INTERNATIONAL COURT OF JUSTICE

ALLEGED VIOLATIONS OF SOVEREIGN RIGHTS AND MARITIME SPACES IN THE CARIBBEAN SEA

(NICARAGUA V. COLOMBIA)

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

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LIST OF ACRONYMS

ACHR	American Convention on Human Rights
CERD	Convention on the Elimination of all Forms of Racial Discrimination
ECHR	European Court of Human Rights
ICJ	International Court of Justice
ICZ	Integral Contiguous Zone
NM	Nicaragua's Memorial
OAS	Organization of American States
PLO	Palestine Liberation Organization
PO	Preliminary Objections of Colombia
UN	United Nations
WSN	Written Statement of Nicaragua

CHAPTER 1. INTRODUCTION

1.1 The Republic of Nicaragua filed an Application on 26 November 2013 concerning the violations of Nicaragua's sovereign rights and maritime zones declared by the Court's Judgment of 19 November 2012 and the threat of the use of force by Colombia in order to implement these violations. The case was entered as the *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia).* By Order of 3 February 2014 the Court fixed 3 October 2014 and 3 June 2015 as the time limits, respectively, for the Memorial and Counter Memorial of Nicaragua and Colombia. The Republic of Nicaragua filed its Memorial within the time limit accorded by the Court. Colombia filed preliminary objections on 19 December 2014. The Order of the Court of 19 December 2014 fixed 20 April for the filing of Nicaragua's Written Statement regarding Colombia's preliminary objections. This Written Statement is thus filed pursuant to the said Order and within the time limit fixed by the Court.

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

> "a. its obligation not to violate Nicaragua's maritime zones as delimited in paragraph 251 of the Court Judgment of 19 November 2012 as well as Nicaragua's sovereign rights and jurisdiction in these zones;
> b. its obligation not to use or threaten to use force under Article 2(4) of the UN Charter and international customary law;
> c. and that, consequently, Colombia has the obligation to wipe out the legal and material consequences of its internationally wrongful acts, and make full reparation for the harm caused by those acts.
> 2. Nicaragua also requests the Court to adjudge and declare that Colombia must:
> a. Cease all its continuing internationally wrongful acts that affect or are likely to affect the rights of Nicaragua.
> b. In as much as possible, restore the situation to the *status quo ante*, in
> (i) revoking laws and regulations enacted by Colombia, which are incompatible with the Court's Judgment of 19 November 2012 including the provisions in the Decrees 1946 of 9 September 2013 and 1119 of 17 June 2014 to maritime areas which have been recognized as being under the jurisdiction or sovereign rights of Nicaragua;

(ii) revoking permits granted to fishing vessels operating in Nicaraguan waters; and
(iii) ensuring that the decision of the Constitutional Court of Colombia of 2 May 2014 or of any other National Authority will not bar compliance with the 19 November 2012 Judgment of the Court.
c. Compensate for all damages caused insofar as they are not made good by restitution, including loss of profits resulting from the loss of investment caused by the threatening statements of Colombia's highest authorities, including the threat or use of force by the Colombian Navy against Nicaraguan fishing boats [or ships exploring and exploiting the soil and subsoil of Nicaragua's continental shelf] and third state fishing boats licensed by Nicaragua as well as from the exploitation of Nicaraguan waters by fishing vessels unlawfully "authorized" by Colombia, with the amount of the compensation to be determined in a subsequent phase of the case.
d. Give appropriate guarantees of non-repetition of its internationally wrongful acts."

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 Bogotá, 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.

1.5 In the alternative, Colombia argues that there existed no objective dispute at the time the Application was filed by Nicaragua on 26 November 2013. Similarly, Colombia considers that even if there was a dispute Nicaragua did not comply with the precondition laid out in Article II of the Pact of Bogotá, namely, that the parties had to be of the opinion that the dispute could not be settled by direct negotiations.

1.6 Additionally, Colombia also refutes the Court's inherent jurisdiction to decide this case and alleges that, in any event, the Court does not have jurisdiction in relation to the parties' international obligation to comply with its judgments.

1.7 Colombia also addresses certain points relating to the Merits of this case that Nicaragua considers may only be properly addressed in the merits phase of this case. For this reason Nicaragua at this phase reserves its rights generally on all these issues. Furthermore, the issues relating to the merits of this case are addressed in the Memorial of Nicaragua.[1]

1.8 This Written Statement is divided into the following chapters:

1.9 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 Bogotá 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.

1.10 Chapter 3 deals with Colombia's second preliminary objection asserting that there was no dispute between the two parties at the time of the filing of the Application. This chapter demonstrates the objective existence of a dispute between Nicaragua and Colombia prior to the filing of the Application, as shown by the conduct of Colombia's Authorities and Navy; and explains that there is no requirement in international law to notify a dispute to the other party through a diplomatic note.

1.11 Chapter 4 addresses Colombia's third preliminary objection regarding preconditions set in Article II of the Pact of Bogotá. It will be shown that the requirements of Article II of the Pact of Bogotá are satisfied, as both parties

[1] *See* for example NM, paras. 2-11-2.21 on the Facts and paras. 3.15-3.31, 3.32-3.36, 3.37-3.55 on Colombia's breaches of its obligations under international law.

considered that the dispute could not be settled through bilateral negotiations, therefore permitting immediate access to the judicial mechanisms contemplated in Article XXXI of the Pact.

1.12 Chapter 5 is in response to Colombia's fourth and fifth objection to the inherent jurisdiction of the Court, including an inherent jurisdiction over obligations arising from its judgments. It will be shown that the Court's inherent jurisdiction is consistent with the consensual basis of jurisdiction and that the Court's jurisdiction is compatible with the competence of the Security Council.

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

CHAPTER 2. THE PACT OF BOGOTÁ

2.1 Both Nicaragua and Colombia signed the 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 that the denunciation was "in force as of today with regard to procedures that are initiated after the present notice"[2].

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."

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.

[2] PO of Colombia, p.19, para. 2.19.

> The denunciation shall have no effect with respect to pending procedures initiated prior to the transmission of the particular notification"[3].

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). Colombia considers that in accordance with 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].

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 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".

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[3] *See* the text of the Pact of Bogotá in its four authentic languages (Spanish, English, French and Portuguese) in Annex 33 of Colombia's PO.
[4] PO of Colombia, p. 19, para. 2.19; pp.41-42, para. 3.1, 3.3; p. 83, para. 3.73.
[5] PO of Colombia, p.49, para. 3.14.

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 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 26 November 2013, when the Nicaragua's Application was filed. It is a principle well

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

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, 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 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

[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.

[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).

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, 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 26 November 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 Vienna Convention on the Law of Treaties.[9]

2.18 On the other hand, the second paragraph of Article LVI cannot apply to expressions of consent under Article XXXI because the acceptances 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,

[9] NM, p. 9, para. 1.18

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.[10]

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[11], a "powerful argument" according to it[12], 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[13].

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'[14]. 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 followed, that paragraph 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 rule established in the first paragraph.

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[10] NM, p. 9, para. 1.19
[11] *See* PO of Colombia, p. 52, para. 3.20; p. 80-81, para. 3.69. Actually, Colombia proposes the Court to endorse the principle *inclusio unius, exclusio alterius,* although it takes care not to mention it *expressis verbis.*
[12] *See* PO of Colombia, p. 81, para. 3.69
[13] NM, p. 10, para. 1.20
[14] PO of Colombia, p.50, para. 3.15-3.16; pp.75-78, para.3.60-3.61

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.[15]

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 important issues, namely, the settlement procedures, which are the Pact's *raison d'être,* covering 41 of its 60 Articles[16].

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.

[15] PO of Colombia, pp. 48-53, para. 3.13-3.22; pp. 76-78, para. 3-62-3.63
[16] Articles IX to XLIX of the Pact.

2.24 An interpretation such as 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 International Court of Justice and the specified settlement procedures.

2.25 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 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)[17].

2.26 In short, in contradiction of 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[18]. Any

[17] 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.
[18] *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.

interpretation that would render part of a disposition superfluous or diminish its practical effects is to be avoided[19].

2.27 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.

2.28 Colombia calls attention to the fact that no State -including Nicaragua- advanced any objection neither at the time nor subsequently within the framework of the OAS, to the terms or mode of Colombia's behaviour[20]. 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 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.

2.29 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*[21]*;* and 2) the denunciation clauses adopted

[19] *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.

[20] PO of Colombia, p.21, para. 2.21; p. 59, para. 3.32.

[21] 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

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[22].

2.30 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 them include clauses of termination with immediate effects.[23] Colombia's reliance is inappropriate, considering the terms of these declarations, which, unlike the Pact of Bogotá, 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.

2.31 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

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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.

[22] 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.55, para. 3.24). Nevertheless the treaties Colombia mentions as examples (pp. 55-58, 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.

[23] PO of Colombia, pp. 53-55, para. 3.23.

> compulsory jurisdiction made in accordance with Article 36, paragraph 2, it should be observed that that declaration was incorporated in the Pact of Bogotá 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 relate*s ratione personae* to the American States parties to the Pact; it remains valid *ratione temporis* for as long as that instrument itself remains in force between those States"[24].

2.32 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.

2.33 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.

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

> 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 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"[25].

2.34 In sum, Nicaragua reaffirms its position on the jurisdiction of the Court on the present case according to Articles XXXI and LVI of the Pact of Bogotá expressed in its Memorial[26], and it does not find in Colombia's responses to the points made by Nicaragua[27] any elements conducive to its revision. On the contrary, Colombia has misunderstood some of the points put forward by Nicaragua and has misinterpreted the meaning of Articles XXXI and LVI of the Pact.

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

2.35 According to Colombia the *travaux préparatoires* of the Pact of Bogotá confirm its interpretation of Article LVI[28]. 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)[29]. Colombia relates how the draft advanced from one version to another, with

[25] 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.
[26] NM, pp. 7-12, para. 1.12-1.23.
[27] PO of Colombia, pp. 74-83, para. 3.58-3.72.
[28] PO of Colombia, pp. 60-72, para. 3.33-3.53; p. 78, para. 3.64
[29] PO of Colombia, pp. 63-66, 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".

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[30]. There Article XXVI, paragraph 3, of the project[31] became Article LVI of the Pact, with a text slightly modified by the Drafting Committee[32].

2.36 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 or 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.

2.37 No mention of this provision can be discovered in the reports of the Committee, or 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[33].

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[30] PO of Colombia, pp. 66-69, para. 3.46-3.49.

[31] 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".

[32] PO of Colombia, pp. 69-71, 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".

[33] 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

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

2.39 The Pact of Bogotá was the successor of the 1929 Treaty[34]. 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 Bogotá, plainly specifies that the Treaty remains in full force for one year after denunciation. In the case of the Pact of Bogotá, 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.

2.40 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 26 November 2013, thus vests the Court with jurisdiction.

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lapsus linguae mentioning Article 16, instead of Article 9, which is the last one of the 1929 Treaty.

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

CHAPTER 3. THE EXISTENCE OF A DISPUTE

3.1 In Chapter 4 of its statement of Preliminary Objections Colombia asserts that the Court lacks jurisdiction because:

> "…there was no dispute between the two Parties since, prior to filing its Application, Nicaragua failed to make any claims relating to the violation of its "sovereign rights and maritime zones" or to "the use of or threat to use force" by Colombia, or to Colombia's Decree 1946 of 2013 that could give rise to a dispute, or any objection to Colombia's conduct relating to the relevant maritime areas."[35]

3.2 Colombia describes this as a "lack of jurisdiction due to the absence of a dispute between the two States with regard to the claims referred to in Nicaragua's Application."[36] Colombia states that "it is particularly noteworthy that Nicaragua's only diplomatic Note in which it complained of Colombia's conduct was sent to Colombia on 13 September 2014, well after the Application was filed."[37] Two elements of this objection to jurisdiction, which is based upon Article II of the Pact of Bogotá, should be distinguished: the first, that no 'dispute' genuinely or objectively exists –or, as Article II puts it, no 'controversy' genuinely or objectively exists; and the second, that even if a dispute did exist in an objective sense, it was not notified to Colombia in the manner required by international law. Both of those propositions are distinct from the question whether the dispute is one that can, in the terms of Article II of the Pact of Bogotá, be settled by negotiation: that separate question is addressed in Chapter 4 of this Written Statement.

[35] PO of Colombia, para. 4.1
[36] PO of Colombia, para. 4.4.
[37] PO of Colombia, para. 4.4, and cf., para. 4.13.

I. Objectively there is a dispute

3.3 As to the first element (the objective existence of a dispute), the Parties are agreed that the question of the existence of a dispute is one for objective determination,[38] and that the dispute must be in existence at the time that the Application is filed, [39] subject to the important proviso that:

> "It may however be necessary, in order to determine with certainty what the situation was at the date of filing of the Application, to examine the events, and in particular the relations between the Parties, over a period prior to that date, and indeed during the subsequent period."[40]

3.4 Further, the Parties appear not to disagree on the approach to the definition of a dispute. Colombia states, for example, that "[i]t must be shown that the claim of one party is positively opposed by the other."[41] Nor does Colombia challenge the much-quoted definition of a dispute taken from the Mavrommatis case: "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons."[42]

3.5 Colombia's case is that there is in fact no dispute concerning "Colombia's purported violations of 'Nicaragua's sovereign rights and maritime zones' (as determined by the 2012 Judgment) as well as 'the threat of the use of force … in order to implement these violations'."[43] In other words, Colombia

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[38] PO of Colombia, para. 4.10.
[39] PO of Colombia, para. 4.8.
[40] *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 69, at para. 66; quoted at CWS, para. 4.7.
[41] PO of Colombia, para. 4.11.
[42] *See 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,* p. 70, paras 30, quoting *Mavrommatis Palestine Concessions*, *Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 6 at p. 11. Cf., *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988*, p. 12, paras. 37– 44; *Certain Property (Liechtenstein* v. *Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005,* p. 6, para. 24, citing other references to the *Mavrommatis* definition.
[43] PO of Colombia, para. 4.13.

argues that there is no disagreement on a point of law or fact, or conflict of legal views or of interests, between Colombia and Nicaragua. That proposition is patently incorrect. It is perfectly obvious that Colombia and Nicaragua are in disagreement on various points of law, and have a conflict of legal views and interests.

3.6 Colombia's Preliminary Objection seeks to convey the impression that Colombia is conducting itself in accordance with its obligations under international law. Yet, prior to the filing of the Application, Colombia declared repeatedly that the ICJ Judgement of 2012 is "not applicable".[44] Indeed, Colombia did not only fail to adjust its existing measures and practices so as to come into conformity with its obligations under the judgment: it introduced new measures that are plainly – even provocatively – inconsistent with the State's obligations under the judgment. It is precisely in relation to such new measures in breach of Colombia's obligations under the 2012 Judgment that the Application was made.

3.7 In the period between the date when the Judgment was read by the Court on 19 November 2012, and the date when the Application was filed by Nicaragua on 26 November 2013, Colombia's conduct included the following:

(i) Colombia repudiated the Judgment, asserting that it was 'not applicable';[45]

(ii) On 9 September 2013, Colombia enacted Decree 1946, which asserts rights over maritime zones that the Court had explicitly determined to be Nicaraguan;[46]

(iii) Colombia took steps using military vessels, aircraft and threats by military authorities in order to intimidate Nicaraguan fishing

[44] Application, paras. 4 – 14;
[45] NM, paras. 2.17.
[46] NM, paras 2.11 – 2.16, 3.15 – 3.29.

vessels from maritime zones that the Court had explicitly determined to be Nicaraguan; [47]

(iv) Colombia initiated a program of military and surveillance operations in maritime zones that the Court had explicitly determined to be Nicaraguan; [48]

(v) Colombia purported to issue licences authorising fishing in maritime zones that the Court had explicitly determined to be Nicaraguan.[49]

3.8 All of these actions were taken prior to the filing of the Application and are the subject-matter of the Application. Yet Colombia maintains that "[w]hen Colombia's actions, including the conduct of its officials and the statements of its President, are taken as a whole, it is apparent that they neither constitute nor imply non-compliance with the Court's 2012 Judgment, as Nicaragua alleges."[50] Nicaragua disagrees, for reasons set out both in its Application and in its Memorial. There is a disagreement on this point of law. Objectively, it is beyond the slightest doubt that the two States are in disagreement on various points of law, and have a conflict of legal views and interests. The dispute between the Parties is genuine, and it objectively exists.

II. Colombia was well aware of the dispute

3.9 The second element in Colombia's objection that the Court lacks jurisdiction because there is no dispute between Colombia and Nicaragua is the argument or suggestion that no dispute exists because Nicaragua did not formally notify Colombia by diplomatic Note sent prior to the filing of the

[47] NM, paras. 2.8-2.10 2.25-2.31 for a detailed and chronological account of incidents *see* Letter from the Nicaraguan Naval Force to the Ministry of Foreign Affairs reporting on incidents with the Colombian Navy in Nicaragua's Exclusive Economic Zone (NM, Annex 23A)
[48] NM, paras 1.7 – 1.9, 2.25 – 2.27.
[49] NM, para. 2.51.
[50] PO of Colombia, para. 2.1.

Application of the existence of a dispute. [51] The implication is that as a matter of international law no 'dispute' can exist until it has been in some way 'constituted' by the sending of a formal diplomatic Note.

3.10 An initial point to be emphasized is that both of the Parties had actual knowledge of the existence of the dispute.

3.11 Colombia states as a 'fact' that Nicaragua's Foreign Ministry was unaware of the alleged violations until a late stage.[52] It infers this 'fact' from the Ministry's 13 August 2014 request to the Navy for information of any incident that may have taken place between the Colombian Navy and the Nicaraguan Navy or Nicaraguan fishermen in the waters determined by the Court to belong to Nicaragua.[53] The inference is, unsurprisingly, incorrect. Colombia tries to represent the August 2014 request for a comprehensive and detailed catalogue of incidents, made in the context of the drafting of Nicaragua's Memorial, as an inquiry by the Foreign Ministry as to whether any such incidents had ever occurred, made in order to correct a total lack of awareness in the Ministry of the situation. The suggestion that until August 2014 the Foreign Ministry was unaware of the steps that Colombia was taking to implement its repudiation of the Court's 2012 judgment is incorrect and absurd.

3.12 The fact that there were occasional statements that "communications with the Colombian Navy were good" and that the "situation in the south-western Caribbean was calm, and that no problems existed"[54] does not alter the position. Nicaragua's decision to hold to a conciliatory, non-escalatory position as regards Colombia's reaction against the 2012 Judgment, [55] and the professional conduct of the Nicaraguan Navy, have thankfully avoided any

[51] PO of Colombia, paras 4.4, 4.16 – 4.18 and Chapter 4 *passim*.
[52] PO of Colombia, paras. 4.19 – 4.20.
[53] PO of Colombia, para. 4.19.
[54] PO of Colombia, para. 4.15.
[55] NM, paras. 1.10 – 1.11, 2.42, 2.53 – 2.63.

serious armed clash; but that restraint has in no way reduced the disagreement or made the dispute go away, and it provides no basis whatever for supposing that Nicaragua was unaware of any dispute over Colombia's conduct. The responses of Nicaragua's naval officers make it very clear that they – Nicaraguan State officials – were well aware of the legal significance of the incidents.[56]

3.13 Nicaragua was aware of the violations by Colombia of its obligations under international law. It is equally clear that Colombia was aware of the legal significance of its actions. Nicaragua's position had been spelled out in detail in its written and oral submissions in the proceedings before the Court. Colombia participated in those proceedings and presented its own case to the Court. Colombia received the Judgment from the Court and considered and reacted to that Judgment. Indeed, Colombia identified the aspects of the Judgment – the delimitation – that it 'emphatically rejects';[57] and it explicitly asserted the right of Colombian fishermen to fish wherever they have been fishing, without asking permission of anyone;[58] and decided that "without a treaty, the Judgment is not applicable".[59] The point was made explicit in several of the exchanges between Colombian and Nicaraguan naval vessels.[60] This was not a situation in which Colombia can claim that it was aware only of 'tension' or of a general, non-specific discontent in relation to maritime matters on the part of Nicaragua. Colombia had actual knowledge of the dispute. There is no credible possibility that Colombia was unaware of the legal significance of its actions between the date of the Judgment and the date of the filing of the Application.

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[56] *See*, e.g., NM, para. 2.31, and cf., para. 2.32. *See* also Annex 23B NM containing and Audio Transcript of 8 May 2014 of an incident with the Colombian Navy, in which the Nicaraguan official stated: "I inform you that this conversation is being recorded for remittal to the competent authorities".

[57] NM, Annex 1.

[58] NM, Annex 3.

[59] NM, Annex 4. Cf., NM, Annex 5.

[60] NM, paras 2.29 – 2.43. Those paragraphs detail incidents before and after the date of the filing of the Application. For the Audio Transcripts of the incidents see Annex 23B NM.

3.14 Colombia's attempts to ascribe significance to the sending of a diplomatic Note by Nicaragua after the filing of Nicaragua's Application therefore cannot rest upon any suggestion that Colombia was unaware of the dispute before the Application was filed.[61] The possibility that Colombia was unaware is excluded on the facts of this case. Any significance that the diplomatic Note might have must therefore be a matter of form rather than substance.[62] That is, Colombia cannot argue that the Note was necessary in order to give it actual knowledge of its actions and the dispute arising from their incompatibility with Colombia's legal obligations: it can only argue that actual knowledge is insufficient as a matter of international law to give rise to a 'dispute' between the Parties and that the existence of the dispute must be communicated to the Respondent State by means of a diplomatic Note.

3.15 Again as a matter of fact, one might ask why Colombia considers that the onus was on Nicaragua to send a diplomatic Note in order to 'constitute' the dispute. It was Colombia that was rejecting the Judgment and that considered the Judgment inconsistent with its legal rights. Nicaragua sought no more than the observance of legal obligations that had just been explicitly and specifically declared by the Court.

3.16 But there are also legal reasons why Colombia's position cannot be sustained. First, Colombia cites no authority whatever for the proposition that a dispute cannot exist until it has been notified to the other Party by means of a formal diplomatic Note. Nothing in the United Nations (UN) Charter or the Statute of the Court, or the Pact of Bogotá suggests that there is any such requirement. Nor is there any evidence of such a requirement in customary

[61] Cf., *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,* p. 70, para. 131.

[62] Cf., the Court's comments on form and substance in *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,* p. 70, paras 156 – 161.

international law. Indeed, those sources of international law suggest the very opposite.

3.17 The UN Charter sets out, in Article 2(3), the obligation upon States to settle their international disputes in such a manner that international peace and security are not endangered. Article 33(1) of the Charter states that:

> "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."

3.18 The obligation is repeated in the Manila Declaration on the Peaceful Settlement of International Disputes,[63] which states:

> "I.3. International disputes shall be settled on the basis of the sovereign equality of States and in accordance with the principle of the free choice of means in conformity with obligations under the Charter of the United Nations and with the principles of justice and international law.
> [...]
> I.5. States shall seek in good faith and in a spirit of co-operation an early and equitable settlement of their international disputes by any of the following means: negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional arrangements or agencies or other peaceful means of their own choice, including good offices. In seeking such a settlement, the parties shall agree upon such peaceful means as may be appropriate to the circumstances and the nature of their dispute.
> [...]
> I.7. In the event of a failure of the parties to a dispute to reach an early settlement by any of the above means of settlement, they shall continue to seek a peaceful solution and shall consult forthwith on mutually agreed means to settle the dispute peacefully.
> [...]
> I.10. States should, without prejudice to the right of free choice of means, bear in mind that direct negotiations are a flexible and effective means of peaceful settlement of their disputes. When they choose to resort to direct negotiations, States should negotiate meaningfully, in order to arrive at an early settlement acceptable to the parties. States should be equally prepared to seek the settlement

[63] UNGA Resolution 37/10, 15 November 1982.

> of their disputes by the other means mentioned in the present Declaration."

3.19 Nothing in those instruments suggests that a 'dispute' cannot exist until it has been 'constituted' by a diplomatic Note; and it would be a very significant curtailment of the duty to settle disputes by peaceful means if any such precondition were imported into the texts.

3.20 In the present case Colombia bases its objections in part upon the reference in Article II of the Pact of Bogotá to controversies which, in the opinion of the parties, cannot be settled by direct negotiations through the usual diplomatic channels. That is a matter discussed in the Chapter that follows. The point made here is that neither prior negotiation, nor prior notification by means of a diplomatic Note, is necessary before international law accepts that a dispute exists. The existence of a dispute is an objective matter; and in the present case there can be no doubt that a dispute exists and was in existence at the time that the Application was filed.

CHAPTER 4. THE DISPUTE COULD NOT, IN THE OPINION OF THE PARTIES, BE SETTLED BY DIRECT NEGOTIATIONS

4.1 Colombia's third preliminary objection is that Nicaragua's case is inadmissible because the Parties were *not* of the opinion that the dispute could not be settled by direct negotiations through the usual diplomatic channels, as Article II of the Pact of Bogotá requires. According to Colombia, "both Parties were of the view that matters arising out of the Court's 2012 Judgment could and should be dealt with by a negotiated agreement."[64]

4.2 Colombia makes three assertions in pressing this argument:

(1) Article II requires that negotiations be attempted and exhausted before resort may be had to the Court;[65]

(2) It must be the opinion of both parties, not just one of them, that the dispute cannot be settled through direct negotiations;[66] and

(3) Both Parties "were in favour of negotiating an agreement regulating matters between them arising as a result of the 2012 Judgment."[67]

4.3 The first two of these assertions are mistaken. Colombia relies on the Court's jurisprudence relating to compromissory clauses in other treaties to support its argument that Article II requires negotiations to be attempted and exhausted. Yet, as the Court itself made abundantly clear in its 1988 Judgment on jurisdiction and admissibility in the *Border and Transborder Armed Actions (Nicaragua v. Honduras)* case, Article II of the Pact of Bogotá is unique.[68] Unlike compromissory clauses in other treaties, Article II focuses on "the opinion of the

[64] PO of Colombia, para. 4.29.
[65] PO of Colombia, paras. 4.41-4.47.
[66] PO of Colombia, paras. 4.30-4.40.
[67] PO of Colombia, para. 4.37.
[68] *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 69 at p. 94, para. 63.

parties".[69] The jurisprudence Colombia cites is therefore inapposite. Moreover, common sense refutes Colombia's argument. Requiring disputing parties to negotiate even when they consider such negotiations incapable of success would be to mandate futility. The absurdity of such a result is self-evident.

4.4 As to Colombia's assertion that Article II requires that both parties, not just one of them, be of the opinion that their dispute cannot be settled by direct negotiations, this too is wrong. Colombia conveniently overlooks two critical elements. *First*, the equally authentic French text of the Pact, Article II of which refers to "*l'avis de l'une des parties*" (i.e., "the opinion of one of the parties"). *Second*, material that Colombia itself cites (but conspicuously fails to submit) that proves the French text is the correct one; the difference with the other languages is the result of a typographical error. In any event, the debate is wholly academic in the context of this case. Both Parties were plainly of the opinion that the dispute Nicaragua has submitted to the Court could not be settled by direct negotiations through the usual diplomatic channels.

4.5 Finally, Colombia's third assertion – that both States were "in favour of negotiating an agreement regulating matters between them arising as a result of the 2012 Judgment"[70] – is only partially true, but entirely irrelevant. Although both Parties had made public statements keeping the door open to eventual negotiations in the abstract, Colombia made it emphatically clear that the door was shut tight on the date of Nicaragua's Application.

4.6 Moreover, the subjects of the negotiations the two sides had adverted to were different than the subject-matter of this dispute. This dispute does not concern the regulation of matters "arising as a result of the 2012 Judgment",[71] as Colombia puts it. Rather, it "concerns the violations of Nicaragua's sovereign

[69] *Ibid*.
[70] PO of Colombia, para. 4.37.
[71] *Ibid*.

rights and maritime zones declared by the Court's Judgment of 19 November 2012 and the threat of the use of force by Colombia in order to implement these violations."[72] The record is clear that on the issue this case presents – Colombia's unconditional duty to respect Nicaragua's rights as adjudged by the Court – there was no negotiation to be had.

4.7 In this respect Nicaragua observes that it has kept the door open to talking about the treaty Colombia wants, including on issues like fishing and environmental protection that are entirely outside the Court's 2012 Judgment, in a show of good faith and to keep the situation created by Colombia's non-compliance from escalating, as it very easily could have. That discretion should not be converted into a reason to deny the admissibility of Nicaragua's claim relating to Colombia flagrant, and continuing, violation of Nicaragua's rights.

4.8 Nicaragua will address each of these three points in the sections that follow.

I. Article II of the Pact of Bogotá does not require an attempt at negotiations

4.9 Quoting the Court's 1988 Judgment on jurisdiction and admissibility in the *Border and Transborder Armed Actions* case, Colombia states "Article II of the Pact 'constitutes … a condition precedent to recourse to the pacific procedures of the Pact in all cases'."[73] Nicaragua, of course, agrees with this statement. It does not, however, agree with the ostensible preconditions Colombia says Article II creates.

[72] Application, para. 2.
[73] PO of Colombia, para. 4.22 (quoting *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 69 at p. 94, para. 62) (emphasis deleted).

4.10 According to Colombia, Article II's precondition "is only met if an attempt at negotiating has been made in good faith, and it is clear, after reasonable efforts, that a deadlock has been reached and that there is no likelihood of resolving the dispute by such means."[74] Colombia arrives at this result relying on the Court's jurisprudence relating to compromissory clauses in treaties that provide for recourse to the Court only in the case of a dispute that "is not" or "cannot be" settled by negotiation.[75] Since, Colombia says, prior negotiations are required in cases involving those treaties, so too they must be deemed required by Article II of the Pact of Bogotá.[76]

4.11 Colombia is mistaken; its argument proceeds from a false premise. Article II of the Pact cannot be analogized to those other compromissory clauses. The Court itself made this clear in its 1988 Judgment in which it underscored Article II's uniqueness in focusing on the opinion of the parties.

4.12 In the *Armed Actions* case, Nicaragua made, and the Court rejected, an argument very much like the one Colombia now puts forward. In particular, Nicaragua argued that the issue to which Article II is addressed "is not whether one of the parties or both of them must think that the dispute cannot be settled by diplomatic means, but whether the dispute can in fact be settled by such means."[77] Just as Colombia does here, Nicaragua made this argument by analogy to the existing "jurisprudence of the Court".[78] The Court had no difficulty rejecting Nicaragua's argument, stating:

> "The Court observes however that that jurisprudence concerns cases in which the applicable text referred to the possibility of such settlement; Article II however refers to the opinion of the parties as to such possibility. The Court therefore does not have to make an

[74] PO of Colombia, para. 4.26.
[75] PO of Colombia, paras. 4.23-4.26.
[76] *Ibid*.
[77] *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 69 at p. 94, para. 63.
[78] *Ibid*.

> objective assessment of such possibility, but to consider what is the opinion of the Parties thereon."[79]

4.13 Significantly, the Court also held that it

> "does not consider that it is bound by the mere assertion of the one Party or the other that its opinion is to a particular effect: it must, in the exercise of its judicial function, be free to make its own determination of that question on the basis of such evidence as is available to it.
>
> […]
>
> … [T]he holding of opinions can be subject to demonstration, and … the Court may expect the Parties to provide substantive evidence that they consider in good faith a certain possibility of negotiation to exist or not to exist."[80]

4.14 The touchstone – the exclusive touchstone – for the application of Article II is thus the opinion of the parties concerning the possibility of settlement by direct negotiations through the usual diplomatic channels. If the objectively-determined opinion of the parties is that the dispute cannot be settled by direct negotiations, Article II is satisfied. Nothing else is required.

4.15 In this respect, Nicaragua notes that requiring negotiations in cases involving compromissory clauses that require that the dispute "is not" or "cannot" be settled by negotiation makes perfect sense. As Judge Fitzmaurice observed in his separate opinion in the *Case concerning the Northern Cameroons (Cameroon v. United Kingdom)*: "[I]t would still not be right to hold that a dispute 'cannot' be settled by negotiation, when the most obvious means of attempting to do this, namely by direct discussions between the parties, had not even been tried – since it could not be assumed that these would necessarily fail …."[81]

4.16 In the case of Article II of the Pact of Bogotá, however, requiring the parties to a dispute to engage in negotiation even when they are of the *bona fide*

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[79] *Ibid*.
[80] *Ibid*., p. 95, para. 65 (internal quotation marks and brackets deleted).
[81] *Case concerning the Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 123. Separate opinion of Judge Sir Gerald Fitzmaurice, p.97.

opinion that such negotiations would be pointless would be a senseless exercise of form over substance. If the parties to a dispute are of the good faith opinion that negotiations would be futile, why compel them to invest the time, effort and expense in pursuing them? In such cases, the evident interest in the prompt and effective resolution of international disputes counsels in favor of permitting immediate access to the judicial mechanisms contemplated in Article XXXI of the Pact.

II. Article II requires only that in the opinion of one of the parties, not both of them, the dispute cannot be settled by direct negotiations

4.17 Colombia also argues that the phrase "in the opinion of the parties" means the opinion of both parties to a dispute, not just one of them. According to Colombia:

> "Under Article 31, paragraph 1, of the Vienna Convention on the Law of Treaties, the words 'in the opinion of the parties' fall to be interpreted in good faith in accordance with the ordinary meaning to be given to their terms in their context and in the light of the Pact of Bogotá's object and purpose. What is clear is that Article II refers to the opinion of the parties, not just of one of them".[82]

4.18 Colombia ignores two obvious and critical facts that disprove this contention. The first is the equally authentic French text of the Pact of Bogotá, Article II of which provides for recourse to the Court when "*de l'avis de l'une des parties*", the dispute cannot be settled by direct negotiation. According to basic principles of treaty interpretation, the differing texts must be harmonized in a manner that does the least violence to any of them. Article 33(4) of the Vienna Convention on the Law of Treaties provides: "[W]hen a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted."

[82] PO of Colombia, para. 4.30 (emphasis deleted).

4.19 Applying these principles here compels the conclusion that only one of the parties need be of the opinion that the dispute is not capable of being settled by negotiation. The phrase "in the opinion of the parties" is, on its face, ambiguous. It is susceptible to either of the interpretations advanced by Colombia and Nicaragua. In contrast, the phrase "*de l'avis de l'une des parties*" could not be more clear. The opinion of one party is all that is required.

4.20 This interpretation is also more consistent with the object and purpose of the Pact of Bogotá. In this respect, it must be recalled that Article 26 of the Charter of the OAS provides:

> "In the event that a dispute arises between two or more American States which, *in the opinion of one of them*, cannot be settled through the usual diplomatic channels, the parties shall agree on some other peaceful procedure that will enable them to reach a solution".

4.21 The Pact of Bogotá was, to borrow Colombia's phrase, "written in the immediate aftermath"[83] of the OAS Charter. Its purpose was to give effect to the undertaking in Article 26 of the Charter to find "other peaceful procedure[s] that will enable them to reach a solution." The two documents must therefore be read in *pari materia*.

4.22 More generally, the purpose of the Pact of Bogotá is to provide for the prompt and effective settlement of international disputes by means of "pacific procedures".[84] That purpose is best served by permitting recourse to the Court when, in the *bona fide* opinion of one of the parties, a dispute cannot be settled by direct negotiation. If even one of the parties is of the good faith opinion that negotiations would be futile, it is difficult to see what purpose would be served by requiring it to nevertheless undertake an effort it genuinely considers useless. In such circumstances, the international interest in the speedy resolution of disputes should permit immediate recourse to the Court.

[83] PO of Colombia, para. 4.35.
[84] Pact of Bogotá, Article I.

4.23 Colombia curiously argues that in "the *Border and Transborder Armed Actions* case, Nicaragua unsuccessfully argued that 'in the opinion of the parties' meant in the opinion of the State seising the Court."[85] It is true that in that case Nicaragua also argued that Article II required only that the opinion of one of the parties be that the dispute cannot be settled by direct negotiations. It is not true, however, that the argument was unsuccessful. To the contrary, the Court expressly declined to decide the issue, determining that it did not need to do so in the context of that case because it was clear that both parties were in fact of the opinion that their dispute could not be settled by direct negotiations through the usual diplomatic channels.[86] The question of the proper interpretation of Article II therefore remains to be decided.

4.24 The second critical omission from Colombia's argument, related to the first, is its failure to address material Colombia itself cites but has chosen not to submit to the Court. In particular, Colombia states:

> "In 1985, the Permanent Council of the OAS requested the Inter-American Juridical Committee to determine whether amendments to the Pact needed to be made. Though the Rapporteur of the Committee had suggested modifying Article II of the Pact by amending the phrase 'in the opinion of the parties' to 'in the opinion of one of the parties', the Committee rejected such proposal. This confirms the conclusion that Article II was drafted specifically with the intention of referring to the opinion of both parties to a dispute, not just one of them."[87]

4.25 Colombia cites to the 1985 Juridical Committee report at footnote 199 of its Preliminary Objections but does not present it as an annex. Colombia's failure is conspicuous, if understandable, because the report expressly refutes Colombia's assertion that "Article II was drafted specifically with the intention of referring to

[85] PO of Colombia, para. 4.31.
[86] *See Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 69 at p. 94, para. 64 ("[T]he Court's reasoning does not require the resolution of the problem posed by this textual discrepancy, and it will therefore not rehearse all the arguments that have been put forward by the Parties to explain it or to justify the preferring of one version to another.").
[87] PO of Colombia, para. 4.40.

the opinion of both parties to a dispute, not just one of them". In point of fact, the report contains the following passage concerning Article II:

> "Also reviewed was the text of Paragraph 2, Article II concerning the discrepancy in the sense that the Pact refers to the situation that where any controversy between two or more States, which "in the opinion of the Parties" cannot be settled through direct negotiations, the Parties agree to make use of the procedures established in the Treaty. By contrast, Article 25 of the OAS Charter provides that in any such situation, in the matter of any dispute no longer capable of being settled through the usual diplomatic means, the 'opinion of one of them' would be sufficient to have recourse to any of the diplomatic means provided in the Pact.
> The Rapporteur took the opportunity to elaborate on his information on the subject, citing an explanatory note in Dr. Juan Carlos Puig's study entitled 'The Inter-American Treaty of Reciprocal Assistance and the Contemporary International Regime', published in the 1983 Law Yearbook of the Organization of American States, page 173, pursuant to which, and the documentation cited therein, the change which was introduced in the Spanish version of the Pact of Bogotá would have been the result of a typing error. The note added that the French text, which is equally authentic, in contrast follows the text of the Organization´s Charter. It was verified that the French text in actuality follows that in the 1947 draft of the Legal Commission and that in Article 25 of the OAS Charter."[88]

[88] Opinion of the Inter-American Juridical Committee on the American Treaty on Pacific Settlement (Pact of Bogotá), Organization of American States, Doc. OEA /Ser.G., CP/Doc. 1603/85, , p. 10, 3 Sept.1985. (WSN, Annex 2)

> "Se revisó también el texto del inciso 2, del Artículo II, en lo que respecta a la discrepancia en el sentido de que el Pacto hace referencia a la circunstancia de que cuando exista una controversia entre dos o más Estados que, "en opinión de las partes" no pueda ser resuelta por negociaciones directas, las partes se comprometen a hacer uso de los procedimientos establecidos en el Tratado. En cambio el Artículo 25 de la Carta de la OEA establece que en tal circunstancia bastaría la "opinión de uno de ellos" acerca de que la controversia ya no pueda ser resuelta por los medios diplomáticos usuales para acudir a cualquiera de los del Pacto.
>
> En esta oportunidad, el propio Relator amplió su información sobre el particular citando una nota aclaratoria que aparece en un estudio del Dr. Juan Carlos Puig, intitulado 'El Tratado Interamericano de Asistencia Recíproca y el Régimen Internacional Contemporáneo', publicado en el Anuario Jurídico de 1983, de la Organización de los Estados Americanos, página 173, conforme a la cual y la documentación que ahí se cita, el cambio introducido en la versión española del Pacto de Bogotá se habría debido a un error dactilográfico. Añade esa nota que el texto en francés, en cambio, sigue al de la Carta de la Organización, texto que resulta igualmente auténtico. Se

4.26 The 1983 study by Dr. Juan Carlos Puig cited in the Juridical Committee report comes to the same conclusion. It states, in part:

> "In fact, the historical method proves, without a doubt, that the term was due to a typing error when preparing the final text for signature. Indeed, the real terms approved were: 'in the opinion of one of them', which were already in the Draft prepared by the Interamerican Juridical Committee that formed the basis for discussion at the Ninth International Conference.
> […]
> There is therefore no doubt that the real intention of the States participating in the Conference of Bogotá was to maintain the criterion of the reference made to 'one of the parties' of the controversy, which is only logic in view that such states in the same Conference held this approach for the Charter. Why would the same delegations attending the Conference adopt different approaches to the same subject? Thus, recourse to the principle of 'plain meaning' (this time limited to some of the official versions) results in interpretations that do not reflect the real will of the parties and completely change the sense of the Treaty that was approved." [89]

4.27 It is thus clear that the conclusion reached by the Juridical Committee is that Article II refers to the opinion of one of the parties to a dispute, not both of

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> comprobó que el texto francés, en verdad, sigue el del Proyecto del Comité Jurídico de 1947 y el del Artículo 25 de la Carta de la OEA."

[89] Juan Carlos Puig, "El Tratado Interamericano de Asistencia Recíproca y el Régimen Internacional Contemporáneo, Organización de Estados Americanos, Secretaría General Washington D.C., Anuario Jurídico Interamericano 1983, p. 173, 175. (WSN, Annex 1)

> "En realidad, el método histórico demuestra, sin dejar lugar a ninguna duda, que esa expresión se debió a un error dactilográfico al prepararse el texto final para la firma. En efecto, los verdaderos términos aprobados fueron: 'en opinión de una de las partes', que ya se encontraban en el Proyecto preparado por el Comité Jurídico Interamericano que sirvió de base para la discusión en la Novena Conferencia Internacional Americana.
> […]
> No cabe, pues, ninguna duda de que la real intención de los Estados participantes en la Conferencia de Bogotá fue la de mantener el criterio de la referencia 'a una de las partes' en el conflicto, la cual además es lo lógico habida cuenta de que los mismos Estados, en la misma Conferencia, mantuvieron ese criterio para la Carta. ¿Por qué iban a adoptar criterios distintos para un mismo tema las mismas delegaciones que asistían a la Conferencia? Es así como el apego al principio del 'plain meaning' (esta vez, limitado a algunas de las versiones oficiales) hace llegar a interpretaciones que no reflejan la real voluntad de las partes y cambian totalmente el sentido del tratado que se aprobó."

them – exactly the opposite of the proposition for which Colombia cites the 1985 Juridical Committee report.

4.28 Finally, Nicaragua observes that reading Article II to require that the opinion of only one of the parties be that the dispute cannot be settled by direct negotiations would not "lead to a manifestly absurd result", as Colombia suggests. [90] The States Parties to the OAS Charter (which include every independent State in the Americas) are plainly of the view that there is no such absurdity. As noted, Article 26 of the Charter provides: "In the event that a dispute arises between two or more American States which, *in the opinion of one of them*, cannot be settled through the usual diplomatic channels, the parties shall agree on some other peaceful procedure that will enable them to reach a solution." [91] If Colombia's argument were right, the OAS Charter would be equally absurd.

4.29 But, of course, it is not. The States Parties to the Charter evidently considered there to be good reason to require that the dispute, in the opinion of only one of the parties, cannot be settled through the usual diplomatic channels before having recourse to other procedures. And it is not difficult to imagine what that reason was. If one of the parties to a dispute is of the good faith opinion that negotiations will not succeed, what purpose could be served by requiring it to undertake an effort it considers pointless? The answer is none.

4.30 In any event, the debate between Nicaragua and Colombia about the meaning of Article II, and whether the opinion of one of them or both of them must be that the dispute cannot be settled by direct negotiations, is entirely academic in the context of this case. Nicaragua will show in the next section that,

[90] PO of Colombia, para. 4.32.
[91] (Emphasis added.)

in fact, both it and Colombia were plainly of the opinion that the dispute before the Court was not capable of being settled by direct negotiations.

III. On the critical date, both parties were of the opinion that the dispute Nicaragua has submitted to the court could not be settled by direct negotiations

4.31 The critical date for determining the admissibility of Nicaragua's Application is the date on which it was filed: 26 November 2013.[92] The Court stated in the *Armed Actions* case:

> "It may however be necessary, in order to determine with certainty what the situation was at the date of filing of the Application, to examine the events, and in particular the relations between the Parties, over a period prior to that date, and indeed during the subsequent period. … In this case, the date at which "the opinion of the parties" has to be ascertained for the application of Article II of the Pact is 28 July 1986, the date of filing of the Nicaraguan Application.
>
> To ascertain the opinion of the Parties, the Court is bound to analyse the sequence of events in their diplomatic relations."[93]

4.32 An analysis of the sequence of events between the issuance of the Court's 2012 Judgment and 26 November 2013 shows that, as of that later date, both Nicaragua and Colombia were plainly of the opinion that this dispute could not be settled by direct negotiations through the usual diplomatic channels.

4.33 The Court observed in *Georgia v. Russia* that

> "in general, in international law and practice, it is the Executive of the State that represents the State in its international relations and speaks for it at the international level (*Armed Activities on the Territory of the Congo (New Application : 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 27, paras. 46‑47). Accordingly, primary attention will be

[92] *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 69 at p. 95, para. 66.
[93] *Ibid*.

> given to statements made or endorsed by the Executives of the two Parties."[94]

Nicaragua will follow the same approach and focus principally on the statements of the Parties' Executives in the discussion that follows.

4.34 It bears noting at the outset Colombia's evident discomfort with the public statements of its own President, which it rather self-consciously seeks to minimize. It states, for example, that Nicaragua's Application seeks "to infer" that "Colombia had rejected the Court's 2012 Judgment. This is incorrect." [95] Elsewhere, Colombia claims that its President had always "emphasised on the importance of respecting international law."[96] These assertions are, with respect, flat-out misrepresentations of the truth.

4.35 In his first speech following the 2012 Judgment, President Santos emphatically declared that the Judgment contained "omissions, errors, excesses, inconsistencies that we cannot accept. Taking into account the above, Colombia – represented by its Head of State – emphatically rejects that aspect of the judgment rendered by the Court today."[97]

4.36 Ten months later, in September 2013, he remained equally uncompromising:

> "[M]y position is clear and unyielding: The Judgment of the International Court of Justice is not applicable – it is not and will not be applicable – until a treaty that protects the rights of Colombians has been celebrated, a treaty that will have to be approved in accordance with our Constitution. I repeat the decision I have made: The judgment of the International Court of Justice IS NOT APPLICABLE without a treaty […] In fact – and we must remember this – the Judgment from the Hague totally disregards the demarcation treaties

[94] *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*, p. 70 at p. 87, para. 37.
[95] PO of Colombia, para. 4.60.
[96] PO of Colombia, para. 4.65.
[97] "Declaration of President Juan Manuel Santos on the judgment of the International Court of Justice", 19 November 2012 (NM, Annex 1).

> that are in place with [other] countries and which we are obliged to comply with. That is another reason we CANNOT apply the Judgment and which forces us to resort to diplomatic means."[98]

4.37 For his part, the statements of Nicaragua's President were equally clear. In a statement reported in the media on 28 November 2012, President Ortega observed: "Colombia will recognize the ruling by the International Court of Justice, because there is no other way forward."[99] And in response to President Santos' September 2013 statement quoted just above, President Ortega stated:

> "The court's decisions are obligatory. They are not subject to discussion. It's disrespectful to the court. It is as if we decided not to abide by the ruling because we didn't receive 100 percent of what we asked, which in this case was the San Andrés archipelago. … Nicaragua wants peace. … [W]e only want what the court at The Hague granted us in its ruling."[100]

A. *As of the date of Nicaragua's Application, Colombia had shut the door to any negotiations*

4.38 The fact that both Parties were of the opinion that their dispute concerning Colombia's violations of Nicaragua's sovereign rights and jurisdiction could not be settled by direct negotiations at the time of Nicaragua's Application is most easily demonstrated by reference to events occurring in the two and a half months leading up to the Application.

4.39 On 9 September 2013, Colombia's President declared the so-called "Integral Contiguous Zone" ("ICZ") described at length in Nicaragua's Memorial.[101] As shown there, Colombia's self-declared ICZ very significantly

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[98] "Declaration of President Juan Manuel Santos on the integral strategy of Colombia on the Judgment of the International Court of Justice", 9 September 2013 (NM, Annex 4) (emphasis in the original).
[99] "Caribbean Crisis: Can Nicaragua Navigate Waters It Won from Colombia?", *Time World*, 28 November 2012 (NM, Annex 28).
[100] "Colombia Will Challenge Maritime Border With Nicaragua", *ABC News*, 10 Sept. 2013 (WSN, Annex 7) (http://abcnews.go.com/ABC_Univision/colombia-challenge-maritime-border-nicaragua/story?id=20217370).
[101] NM, paras. 2.12-2.21.

infringes on Nicaragua's maritime zones as adjudged by the Court.[102] The decree establishing the ICZ specifically states that "the Colombian State shall exercise in the established Integral Contiguous Zone its sovereign authority and […] powers ….",[103]

4.40 In his national address to the Colombian people made the same day as the announcement of the ICZ President Santos made the declaration, quoted above, about "judgment of the International Court of Justice" not being "applicable".

4.41 Three days later, the President of Colombia followed up the decree establishing the ICZ with a Complaint ("*demanda*") to Colombia's Constitutional Court, submitted in his own name, asking the Pact of Bogotá to be declared unconstitutional. President Santos argued that the Pact was unconstitutional because it permitted the modification of Colombia's boundaries, including by means of a Judgment of this Court, without a treaty.[104] In contrast, the President argued, the Colombian Constitution only permits national boundaries to be modified by means of duly ratified treaties.[105]

4.42 President Santos' complaint makes several notable arguments, including the following:

> "As it is publicly known, the International Court of Justice issued two judgments in the dispute between Nicaragua and Colombia, which create a contradiction with the Constitution at least in three elements: (i) they do not recognize the border at Meridian 82 and therefore modify the borders of Colombia through a means prohibited by the Charter; (ii) they transfer to Nicaragua the rights of Colombia over maritime areas that only Colombia can regulate through a treaty based on reciprocity and equity; and (iii) they draw a new maritime border between the two States without the consent of the Colombian people through their representatives in the exercise of their sovereignty and right to self-determination.

[102] *Ibid*., paras. 2.11-2.15.
[103] Presidential Decree 1946 of 9 September 2013 (NM, Annex 9).
[104] *See generally* President Juan Manuel Santos, Complaint against articles XXXI and L of the Pact of Bogotá, Constitutional Court, D-9907 (12 September 2013). (NM, Annex 15).
[105] *Ibid.*

> This modification of the maritime boundaries of the State of Colombia, with the consequent curtailment of rights for Colombia, and the allocation of the maritime areas of the Archipelago without following the procedure which the Constitution provides to change existing boundaries, is prohibited by Article 101 of the Constitution in accordance with Articles 3 and 9 of the Charter.
> […]
> In effect, although the borders of Colombia with other States cannot be altered by a judicial decision rendered by the International Court of Justice, which does not represent the people of Colombia, or constitutes an expression of self-determination of the Colombians, nor is it one of the means set forth in Article 101 for fixing or modifying the borders of Colombia ….[106]

4.43 Although President Santos' Complaint does not say so in so many words, he elsewhere made clear that without a treaty, Colombia would continue to exercise sovereignty right up to the 82nd Meridian it had historically claimed, notwithstanding the Court's Judgment. On 18 September 2013, he declared:

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[106] President Juan Manuel Santos, Complaint against articles XXXI and L of the Pact of Bogotá, Constitutional Court, D-9907 (12 September 2013), pp. 30-31 (NM, Annex 15) (WSN, Annex 3).

> "Como es de conocimiento público, la Corte Internacional de Justicia profirió dos sentencias sobre la disputa entre Nicaragua y Colombia que generan una contradicción con la Constitución, al menos en tres elementos: (i) no reconocen el límite en el meridiana 82 por lo cual constituyen una modificación de los límites de Colombia por una vía prohibida por la Carta; (ii) transfieren a Nicaragua derechos de Colombia sobre aéreas marítimas que solo Colombia puede regular mediante un tratado sobre bases de reciprocidad y equidad; y (iii) trazan un nuevo límite marítima entre los dos Estados sin que estos hayan sido consentidos por el pueblo de Colombia por medio de sus representantes en ejercicio de su soberanía y de su derecho a la autodeterminación.
>
> Esta modificación de los límites marítimos del Estado de Colombia, con la consecuente disminución de derechos de Colombia y la afectación de las aéreas marítimas del Archipiélago, sin seguir el procedimiento previsto en la Constitución para modificar los limites existentes, está prohibida por el artículo 101 de la Constitución, en concordancia con los artículos 3 y 9 de la Carta.
> […]
> En efecto, si bien los límites de Colombia con otros Estados no pueden ser alterados por medio de una sentencia judicial proferida por la Corte Internacional de Justicia, que no representa al pueblo de Colombia, no constituye una expresión de la autodeterminación de los colombianos, ni es uno de los medios previstos en el artículo 101 para fijar o modificar los límites de Colombia …."

> "Colombia deems that the ruling by The Hague is not applicable, and we will not apply it, as we stated then and I repeat today, until we have a new treaty. … And we will continue patrolling, just as we are doing so today. And we will continue exercising sovereignty over our territory, over our waters."[107]

A May 2014 press release from the Presidency of the Republic of Colombia confirms the point. It states that the maritime boundary between Colombia and Nicaragua would continue to be as established in the Esguerra-Bárcenas treaty of 1928; i.e., in Colombia's view, the 82nd Meridian.[108]

4.44 Subsequent to the filing of his Complaint, President Santos made it equally clear that pending the decision of the Constitutional Court, there was nothing to negotiate with Nicaragua. In his 18 September 2013 comments, he stated flatly: "[*W*]*e will not implement any action, in any direction*, until the Constitutional Court rules, after the lawsuit that I personally introduced against the Bogotá Agreement."[109]

4.45 President Santos' comments confirmed the statements of his Foreign Minister made just a few days before. In an article appearing on 15 September, the Colombian Foreign Minister was reported as saying: "Colombia is open to a dialogue with Nicaragua to sign a treaty that establishes the boundaries and a legal regime that contributes to the security and stability in the region."[110] But she added: "The Government has said that it awaits the decision of the Constitutional Court *before initiating any action*." And further: "Again, before considering the

[107] "Declaration of President Juan Manuel Santos during the sovereignty exercises performed in the Caribbean Sea", 18 September 2013 (NM, Annex 5).
[108] Presidency of the Republic of Colombia, Press Release, "The Limits of Colombia with Nicaragua continue to be those established in the Esguerra-Barcenas Treaty, affirmed the President of Colombia", 2 May 2014 (NM, Annex 7).
[109] "Declaration of President Juan Manuel Santos during the sovereignty exercises performed in the Caribbean Sea", 18 September 2013 (NM, Annex 5) (emphasis added).
[110] The Minister of Foreign Affairs explains in detail the strategy against Nicaragua, *El Tiempo*, Colombia, 15 September 2013 (PO of Colombia, Annex 42) (WSN, Annex 4).

details of a treaty, the government will be attentive to the pronouncement of the Court."[111]

4.46 It is thus clear that, pending the decision of the Constitutional Court, Colombia was of the opinion that no negotiation was even possible, much less that it might succeed. Nicaragua was justified in adopting the same view. Because this was the prevailing situation on the date Nicaragua submitted its Application, Article II of the Pact of Bogotá is satisfied.

4.47 An analogous circumstance arose in the case concerning the *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*. That case involved the situation arising from the 1987 enactment of the Anti-Terrorism Act by the United States of America, which prohibited the maintenance of an office of the Palestinian Liberation Organisation ("PLO") in the jurisdiction of the United States. The PLO, however, had an Observer Mission to the U.N., which the Secretary General considered covered by the Headquarters Agreement. The United States "did not dispute that certain provisions of [the Headquarters] Agreement applied to the PLO Mission to the United Nations in New York" but "gave precedence to the Anti-Terrorism Act over the Headquarters Agreement."[112]

4.48 The Secretary General sought to invoke the dispute resolution provisions of the Headquarters Agreement, which provided for arbitration in the case of a dispute that "is not settled by negotiation or other agreed mode of settlement".[113] The United States, however, took the position that it was "still in the process of evaluating the situation which would arise out of the application of the legislation

[111] *Ibid*.
[112] *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988,* p. 12 at p. 32, para. 48.
[113] *Ibid.*, pp. 14-15, para. 7.

and pending the conclusion of such evaluation takes the position that it cannot enter into the dispute settlement procedure."[114]

4.49 The Court had no difficulty in concluding that "the Secretary-General has in the circumstances exhausted such possibilities of negotiation as were open to him."[115] In so deciding, the Court quoted its decision in the case concerning *United States Diplomatic and Consular Staff in Tehran*, in which it held that "'owing to the refusal of the Iranian Government to enter into any discussion of the matter', the Court concluded that 'In consequence, there existed at that date not only a dispute but, beyond any doubt, a 'dispute ... not satisfactorily adjusted by diplomacy'…".[116] The Court then concluded: "In the present case, the Court regards it as similarly beyond any doubt that the dispute between the United Nations and the United States is one 'not settled by negotiation' within the meaning of section 21, paragraph *(a)*, of the Headquarters Agreement."[117]

4.50 The same conclusion follows from the facts in this case. As of the date of Nicaragua's Application, Colombia had made clear that negotiations with Nicaragua were off the table. In the words of its President: "[W]e will not implement any action, in any direction, until the Constitutional Court rules …."[118] By stating that there was not then any possibility of negotiation, Colombia can only be understood to have been of the opinion that negotiations could not succeed. Nicaragua was justified in forming the same view, as the filing of its Application attests.

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[114] *See ibid.*, p. 20, para. 19.
[115] *Ibid.*, p. 33, para. 55.
[116] *Ibid.* p. 34, para. 55 (citing *I.C.J. Reports 1980***,** p. 27, para. 51).
[117] *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988,* p. 12 at p. 34, para. 55.
[118] "Declaration of President Juan Manuel Santos during the sovereignty exercises performed in the Caribbean Sea", 18 September 2013 (NM, Annex 5) (emphasis added).

4.51 Nicaragua observes that the parallels with the *Headquarters Agreement* case run even deeper. On 11 March 1988, the United States Attorney General wrote the Permanent Observer of the PLO to the U.N. informing him that the maintenance of the PLO Observer Mission was "unlawful" and demanding "compliance."[119] When the PLO Mission did not comply, the United States Department of Justice filed a lawsuit in the courts of the United States to compel compliance.[120] The Permanent Representative of the United States stated his country's views: "Until the United States courts have determined whether that law requires closure of the PLO Observer Mission the United States Government believes that it would be premature to consider the appropriateness of arbitration."[121] Nevertheless, as stated, the Court had no difficulty rejecting the U.S. position, determining that negotiations would be futile and deciding that the United States was obligated to arbitrate with immediate effect.

4.52 A similar analysis applies here. The pendency of domestic litigation in the United States that the U.S. side hoped would bring clarity to the situation did not change the conclusion that further negotiations would be futile in the *Headquarters Agreement* case. So too here the pendency of proceedings before Colombia's Constitutional Court, during which Colombia made it clear that it would not take "any action, in any direction", compels the conclusion that, as of the critical date, Colombia was of the opinion that no negotiation was possible.

B. *The subject-matters on which the parties kept the door open to eventual negotiation are different from the subject-matter of this dispute*

[119] *See Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988,* p. 12 at p. 23, para. 25.
[120] *Ibid*., p. 25, para. 29.
[121] *Ibid*., p. 26, para. 31.

4.53 In any event, quite apart from the fact that Colombia had emphatically shut the door to negotiation in September 2013, Article II of the Pact of Bogotá is satisfied for another reason as well. In particular, the subjects of the possible treaty to which the Parties "kept the door open" were (and are) different than the subject-matter of this dispute. And by insisting on a treaty dealing with a number of issues entirely outside the scope of the Court's 2012 Judgment before it would even consider respecting Nicaragua's sovereign rights and jurisdiction, Colombia's conduct only underscores that it did not consider that the dispute Nicaragua has submitted to the Court could be settled by direct negotiation.

4.54 The subject-matter of this dispute is stated clearly in paragraph 2 of Nicaragua's Application captioned "Subject of the Dispute." It states: "The Dispute concerns the violations of Nicaragua's sovereign rights and maritime zones declared by the Court's Judgment of 19 November 2012 and the threat of the use of force by Colombia in order to implement these violations."

4.55 This subject-matter is amplified in Chapter 1 of Nicaragua's Memorial under the heading "The Court's Task." It states:

> "To avoid any doubt, Nicaragua will make clear what the dispute submitted to the Court is *not*: it is not a request for interpretation of the November 2012 *Judgment* in that 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". …
> Nor does Nicaragua ask the Court to reaffirm what it has already decided in its Judgment: this is *res judicata* and Article 59 of the Statute imposes upon Colombia an unconditional duty to comply without delay or any restriction. …
> The present case takes place downstream: it originates in Colombia's actions subsequent to the *Judgment*, beginning with its rejection of it and declaration that it is "inapplicable," and consisting of its assertion of new claims to the waters adjudged to belong to Nicaragua, its exercise of purported sovereign rights and jurisdiction in those waters, and its prevention of Nicaragua from exercising its sovereign rights and jurisdiction within its maritime boundaries as fixed by the Court. … The present case seeks to hold Colombia internationally

> responsible for the breaches of its obligations to comply with, and to respect the rights recognized in, the November 2012 Judgment."[122]

4.56 In order for Article II of the Pact of Bogotá *not* to be satisfied, this is the dispute that the parties must have been of the opinion could be settled by direct negotiations. It is not enough that the Parties considered that there were other subjects on which negotiations might eventually be had. There must be identity between the subject of the dispute, on the one hand, and the subjects amenable to negotiation, on the other. As the Court stated in a related context in *Georgia v. Russia*:

> "[T]o meet the precondition of negotiation in the compromissory clause of a treaty, these negotiations must relate to the subject-matter of the treaty containing the compromissory clause. In other words, *the subject-matter of the negotiations must relate to the subject-matter of the dispute* which, in turn, must concern the substantive obligations contained in the treaty in question."[123]

4.57 The Court's Judgment in *Georgia v. Russia* provides a useful illustration of the connection required between the subject-matter of the dispute and the subject-matter of the negotiations. Georgia alleged the existence of a long-standing dispute concerning the interpretation or application of the Convention on the Elimination of all Forms of Racial Discrimination ("CERD"), and cited a number of documents intended to evidence that dispute. With the limited exception of some very late exchanges that took place just before Georgia filed its Application, the Court found that the documents and statements submitted by Georgia did not show the existence of a dispute under CERD. In so doing, the Court made clear that exchanges even on issues bearing thematic similarities do not necessarily relate to the same dispute. Referring to the documents Georgia had cited from the period prior to July 1999, for example, the Court stated:

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[122] NM, paras. 1.34-1.36.

[123] *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*, p. 70at p. 133, para. 161 (emphasis added).

> [N]one of the documents or statements provides any basis for a finding that there was such a dispute [under CERD] by July 1999. … [T]he subject-matter of the complaints is the alleged unlawful use of force, or the status of Abkhazia, rather than racial discrimination; and, where there is a possibly relevant reference, usually to the impeding of return of refugees and IDPs, it is as an incidental element in a larger claim – about the status of Abkhazia, the withdrawal of the Russian Federation troops or the alleged unlawful use of force by them."[124]

4.58 Even exchanges clearly touching upon issues of racial discrimination were considered to relate to a different dispute. A press release by the Georgian Foreign Ministry, for example, rejected an earlier Russian statement, saying it "was completely at variance with the mandate of the [Commonwealth of Independent States] collective peacekeeping forces."[125] Russia's "true design", according to Georgia, was

> "to legalize results of the ethnic cleansing instigated by itself and conducted through Russian citizens in order to make easier annexation of the integral part of Georgia's internationally recognized territory, which the Russian Federation tries to achieve via military intervention in Abkhazia, Georgia."[126]

Despite language explicitly stating that Russia had instigated ethnic cleansing, the Court nevertheless found that

> "the reference to ethnic cleansing … is to be understood in the context of the principal theme of the press release, that is, the concern of Georgia in relation to the status of Abkhazia and the territorial integrity of Georgia. ... In any case, the press release raised the issue of the proper fulfilment of the mandate of the CIS peacekeeping force, and not the Russian Federation's compliance with its obligations under CERD."[127]

4.59 The wording of Colombia's Preliminary Objections is carefully chosen to elide the critical differences between the subject-matter of the dispute Nicaragua has presented to the Court and the subject-matter of the negotiations both Parties had expressed willingness to consider. Colombia variously states:

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[124] *Ibid.,* p. 100, para. 63.
[125] *Ibid.*, p. 116, para. 104.
[126] *Ibid*.
[127] *Ibid*.

- "both Parties were of the view that matters arising out of the Court's 2012 Judgment could and should be dealt with by a negotiated agreement";[128]
- "Colombia always kept the door open for a negotiation with Nicaragua";[129]
- "both of them were in favour of negotiating an agreement regulating matters between them arising as a result of the 2012 Judgment";[130]
- "the highest officials of both countries were on record as stating that they wished to undertake the negotiation of a treaty in the light of what the Court decided in the 2012 Judgment";[131] and
- "Colombia also considered that any maritime issues between the two Parties arising as a result of the Court's Judgment should be dealt with by means of negotiations in order to conclude a treaty."[132]

4.60 The reason for Colombia's meticulous choice of words is evident: what it expressed openness to eventually negotiate was not the subject-matter of this dispute. This dispute concerns Colombia's violation of Nicaragua's sovereign rights and jurisdiction as adjudged by the Court. It does not concern general "maritime issues between the two Parties arising as a result of the Court's Judgment". Neither does it concern the regulation of "matters between them arising as a result of the 2012 Judgment". As Nicaragua stated in its Memorial, Colombia has "an unconditional duty to comply [with the Judgment] without delay or any restriction".[133] Whatever its domestic law may or may not require, international law demands immediate respect for Nicaragua's rights as determined by the Court. Colombia cannot avoid compliance, and continue willfully to violate Nicaragua's rights, until such time (if ever) as it secures a treaty regulating the matters about which it has expressed concern.

[128] PO of Colombia, para. 4.29.
[129] *Ibid*.
[130] *Ibid*., para. 4.37.
[131] *Ibid*., para. 4.48.
[132] *Ibid*., para. 4.59.
[133] NM, para. 1.34.

4.61 Colombia's public statements also make clear that the matters it expects to have regulated in any eventual treaty are entirely unrelated to Nicaragua's rights as determined by the Court in 2012. The disconnect between the subject-matter of this dispute and the treaty Colombia demands (and Nicaragua has expressed willingness to consider) are most clearly captured in a 1 December 2012 declaration by President Santos published on a Colombian government website. In it, he states:

> "[Today] [w]e – the Minister of Foreign Affairs and I – gathered with President Ortega. We explained in the clearest way our position: we want the Colombian rights, those of the raizales, not only with respect to the rights of the artisanal fishermen but other rights, to be re-established and guaranteed. He understood. We expressed that we should handle this situation with cold heads, in an amicable and diplomatic fashion, as this type of matters must be dealt with to avoid incidents. He also understood. …
> … We will keep looking for the mechanism that both the international court of The Hague and international diplomacy have at their disposal to re-establish the rights infringed by the Judgment. That does not exclude these channels of communication with Nicaragua. I believe that those channels of communication are an important complement. In this sense we will continue – and we said this clearly to President Ortega – looking for the reestablishment of the rights that this Judgment breached in a grave matter for the Colombians."[134]

4.62 These statements were echoed in additional comments reported in the press two days later, in which President Santos underscored that Colombia would not abide by the Judgment until "we see that the Colombian rights which have been violated are restored and guaranteed for the future."[135] Included among the rights ostensibly "violated" by the Judgment were the "rights of the raizales, the

[134] "Declaration of the President of the Republic of Colombia", 1 December 2012 (PO of Colombia, Annex 9) (emphasis added).
[135] "Government of Colombia will not implement ICJ judgment until the rights of Colombians have been restored", *El Salvador Noticias.net*, 03 December 2012 (WSN, Annex 5) (http://www.elsalvadornoticias.net/2012/12/03/gobierno-de-colombia-no-aplicara-fallo-cij-mientras-no-se-restablezcan-derechos-de-colombianos/).

right of fishing – including not only artisanal fishing but also industrial – environmental rights, rights in respect of security."[136]

4.63 Colombia's insistence on recognizing these rights allegedly "violated" by the Court's Judgment has remained constant ever since. In an article appearing in the press on 10 September 2013, Colombian Minister of Foreign Affairs explained that any treaty should contain "a series of agreements in themes of fishing and security."[137] And as recently as 22 November 2014, Colombia's Agent in these proceedings was quoted as saying that an agreement with Nicaragua would have to "have aspects related to the protection of the raizal culture and the rights to fishing and navigation of the communities in all zones, without any type of limitation. And with the protection of the Seaflower reserve."[138]

4.64 None of these issues, of course, have anything to do with Colombia's violation of Nicaragua's rights as adjudged by the Court. Moreover, it is not even clear that the treaty Colombia demands would recognize those rights, even if Nicaragua agrees to the concessions Colombia has demanded. In his Complaint to Colombia's Constitutional Court, for example, President Santos included a long section of argument in which he claimed that "res judicata of the ICJ judgments does not bind the parties in a dispute in the event that they decide to a contractual solution different from that set forth in the judgment of the ICJ."[139] And in a 9 September 2013 article appearing in the Colombian press, a "member of the

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[136] *Ibid*.

[137] "Colombia responds to a proposal for dialogue", *La Prensa*, Nicaragua, 10 September 2013 (WSN, Annex 8) (http://www.laprensa.com.ni/2013/09/10/politica/161912-colombia-responde-a-propuesta-de-dialogo).

[138] "It is possible to Negotiate with Nicaragua in The Hague: Carlos Gustavo Arrieta", *El Tiempo*, Colombia, 22 November 2014 (WSN, Annex 9) (http://www.eltiempo.com/politica/gobierno/carlos-arrieta-dice-que-es-posible-negociar-con-nicaragua-en-la-haya/14870462).

[139] President Juan Manuel Santos, Complaint against articles XXXI and L of the Pact of Bogotá, Constitutional Court, D-9907 (12 September 2013), p. 36 (NM, Annex 15) (WSN, Annex 3).

> "…la cosa juzgada de los fallos de la CIJ no obliga a las partes en conflicto en caso de que estas opten par una solución contractual diferente a la prevista por la CIJ en su fallo"

Committee on International Affairs of the [Colombian] Senate, said that the Colombian Congress would not approve any treaty in which the maritime borders of Colombia correspond to those fixed by the Hague Court in its judgment of November 2012."[140]

4.65 It is therefore clear that as of the date of Nicaragua's Application, and even now, Colombia considered itself under no obligation to desist from its violations of Nicaragua's sovereign rights and jurisdiction until such time as the two States conclude a treaty – a treaty, moreover, in which Colombia appears intent on legitimizing its violations of the 2012 Judgment. It is therefore equally clear that Colombia was not then, or now, of the opinion that the Parties' specific dispute concerning its past and present violations of Nicaragua's rights was capable of being settled by direct negotiations. To the extent Nicaragua was willing, in an exercise of discretion, to entertain Colombia's demands, Nicaragua was necessarily of the same view. The requirements of Article II of the Pact of Bogotá are therefore satisfied.

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[140] "Santos does not close the door to the dialogue with Ortega", *Semana*, 9 September 2013 (WSN, Annex 6) (http://www.semana.com/nacion/articulo/el-fallo-de-la-haya-no-es-aplicable-santos/357107-3).

> "Incluso, el senador Juan Lozano, integrante de la comisión de asuntos internacionales del Senado, aseguró que el Congreso colombiano no aprobaría ningún tratado en el cual los límites marítimos de Colombia correspondan a los que fijó la Corte de La Haya en su fallo de noviembre del 2012."

CHAPTER 5. THE COURT HAS AN INHERENT JURISDICTION OVER DISPUTES ARISING FROM THE NON-COMPLIANCE WITH ITS JUDGMENTS (FOURTH AND FIFTH PRELIMINARY OBJECTIONS)

5.1 The fourth and fifth preliminary objections of Colombia read as follows:

> "7.5. *Fourth*, the Court has no 'inherent jurisdiction' upon which Nicaragua can rely in the face of the lapse of jurisdiction under the Pact of Bogotá. There is no basis in the law and practice of the Court for Nicaragua's assertion that 'the jurisdiction of the Court lies in its inherent power to pronounce on the actions required by its Judgments.'
> 7.6. *Fifth*, the assertion of an inherent jurisdiction to ensure and monitor compliance with the Judgment of the Court of 19 November 2012 likewise has no basis in the law and practice of the Court. The Court lacks jurisdiction over 'disputes arising from non-compliance with its Judgments'."[141]

5.2 Nicaragua has some difficulty understanding the distinction Colombia makes between both grounds: compliance with the Court's judgments is no doubt the first action required by the Court's judgments. And indeed, the very repetitive character of Chapters 5 and 6 of the Colombian Preliminary Objections, which are supposed to deal respectively with the fourth and the fifth objections, bear witness of the artificiality of the distinction. There is therefore neither logical reason nor legal ground to differentiate between the two arguments and Nicaragua will deal with both together in the present Chapter.

5.3 Two other preliminary clarifications are in order. *First*, it goes without saying that Nicaragua bases itself on both grounds for the jurisdiction of the Court, the Pact of Bogotá on the one hand – and it has shown in Chapter 2 above that this was, at the time of the Application, still a valid ground – and the Court's inherent jurisdiction to settle disputes arising from the non-compliance with its Judgments. These two grounds are by no means mutually exclusive. As the Permanent Court noted in *The Electricity Company of Sofia and Bulgaria* case:

[141] PO of Colombia, pp. 165-166.

> "the multiplicity of agreements concluded accepting the compulsory jurisdiction is evidence that the contracting Parties intended to open new ways of access to the Court rather than to close old ways or to allow them to cancel each other out with the ultimate result that no jurisdiction would remain.[142]"

Colombia emphatically stresses that in that case, "the PCIJ had two treaty-grounded bases of jurisdiction before it."[143] But this is not a distinguishing characteristic. The fact is that after noting that the examination of the first source of jurisdiction had led to a negative result, the Court considered that this fact "does not however dispense the Court from the duty of considering the other source of jurisdiction invoked separately and independently from the first" and proceeded to examine the Bulgarian Government's argument relating to the other ground for jurisdiction it had invoked.[144] Indeed, "*The Electricity Company of Sofia* did not raise, even by implication, the issue of 'inherent jurisdiction'."[145]; but Nicaragua does not invoke that case to that end: this precedent simply establishes that when a Claimant State can base itself on several bases for jurisdiction, those bases are not mutually exclusive but, on the contrary, reinforce one another.[146]

5.4 *Second*, Colombia believes that it can detect a change in the Nicaraguan argument concerning the second ground for the jurisdiction of the Court or, more generally, the very subject-matter of the dispute submitted to the Court by Nicaragua. Thus, in the Introduction of the *Preliminary Objections*, Colombia stresses that Nicaragua would have rephrased its submissions in the Memorial, compared with its Application, in order "to distance the submissions from the

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[142] P.C.I.J., Judgment, 4 April 1939, *The Electricity Company of Sofia and Bulgaria*, *Preliminary Objections*, Series A/B, No. 77, p. 76. See also I.C.J., Judgment, 13 December 2007, *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, *Preliminary Objections*, *Reports 2007*, p. 873, para. 135.
[143] PO of Colombia, p. 138, para. 5.14.
[144] P.C.I.J., Judgment, 4 April 1939, *The Electricity Company of Sofia and Bulgaria*, *Preliminary Objections*, Series A/B, No. 77, p. 80.
[145] PO of Colombia, p. 139, para. 5.14.
[146] *See* NM, p. 12, para. 1.24.

issue of compliance."[147] This is nothing but a gross misunderstanding: the fact is that *as a consequence of the Judgment of 19 November 2012*, Colombia has an "obligation not to violate Nicaragua's maritime zones *as delimited in paragraph 251 of the Court Judgment of 19 November 2012* as well as Nicaragua's sovereign rights and jurisdiction in these zones".[148]

5.5 Indeed, any State has an obligation not to violate another State's maritime zones. However, as Colombia itself explained in its Rejoinder in the case concerning *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*:

> "Where two States disagree as to a maritime boundary, it is counterfactual, and would be highly counterproductive, to treat the eventual adjudicated boundary as having existed "from the beginning" and to award damages to the winning party in a given sector for earlier use of the disputed resources by the other party in that sector."[149]

In its 19 November 2012 Judgment, the Court upheld Colombia's position and stated:

> "The Court observes that Nicaragua's request for this declaration is made in the context of proceedings regarding a maritime boundary which had not been settled prior to the decision of the Court. The consequence of the Court's Judgment is that the maritime boundary between Nicaragua and Colombia throughout the relevant area has now been delimited as between the Parties. In this regard, the Court observes that the Judgment does not attribute to Nicaragua the whole of the area which it claims and, on the contrary, attributes to Colombia part of the maritime spaces in respect of which Nicaragua seeks a declaration regarding access to natural resources. In this context, the Court considers that Nicaragua's claim is unfounded."[150]

5.6 The situation is different once the Judgment is given. From that point on, each party is under the obligation to abstain from non-permitted activities in the area allocated to the other party and not to take and implement any measures in

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[147] PO of Colombia, p. 4, para. 1.5; *see* also pp. 21-22, para. 2.23, or pp. 151-152, paras. 6-5-6-6.
[148] NM, Submissions, p. 107, para. 1(a) – italics added.
[149] Rejoinder of Colombia in the case concerning the *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, 18 June 2010, p. 323, para. 9.10.
[150] I.C.J., Judgment 19 November 2012, *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, *Reports 2012*, p. 718, para. 250.

this area. The Court "has already had occasion to deal with situations of this kind."[151] In the *Temple of Preah Vihear* case,

> "it held that the temple was situated on territory falling under the sovereignty of Cambodia. From this it concluded that 'Thailand [was] under an obligation to withdraw any military or police forces, or other guards or keepers, stationed by her at the Temple, or in its vicinity on Cambodian territory' *(Merits, Judgment, I.C.J. Reports 1962,* p. 37)."[152]

More recently, in the *Cameroon* v. *Nigeria* case, the Court decided

> "that Cameroon [was] under an obligation expeditiously and without condition to withdraw any administration or military or police forces which may be present in areas along the land boundary from Lake Chad to the Bakassi Peninsula which pursuant to the present Judgment fall within the sovereignty of Nigeria."[153]

5.7 Similarly, in the present case, Colombia cannot take shelter behind a supposed uncertainty or dispute as to the precise limits of its maritime zones[154] to evade its responsibility. Therefore, it does not make sense to distinguish between both aspects: the spatial limits of the respective rights and obligations have been precisely determined by the Court's Judgment; they have binding force between the Parties[155] and must be scrupulously respected without delay or condition.

5.8 Now, by way of precaution and for the avoidance of doubt (which Colombia hopes to raise), Nicaragua does not exclude the eventuality to reintroduce a formal submission concerning the violation of the 2012 Judgment in

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[151] I.C.J., Judgment, 10 October 2002, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening)*, *Reports 2002*, p. 451, para. 313.
[152] *Ibid*.
[153] *Ibid.*, pp. 451-452, para. 315.
[154] At least insofar the continental shelf within 200 nautical miles from the Nicaraguan coasts is concerned. As for the area beyond this distance, the Court abstained to take a decision in its 2012 Judgment (see I.C.J., Judgment 19 November 2012, *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, *Reports 2012*, p. 669, para. 129, p. 670, para. 131 and p. 719, para. 251(3)) and has been called to delimit this part of the delimitation by Nicaragua's Application of 16 September 2013 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 (Nicaragua* v. *Colombia)*.
[155] Statute of the Court, Art. 59.

its final Submissions on the merits, although it would be redundant with its more detailed submissions concerning Colombia's responsibility and its consequences.

5.9 In any case, and as Colombia itself seems to acknowledge,[156] this nice legal discussion relates to the merits phase. Whether, the responsibility of a Party is entailed because of its violations of the Judgment itself[157] or for the obligations resulting from the Judgment is irrelevant as regards the Court's jurisdiction. But, in both cases, the question arises whether the Court has jurisdiction to decide on a dispute concerning compliance with its own Judgments. The answer is definitely in the affirmative. In effect, contrary to the assertions made by Colombia, there is no contradiction:

- between the consensual nature of the competence of the Court and its inherent jurisdiction to deal with disputes concerning compliance with its Judgments (I.); nor

- between this inherent jurisdiction and the competence of the Security Council to "make recommendations or decide upon measures to be taken to give effect to the" judgments of the Court[158] (II.).

[156] *See* PO of Colombia, p. 4, para. 1.5: "It is not appropriate, in the present pleading, to enter into the merits."
[157] As a reminder: the existence of a damage is not a condition for entailing the responsibility of a wrongdoer under international law ; see Article 2 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts: "There is an internationally wrongful act of a State when conduct consisting of an action or omission: (*a*) is attributable to the State under international law; and (*b*) constitutes a breach of an international obligation of the State" (A/RES/56/83, 12 December 2001).
[158] Cf. Art. 94, para. 2, of the UN Charter.

I. Inherent Jurisdiction is consistent with the consensual principle

5.10 According to Colombia, the ICJ has no jurisdiction over the "compliance phase" of a dispute.[159] This is so, Colombia argues, because neither of the governing instruments "assign […] enforcement, including supervision and monitoring of compliance, to the International Court of Justice."[160] Therefore, the jurisdiction of the Court "lacks any basis in the Statute of the Court, in the Pact of Bogotá or in the Court's jurisprudence."[161] Colombia's argument goes even further since Colombia claims that the exercise by the Court of its inherent jurisdiction would be "in clear contradiction with its Statute and the Charter of the United Nations."[162]

5.11 As explained in the Memorial,[163] by definition, an "inherent jurisdiction" is not expressly provided for but it stems from the very nature of the International Court of Justice as a court of law and is implied in the texts determining the jurisdiction of the Court. As the Iran-United States Claims Tribunal has clearly explained in an important decision, an international tribunal

> "possesses certain inherent powers. Inherent powers 'are those powers that are not explicitly granted to the tribunal but must be seen as a necessary consequence of the parties' fundamental intent to create an institution with a judicial nature.' It has been suggested that 'the source of the inherent powers of international courts and tribunals is their need to ensure the fulfilment of their functions'."[164]

5.12 This finding of the Iran-United States Claims Tribunal echoes that of the Court in the *Nuclear Test* cases. The Court's inherent jurisdiction "derives from

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[159] PO of Colombia, p. 153, para. 6.9, and p. 163, para. 6.28
[160] PO of Colombia, p. 153, para. 6.9.
[161] PO of Colombia, p. 150, para. 6.3. *See* also pp. 133-134, para. 5.6, p. 136, para. 5.11 and p. 156, para. 6.14
[162] PO of Colombia, p. 157, para. 6.15.
[163] NM, p. 13, para. 1.26.
[164] Decision Ruling on Request for Revision by Iran, 1 July 2011, *Iran v. United States*, Decision n° 134-A3/A8/A9/A14/B61-FT, para. 59, citing D. Caron, L. Caplan and M. Pellonpää (ed.), *The UNCITRAL Arbitration Rules: A Commentary*, OUP, 2006, p. 915 and C. Brown, "The Inherent Powers of International Courts and Tribunals", *BYbIL*, Vol. 76, 2005, p. 228.

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."[165] Colombia complains that "Nicaragua fails to mention that the words '[*s*]*uch* inherent jurisdiction' in the above quotation refer back to the earlier part of that paragraph and the paragraph before it."[166] This is true, but cannot obliterate the conclusion drawn by the Court from precisely these two previous paragraphs relating to its competence and the admissibility of its seizing. This conclusion reads in full as follows:

> "Such inherent jurisdiction, on the basis of which the Court is fully empowered to make whatever findings may be necessary for the purposes just indicated, 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".[167]

Such a conclusion is clearly not restricted to "the 'inherent *limitations'* on the exercise of the judicial function of the Court" as Colombia would have the Court think.[168]

5.13 Moreover, the exercise of such inherent jurisdiction does not imply that, as Colombia claims, the Court "somehow exists and operates independently from its Statute"[169] or "in clear contradiction with its Statute and the Charter of the United Nations."[170] The ICJ Statute is simply *silent* on this matter. Therefore, the exercise of such inherent jurisdiction would not be *contra statum* since no provision of the ICJ Statute (or of the UN Charter or the Pact of Bogotá) precludes it.

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[165] I.C.J., Judgments, 20 December 1974, *Nuclear Tests (Australia* v. *France)*, *Reports 1974*, 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.
[166] PO of Colombia, p. 139, para. 5.15.
[167] *See* fn. 165 *supra*.
[168] PO of Colombia, p. 140, para. 5.15 – italics added.
[169] PO of Colombia, pp. 133-134, para. 5.6.
[170] PO of Colombia, p. 157, para. 6.15 and p. 163, para. 6.28.

5.14 This analysis is among others confirmed by the practice of the ICJ concerning violations of an order indicating provisional measures, which shows that the Court "can to some extent 'punish' failures to respect its previous judgment"[171] In its 2001 Judgment in the *LaGrand* case, the Court made clear that:

> "Where the Court has jurisdiction to decide a case, it also has jurisdiction to deal with submissions requesting it to determine that an order indicating measures which seeks to preserve the rights of the Parties to this dispute has not been complied with."[172]

In that same Judgment, the Court further found that its jurisdiction would have extended to the determination of the appropriate reparation "had Germany's submission included a claim for indemnification."[173]

5.15 Two important conclusions can be drawn from the decision of the Court in the *LaGrand* case and its posterity:

(i) The fact that the ICJ Statute is silent on the jurisdiction of the Court over disputes concerning the responsibility of a party for non-compliance with an order of the Court indicating provisional measures does not preclude the Court from deciding a dispute arising in such a case.

(ii) In the case in point, the Court clearly exercises an inherent jurisdiction and it finds it so obvious that in the subsequent cases, it does not takes pain to

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[171] Robert Kolb, *The International Court of Justice*, Hart Publishing, Oxford and Portland, 2013, p. 830.

[172] I.C.J., Judgment, 27 June 2001, *LaCrand (Germany* v. *United States of America)*, *Reports 2001*, p. 484, para. 45. ICSID tribunals have followed the same approach; see e;g. *Victor Rey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No ARB/98/2, Decision on Provisional Measures, 25 September 2001, paras. 17 and 20, *City Oriente Limited v. Republic of Ecuador and Empresa Estatal Petroleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/06/21, Decision on Provisional Measures, 19 November 2007, para. 92; *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Provisional Measures, 8 May 2009, paras. 75-6 and *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Provisional Measures, 13 December 2012, para. 120.

[173] I.C.J., Judgment, 27 June 2001, *LaGrand (Germany* v. *United States of America)*, *Reports 2001*, p. 508, para. 116.

justify it anew and simply recalls that it had jurisdiction as established in the *LaGrand* case.[174]

5.16 There is no reason why the Court's position concerning its inherent jurisdiction to decide on the non-compliance with orders indicating interim measures could not be transposed *mutatis mutandis* to disputes arising from the non-compliance with its Judgments.

5.17 Moreover, there is another precedent, even closer to the present case, in which the Court, without any express provision in its Statute, exercised its inherent power to decide on the compliance – or not – with its previous Judgment. That is its Order of 22 September 1995, on the *Request* of New-Zealand *for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests* case, in which the Court accepted to examine whether "the basis of the Judgment delivered on 20 December 1974 in the *Nuclear Tests (New Zealand v. France) case* [had] been affected".[175] According to Colombia, the Judgments in those cases "confirm that the Court will make such a reservation [as the one included in paragraph 63 of the 1974 Judgments] only in a rare situation, such as was presented in *Nuclear Tests* where the defection of a party from its unilateral commitment would have undercut the premise on which its judgments were based."[176] This is indeed the case when a Party bluntly refuses to implement the Judgment of the Court.

5.18 One of the basic judicial functions of the Court is to settle disputes between States. One cannot reasonably claim that this mandate has been fulfilled when one of the Parties to a particular case refuses to abandon its claims and

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[174] *Ibid.*, pp. 482-483, para. 42 and 485, para. 48.
[175] 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. See NM, pp. 14-16, paras. 1.29-1.31.
[176] PO of Colombia, p. 141, para. 5.17.

deliberately refuses to comply with the Court's Judgment. Colombia has officially declared on several occasions – starting on the day of the Judgment[177] –:

- that it will not comply with the Court's Judgment;[178] and

- that it demands that Nicaragua sign a maritime delimitation treaty establishing a maritime boundary different from that established by the Court in its Judgment of 19 November 2012,[179] which undoubtedly is *res judicata* as Colombia acknowledges on the other hand.[180]

5.19 The principle of *res judicata* is neither a kind of abstract expression of wishful thinking nor is it self-sufficient. It has systemic implications in that it implies that it has to be effectively implemented;[181] even though the Court – as any other court or tribunal – has no enforcement capability[182], it can and must decide on disputes as to the implementation of its Judgments, within the framework of its inherent function of settling disputes between States**.**

5.20 Moreover, as Shabtai Rosenne wrote fifty years ago:

> "The definition of the status of the Court as a principal organ, and the principal judicial organ, of what is essentially a political organization, the United Nations, emphasized that international adjudication is a function which is performed within the general framework of the political organization of the international society, and that the Court has a task that is directly related to the pacific settlement of international disputes and hence to the maintenance of international peace."[183]

5.21 Thirty years later, the President of the ICJ confirmed this view:

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[177] *See* NM, pp. 22-23, paras. 2.3-2.5.
[178] *See* NM, pp. 21-26, paras. 2.2-2.10 and pp. 85-93, paras. 4.17-4.38.
[179] *See* NM, pp. 24-25, para. 2.7, pp. 87-90, paras. 4.22-4.26 and p. 90, para. 4.28.
[180] *See* e.g. PO of Colombia, p.141, para. 5.17.
[181] *See* H. Ascensio, "La notion de juridiction internationale en question" in Société française pour le Droit international, *La juridictionnalisation du droit international*, colloque de Lille, Paris, Pedone, 2003, pp. 163-202, e.g. pp. 178 and 183.
[182] *See* paras. 5.22 below.
[183] Sh. Rosenne, *The Law and Practice of the International Court,* Leiden, Sijthoff, 1965, p. 23. See also L. Gross, "The International Court of Justice and the United Nations", *Recueil des cours*, Vol. 120, 1967/1, p. 340.

> "the Court is clearly an essential part not just of the machinery for the peaceful settlement of disputes set up by the Charter, but also of the general system for the maintenance of international peace and security that it introduced. No provision of the Charter or of the Statute of the Court sets any limits to its action in this respect."[184]

This very particular and eminent role of the Court in the system for the maintenance of international peace and security makes it all the more necessary that its "jurisdiction and authority are made fully effective."[185]

5.22 The circumstances of the present case are such that the Court should exercise its inherent jurisdiction. As demonstrated in the Memorial, Colombia has continuously threatened to use force in areas of the Caribbean Sea where Nicaragua has sovereign rights and jurisdiction as definitely decided by the Court.[186] As a consequence, it is the integrity of the functions of the Court as the principal judicial organ of the United Nations and its role in the system for the maintenance of the international peace and security which are at stake – and at risk of being jeopardised.

II. The Inherent Jurisdiction of the Court is compatible with the competence of the Security Council

5.23 Besides its general allegation that the Court has no inherent jurisdiction in matters of non-compliance with its Judgments, Colombia requests the Court to find that it has no jurisdiction over Nicaragua's Application of 26 November 2013 because such jurisdiction "is expressly assigned to other institutions. Both the UN

[184] Address by H. E. Judge Mohammed Bedjaoui, President of the International Court of Justice, to the General Assembly of the United Nations, 13 October 1994 (http://www.icj-cij.org/court/index.php?p1=1&p2=3&p3=1&pt=3&y=1994&lang=en).
[185] Cf. Iran-United States Claims Tribunal**,** *E-Systems, Inc. v. Iran*, 4 February 1983, *Iran-USCTR*, Vol. 2, p. 57. See also *Rockwell International Systems, Inc. v. Iran*, 1985, *Iran-USCTR*, Vol. 2, p. 311 and *Ford Aerospace and Communications Corporation v. Air Force of Iran*, 1986, *Iran-USCTR*, Vol. 4, pp. 108-109. What holds true for the Iran/US Tribunal is even more peremptory when the World Court is concerned.
[186] *See* NM, pp. 33-51, paras. 2.22-2.52, pp. 70-78, paras. 3.37-3.55, and pp. 91-93, paras. 4.33-4.38.

Charter and the Pact of Bogotá assign the subject matter of Nicaragua's claim to the Security Council."[187]

5.24 Colombia's reading of both the UN Charter and the Pact of Bogotá is misleading and rests on confusion between enforcement power (*pouvoir exécutoire*) and competence with regard to compliance of the judgments. It is clear that the Court has no means to 'enforce" its Judgments. No military or police force is at its disposal for *enforcing* its Judgments – contrary to the situation prevailing in the domestic sphere. As defined in the *Dictionnaire de droit international public*, enforceability (*force exécutoire*) means:

> "A. En droit interne, caractéristique d'un acte ou d'une décision juridictionnelle qui est susceptible d'une exécution forcée par l'autorité publique.
> B. En principe, le droit international ne connaît pas de situation analogue, faute d'autorité publique supérieure aux États."[188]
> [A. In/under domestic law, the character of an act or judicial decision which may be enforced by public authority/power.
> B. In principle, there is no similar situation in/under international law, due to the lack/in the absence of public authority superior to States]

5.25 It is true that the UN Charter sets forth a mechanism available for the enforcement of the Court's Judgments in case of non-compliance. Article 94(2) of the Charter reads as follows:

> "If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party *may* have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment"[189]

But the power thus conferred to the Security Council relates to the enforceability of the Judgments of the Courts and does not deprive the Court from its inherent jurisdiction in matter of non-compliance.

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[187] PO of Colombia, p. 150, para. 6.3. See also p. 155, para. 6.12.
[188] Jean Salmon (dir.), *Dictionnaire de droit international public*, Bruylant/AUF, Bruxelles, 2001, p. 513.
[189] Article 94(2) of the UN Charter – italics added.

5.26 Moreover, this mechanism is neither compulsory nor exclusive. As Professor Kolb aptly puts it, "[t]he first question is whether this provision is exhaustive, in the sense that it contains the sole acceptable mechanism for ensuring the forced execution of the Court's judgments. It is not, and does not."[190] The wording of Article 94(2) makes clear that this mechanism "*a un caractère facultatif*"[191] [is of a facultative nature]. The recourse to the Security Council is simply a *possibility* ("may") offered to one party to the dispute complaining of non-compliance by the other party. It is not an *obligatory* course of action.

5.27 The optional character of the Article 94(2) mechanism is perfectly logical. Given the composition of the UN Security Council and the presence of five permanent Members with a veto right, were this mechanism to be exclusive and compulsory, its effectivity would be uncertain, to say the least, in cases where one of the Parties is one of the five permanent Members of the Security Council. As authoritatively noted by a former President of the Court, "[i]n particular, no provision along the lines of Article 12 of the Charter would, on the face of it, preclude the Court from finding on a dispute being dealt with by the Security Council or by any other organ or agency. Relations between principal organs are, generally speaking, governed by the principles of speciality, equality, the power of each to determine its own jurisdiction, and co-ordination; the whole architecture of the United Nations is based upon the rule of autonomy for each principal organ, none of which is subordinate to any other, and upon the requirement of a concerted pursuit of the common objectives set forth in the Charter. In the absence of any other specific restriction, the Court has always considered the referral of a dispute to more than one principal organ as not, in

[190] R. Kolb, *op. cit.* note 171, p. 839.

[191] A. Pillepich, "Article 94", in J.P. Cot and A. Pellet (ed.), *La Charte des Nations Unies*, *Commentaire article par article*, Paris, Economica, 2005, Vol. II, para. 16, p. 1995. See also para. 11, p. 1992; M. Kamto, "Considérations actuelles sur l'inexécution des decisions de la Cour internationale de Justice", in T. M. Ndiaye and R. Wolfrum, *Law of the Sea, Environmental Law and Settlement of Disputes. Liber Amicorum Judge Thomas A. Mensah*, Leiden/Boston, Nijhoff, 2007, p. 218.

itself, constituting any impediment to its performance of its duty."[192] This position is illustrated by the famous *dictum* of the Court in *Nicaragua*:

> "The Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the same events.."[193]

In that Judgment, the Court was referring to Article 12 of the Charter. There is no reason why this reasoning could not apply to Article 94 as well.

5.28 Colombia then asserts that its position is confirmed by Article L of the Pact of Bogotá, which reads as follows:

> "If one of the High Contracting Parties should fail to carry out the obligations imposed upon it by a decision of the International Court of Justice or by an arbitral award, the other party or parties shall, before resorting to the Security Council of the United Nations, propose a meeting of Consultation of Ministers of Foreign Affairs to agree upon appropriate measures to ensure the fulfillment of the judicial decision or award."[194]

5.29 Colombia argues that:

> "Article L mandates ('shall') a specific, non-judicial mechanism in the case of a complaint alleging 'fail[ure] to carry out the obligations imposed upon it by a decision of the International Court of Justice…'. The premise of the provision is that this is a matter assigned to the Security Council. Before that, the party seeking fulfillment 'shall… propose a meeting of Consultation of Ministers of Foreign Affairs… to agree upon appropriate measures to ensure the fulfillment of the judicial decision…'."[195]

5.30 Colombia's interpretation of Article L of the Pact of Bogotá is erroneous for at least two reasons.

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[192] Address by H. E. Judge Mohammed Bedjaoui, President of the International Court of Justice, to the General Assembly of the United Nations, 13 October 1994 (http://www.icj-cij.org/court/index.php?p1=1&p2=3&p3=1&pt=3&y=1994&lang=en).
[193] I.C.J., Judgment, 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility*, *Reports 1984*, p. 435, para. 95.
[194] Article L of the Pact of Bogotá.
[195] PO of Colombia, pp. 157-158, para. 6.17.

5.31 *First*, contrary to what Colombia argues, the obligation set out in this Article is not to resort to the UN Security Council. In this respect, Article L by no means contemplates recourse to Article 94(2) of the UN Charter as compulsory. It only requests one or the two Parties to "propose a meeting of Consultation of Ministers of Foreign Affairs" *if* one or the two of them envisage(s) to have recourse to the Security Council; and

5.32 *Second*, the obligation for the party to the dispute which complains about non-compliance by the other party, to "propose a meeting of Consultation of Ministers of Foreign Affairs to agree upon appropriate measures to ensure the fulfillment of the judicial decision…" arises *if and only if* that party decides to seize the Security Council. In the present case, Nicaragua has not had such an intention. And if it would have had it, this would not prevent the Court to exercise its inherent jurisdiction since, as shown above, "[b]oth organs can … perform their separate but complementary functions with respect to the same events."[196]

5.33 In any case, even though Nicaragua had no obligation to enter into consultation with Colombia, Nicaragua has amply done so.[197] As Nicaragua has shown in its Memorial,[198] President Ortega has invited President Santos to enter into a constructive dialogue[199], met with him on two different occasions[200] and

[196] *See* para. 5.26 above.
[197] *See* paras. 2.53- 2.63 NM.
[198] NM, pp. 51-55, paras. 2.53-2.63.
[199] *See* e.g. "Message from President Daniel to the People of Nicaragua", El 19 Digital, 26 November 2012, (NM, Annex 27)(http://www.el19digital.com/articulos/ver/titulo:7369-mensaje-del-presidente-daniel-al-pueblo-de-nicaragua).
[200] "Nicaragua asks Bogotá to form The Hague Commissions", La Opinion, 22 February 2013, (NM, Annex 35) (http://laopinion.com.co/demo//index.php?option=com_content&task=view&id=414468&Itemid=2 9).

has even offered to sign a treaty implementing the Court's Judgment[201] – a step which, however cannot be a precondition for the implementation of the Judgment.

5.34 Colombia reproaches Nicaragua for basing "itself on the purported powers of some regional international courts, which operate under entirely different treaty systems: the European Court of Human Rights (ECHR) and the Inter-American Court of Human Rights" and for ignoring "the fact that the competence of these two courts of human rights with regard to monitoring and compliance with their judgments are explicitly provided for in their constituent instruments, together with the conditions under which they may exercise such a competence."[202] Colombia misses the point: while it is true that the Conventions of Rome and San José provide for particular mechanisms of implementation of their judgments which are respectively assigned to the Committee of Ministers (Article 46 ECHR) and to General Assembly of the Organization of American States (Article 65 I-ACHR) these instruments do not envisage a direct role for these Courts for supervising the execution of their judgments in case of non-compliance and yet they *do* intervene. The comparison is all the more relevant because these mechanisms which involve the political organs of the two regional organisations are infinitely more efficient and systematic than the one envisaged by Article 94(2) of the UN Charter. However, the regional Courts of human rights have not been dissuaded to clearly assert their jurisdiction for dealing with the non-compliance of their judgments – an inherent jurisdiction since it is not mentioned in their statutes.

[201] *See* "Daniel: 40 years from the martyrdom of Allende, peace must prevail", El 19 Digital, 11 September 2013 (NM, Annex 39) (http://www.el19digital.com/articulos/ver/titulo:13038-daniel-a-40-anos-del-martirio-de-allende-debe-prevalecer-la-paz)
"Nicaragua proposes to coordinate The Hague's sentence with Colombia", *AFP,* 9 May 2014 (NM, Annex 46) http://www.noticiasrcn.com/internacional-america/nicaragua-propone-coordinar-fallo-haya-colombia
[202] PO of Colombia, pp. 159-160, para. 6.23.

5.35 Colombia erroneously argues that the ECHR "has no power to monitor compliance with its judgments and to review measures of implementation of a previous judgment on the basis of a new complaint by the applicant."[203] The practice of the European Court clearly contradicts this view.[204] The Grand Chamber of the Court has summarized this practice in a very recent case, in which the Court, while acknowledging the role of the Committee of Ministers, considered that it was not prevented from exercising jurisdiction in case of non-compliance with its judgments:

> "Under Article 46 § 2, the Committee of Ministers is vested with the powers to supervise the execution of the Court's judgments and evaluate the measures taken by respondent States. However, the Committee of Ministers' role in the sphere of execution of the Court's judgments does not prevent the Court from examining a fresh application concerning measures taken by a respondent State in execution of a judgment if that application contains relevant new information relating to issues undecided by the initial judgment (see *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], no. 32772/02, §§ 61-63, ECHR 2009)."[205]

This is indeed even more relevant when the State has taken no measure of application. Therefore, it is simply not true that "the powers of the European Court of Human Rights flow from express stipulations in the Convention."[206] As exercised by the European Court, they go far beyond what is expressly provided for in Article 46. Moreover and in any case, Article 94 of the Charter provides for an implementation mechanism infinitely weaker than those existing under the regional instruments.

5.36 The ICJ has repeatedly affirmed that it "'neither can nor should contemplate the contingency of the judgment not being complied with' *(Factory*

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[203] PO of Colombia, pp. 160-161, para. 6.25.
[204] *See* NM, pp. 13-14, para. 1.27 and the case law mentioned therein (at note 18).
[205] E.C.H.R., Grand Chamber, Judgment, 5 February 2015, *Bochan v. Ukraine (no. 2)*, Application no. 22251/08, paras. 33.
[206] PO of Colombia, p. 145, para. 22.

at Chorzow, P.C.I.J., Series A, No. 17, p. 63)."[207] Curiously, Colombia asserts that "[t]his dictum, rather than suggesting an implied power of supervising compliance in subsequent proceedings, is opposed to it."[208] Although supposedly unthinkable, non-compliance has occurred in the present case. It is proper for the Court to address this situation in such a way that its authority will not be impaired and its judgments not be mocked and treated as scraps of paper.

[207] *I.C.J., Judgment, 26 November 1984, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Reports 1984*, p. 437, para. 101, quoting P.C.I.J., Judgment, 13 September 1928, *Factory at Chorzów*, Jurisdiction, Series A, No. 17, p. 63. See also NM, p. 14, para. 1.29.
[208] PO of Colombia, p. 159, para. 6.20.

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 in respect of the jurisdiction of the Court are invalid.

The Hague, 20 April 2015

CARLOS ARGÜELLO GÓMEZ
Agent of the Republic of Nicaragua

CERTIFICATION

I have the honour to certify that this Written Statement and the documents annexed are true copies and conform to the original documents and that the translations into English made by the Republic of Nicaragua are accurate translations.

The Hague, 20 April 2015.

CARLOS ARGÜELLO GÓMEZ
Agent of the Republic of Nicaragua

LIST OF ANNEXES