

**STATEMENT BY H.E. JUDGE PETER TOMKA, PRESIDENT OF THE INTERNATIONAL
COURT OF JUSTICE, AT THE ORGANIZATION OF AMERICAN STATES**

**The Role of the International Court of Justice in World Affairs: Successes and Challenges
with Special Reference to OAS Member States and the Pact of Bogotá**

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Dear Mr. Secretary-General,
Excellencies, distinguished colleagues,

I am most pleased to be in Washington with you today at the Organization of American States (“OAS”). I express warm gratitude to the Secretary-General José Miguel Insulza for his kind invitation, and to Mr. George Sanin, Director of the Department of International Affairs, and his team, for arranging my visit here today. I also take this opportunity to extend my warm greetings to Dr. Jean Michel Arrighi, Secretary for Legal Affairs. I am particularly delighted to be here representing the International Court of Justice (“ICJ” or “Court”), the principal judicial organ of the United Nations, in a time of a great American involvement in the work of the Court. It is no secret that American States have been the most frequent clients of the Court since its inception in 1945.

The Court has been particularly active in the last 23-24 years. In fact the Court has rendered more judgments since 1991, some 65 of them, than during the previous 45 years of its existence (52 judgments).

It is to be noted, with great satisfaction, that American States have contributed to this positive development by having more frequently resorted to the Court as a forum for the settlement of their disputes. While during the first 15 years there were only four cases between American States submitted for judicial resolution by the principal Court of the United Nations, and no case between 1960 and 1980, subsequently some 22 cases in which American States appear on both sides of the aisle (i.e., one as the Applicant, the other as the Respondent) have been brought before the Court. Only in the last 15 years, 17 such cases. This clearly illustrates that the Court has become a viable option for States in need to assist them in resolving their disputes or to assert their rights which are being either contested or denied by other State(s). The judgments of the Court are endowed with the authority of the principal judicial organ and all UN Member States have committed to comply with them under the Charter of the United Nations and the Court’s Statute.

The Court is currently experiencing — and welcomes — a particularly Latin American-friendly judicial period. The statistics covering only the last few years are eloquent: of the ten cases currently in the Court’s docket, six of those proceedings involve disputes between Latin American States. What is more, the Court recently handed down its Judgment in the case concerning the *Maritime Dispute* between Peru and Chile and similarly resolved a long-standing maritime dispute opposing Nicaragua and Colombia in November 2012. Up until last September, the Court was also seised of the dispute concerning *Aerial Herbicide Spraying* between Ecuador and Colombia, which was settled by the parties just three weeks prior to the opening of the public hearings in the Great Hall of Justice of the Peace Palace.

I. General remarks: the Court and the Americas

In many ways, therefore, my remarks here today will aim to underscore and celebrate some of the many contributions of OAS Member States to the work of the judicial institution. One has to look no further than the Bench of the World Court to see the various contributions to its work, if only by way of judicial human resources. For instance, since its inception in 1945 the Court has benefited from the service of 28 judges originating from OAS Member States; six judges from that contingent went on to become President of the principal judicial organ of the UN, while five others became its Vice-President. In the considerably shorter lifespan of the Court's predecessor institution, the Permanent Court of International Justice ("PCIJ") which operated for some 18 years from its inception in 1922, nine judges originating from OAS States served on its Bench, including one of those judges going on to preside that judicial body.

Yet, statistics alone do not do justice to the pervasive influence of OAS Member States on the work of the Court; indeed, the extent and reach of this influence goes much deeper. For instance, it is interesting to highlight the historical contributions of OAS Member States in the various conferences and preparatory works that paved the way for the inception of the PCIJ and, eventually, that of the present-day Court. While only the USA and Mexico were represented at the First Hague Peace Conference in 1899, 19 American States participated in the Second Hague Peace Conference in 1907, out of a total of 44 in attendance.

In that context, American States contributed greatly to moving the agenda forward, in particular by advancing the following ideas, among others: arguments advocating the non-recourse to force and resort to arbitration for the recovery of contract debts; extensive reliance on the notion of juridical equality of States, especially in connection with the manner of electing judges to international tribunals; and support for the idea of compulsory arbitration. Needless to say, these advances were far from surprising given that Latin American States have had a long history of agreements and affirmations providing for the peaceful settlement of disputes as between themselves. What is more, there is no doubt that the discussions and proposals floated in the context of the Second Hague Peace Conference served as a valuable precursor for the adoption of the PCIJ and the ICJ's respective constitutive instruments.

It is well known that during the initial drafting of the PCIJ Statute, which was assigned to the Advisory Committee of Jurists, considerable efforts were deployed to endow the first standing permanent court of international justice with compulsory jurisdiction. In short, while States would have remained unfettered in their choice to adhere to the Statute of that judicial institution or not, the acceptance of this instrument would have given jurisdiction to the PCIJ to adjudicate legal disputes, provided that "no agreement ha[d] been made to choose another jurisdiction". Ultimately, this proposal did not acquire credence in the Council of the League of Nations; rather, the prevailing view was that while adherence to the PCIJ should be actively promoted and enhanced, States should nonetheless retain some degree of discretion in subjecting themselves to the judicial settlement of their disputes.

However, I should like to point out that the Brazilian delegate, Raoul Fernandes, strongly criticized this lack of compulsory jurisdiction, and proposed a compromise which ultimately resulted in the acceptance by delegates of what is commonly termed the "Optional Clause". Thus, the resulting document — the Statute of the PCIJ — contained a provision which was quasi-identical to what is now Article 36 (2) of the present-day Court's Statute. The actual declaration was actually contained in an "Optional Clause" annexed to a Protocol of Signature, as opposed to requiring States to deposit declarations recognizing the Court's jurisdiction as compulsory under a specific provision of the Statute. The "Optional Clause" read as follows:

“The undersigned, being duly authorized thereto, further declare, on behalf of their Government, that, from this date, they accept as compulsory *ipso facto* and without special convention, the jurisdiction of the Court in conformity with Article 36, paragraph 2, of the Statute of the Court, under the following conditions.”

Some have even labelled this provision — which is the genesis of Article 36 (2) of the present-day Court’s Statute — the “clause Raul Fernandes”. The official records confirm that it was “[o]n the motion of the Brazilian delegate” that the Third Committee, to which the Assembly of the League of Nations submitted the draft Statute, inserted a new paragraph to the existing jurisdictional clause that empowered States to adopt compulsory jurisdiction in full or in part. There is no doubt, therefore, that Mr. Fernandes played an instrumental role in the preparatory stages leading up to the adoption of this provision.

II. The importance of State consent and the jurisdiction of the Court: the Pact of Bogotá and beyond

The founders of the United Nations system insisted that State consent should remain the cornerstone when electing potential avenues for the peaceful resolution of international disputes arising between Member States. This undoubtedly prompted the framers of the Charter to reflect this wide margin of choice afforded States in selecting settlement mechanisms with a view to resolving their differences.

In this regard, the first paragraph of Article 33 of the Charter provides that

“[t]he 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”.

It is quite telling that those modes of dispute resolution — along with the OAS’s corresponding commitment to allowing parties to international disputes to choose their methods of settlement — are mirrored in the OAS Charter, in particular in Chapter V. Those features of the international system — and the corresponding implications for judicial dispute resolution — are spelled out in greater detail in Chapter One of the Pact of Bogotá.

More importantly, this commitment to the peaceful settlement of international disputes also underpins one of the most important jurisdictional instruments under the OAS framework — the Pact of Bogotá — which I will discuss in a moment. In the meantime, suffice it to underscore that the Court itself has acknowledged the importance of peaceful dispute resolution as a driving force behind the adoption of the Pact. In its Judgment on jurisdiction and admissibility of the application in the case concerning *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, the Court declared that “[i]t is . . . quite clear from the Pact that the purpose of the American States in drafting it was to reinforce their mutual commitments with regard to judicial settlement”. In short, an unequivocal symbiosis — and compatibility — exists between the underlying philosophy of the Pact of Bogotá and the ideals enshrined in the UN Charter.

The World Court’s jurisdiction on contentious matters is based on State consent. Simply put, only if parties have consented to its jurisdiction over the dispute can the Court adjudicate the merits of the case before it. In that regard, a dispute may be brought to the Court in four different ways. First, two disputing States can conclude a “special agreement” — commonly referred to as *compromis* in French — with the stated purpose of submitting their dispute to the Court. This is by far the most efficient and direct route for electing recourse to the Court. To date, some 17 cases have been brought to the Court by way of special agreement. Some three disputes between OAS Member States were brought to the Court via this jurisdictional mechanism, namely the first

Asylum Case between Colombia and Peru in 1949, the dispute concerning the *Delimitation of the Maritime Boundary in the Gulf of Maine Area* between Canada and the United States of America, and the Honduras/El Salvador case in the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*.

Those cases undoubtedly demonstrated the utility of submitting disputes to the Court by way of special agreement. Such agreements enable parties to define the dispute the Court is called upon to resolve, to agree on some procedural issues, and occasionally even to identify the applicable legal instruments. For one thing, the Court is not typically called upon to pronounce on preliminary objections to its jurisdiction or the admissibility of the Applicant's claims when a case is brought to it by special agreement.

Second, a special provision — commonly termed “compromissory clause” — granting jurisdiction to the Court in respect of disputes relating to the interpretation or application of a bilateral treaty or multilateral convention, in which such clause is enshrined, may be invoked by a party to submit a dispute to the Court. Prior to the merits phase, however, the Court often has to hear the parties regarding preliminary objections raised by the respondent State to the jurisdiction of the Court, or to the admissibility of the Applicant's claims, or both. Since the end of the Cold War, we have witnessed a growing number of such compromissory clauses in bilateral treaties and multilateral conventions granting jurisdiction to the Court, with over 300 such instruments currently in force.

An example is the case concerning *Pulp Mills on the River Uruguay*, opposing Argentina and Uruguay, which culminated in the Court's Judgment on the merits on 20 April 2010. In that case, the jurisdiction of the Court was established on the basis of a compromissory clause contained in a bilateral treaty, namely Article 60, first paragraph, of the 1975 Statute of the River Uruguay, which read as follows: “Any dispute concerning the interpretation or application of the [Montevideo] Treaty [of 7 April 1961, concerning the boundary constituted by the River Uruguay] and the Statute which cannot be settled by direct negotiations may be submitted by either party to the International Court of Justice.”

Third, by way of *forum prorogatum* a State may refer a dispute to the Court, over which it does not have jurisdiction initially, and invite the other State to accept the Court's jurisdiction in that specific case. Should this second State consent to such arrangement, the Court is then able to consider the matter. In short, this option enables a State which did not recognize the jurisdiction of the Court at the moment when the application instituting proceedings against it was filed to nonetheless accept such jurisdiction subsequently, so that the Court may decide the case. A provision to this effect has been included in the Rules of Court, adopted in 1978 under the Presidency of Judge Eduardo Jiménez de Aréchaga from Uruguay.

Fourth, and more importantly for our purposes, a State may make a unilateral declaration by which it recognizes as compulsory the jurisdiction of the Court, with reciprocal effect on other States. These declarations are made under Article 36 (2) of the Court's Statute. That said, such declarations may be “tailored” to fit the needs and interests of those States making them, in particular by determining the scope of the acceptance of the Court's jurisdiction or determining the classes or categories of disputes falling within such jurisdiction.

In the world of today, when many leaders advocate the rule of law, it is important — in my view — to increase the number of States having subscribed to this jurisdictional avenue. In his Report of 2012 for the High-Level Event on the Rule of Law, the UN Secretary-General called on the UN Member States to make declarations recognizing the jurisdiction of the Court as compulsory, an initiative that should be commended heartily. Moreover, some seven years earlier, the *World Summit Outcome* document had similarly called “upon States that have not yet done so to consider accepting the jurisdiction of the Court in accordance with its Statute”. However, considerable work remains to be done on this front. At present, only slightly over a third of the

United Nations membership — namely 70 States out of 193 — accept the Court’s jurisdiction under such declarations, including only one Permanent Member of the Security Council, as when compared to 59 per cent of the Organization in 1948 (34 States out of 58 Member States), which included four of the five Permanent Members of the Security Council. Out of the 35 OAS Member States, 14 States currently have optional declarations in force under the Court’s Statute¹, a figure representing 40 per cent of the membership of your august Organization.

With respect to the jurisdiction of the World Court, some regional conventions on the peaceful settlement of disputes provide for compulsory jurisdiction, which signatory States accept when adhering to the relevant conventional scheme. For instance, the European Convention for the Peaceful Settlement of Disputes enshrines such a jurisdictional mechanism.

Similarly, and more importantly for our purposes today, the American Treaty on Pacific Settlement (known as the “Pact of Bogotá”), which was signed in 1948, constitutes another similar instrument. Its key provision on judicial procedure, Article XXXI², essentially replicates Article 36 (2) of the World Court’s Statute which, as I pointed out earlier, governs declarations made by States recognizing the Court’s jurisdiction as compulsory. This provision thus provides a jurisdictional basis for disputes between the parties to be submitted to the principal judicial organ of the United Nations for adjudication. At present, the number of ratifications and accessions made by States under the Pact of Bogotá totals 14 out of the 35 Member States of the OAS.

Article XXXI of the Pact of Bogotá has been the foundation of the World Court’s jurisdiction in several cases submitted to it. In particular, out of the 26 disputes opposing OAS Member States brought to the Court, it is noteworthy that jurisdiction in 13 of these cases was at least partially argued to be based on the Pact of Bogotá³. Moreover, the Court has been called upon to discuss the effect and scope of the Pact of Bogotá in two cases, thereby providing an analysis of some of its provisions.

One such occasion occurred in the above-mentioned Judgment on jurisdiction and admissibility of the application in the case concerning *Border and Transborder Armed Actions (Nicaragua v. Honduras)*. In that case, the Court was faced with the possibility of dual bases of jurisdiction under the Pact of Bogotá and the Optional Clause under Article 36 (2) of the Court’s Statute. Ultimately, the Court did not determine whether Article XXXI of the Pact of Bogotá constituted a declaration under Article 36 (1) or 36 (2) of the Court’s Statute, considering it sufficient to highlight that any declaration under the Pact was not subject to reservations made under the Optional Clause and would need to be modified in accordance with the rules contained in the Pact.

More recently, also in the context of its Judgment on preliminary objections in the *Territorial and Maritime Dispute* between Nicaragua and Colombia, the Court had to consider

¹These States are Barbados, Canada, Costa Rica, Dominica, Dominican Republic, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname and Uruguay.

²Article XXXI provides 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.”

³This total of 26 cases includes: one application for revision; two applications for interpretation; four cases that were discontinued; and six cases yet to be heard on the merits (six applications in total).

whether certain aspects of the dispute of which it was seised had already been “settled” in the sense of Article VI of the Pact of Bogotá and thus fell outside the jurisdiction conferred upon it under Article XXXI of the Pact. Again, the Court was faced with the possibility of dual bases of jurisdiction under the Pact of Bogotá and the Optional Clause under Article 36 (2) of the Court’s Statute. These questions arose against the backdrop of a long-standing dispute which concerned both sovereignty over certain maritime features and maritime delimitation in the Western Caribbean Sea. Invoking its findings in the *Border and Transborder Armed Actions* case, the Court held that the different bases of jurisdiction were distinct and could be wider in one case than in another.

Ultimately, the Court determined that it lacked jurisdiction regarding Nicaragua’s claim to sovereignty over the islands of San Andrés, Providencia and Santa Catalina in view of Article VI of the Pact of Bogotá. This provision states that

“[t]he aforesaid procedures [geared towards the settlement of disputes by pacific means] . . . may not be applied to matters already settled by arrangement between the parties, or by arbitral award or by decision of an international court, or which are governed by agreements or treaties in force on the date of the conclusion of the present Treaty”.

As a result, the Court opined that sovereignty over the three disputed islands had been resolved in favour of Colombia by the Treaty concerning Territorial Questions at Issue between Colombia and Nicaragua, signed at Managua on 24 March 1928 and, consequently, the procedures under the Pact of Bogotá may not be applied, as these matters were settled before the entry into force of the Pact.

Nevertheless, this left several maritime features in dispute lying in the maritime area where the delimitation sought was to be carried out by the Court: these features were the Alburquerque Cays, East-Southeast Cays, Roncador, Serrana, Quitasueño, Serranilla and Bajo Nuevo. However, it must be stressed that in its Judgment on Preliminary Objections, the Court unanimously rejected the preliminary objection of Colombia based on the contention that the 1928 Treaty and the 1930 Protocol on the Exchange of Instruments of Ratification settled the question of maritime delimitation, Colombia arguing that the Parties agreed on the 82nd meridian as the delimitation line dividing their respective maritime areas. The Court rendered its Judgment on the merits on 19 November 2012, to which I will return shortly.

III. Select jurisprudence involving OAS Members with a focus on Latin America

Even a cursory glance at the Court’s docket reveals the profound commitment of OAS Member States to the peaceful and judicial settlement of international disputes. The contributions of Latin American countries have been particularly significant on this front, with a number of States from that region having entrusted their disputes to the Court for settlement, and on a few occasions also the United States. By way of example, let me point out a few instances of those contributions in several areas of international law that have been the subject of consideration by the Court.

A. Asylum Law

One such area pertains to asylum law. In that legal field, some of the earliest cases brought before the ICJ related to a dispute between Colombia and Peru regarding Colombia’s decision to grant asylum to Peruvian rebel leader, Mr. Víctor Raúl Haya de la Torre, in its Embassy in Lima. This decision resulted in strained bilateral relations between Peru and Colombia in 1949 and prompted the Parties to seek judicial guidance from the Court in resolving the controversy over the application of the rules governing diplomatic asylum, including under the Havana Convention

of 1928. As a result, this dispute kept the Court rather busy and generated two Judgments on the merits and a request for interpretation before the disagreement between the Parties was finally settled.

On the substance of the claims, and given the circumstances of the case, the Court found that Colombia had failed to comply with the prescriptions enshrined in the Havana Convention of 1928. This finding hinged primarily on the fact that no reason of “urgency” could be said to justify Colombia’s decision to grant diplomatic asylum to Haya de la Torre, pursuant to the Convention. That said, to some extent the Court returned part of the matter to the Parties, unresolved, given that the relevant legal principles required them to negotiate a solution in respect of the termination of the asylum. This conclusion stemmed from the Court’s finding that Colombia had no obligation to surrender Mr. Haya de la Torre to Peruvian authorities, pointing out that the 1928 Convention was silent on this point.

As a corollary, for the Court it followed that

“[t]his silence cannot be interpreted as imposing an obligation to surrender the refugee in case the asylum was granted to him contrary to the provisions of Article 2 of the Convention. Such an interpretation would be repugnant to the spirit which animated that Convention in conformity with the Latin-American tradition in regard to asylum, a tradition in accordance with which political refugees should not be surrendered. There is nothing in that tradition to indicate that an exception should be made where asylum has been irregularly granted. If it has been intended to abandon that tradition, an express provision to that effect would have been needed, and the Havana Convention contains no such provision. The silence of the Convention implies that it was intended to leave the adjustment of the consequences of this situation to decisions inspired by considerations of convenience or of simple political expediency.”

Ultimately, an agreement was finally struck by the Parties on 22 March 1954 to resolve their disagreements, namely over five years after Mr. Haya de la Torre had initially sought refuge at the Colombian Embassy in Lima; he had remained in that location this whole time. The agreement reached by the Parties provided for the surrender of Haya de la Torre to Peruvian authorities with a view to expelling him subsequently to Mexico, which occurred on 6 April 1954.

In a broader perspective, the Court’s judgments in the Haya de la Torre affair ultimately paved the way for a new regional Convention on Diplomatic Asylum, which was adopted in Caracas in 1954. Indeed, the Court’s construction of the Havana Convention of 1928 proved illuminating in identifying lacunae and other opportunity areas in the conventional régime governing diplomatic asylum in respect of several Latin American States at the time, which enabled the signatories to devise a more comprehensive and forward-looking instrument. Among noteworthy innovations under the new conventional scheme were an express right of unilateral qualification on the part of the State granting asylum, and the corresponding duty of the territorial State to provide safe conduct to the refugee upon the request of the State of asylum. It is interesting to note that both these international legal principles were not recognized by the Court in the *Asylum* cases, given that they had no grounding in the Havana Convention of 1928.

B. The *Nicaragua* Decision

I would be remiss — in addressing your noble Organization — if I failed to offer a few words on the seminal case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*). It would probably not be an exaggeration to characterize that case as one of the most important disputes involving American States brought to the Court, at least in terms of legal complexity, historical significance and precedential scope.

Similarly, there is no doubt that the Court's Judgment on the merits, which it handed down in 1986, constitutes a landmark decision in the broader corpus of international jurisprudence.

Since so much has already been written and said about this dispute, my intention is not to add anything further to the voluminous legal, political, scholarly and journalistic commentary that has already engaged the Judgment's legacy. Suffice to say that this dispute provided an opportunity for the Court to further develop and clarify international legal rules in several sensitive fields, including: the law governing recourse to force and self-defence; the interplay between the Court and the Security Council under the UN Charter; the scope and content of the principle of non-intervention into the affairs of sovereign States; the distinct co-existence of conventions and customary international law as sources of international law obligations; and the law governing the international responsibility of States.

By way of example, the Court made significant advances in the law of State responsibility, at a time when the International Law Commission was still far away from finalizing its codification project on the Responsibility of States for Internationally Wrongful Acts. In assessing the facts it had to grapple with, the Court was called upon to examine the rules governing the attribution of international wrongful conduct carried out by non-State actors to sovereign States. In the context of its analysis — which took place against a complex factual backdrop — the Court developed a legal inquiry that would become known as the “effective control” test, thereby clarifying attribution of conduct to a State for the purposes of determining international responsibility. The Court's contribution to the law of State responsibility on attribution would later become the foundation for the formulation of Article 8 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts. What is more, it was relied on by the Court some 19 years later in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* and reaffirmed 21 years later in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*. It has also received widespread academic support and has been invoked in various fora.

Perhaps more importantly, the *Nicaragua* proceedings before the Court undoubtedly cemented that judicial organ's status as a reliable forum in which complex and politically sensitive disputes could be settled peacefully, and in utmost independence and impartiality. This precedent also evidences the Court's role in furthering the broader objective of maintaining international peace and security, particularly by promoting the peaceful settlement of disagreements in the context of an ongoing armed conflict.

C. States' and individual rights litigated before the Court

It is also interesting to note that some disputes between OAS Member States have involved not only national interests for the Applicant State but also rights of its nationals. The case concerning *Avena and Other Mexican Nationals* is certainly illustrative of that phenomenon, as it involved questions of life and death. In particular, that case entailed the diplomatic protection of 51 Mexican nationals sentenced to death in the USA, as a result of the alleged perpetration of serious crimes on the territory of that State. They have been convicted without being duly and timely informed by the US authorities of their right, under Article 36 of the Vienna Convention on Consular Relations, to consular protection by Mexico. This case followed a familiar pattern in the Court's jurisprudence, particularly the case concerning *Vienna Convention on Consular Relations (Paraguay v. United States of America)* and the *LaGrand* case between Germany and the USA, in that it highlighted the importance of the provisions of Article 36 of the Vienna Convention on Consular Relations, which seek to protect the rights to consular protection of individuals arrested in a foreign State. It should be stressed that prior to this dispute, in the *LaGrand* case, the Court pronounced on the scope and content of the provisions of Article 36, in particular underscoring that its first paragraph enshrines the *individual* right to consular notification.

Among other important prescriptions, one part of Article 36 provides that

“if he [the person arrested] so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner”.

The Court in *Avena* held that this provision gives rise to “a duty upon the arresting authorities to give that information to an arrested person as soon as it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national”.

Perhaps the most important aspect of the Court’s decision in the *Avena* case resides in its engagement with the content of the obligation to provide review and reconsideration of sentences entered in violation of the Vienna Convention on Consular Relations. While in principle the USA enjoyed a large degree of latitude in choosing the means to achieve this objective, the Court nonetheless specified that review and reconsideration should be effective and take into account the right violated. In sum, both the violation and the possible harm suffered had to be fully assessed and considered in relation to both the sentence and the conviction. Moreover, the Court indicated that the process of review and reconsideration should be conducted within the overall judicial proceedings relating to the individual defendant concerned. Ultimately, based on the facts of the case, the Court concluded that the clemency procedure, as practised in the USA’s criminal justice system, failed to satisfy the requirements set forth by the ICJ. Consequently, it followed that it was “therefore not sufficient in itself to serve as an appropriate means of ‘review and reconsideration’ as envisaged by the Court in the *LaGrand* case”.

It is interesting to note that in 2007, the General Assembly of the OAS referenced the *Avena* Judgment in the preambular paragraphs of a resolution concerning the human rights of migrant workers and their family. Similarly, in a 2009 resolution on the same subject, the OAS General Assembly again referenced the *Avena* Judgment in the preambular paragraphs, before later on “Resolv[ing]”, among other things, to affirm the duties of States parties under the Vienna Convention on Consular Relations, and “to call to the attention of the states”, *inter alia*, the Court’s decision in *Avena*. While the ICJ dismissed Mexico’s request for interpretation of its Judgment in *Avena and Other Mexican Nationals* in 2009, as there was no dispute as to the meaning of the 2009 Judgment, the Court nevertheless underscored that the obligation to provide means for review and reconsideration “is indeed an obligation of result which clearly must be performed unconditionally; non-performance of it constitutes internationally wrongful conduct”. I regret that ten years since the Judgment was rendered, the United States has still not implemented it. While President G. W. Bush issued a memorandum to the Attorney General expressing the determination of the US Government to discharge its international obligations by having state courts give effect to the ICJ ruling, the President’s memorandum was challenged within the US judicial system. In *Medellín v. Texas* (2008), the US Supreme Court, by majority, decided that the President had no constitutional authority to order that state courts enforce the ICJ Judgment. It also held that neither the Vienna Convention on Consular Relations nor ICJ Judgments were self-executing within the US legal order.

Therefore, the only way to implement the *Avena* Judgment is by legislative Act approved by Congress. Although an Act was drafted in 2009, no federal legislation has yet been enacted.

None of the Mexican nationals listed in the *Avena* Judgment has so far been given the due and proper reconsideration of his conviction and death sentence, while four of them have been in the meantime executed.

D. Strengthening transborder relations

Over the last two decades, OAS Member States — particularly Latin American countries — have often entrusted the Court with the adjudication of disputes concerning the use and exploitation of shared natural resources and the delimitation of land and maritime boundaries. More recently, the Court’s docket was supplemented with two (pending) cases involving allegations of transboundary environmental harm and contested activities on the border between Nicaragua and Costa Rica, in the cases concerning *Certain Activities carried out by Nicaragua in the Border Area* and the *Construction of a Road in Costa Rica along the San Juan River*. Those two proceedings were eventually joined by the Court in the interests of the sound administration of international justice.

In 2010 the Court handed down its decision in the case concerning *Pulp Mills on the River Uruguay* between Argentina and Uruguay, against the backdrop of transborder relations in connection with the shared resource of water. Following Uruguay’s authorization of the construction of two pulp mills on the bank of the River Uruguay, which forms the natural frontier between both States pursuant to the Treaty of Montevideo of 1961, the dispute concerned the interpretation of the Treaty of Salto of 1975 constituting the Statute of the River Uruguay. That instrument imposes a series of procedural and substantive obligations in the context of a co-operative framework for the common use of the River, the preservation of wildlife and the prevention of pollution. The Court held that while Uruguay had violated several important procedural obligations, Argentina had not made out the case that Uruguay’s actions and decisions caused any significant damage to the quality of the waters or the environment. Interestingly, in its Judgment the Court declared for the first time that “it may now be considered a requirement under general international law to undertake an environmental impact assessment where the risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource”.

E. Territorial and maritime delimitation disputes

It is no secret that some legal disagreements brought to the Court often form part of broader political disputes. In some cases, legal disputes are even brought against the backdrop of acutely precarious transborder security situations, or open armed conflicts. The Court can play a role in defusing tensions between disputing parties in such instances, with its jurisprudence demonstrating the complementary — and often mutually reinforcing — roles that international judicial settlement and political means of dispute resolution can play in such difficult scenarios. The *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* is a particularly apt case in point: it entailed the very active involvement of the OAS — primarily through the pursuit of intense multilateral negotiations within that forum — both before and after the Chamber of the Court delivered its Judgment in 1992.

Indeed, that case involved extremely sensitive territorial and boundary questions — in particular, disputed portions of territory, sovereignty over maritime features, and disagreement over the maritime frontier — and unfolded in the context of highly volatile transborder relations. Thankfully, the Chamber’s decision resolved a dispute that had strained the relations between the two neighbouring States for over a century, even leading to a five-day armed conflict between the two States in July 1969. In its Judgment, the Chamber of the Court acknowledged that “[a]fter one hundred hours of hostilities, the Organization of American States succeeded in bringing about a cease-fire and the withdrawal of troops”. However, the Court went on to note that “nevertheless the formal state of war between the two States was to persist for more than ten years”. Aside from demonstrating the complementarity between the OAS’s multilateral process and the Court’s judicial process in resolving the dispute, the Court’s decision also constituted a seminal precedent for the application of the principle of *uti possidetis iuris* and other relevant legal principles applicable to contested territorial title. These rules were again central in the Court’s reasoning in

subsequent cases involving OAS Member States, particularly in *Nicaragua v. Honduras* and *Nicaragua v. Colombia*, which I shall discuss in a moment.

First, I come to the *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*. It is interesting to note the Parties' respective claims regarding their shared maritime boundary [Show sketch-map 1]. The Court rejected the thesis advanced by Honduras as to the alleged existence of a traditional maritime boundary between Nicaragua and Honduras along the 15th parallel. However, the method of delimitation ultimately selected by the Court undoubtedly constitutes the most interesting aspect of this decision. It has long been established in the Court's jurisprudence — and confirmed in 2009 in the *Maritime Delimitation in the Black Sea (Romania v. Ukraine)* case — that the basic maritime delimitation methodology essentially consists of three steps: first, the Court draws a provisional equidistance line in the area to be delimited; next, it examines whether that line needs to be adjusted or shifted in the light of relevant circumstances; finally, the Court subjects the adjusted line to a disproportionality analysis, in order to ascertain whether the maritime areas attributed to each of the parties in the relevant zone are markedly disproportionate to the length of their respective coasts. In the end, the purpose of maritime delimitation is to achieve an equitable result, as stipulated in Articles 74 and 83 of the UNCLOS.

Despite initial resistance exhibited by the Court in its earlier jurisprudence, the method by which it posits a provisional equidistance line in the area to be delimited before eventually adjusting that line, if necessary, by taking account of special circumstances for the purposes of achieving an equitable solution ultimately became its preferred delimitation approach. However, because of the particular geographical situation in the *Nicaragua v. Honduras* case, the Court resorted to a bisector line as it was infeasible to construct an equidistance line [Show sketch-map 2]. However, it underscored that “[a]t the same time equidistance remains the general rule”.

Given the instability of the mouth of the River Coco near the Nicaragua-Honduras land boundary, thereby affecting the position of the appropriate base points to construct an equidistance line, the Court discarded the equidistance approach. Particularly challenging was the fact that, given the changes in the morphology of the mouth of the river over the years, the co-ordinates once identified as describing the location of the terminus of the land boundary no longer corresponded to that point. In order to depart from the traditional rule, the Court found support in the wording of Article 15 of UNCLOS⁴, which it did not interpret as precluding geomorphological problems from amounting to “special circumstances” and, therefore, from falling within the purview of the exception laid down in that provision. The Court took note of the fact that the parties had raised the possibility of using a different delimitation methodology. Using the bisector methodology, which has taken into account the macro-geography of the coastline, the Court drew the maritime boundary between the parties [S 3] and, in so doing, took into account the various cays that lay seaward of the coast of the Parties' territories. In that regard, the Court had, before dealing with the maritime boundary, decided that Honduras had sovereignty over Bobel Cay, Savanna Cay, Port Royal Cay and South Cay on the basis of *uti possidetis iuris*.

Another important and recent case in the Court's maritime delimitation jurisprudence is the *Territorial and Maritime Dispute between Nicaragua and Colombia*. In light of the Court's 2007 Judgment on Preliminary Objections — which confirmed that the issue of sovereignty over

⁴Article 15 of UNCLOS provides that:

“Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.”

the islands of San Andrés, Providencia and Santa Catalina has been resolved in favour of Colombia under the 1928 Treaty — Nicaragua later adjusted its claims as follows [Show sketch-map 4]: it requested the Court to delimit the continental shelf between Nicaragua and Colombia in view of the fact that the natural prolongations of the mainland territories of the Parties meet and overlap. In short, Nicaragua was seeking to have the Court pronounce on an extended continental shelf in its favour — that is to say, beyond the ordinary 200-nautical-mile limit measured from its coast. Nicaragua requested the Court to define a continental shelf boundary dividing by equal parts the overlapping entitlements to a continental shelf of both Parties. For its part [Show sketch-map 5], Colombia requested that the delimitation of the exclusive economic zone and the continental shelf between Nicaragua and Colombia be effected by a single maritime boundary, constructed as a median line between Nicaraguan fringing islands and the islands of the San Andrés Archipelago.

In its analysis, the Court confirmed its 2007 conclusion that no maritime delimitation between the Parties had been effected by the 1928 Bárcenas-Esguerra Treaty or the 1930 Protocol of Exchange of Ratifications. Thus, the Court then applied the usual three-step methodology. First [Show sketch-map 6], the Court plotted a provisional equidistance line between the Parties' relevant coasts, which is now shown on the screen. As you can see from the sketch-map, the Court selected base points on Nicaragua's fringing islands and on Colombia's islands in and around the San Andrés Archipelago in order to construct the provisional median line. Turning next to the second step of the delimitation methodology, the Court then investigated whether any relevant or special circumstances existed which may have called for an adjustment or shifting of the provisional equidistance line so as to achieve an equitable result.

In this regard, the Court concluded that the location of the Colombian islands, which lay at an important distance from each other, signalled that a median line between those features and Nicaragua's mainland coast would have effectively cut off Nicaragua from some three quarters of the area into which its coast projected. Furthermore, the Court noted the considerable disparity in the lengths of the relevant coasts [Show sketch-map 7]. Concluding that these circumstances required an adjustment of the provisional median line, the Court shifted the line eastwards and continued the finalized boundary line out to the line 200 nautical miles from the Nicaraguan baselines along lines of latitude.

In the final step of its analysis pursuant to the methodology laid down in *Maritime Delimitation in the Black Sea*, the Court concluded that, upon consideration of all the circumstances, the result achieved by its maritime delimitation did not entail a significant disproportionality as to create an inequitable result. This case is significant in the Court's broader corpus of jurisprudence because it emphasized the importance of the search for an equitable solution in maritime delimitation matters. In its Judgment of 2012, the Court held that Nicaragua's claim to an extended continental shelf could not be upheld, primarily on the basis that there had been a dearth of information submitted during the proceedings, thereby precluding the conclusion that Nicaragua had established that it has a continental margin extending sufficiently to overlap with Colombia's 200-nautical-mile entitlement to the continental shelf, as measured from Colombia's mainland coast.

The Court has taken note, with regret, of the Colombian Government's decision, just a week after the unanimous Judgment of the Court was delivered, to withdraw from the Pact, which still is to be called "Pact of Bogotá" in accordance with its Article LX.

In September 2013, Nicaragua introduced new proceedings before the Court against Colombia and formulated two requests to the Court: (i) that it determine the "precise course of the maritime boundary between Nicaragua and Colombia in the areas of the continental shelf which appertain to each of them beyond the boundaries determined by the Court in its Judgment of 19 November 2012"; and (ii) that it indicate the

“principles and rules of international law that determine the rights and duties of the two States in relation to the area of overlapping continental shelf claims and the use of its resources, pending the delimitation of the maritime boundary between them beyond 200 nautical miles from Nicaragua’s coast”.

Moreover, in November 2013 Nicaragua instituted distinct proceedings against Colombia in which it alleges that Colombia has violated several international legal obligations regarding Nicaragua’s sovereign rights and maritime zones declared by the Court’s Judgment of November 2012 in *Territorial and Maritime Dispute (Nicaragua v. Colombia)*. Both cases are currently pending before the Court.

In February, in view of the fact that the Parties’ coasts generate overlapping entitlements to maritime areas in both the Caribbean Sea and the Pacific Ocean, Costa Rica instituted proceedings against Nicaragua before the Court. In that context, Costa Rica asks the Court

“to determine the complete course of a single maritime boundary between all the maritime areas appertaining, respectively, to Costa Rica and to Nicaragua in the Caribbean Sea and in the Pacific Ocean, on the basis of international law”.

Granted, this new case is only tangentially related to the Court’s 2012 Judgment in the *Territorial and Maritime Dispute* between Nicaragua and Colombia but, in any event, it should be stressed that the potential rights of third States remained of paramount importance in the Court’s reasoning. In fact, in 2012 the Court emphasized that it

“has always taken care not to draw a boundary line which extends into areas where the rights of third States may be affected. The Judgment by which the Court delimits the boundary addresses only Nicaragua’s rights as against Colombia and vice versa and is, therefore, without prejudice to any claim of a third State or any claim which either Party may have against a third State.”

Perhaps more importantly, the new proceedings instituted by Costa Rica against Nicaragua are historically significant: they constitute the first time ever a State has requested that the Court effect a maritime delimitation in areas lying seaward of both extremities of the shared land frontier between the relevant States, in this case in maritime areas lying in the Caribbean Sea and in the Pacific Ocean.

It is also interesting to note that, just as a number of the cases involving American States before the Court have raised questions of maritime delimitation, these States have played a key role in the development of the current law on maritime jurisdiction. As is well known, the current law allowing States a 200-nautical-mile right to the continental shelf and exclusive economic zone was developed after unilateral declarations were formulated by the United States and several Latin American States. In fact, the existence of declarations proclaiming certain maritime rights extending to a distance of 200 nautical miles on the part of the concerned States, and other States in the region, was mentioned by the Court in its recent decision in the *Maritime Dispute* opposing Peru and Chile. That case also presented a novel factual scenario in respect of the diametrically opposed theses defended by the Parties regarding their maritime boundary, and whose respective positions now appear on the screen [Show sketch-map 8]. Peru argued that no maritime boundary had been earlier agreed between the Parties. Therefore, in Peru’s view, the Court should effect a maritime delimitation between the Parties in conformity with the usual equidistance/relevant circumstances methodology, emphasizing that no such circumstances justified an adjustment of the equidistance line in the circumstances of the case. For its part, Chile took the view that the entire maritime boundary had already been agreed by the Parties — particularly in the 1952 Santiago Declaration — and that it ran along the parallel of latitude passing through a starting-point of their land boundary at the coast, out to a distance of 200 nautical miles.

Ultimately, on the basis of the evidence submitted to it, the Court found that the Parties had acknowledged in the 1954 Agreement Relating to a Special Maritime Frontier Zone the existence of a maritime boundary, along the parallel of latitude. After examining the entirety of the evidence presented to it — particularly the fishing practice of the parties at that time — the Court concluded that the agreed maritime boundary between the Parties extended to a distance of 80 nautical miles along the parallel from its starting-point [Show sketch-map 9]. In drawing the undelimited portion of the maritime boundary seaward from the point where the agreed boundary ended — which is depicted as Point A on the map on the screen — the Court relied upon the three-step delimitation methodology I described earlier. The finalized course of the maritime boundary appears on the screen. I wish to commend both Parties, and their leaders, for having within two months from the rendering of the Judgment agreed on the precise geographic co-ordinates of their maritime boundary on the basis of its description in the Court's Judgment.

In April 2013, Bolivia instituted proceedings against Chile in the case concerning the *Obligation to Negotiate Access to the Pacific Ocean*. In that pending case, in which Bolivia invokes Article XXXI of the Pact of Bogotá to found the jurisdiction of the Court, Bolivia asks the Court to adjudge and declare that: (i) Chile has the obligation to negotiate with Bolivia in order to reach an agreement granting Bolivia a fully sovereign access to the Pacific Ocean; (ii) Chile has not been complying with that obligation; and (iii) Chile must fulfil that duty in good faith, promptly, formally, within a reasonable time and effectively, to grant Bolivia a fully sovereign access to the Pacific Ocean.

IV. Concluding remarks

Dear Mr. Secretary-General,
Excellencies, distinguished colleagues,

On the whole, it can be said with confidence that the Court has overall played an important and positive role in settling disputes involving OAS Member States. As I have highlighted in this brief survey of cases, Latin American States have been particularly engaged with the Court's work and have entrusted it with a number of important disputes. It is to be hoped that in the six pending cases involving Latin American States, too, the Court's judgments will settle long-standing disputes and thus assist the parties in maintaining and further strengthening their relations. Indeed, the restoration of harmonious relations between States sometimes hinges on the judicial resolution of their disputes by the Court. This possibility becomes particularly compelling when seen through the prism of Chapter VI of the UN Charter, which addresses the pacific settlement of disputes likely to endanger the maintenance of international peace and security. Thus, the prospect of parties referring their disputes to the Court may have a stabilizing impact on their mutual relations or defuse tensions between them, a feature that often characterizes proceedings before the Court. This is particularly true with respect to disputes involving competing claims to sovereignty or maritime zones. In the absence of fruitful avenues of resolution by means of mediation or negotiation, or where creative solutions such as joint management and exploitation régimes may not be devised, recourse to the Court remains a viable pacific settlement option for disputing States.

That said, it should be emphasized that the Court can play an important role in assisting parties in peacefully settling their disputes prior to rendering a judgment on the merits, even if the proceedings before the Court are eventually discontinued prior to the commencement of public hearings. This eventuality materialized last September in the case concerning *Aerial Herbicide Spraying*, opposing Ecuador and Colombia, with the Parties having reached an agreement to settle their dispute. However, both Parties expressed their gratitude to the Court for the time, resources and efforts it had deployed in that case during a period of over five years, acknowledging that settlement of the dispute would have been difficult — if not impossible — but for the involvement of the Court.

Despite the profound commitment to peaceful judicial settlement in the Latin American context, additional efforts must be deployed in order to enhance the compulsory jurisdiction of the Court and promote greater adherence to the Pact of Bogotá for those States that have yet to make a declaration recognizing the jurisdiction of the Court as compulsory, or to ratify or accede to the Pact. As distinguished and privileged experts working specifically in the fields of international relations and international law, you are particularly well situated when advising your respective home States. I also invite you to envisage promoting both dispute settlement by the Court and greater adherence to its compulsory jurisdiction as ways to achieve peaceful conflict resolution and more harmonious inter-State relations. Indeed, it is to be hoped that more States represented in your distinguished Organization will consider recognizing the jurisdiction of the Court in the future, be it through compromissory clauses, case-specific special agreements, by ratifying the Pact of Bogotá or via the more general formulation of an Article 36 (2) declaration. I can see few better ways to effectively reflect the deep and long-standing commitment to international law and the rule of law that a number of American States have already manifested, and which were embodied by the eminent judges from OAS Member States that have served on the World Court. The regions covering the membership of your august Organization remain absolutely vital to the work of the Court and progress of international justice.

















