformed into an "entitlement" to a continental shelf, or (Colombia's submission is ambiguous) into an "entitlement whose external limit is 'final and binding' under Article 76(8) and opposable *erga omnes.*".[124]

5.24 Colombia offers neither authority nor reasoning in support of the suggestion that such "inchoate rights", falling short of an "entitlement", exist anywhere in international law. Colombia makes no attempt to justify, by reference to the *travaux préparatoires* or otherwise, the implication that such rights are enshrined in UNCLOS Article 76 and/or that the continental shelf rights of a State under customary international law (whether or not a party to UNCLOS) are restricted to these alleged "inchoate rights". Indeed, Colombia does not even try to explain what the concept means. If a State has (on Colombia's argument) 'inchoate rights' over an area of seabed, what does that mean? Can it object to another State engaging in activities in the area that would violate the first State's rights if the 'inchoate rights' were perfected? Can it take any steps to deter or prevent such activities, and if so, what steps?

[123] ITLOS Judgment of 14 March 2012, para. 446.
[124] PO, para. 7.11.

5.25 Whatever the merits of this novel theory of 'inchoate rights', it is notable that the Arbitral Tribunal in the *Barbados / Trinidad & Tobago* arbitration found no obstacle to its jurisdiction over the maritime boundary in relation to that part of the continental shelf extending beyond 200 M,[125] even though the effect of the CLCS role had been expressly raised.[126] Nor is there any legal basis for the suggestion that the role of a CLCS recommendation regarding the outer limits of the continental shelf (not being boundaries between opposite or adjacent States) could have this effect. It is also notable that the Tribunal in the *Bangladesh/India* case, decided after this Court's Judgment of 19 November 2012, adhered to the view that "the delimitation of the continental shelf beyond 200 nm through judicial settlement was in conformity with article 76 [of UNCLOS]".[127]

5.26 A recommendation is by definition[128] a suggestion or proposal, an indication of a course of action that is regarded as desirable or advisable. It is not a binding decision with which the addressee is obliged to comply.[129] UNCLOS contains several provisions that require States to act on the basis of, or take into account, recommendations of international bodies The provisions include those relating to sealanes and traffic separation schemes,[130] conservation measures in the Exclusive Economic Zone (EEZ),[131] and measures to prevent pollution.[132]

5.27 In exceptional cases, such 'recommendations' have a certain prescriptive character, despite their name; and where this is the case, UNCLOS says so. For example, safety zones around offshore installations may not exceed 500 metres

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[125] Award of 2006, paragraph 217.
[126] Award of 2006, paragraph 87.
[127] *Bay of Bengal Maritime Boundary Arbitration (Bangladesh / India)*, Award, 7 July 2014, paragraph 458, http://www.pcacases.com/web/sendAttach/383.
[128] *See*, e.g., the Oxford English Dictionary, http://www.oed.com/view/Entry/159718?redirectedFrom=recommendation&.
[129] *See*, e.g., UNCLOS Article 21(2). Cf., O Jensen, *The Commission on the Limits of the Continental Shelf* , (2014), ch. 3.
[130] Article 33.
[131] Article 61(3).
[132] Article 207(1), (4),(5); Article 212.

unless "authorized by generally accepted international standards or as recommended by the competent international organization." [133] In such exceptional cases the 'recommendation' does have a legally binding character, and must be respected and applied by the State party to UNCLOS no matter how carefully it has taken the recommendation into account and how powerful its reasons might be for diverging from it.

5.28 In the case of CLCS recommendations, they have this prescriptive character: but they have it only in the limited context of the establishment of delineation lines that are both (i) the outer limits of the continental shelf, separating it from the international seabed area, and are also (ii) 'final and binding' lines. There is no indication that they have that character in relation to basic continental shelf entitlements, or even to the establishment of provisional (non-final) outer limits pending the making of a recommendation – let alone that CLCS recommendations have any bearing whatever in relation to inter-State maritime boundaries. Indeed, it is explicitly stipulated that CLCS recommendations do not affect questions of continental shelf delimitation between adjacent or opposite States. It is, Nicaragua submits, self-evidently incorrect as a matter of international law to suggest that a coastal State has no rights over its continental shelf until such time as 'final and binding' outer limits are established by adoption of CLCS recommendations.

B. *The practical impasse*

5.29 The practical impasse was pointed out in the Bangladesh / Myanmar Maritime Boundary dispute, where Myanmar raised before the International Tribunal for the Law of the Sea (ITLOS) the argument that the CLCS must issue its recommendations before the ITLOS could delimit the boundary.[134] But in the

[133] Article 60(5). Cf., Article 208(3).
[134] Counter-Memorial of Myanmar, para. 1.17.

absence of the consent of all States concerned, the CLCS does not make recommendations in situations where there are disputed claims to the outer continental shelf.[135] If the argument is accepted the result is an impasse: the ITLOS would have to wait for the CLCS to act and the CLCS would have to wait for the Tribunal to act.

5.30 The ITLOS rejected this absurdity. Its analysis, which referred to international jurisprudence antedating its 2012 judgment, is worth quoting at some length, It said:

> "370. The Tribunal wishes to point out that the absence of established outer limits of a maritime zone does not preclude delimitation of that zone. Lack of agreement on baselines has not been considered an impediment to the delimitation of the territorial sea or the exclusive economic zone notwithstanding the fact that disputes regarding baselines affect the precise seaward limits of these maritime areas. ...
>
> [.....]
>
> 373. The [United Nations Law of the Sea] Convention sets up an institutional framework with a number of bodies to implement its provisions, including the Commission, the International Seabed Authority and this Tribunal. Activities of these bodies are complementary to each other so as to ensure coherent and efficient implementation of the Convention. The same is true of other bodies referred to in the Convention.
>
> 374. The right of the coastal State under article 76, paragraph 8, of the Convention to establish final and binding limits of its continental shelf is a key element in the structure set out in that article. In order to realize this right, the coastal State, pursuant to article 76, paragraph 8, is required to submit information on the limits of its continental shelf beyond 200 nm to the Commission,

[135] *See* Annex I, paragraph 5 (a) to the Rules of Procedure of the Commission on the Limits of the Continental Shelf.

whose mandate is to make recommendations to the coastal State on matters related to the establishment of the outer limits of its continental shelf. The Convention stipulates in article 76, paragraph 8, that the "limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding".

375. Thus, the Commission plays an important role under the Convention and has a special expertise which is reflected in its composition. Article 2 of Annex II to the Convention provides that the Commission shall be composed of experts in the field of geology, geophysics or hydrography. Article 3 of Annex II to the Convention stipulates that the functions of the Commission are, *inter alia*, to consider the data and other material submitted by coastal States concerning the outer limits of the continental shelf in areas where those limits extend beyond 200 nm and to make recommendations in accordance with article 76 of the Convention.

376. There is a clear distinction between the delimitation of the continental shelf under article 83 and the delineation of its outer limits under article 76. Under the latter article, the Commission is assigned the function of making recommendations to coastal States on matters relating to the establishment of the outer limits of the continental shelf, but it does so without prejudice to delimitation of maritime boundaries. The function of settling disputes with respect to delimitation of maritime boundaries is entrusted to dispute settlement procedures under article 83 and Part XV of the Convention, which include international courts and tribunals.

377. There is nothing in the Convention or in the Rules of Procedure of the Commission or in its practice to indicate that delimitation of the continental shelf constitutes an impediment to the performance by the Commission of its functions.

378. Article 76, paragraph 10, of the Convention states that "[t]he provisions of this article are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts". This is

further confirmed by article 9 of Annex II, to the Convention, which states that the "actions of the Commission shall not prejudice matters relating to delimitation of boundaries between States with opposite or adjacent coasts".

379. Just as the functions of the Commission are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts, so the exercise by international courts and tribunals of their jurisdiction regarding the delimitation of maritime boundaries, including that of the continental shelf, is without prejudice to the exercise by the Commission of its functions on matters related to the delineation of the outer limits of the continental shelf.

[.....]

391. A decision by the Tribunal not to exercise its jurisdiction over the dispute relating to the continental shelf beyond 200 nm would not only fail to resolve a long-standing dispute, but also would not be conducive to the efficient operation of the Convention.

392. In the view of the Tribunal, it would be contrary to the object and purpose of the Convention not to resolve the existing impasse. Inaction in the present case, by the Commission and the Tribunal, two organs created by the Convention to ensure the effective implementation of its provisions, would leave the Parties in a position where they may be unable to benefit fully from their rights over the continental shelf.

393. The Tribunal observes that the exercise of its jurisdiction in the present case cannot be seen as an encroachment on the functions of the Commission, inasmuch as the settlement, through negotiations, of disputes between States regarding delimitation of the continental shelf beyond 200 nm is not seen as precluding examination by the Commission of the submissions made to it or hindering it from issuing appropriate recommendations.

> 394. For the foregoing reasons, the Tribunal concludes that, in order to fulfil its responsibilities under Part XV, Section 2, of the Convention in the present case, it has an obligation to adjudicate the dispute and to delimit the continental shelf between the Parties beyond 200 nm. Such delimitation is without prejudice to the establishment of the outer limits of the continental shelf in accordance with article 76, paragraph 8, of the Convention."

5.31 Nicaragua agrees with this approach. It is especially applicable in the present circumstances. Because the continental shelf beyond 200 nautical miles from Nicaragua is disputed, the CLCS, under its own rules of procedure and consistent practice, will not determine the location of the shelf's outer limits or issue recommendations to Nicaragua. Thus, the Court is in the same position as the ITLOS when it confronted this matter in *Bangladesh/Myanmar*. It faces a CLCS that is precluded from acting on Nicaragua's submission, notwithstanding that the submission is now complete. If the Court were to decline to act unless the CLCS goes first, there would be no action of any kind. Neither the boundary dispute between Nicaragua and Colombia, nor the outer limits of Nicaragua's continental shelf would ever be established. The dispute would be rendered permanent, and the stability of legal relations would never be achieved. This would be a clear abdication of the Court's duty to resolve legal disputes where its jurisdiction is established. Yet this is precisely what Colombia is advocating by its challenge to the admissibility of Nicaragua's Application. Nicaragua does not, however, understand the Court to have intended to subordinate the exercise of its jurisdiction to the processes of the CLCS.

C. *Not an exclusively preliminary character*

5.32 In addition to the defects in Colombia's arguments on admissibility, addressed above, they have been made at the wrong time and in the wrong place. They do not have an 'exclusively preliminary character', in the words of Article 79.9 of the Rules of Court, and therefore should not have been raised as Preliminary Objections, but presented (if at all) in Colombia's Counter Memorial.

5.33 Colombia cannot, merely by framing submissions that Nicaragua's continental shelf rights are 'inchoate', block any further discussion of these points before the Court. To accept them as Preliminary Objections would be to permit a highly controversial proposition by a Respondent State to function *in limine* as a bar to all further argument on that very proposition.

5.34 The principle is well established in the jurisprudence of the Court.[136] For example, in the *German Interests in Polish Upper Silesia* case, the Court said:

> "[T]he Court cannot in its decision on this objection in any way prejudge its future decision on the merits. On the other hand, however, the Court cannot on this ground alone declare itself incompetent; for, were it to do so, it would become possible for a Party to make an objection to the jurisdiction – which could not be dealt with without recourse to arguments taken from the merits – have the

[136] *See*, e.g., *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 392, at paragraph 76; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986*, p. 14, at paragraphs 37-44, 54; *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803, at paragraphs 53-54; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 115 at paragraphs 46-50; *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 275, at paragraphs 107-109, 112-117; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 412 at paragraphs 120-130.

effect of precluding further proceedings simply by raising it in *limine litis*; this would be quite inadmissible."[137]

5.35 Similarly, in the *Barcelona Traction* case the Court, after reviewing its jurisprudence and successive versions of its Rules relating to preliminary objections, said:

> "... It must not be overlooked ... that respondents are given broad powers by this provision [sc., Article 65 of the Rules of Court as they then stood], since merely by labelling and filing a plea as a preliminary objection they automatically bring about the suspension of the proceedings on the merits (paragraph 3 of Article 62). This assures the respondent State that the Court will give consideration to its objection before requiring it to respond on the merits; the Court takes no further step until after hearing the parties (paragraph 5 of Article 62-see the discussion on this point by the Permanent Court in 1936, P.C.I. J., *Series D, Third Addendum to No. 2*, pp. 646-649). The attitude of the respondent State is however only one of the elements that the Court may take into consideration; and paragraph 5 of the Article simply provides that, after the hearing, "the Court shall give its decision on the objection or shall join the objection to the merits".
>
> In reaching its conclusion, the Court may decide that the objection does not in fact have a preliminary character, and that therefore, without prejudice to the right of the respondent State to raise the same question at another stage of the proceedings, if such there be, the objection cannot be entertained as a "preliminary objection". Again, the Court may find that the objection is properly a

[137] PCIJ, Ser. A, No. 6, at p. 15. It seems that the words "which would" should be understood to lie before the words "have the effect of precluding" in the second sentence quoted. The French text reads as follows: « Mais, d'un autre côté, la Cour ne saurait décliner sa compétence par ce seul fait, car ainsi elle ouvrirait la porte à la possibilité pour une Partie de donner à une exception d'incompétence, ne pouvant être jugée sans avoir recours à des éléments puisés dans le fond, un caractère péremptoire, simplement en la présentant in limine litis, ce qui est inadmissible. »

> preliminary one as, for example, to the jurisdiction of the Court, and it may dispose of it forthwith, either upholding it or rejecting it. In other situations ... the Court may find that the objection is so related to the merits, or to questions of fact or law touching the merits, that it cannot be considered separately without going into the merits (which the Court cannot do while proceedings on the merits stand suspended under Article 62), or without prejudging the merits before these have been fully argued. In these latter situations, the Court will join the preliminary objection to the merits."[138]

5.36 Nicaragua submits that in the present case, if Colombia's Preliminary Objections are not rejected outright, they should be joined to the merits in accordance with the established principles laid down by the Court to govern its procedure and now secured in Article 79 of the Rules of Court.

II. Nicaragua's second request

5.37 Colombia's second objection to admissibility concerns Nicaragua's Second Request, which is that the Court adjudge and declare the rules and principles of international law that are applicable pending delimitation. Colombia says that,

> "7.27 The Second Request of Nicaragua is inadmissible as an automatic consequence of the Court's lack of jurisdiction over, or of the inadmissibility of, its First Request. If, as submitted by Colombia, the Court has no jurisdiction to decide on the request for the delimitation of seabed areas beyond 200 nautical miles from the Nicaraguan coast, or if the request to that effect is inadmissible, there cannot be jurisdiction, or the request cannot be admissible, to decide whatever issue pending a decision on such delimitation."

[138] *Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, Judgment, I.C.J. Reports 1964*, p. 6 at pp. 43-44.

5.38 This analysis is incorrect. It is common ground that there is no delimitation of the continental shelf beyond 200 nautical miles between Nicaragua and Colombia in existence at present. If the Court does not have jurisdiction to effect such a delimitation, that situation will persist. If the Court does have jurisdiction to indicate the continental shelf boundary, and the exact geographical coordinates of a specific part of the boundary might be affected by a subsequent recommendation of the CLCS or by action in response to such a recommendation, that situation may similarly persist. In either event, there will be a period pending the establishment of definitive outer limits for the continental shelf. Colombia is wrong to say that there is no time-frame within which to apply the rules and principles of international law identified by the Court in its decision on the Second Request pending the decision on the First Request.[139]

5.39 The question is whether during that period, the situation in relation to any areas that are in dispute remains unregulated by international law, so that each State can act as it chooses. Nicaragua submits that the answer is that the situation is not unregulated by international law; and it asks the Court to declare what the applicable principles of law are.

5.40 More particularly, Nicaragua will argue in its Memorial that the applicable principles are not restricted to the basic principles regarding the settlement of disputes and the non-use of force, as set out in the UN Charter. It will argue that that there are more precise duties of restraint and cooperation incumbent upon both States. Again, argument as to the content of these duties is a matter for the merits stage, and not for Preliminary Objections.

5.41 Colombia also objects that Nicaragua's Second Request is a disguised request for provisional measures. It is not. There is a present dispute between the

[139] PO, para. 7.30.

Parties. There is, to use the often-quoted definition of this Court in the *Mavrommatis* case, a "disagreement on a point of law or fact, a conflict of legal views or of interests between two persons."[140] The dispute concerns the existence and scope of the legal entitlement of Nicaragua to a continental shelf beyond 200 nautical miles from its baselines. Nicaragua maintains that it has such rights, subject to delimitation with neighbouring States: Colombia denies that Nicaragua has any such rights. But the dispute undoubtedly exists. Indeed, the Second Request is not directed exclusively at Colombia's conduct at all. It is a request for guidance from the Court as to what each of the Parties to this case may and may not do pending the delimitation of the maritime boundary between them beyond 200 nautical miles from Nicaragua's coast; and that may include actions taken in relation to third States, such as the licensing of exploration or exploitation activities. Nicaragua seeks that guidance precisely in order to avoid a situation in which one or other Party to the present case might overstep its rights under international law.

5.42 Colombia objects further that there is "no evidence of an opposition of views between Nicaragua and Colombia concerning a hypothetical legal regime to be applied pending the decision on the maritime boundary beyond 200 nautical miles of Nicaragua's coast."[141] Colombia also states, however, that "in its view there are no overlapping claims beyond 200 nautical miles from the baselines of Nicaragua."[142] It is the denial by Colombia that Nicaragua has *any* legal rights – or even, perhaps, any claims – more than 200 nautical miles from its coast that is the matter on which the views of the two States are opposed, and which is the basis of the dispute. The Second Request of Nicaragua is thus an issue that is subsumed within the dispute that is the subject-matter of this case.

[140] PCIJ Ser. A, No. 2, p. 11.
[141] PO, para. 7.33.
[142] PO, para. 7.26.

5.43 For these reasons Nicaragua submits that Colombia's Preliminary Objections are misconceived. Colombia attempts to inflate the role of the CLCS beyond its expert technical function and to give it a priority over the Court in the process of the determination of legal rights and duties. As is clear from the text of the UNCLOS, however, the Court and the CLCS are addressing very different aspects of the seabed, for different purposes and under different sources of authority; and neither body would impede the work of the other by discharging its responsibilities within the field allotted to it. Moreover, if there should be any question of what the limits of each of those fields is, that is a question which Nicaragua submits must be addressed during a proper hearing of this case, and not dealt with as a Preliminary Objection.

SUBMISSIONS

For the above reasons, the Republic of Nicaragua requests the Court to adjudge and declare that the Preliminary Objections submitted by the Republic of Colombia, both in respect of the jurisdiction of the Court and of the admissibility of the case, are invalid.

CARLOS ARGÜELLO GÓMEZ
Agent of the Republic of Nicaragua

The Hague, 19 January 2015