

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

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

I. INTRODUCTION

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

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

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

II. THE PRINCIPLE OF *RES JUDICATA* IN THE JURISPRUDENCE OF THE COURT AND ITS APPLICATION TO THE PRESENT CASE

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

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

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

6. As the Court has stated previously, it is well established that the *dispositif* of a judgment possesses the force of *res judicata* (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007 (I), p. 94, para. 123). However, the Court has also noted that *res judicata* may attach to the reasons of a judgment of the Court if those reasons are “inseparable” from the operative clause of a judgment (*Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Preliminary Objections (*Nigeria v. Cameroon*), Judgment, I.C.J. Reports 1999 (I), p. 35, para. 10) or if they constitute a “condition essential to the Court’s decision” (*Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand)*, Judgment, I.C.J. Reports 2013, p. 296, para. 34; *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)*, Judgment No. 11, 1927, P.C.I.J., Series A, No. 13, p. 20).

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

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

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

III. THE *DISPOSITIF* OF THE 2012 TERRITORIAL AND MARITIME DISPUTE JUDGMENT

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

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

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

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

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

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

13. Similarly, in the *Frontier Dispute* case (*Burkina Faso/Niger*), Burkina Faso requested the Court to adjudge and declare that certain co-ordinates constituted the boundary along two sections of its border with Niger in points 1 and 3 of its final submissions (*Judgment*, *I.C.J. Reports 2013*, p. 66, para. 35). These sections of the boundary were not the subject of the dispute before the Court. Burkina Faso, however, wanted the Court to include them in the *dispositif* of the Judgment to “endow this line with the force of *res judicata*” (*ibid.*, p. 66, para. 37). Noting that the function of the Court is to “decide in accordance with international law such *disputes* as are submitted to it” (*ibid.*, p. 70, para. 48; emphasis added), the Court held that Burkina Faso’s request was “not compatible with its judicial function” (*ibid.*, p. 72, para. 58) and thus did not proceed to delimit the boundary along these two sections. In the *dispositif*, the Court stated that “it cannot uphold the requests made in points 1 and 3 of the final submissions of Burkina Faso” (*ibid.*, p. 92, para. 114 (1)). Again, the phrase “cannot uphold” was used to signify a clear rejection of the Burkinabe requests by the Court; it was not a refusal to make a decision, as counsel for Nicaragua suggested during the hearings in the present case².

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

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

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

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

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

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

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

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

IV. THE REASONING OF THE COURT IN THE 2012 *TERRITORIAL AND MARITIME DISPUTE* JUDGMENT

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

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

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

This is a misreading of the 2012 Judgment.

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

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

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

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

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

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

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

128. The Court recalls that in the second round of oral argument, Nicaragua stated that it was ‘not asking [the Court] for a definitive ruling on the precise location of the outer limit of Nicaragua’s continental shelf’. Rather, it was ‘asking [the Court] to say that Nicaragua’s continental shelf entitlement is divided from Colombia’s continental shelf entitlement by a delimitation line which has a defined course’. Nicaragua suggested that ‘the Court could make that delimitation by defining the boundary in words such as ‘the boundary is the median line between the outer edge of Nicaragua’s continental shelf fixed in accordance with UNCLOS Article 76 and the outer limit of Colombia’s 200-mile zone’’. This formula, Nicaragua suggested, ‘does not require the Court to determine precisely where the outer edge of Nicaragua’s shelf lies’. The outer limits could be then established by Nicaragua at a later stage, on the basis of the recommendations of the Commission.

129. However, since Nicaragua, in the present proceedings, has not established that it has a continental margin that extends far enough to overlap with Colombia’s 200-nautical-mile entitlement to the continental shelf, measured from Colombia’s mainland coast, the Court is not in a position to delimit the continental shelf boundary between Nicaragua and Colombia, as requested by Nicaragua, even using the general formulation proposed by it.” (*I.C.J. Reports 2012 (II)*, p. 669; cross-references omitted.)

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

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

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

Article 76 and the outer limit of Colombia's 200-mile zone"³ (*I.C.J. Reports 2012 (II)*, p. 669, para. 128).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. THE INCOHERENCE OF THE PROCEDURAL REQUIREMENT INTRODUCED BY THE MAJORITY

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

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

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

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

43. In the present Judgment, the majority states that

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

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

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

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

112. *The Court concludes that the claim contained in final submission I (3) by Nicaragua is admissible.*” (*Ibid.*, p. 665, paras. 111-112; emphasis added.)

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

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

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

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

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

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

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

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

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

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

VI. THE PURPOSES OF SUBMISSION OF INFORMATION UNDER ARTICLE 76 OF UNCLOS AND ARTICLE 4 OF ITS ANNEX II

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

53. This finding is unsurprising and unexceptional: the submission of “Preliminary Information” is not designed to fulfil the requirements to submit information under Article 76 (8). Rather, the term “Preliminary Information” was first used in the decision of States parties to UNCLOS of 20 June 2008 (SPLOS/183), in which it was recognized that coastal States intending to claim a continental shelf could file “indicative” information as a means of fulfilling their obligation under Article 4 of Annex II to UNCLOS to submit “particulars” of prospective continental shelf claims to the CLCS within ten years of the entry into force of the Convention for that State⁴. This was a means of allowing States, in particular developing ones, which may lack the necessary technical capabilities, the possibility of complying with the “sunset clause” for claiming an extended continental shelf under UNCLOS, whilst providing them with the extra

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

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

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

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

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

55. The procedural requirement upon which the majority places great emphasis — the obligation to submit information to the CLCS according to Article 76 (8) of UNCLOS — is also conditional on the fulfilment of the “test of appurtenance”, as set out in the Guidelines of the CLCS⁵. According to this test, a coastal State must first prove that it has a continental shelf entitlement that extends beyond 200 nautical miles before it is permitted — indeed, obliged — to delineate the outer limits of the shelf⁶. This test is based on Article 76 (4) (a) of UNCLOS, which provides that “the coastal State *shall* establish the outer edge of the continental margin *wherever* the margin extends beyond 200 nautical miles . . .”⁷. The obligation to delineate the outer limits of the continental shelf, and thus submit

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

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

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

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

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

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

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

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

⁸ CLCS Guidelines, point 2.2.4.

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

VII. *NE BIS IN IDEM* AND THE EXHAUSTION OF TREATY PROCESSES

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

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

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

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

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

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

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

VIII. CONCLUSION: THE AUTHORITY OF *RES JUDICATA* AND THE PROTECTION OF THE JUDICIAL FUNCTION

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

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

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

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

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

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

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

(Signed) Abdulqawi A. YUSUF.

(Signed) Antônio Augusto CANÇADO TRINDADE.

(Signed) XUE Hanqin.

(Signed) Giorgio GAJA.

(Signed) Dalveer BHANDARI.

(Signed) Patrick L. ROBINSON.

(Signed) Charles N. BROWER.
