

SEPARATE OPINION OF JUDGE OWADA

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I. *RES JUDICATA*A. *The Definition and Scope of Res Judicata*

1. I concur with the conclusions that the Court has reached in this case as contained in the operative clause (*dispositif*). However, I wish to append to the Judgment my own separate opinion in order to clarify my own reasoning on the issue of *res judicata* and supplement a few salient points of law, which in my view have not been adequately addressed in the Judgment.

2. The present Judgment correctly points out that “the principle of *res judicata* . . . is a general principle of law which protects, at the same time, the judicial function of a court or tribunal and the parties to a case which has led to a judgment that is final and without appeal” (Judgment, para. 58). Needless to say, the prerequisite for the application of this principle of *res judicata* is, as defined in the famous dictum of Judge Anzilotti, the existence of three traditional elements, namely the identity of “*persona, petitum* [and] *causa petendi*” (*Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)*, Judgment No. 11, 1927, P.C.I.J., Series A, No. 13, dissenting opinion of Judge Anzilotti, p. 23). In the present case,

it is accepted that the existence of these essentially formal criteria has been satisfied, to the extent that the presence of these essential elements has not been questioned by the Parties and is therefore not at issue.

3. In my view, the more intrinsically important issue in the present case is whether the decision reached in the 2012 Judgment contains a “final and definitive determination by the Court” to which the effect of *res judicata* should attach. In other words, the issue is with the scope of the *res judicata*. It is generally accepted in the jurisprudence of national and international courts and tribunals that the effect of *res judicata* would accrue only to a final judgment of the Court. A final Judgment should refer to “a Court’s final determination of the rights and obligations of the parties in a case” through which “an issue has been definitely settled by judicial decision” (*Black’s Law Dictionary*, 9th ed., pp. 918, 1425). In the same vein, this Court has held that

“[the] principle [of *res judicata*] signifies that the decisions of the Court are not only binding on the parties, but are final, in the sense that they cannot be reopened by the parties *as regards the issues that have been determined*” (*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; emphasis added).

The necessary corollary of this is that “[i]f a matter has not in fact been determined, expressly or by necessary implication, then no force of *res judicata* attaches to it” (*ibid.*, p. 95, para. 126).

4. The Court has previously been faced with a situation somewhat similar to the present one when a question arose as to the proper scope of the *res judicata* of a particular judgment. In the *Asylum (Colombia/Peru)* case before the Court in 1950, the Colombian Government granted diplomatic asylum to a political refugee, Víctor Raúl Haya de la Torre, in its Embassy in Lima over the objections of the Peruvian Government. In its 1950 Judgment, the Court decided the general legal questions relating to the legality of this asylum raised by the Parties, while noting that “the question of the possible surrender of the refugee . . . was not raised either in the diplomatic correspondence submitted by the Parties or at any moment in the proceedings before the Court” (*Asylum (Colombia/Peru)*, Judgment, I.C.J. Reports 1950, p. 280). Immediately thereafter, Colombia filed a request for interpretation under Article 60 of the Statute asking whether the Judgment required the surrender of the political refugee by the Government of Colombia. The Court in response to this request for interpretation of the previous Judgment did not provide an answer to this question, stating instead that “[t]he Court can only refer to what it declared in its Judgment in perfectly definite terms: this question was completely left outside the submissions of the Parties. The Judgment in no way decided it, nor could it do so.” (*Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case (Colombia v. Peru)*, Judgment, I.C.J. Reports 1950, p. 403.) Subsequently, Colombia insti-

tuted new proceedings in the *Haya de la Torre* case so as to resolve this issue. In the 1951 Judgment on this new case, the Court affirmed that: “the question of the surrender of the refugee was not decided by the Judgment [of 1950, and]. . . [t]here is consequently no *res judicata* upon the question of surrender” (*Haya de la Torre (Colombia v. Peru)*, Judgment, I.C.J. Reports 1951, p. 80). According to the analysis by one learned writer, the 1950 Judgment exemplifies a situation in which “the problem was not that of the existence of a final judgment, but of the scope of the binding force of the decision. This judgment did not settle the dispute, for the simple reason that the submissions of the parties were insufficient for this purpose.” (Shabtai Rosenne, *The Law and Practice of the International Court: 1920-2005*, 2006, Vol. III, 1603.) It could be argued that a fine distinction exists between this case and the present one, to the extent that the specific point at issue was “left outside” in the 1950 proceedings, but the essential point is that the submissions of the parties were insufficient in both cases to allow the Court to determine the dispute and the decision did not constitute *res judicata*.

5. The scope of the *res judicata* was also at issue in the merits phase of the *Genocide Convention (Bosnia and Herzegovina v. Serbia and Montenegro)* case, though with a markedly different outcome, which is also worthy of note here. In its 1996 Judgment on preliminary objections in that case, the Court rejected all of the preliminary objections on jurisdiction by the Respondent Yugoslavia (Serbia and Montenegro) and found the Application of the Applicant (Bosnia and Herzegovina) admissible, declaring that “the Court may now proceed to consider the merits of the case on that basis” (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections, Judgment, I.C.J. Reports 1996 (II), p. 622, para. 46). At the merits phase, however, the Respondent argued that its own lack of *jus standi* had not been adjudicated and that this precluded the Court from reaching a decision on the merits. The essence of this claim was that the Respondent was not a continuator of the Socialist Federal Republic of Yugoslavia and was therefore not a party to the Genocide Convention or the Statute of the Court when the proceedings were instituted — the position taken by the Court in its Judgment of 2004 in the *Legality of Use of Force (Serbia and Montenegro v. Belgium et al.)* cases. In the 2007 Judgment on the merits, the issue was whether that question had been disposed of in the 1996 Judgment. Styled as such, this issue related to the scope of the *res judicata* of the 1996 Judgment (*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. 101, para. 140).

6. Although the issue of *jus standi* had not been explicitly raised as an issue by the parties at the time of the 1996 Judgment, the Court in the

2007 Judgment took the position that it had been decided by the Court because such a determination on the standing of the Respondent was a necessary prerequisite to the Court's decision to reject the preliminary objections of the Respondent on jurisdiction *ratione personae*, *ratione materiae*, and *ratione temporis* (see for details, *I.C.J. Reports 2007(I)*, separate opinion of Judge Owada, p. 296, para. 33).

7. I refer to this case here because it presented a unique situation in which the Court apparently took the position that an issue that had *not* been raised by the parties nor expressly addressed in its previous Judgment *had in fact been decided* by the Court, despite a seemingly contradictory decision of the Court in the 2004 *Legality of Use of Force* cases. (It is clear that this precedent did not constitute *res judicata* for the 2007 case, though it could have had *stare decisis* implications for the 2007 issue (*Preliminary Objections, Judgment, I.C.J. Reports 2004 (III)*, p. 1337, para. 76.) The issue of the *jus standi* of the Respondent in the *Genocide Convention* case was thus determined to fall within the scope of *res judicata*. However, this finding should be regarded as a unique exception based on the specific structure of jurisdictional decisions.

8. These cases illustrate the complexity involved in determining what falls within the scope of *res judicata* in a preceding judgment. In the present case, the crucial issue for the Court in ruling upon the third preliminary objection of Colombia is therefore to determine whether or not there was a final and conclusive decision binding upon the Parties in the operative part of the 2012 Judgment read in the complex context surrounding this issue, to the extent that it relates to the claim of the Republic of Nicaragua concerning an extended continental shelf. In analysing this issue, the Court may take into account, if necessary, the reasoning of the *motif* as far as it is indispensable in understanding the *dispositif*. As the Court has declared: “[I]f any question arises as to the scope of *res judicata* attaching to a judgment, it must be determined in each case having regard to the context in which the judgment was given”. (*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. 95, para. 125). It is thus my view that in order to answer this question, one must first delve into the context in which this newly reformulated claim of Nicaragua emerged in 2007, against which the relevant statement in the operative part in question came to be adopted. Only then can one correctly understand the relevant decision of the 2012 Judgment in its operative part (para. 251 (3)) and the reasoning of the Court underlying this decision on Nicaragua's maritime entitlement claim.

9. It is thus my conclusion on this methodological issue that only by examining the context in which the operative part of the 2012 Judgment was developed, as well as the reasoning of the Court and the overall structure of the Judgment, can one clarify the precise scope and the meaning of the 2012 Judgment and thus determine whether the claim presented

by Nicaragua in the present case is admissible or whether it is barred by the principle of *res judicata*.

B. The Background of the Court’s Decision in Its 2012 Judgment on the Reformulated Claim of Nicaragua

10. In order to clarify this situation, it seems necessary in my view to recall the genesis of the present problem, which emanated from the evolving claim of Nicaragua. Nicaragua introduced a reformulated claim on the continental shelf after the Court’s 2007 Judgment on preliminary objections, which now forms the basis of the third preliminary objection of Colombia.

11. In its original Application of 6 December 2001 in the case concerning the *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Nicaragua as Applicant stated that:

“Accordingly, the Court is asked to adjudge and declare:

.....

Second, in the light of the determinations concerning title requested above, the Court is asked further to determine the course of the single maritime boundary between the areas of continental shelf and exclusive economic zone appertaining respectively to Nicaragua and Colombia, in accordance with equitable principles and relevant circumstances recognized by general international law as applicable to such a delimitation of a single maritime boundary.” (*Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Application of the Republic of Nicaragua, p. 8, para. 8.)

Nicaragua maintained the same formulation in its Memorial submitted on 28 April 2003 (*ibid.*, Memorial of the Republic of Nicaragua, pp. 265-267, para. 3.39).

12. However, Nicaragua suddenly changed its submissions in its Reply of 18 September 2009 to what came to be known as submission I (3). The final submissions of the Applicant, as presented orally at the conclusion of the oral proceedings held on 1 May 2012, thus expressed Nicaragua’s claim as follows:

“I. May it please the Court to adjudge and declare that:

.....

(3) The appropriate form of delimitation, within the geographical and legal framework constituted by the mainland coasts of Nicaragua and Colombia, is a continental shelf boundary dividing by equal parts the overlapping entitlements to a continental shelf of both Parties.” (*Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, *I.C.J. Reports 2012 (II)*, p. 636, para. 17.)

13. Colombia as Respondent lodged an objection to this, charging that this newly reformulated claim of Nicaragua “fundamentally changed the

subject-matter of the dispute which Nicaragua originally asked the Court to decide” and asserted that this claim was inadmissible (CR 2012/12, p. 44, para. 2 (Bundy)). It was contended, notably, that this radical change in the Applicant’s position took its concrete form only in late 2007, more than six years after the original dispute had been submitted, ostensibly in connection with the 2007 Judgment of the Court on preliminary objections, and that this change radically transformed the nature of the claim (*Territorial and Maritime Dispute (Nicaragua v. Colombia) Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*).

14. In its 2012 Judgment, however, the Court decided to find admissible

“the Republic of Nicaragua’s claim contained in its final submission I (3) requesting the Court to adjudge and to 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” (*I.C.J. Reports 2012 (II)*, p. 719, para. 251 (2)).

15. As a participating judge in this Judgment, I voted against this finding of the Court. As I stated in my dissenting opinion, my position was that

“[t]he essence of the situation in the present case is that the Applicant attempted to *replace* [rather than reformulate] the original formulation of the claim submitted to the Court in its Application by a newly formulated, ostensibly different, claim relating to the existing dispute” (*ibid.*, dissenting opinion of Judge Owada, p. 722, para. 6).

16. The significant element of the Judgment of the Court on this point is that the Court decided that “[t]he new submission thus still concerns the delimitation of the continental shelf, although on different legal grounds” (*ibid.*, p. 665, para. 111). The logical conclusion stemming from this decision of the Court is therefore that, by accepting the position that Nicaragua’s submission was admissible, the Court must be regarded as having taken the position that all of the issues contained in the newly reformulated claim would have to be squarely addressed on their merits in the Judgment.

C. What the Court Has Decided in Fact in Its 2012 Judgment

17. The Court can thus be seen to have accepted the newly reformulated claim of the Applicant as *procedurally admissible* in the 2012 Judgment, with its legal implication that the substance of the newly reformulated claim of Nicaragua should fall within the purview of its Judgment on the merits. The Court, however, could not, and did not in fact, examine the substance of Nicaragua’s claim for an extended continental shelf on its merits. Indeed, the final text of the 2012 Judgment clearly reveals that the Court ultimately concluded that “it was not in a

position” at that stage of the proceedings to examine the substance of the merits of the claim (*I.C.J. Reports 2012 (II)*, p. 669, para. 129). I wish to raise and examine several reasons why it could not and did not in fact come to a final decision on the merits on this issue.

(i) *The reasoning contained in Part IV of the Judgment*

18. The position of the Court is apparent first of all in the reasoning contained in Part IV of the Judgment. The Court, having concluded in Part III that Nicaragua’s claim for the delimitation of a continental shelf beyond 200 nautical miles was admissible, proceeded on this basis to its “[c]onsideration” of this claim (*ibid.*, p. 665). It is significant to note, however, that in embarking upon its “consideration” of this claim on the merits, the Court immediately proceeded to declare that it was turning “to the question whether it is in a position to determine” the continental shelf boundary proposed by Nicaragua (*ibid.*, p. 665, para. 113; emphasis added).

19. These introductory remarks would seem to signal that the Court was not necessarily prepared to enter into a thorough examination of the issues required in order to reach a final determination on the substantive merits. It is true that the Judgment introduced and laid out the arguments advanced by the Parties. However, it is clear that it did not engage in an independent analysis of these arguments. The Judgment recounted certain areas of agreement between the Parties as well as the principal arguments of Nicaragua related to the substance of the claim for an extended continental shelf (*ibid.*, pp. 666-667, paras. 119-121) and the arguments of Colombia in rebuttal (*ibid.*, pp. 667-668, paras. 122-124). Specifically, the Judgment recalled the claims asserted by the Parties with respect to: (a) the existence, as a matter of fact, of the extended continental shelf as a natural prolongation of the Nicaraguan mainland into the Caribbean Sea; (b) the applicability of the procedures of Article 76 of the Law of the Sea Convention; and (c) the methodology to be applied for the delimitation of the overlapping area of the continental shelf, with one based on the natural prolongation criterion and the other based on the distance criterion. However, the Court did not engage in an examination and analysis of these claims in order to reach its own conclusion on these concrete issues arising out of the argument of the Parties.

20. It is interesting to note that the Court’s treatment of the claim of Nicaragua in the 2012 Judgment was not confined to a simple recitation of the arguments advanced by the Parties. Thus, the Judgment, based on the submission of Nicaragua in support of its claim for the delimitation of a continental shelf extending beyond 200 nautical miles, confined itself to confirming that there had not been any “case in which a court or a tribunal was requested to determine the outer limits of the continental shelf beyond 200 nautical miles”, noting in particular that Nicaragua had itself failed to establish that any such precedents existed (*ibid.*, p. 668, para. 125).

21. It is obvious that for a claim such as the one at issue in this case, namely a claim concerning an entitlement to a continental shelf extending beyond 200 nautical miles, a number of complex facts and intricate legal standards must be examined and addressed in order to conclusively resolve the rights and duties at issue. A typical examination in this respect should entail, *inter alia*: (a) a detailed inspection of the geological and geomorphological features of the disputed area to establish the existence of overlapping entitlements of Nicaragua and Colombia; (b) the verification of the existence and delineation of the continental margin as claimed by Nicaragua; (c) the acceptability of a median line as the criterion for delimitation between Nicaragua (based on the natural prolongation principle) and Colombia (based on the distance principle) such as the one proposed by Nicaragua for the delimitation of the overlapping entitlements; (d) the applicability or non-applicability of Article 76 of the United Nations Convention on the Law of the Sea as a whole, covering the provisions contained in its paragraphs (4) to (9); and finally (e) the requirement *vel non* of the review by the Commission on the Limits of the Continental Shelf (CLCS) of such a claim preceding the delimitation by the Court.

22. However, in the 2012 Judgment, following a discussion of the arguments advanced by the Parties, and without further analysis of these points, the Court curtly concluded that it was “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, para. 129). This pronouncement was made in the absence of any substantive analysis of the factual and legal issues that would have been necessary for resolving the claim of an entitlement. There exists only a brief reference to a factual element that “Nicaragua, in the present proceedings, has not established that it has a continental margin that extends [beyond two hundred nautical miles]”, without any indication of the legal implication of this statement in the context of the burden of proof (*ibid.*).

23. Seen in this way, the Court’s reference to Nicaragua’s obligation under Article 76 of UNCLOS should not, in my view, be seen as merely a procedural requirement. The reasoning of the Court instead makes clear that the condition of the submission of information to CLCS imposed by Article 76 is instead a substantive element that is fundamentally necessary in order for the Court to decide on the issues raised by the Parties. A delimitation cannot be effected in the absence of the existence of overlapping entitlements, which in this case requires the establishment by Nicaragua of its entitlement to a continental shelf extending beyond 200 nautical miles. This can and must be achieved by the submission of detailed information to the CLCS, which is not — as some might suggest — a mere procedural requirement.

24. In this situation, it is in my view impossible to draw from Part IV of the 2012 Judgment a far-reaching conclusion that the Court made a final

and binding decision on the merits that can be said to constitute *res judicata*. On the contrary, the Judgment proceeded to expressly declare that

“In view of the above, the Court need not address any other arguments developed by the Parties, including the argument as to whether a delimitation of overlapping entitlements which involves an extended continental shelf of one party can affect a 200-nautical-mile entitlement to the continental shelf of another party.” (*I.C.J. Reports 2012 (II)*, pp. 669-670, para. 130.)

It was on the basis of this reasoning that the Court stated in the operative part of the 2012 Judgment that “it cannot uphold the Republic of Nicaragua’s claim contained in its final submission I (3)” reformulating the same conclusion as was made at the end of Part IV of the Judgment (*ibid.*, p. 719, para. 251 (3)).

(ii) *The structure of the 2012 Judgment*

25. Second, the position of the Court is apparent in the distinction that the Judgment makes between the Court’s treatment of (a) Nicaragua’s request for the delimitation of its continental shelf extending beyond two hundred nautical miles of its coast (Part IV), and (b) the delimitation of the maritime boundary between the overlapping entitlements emanating from Nicaragua’s mainland and Colombia’s islands (Part V) in the 2012 Judgment.

26. The structure of the 2012 Judgment — and particularly the separation and juxtaposition of the analysis and decisions contained in Parts IV and V — demonstrates that the Court did not make a final and definitive determination of the merits as far as Nicaragua’s submission I (3) is concerned. As discussed above, in Part IV of the Judgment, the Court deliberately limited its examination of the issue to an analysis of the legal argumentation advanced by the Parties. In doing so, the Court not only avoided a substantive examination on its own of the claim on the merits, but also formally separated this part of its analysis from the more extensive examination of the claim relating to the delimitation of the relevant maritime area lying between the two opposing States contained in Part V of the Judgment.

27. This demonstrates a stark contrast in the treatment of the Court between the two distinctive categories of claims concerning the continental shelf covered in Parts IV and V of the Judgment. Part V, aptly entitled “Maritime Boundary”, contains a comprehensive discussion of the delimitation of entitlements on the merits. It would seem that rather than addressing submission I (3) on its merits, which involved a delimitation of a maritime boundary in the form of a median line between the mainland coasts of the two Parties, the Court instead concerned itself only with the delimitation of a boundary between the overlapping entitlements of Nicaragua based on its mainland coast and of Colombia based on its islands

off the coast of Nicaragua. It has to be stressed that these two parallel claims of Nicaragua, classified as claims (a) and (b) above (para. 25), entail totally distinct geological and geomorphological features and required the Court to apply entirely different rules of customary international law.

28. In Part V, the Court did scrutinize the evidence presented by the Parties and drew the maritime boundary in accordance with the well-established jurisprudence of the Court relating to the delimitation of the continental shelf between States with overlapping entitlements, namely the three-step approach articulated in the case concerning the *Maritime Delimitation in the Black Sea (Romania v. Ukraine)* (Judgment, *I.C.J. Reports 2009*, p. 89, para. 78). It is clear that the conclusion that the Court stated in operative paragraph 251 (4) of the 2012 Judgment is a final and binding decision of the Court, thus constituting *res judicata*. It seems equally clear that the statement of the Court in operative paragraph 251 (3), read together with the reasoning contained in Part IV, is not a conclusive determination of the subject-matter requested by Nicaragua in its submission I (3) and cannot be regarded as constituting *res judicata* (*Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, *I.C.J. Reports 2012 (II)*, p. 719, para. 251 (3)).

29. In light of all of these considerations, one is bound to come to the conclusion that the Court deliberately divided these issues between Parts IV and V because it did not wish to engage in a substantive examination of the merits on Nicaragua's submission I (3) at that time.

(iii) *The burden of proof*

30. Finally, it might be suggested by some that the Court did decide on submission I (3) on the merits in the 2012 Judgment and that, in doing so, it rejected the claim on the ground that the Applicant failed to meet its burden of proof. It cannot be denied that in the strictly adversarial framework of litigation traditionally accepted by the Court — whether this is a commendable approach for the proceedings of the International Court of Justice is a different matter — the burden of proof, and thus the burden of risk, falls heavily on the shoulders of the Applicant (*onus probandi incumbit actori*) (*Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, *I.C.J. Reports 2010 (I)*, p. 71, para. 162). It can be accepted on this basis that the principle exists that it is the responsibility of the Applicant to substantiate its claim, such that the burden of proof plays an extremely important role, with the result that the failure of the Applicant to establish a single, crucial point can prove fatal under certain

circumstances to its cause of action. The question is whether, when examined in this complex context that I have tried to depict, the present case falls within the framework of this reasoning.

31. It is submitted that it is wrong to regard the issue of the burden of proof as such an essential element in the present case, when, as a matter of fact, the Court in the 2012 Judgment went no further than to observe that “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” (*Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, *I.C.J. Reports 2012 (II)*, p. 669, para. 129). To conclude, on the basis of such a curt statement of facts, that Nicaragua had failed in law to meet its heavy burden of proof is to my mind tantamount to “reading too much” into this dictum of the Judgment — particularly when this remark could legitimately be interpreted as support for the Court’s view that it was, at that time, “not in a position” to proceed further to the merits of the claim in the absence of complete submissions to the CLCS. It would seem clear from this context that much more than the insufficiency or absence of evidence was at issue in the 2012 Judgment of the Court. It is for this reason that I take the view that the third preliminary objection of Colombia must be rejected.

D. Conclusion

32. In conclusion, when presented with a question about the binding force of a previous Judgment, the Court must

“distinguish between, first, the issues which have been decided with the force of *res judicata*, or which are necessarily entailed in the decision of those issues; secondly any peripheral or subsidiary matters, or *obiter dicta*; and finally matters which have not been ruled upon at all” (*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. 95, para. 126).

Although the 2012 Judgment of the Court may have created some confusion in the language it used in the *dispositif*, the context in which Nicaragua originally requested the delimitation of a continental shelf extending beyond 200 nautical miles, as well as the manner in which this claim was treated by the Court in the 2012 Judgment, leads me to the conclusion that the Court did not reach a final and definitive determination that would bind the Parties as *res judicata*. In light of this contextual background, it is my view that it is wrong to conclude in an automatic and facile manner that the Court disposed of Nicaraguan submission I (3) in the 2012 Judgment simply because of the statement in the *dispositif* that “[the Court] cannot uphold the Republic of Nicaragua’s claim contained in its final submission I (3)”, whether for the reason that Nicaragua failed

to provide sufficient evidence to substantiate its claim or for any other reason (*Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, *I.C.J. Reports 2012 (II)*, p. 719, para. 251 (3)). The Court did not reject the claim on the merits.

II. THE OPPOSABILITY OF UNCLOS BY COLOMBIA TO NICARAGUA

33. In addition to these points, I wish to touch upon an issue relating to the approach of the Court to the role of CLCS, which is especially relevant to the fifth preliminary objection of Colombia. Since I agree with the reasoning expressed by the Court in the present Judgment, this point may be somewhat otiose, but it is important to review this point as a matter of principle with respect to the applicable law in the present case. In its fifth preliminary objection, Colombia argues that Nicaragua's request for a delimitation on the basis of its entitlement to an extended continental shelf is inadmissible because Nicaragua has failed to secure the recommendations of the CLCS required by Article 76 of UNCLOS. The question is whether the obligations contained in Article 76 are opposable to Nicaragua on the part of Colombia, which is not a party to UNCLOS.

34. It is well established that, pursuant to Article 26 of the Vienna Convention on the Law of Treaties, "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith". A necessary corollary to this pronouncement, contained in Article 34 of the Vienna Convention, is the rule that "[a] treaty does not create either obligations or rights for a third State without its consent", or the principle of *res inter alios acta*. Even before the adoption of the Vienna Convention, this rule found expression in the jurisprudence of the Court. The Permanent Court of International Justice held that "[a] treaty only creates law as between the States which are parties to it; in case of doubt, no rights can be deduced from it in favour of third States" (*Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7, p. 29*). In the case concerning the *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, the Court was faced with the question as to whether Article 6 of the Geneva Convention on the Continental Shelf — and specifically the rules on delimitation of the continental shelf between the adjacent States — was opposable to the Federal Republic of Germany, which was not a party to the Convention. The Court observed that, because Germany had signed but not ratified the Geneva Convention, Article 6 "is not, as such, applicable to the delimitations involved in the present proceedings" and that the Convention "is not opposable to the Federal Republic [of Germany]" (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, *I.C.J. Reports 1969, p. 27, para. 34*

and p. 46, para. 83). In other words, a convention ratified by one State is not opposable to a third State.

35. In the present context, the Court is faced with a situation in which Colombia, a non-party to the Convention, seeks to invoke the provisions of Article 76 of UNCLOS on Nicaragua, which is a State party. Colombia appears to be claiming, without being a party to the Convention, that Nicaragua, a State party, is under the obligation to carry out the provisions of UNCLOS without being subject to its many obligations. Although Nicaragua is not a party to the Vienna Convention of the Law of Treaties, and though this Court has not previously affirmed the status of Article 34 of the Vienna Convention as reflecting a customary rule of international law, its previous jurisprudence supports the view that Colombia cannot invoke Article 76 as an argument opposable to Nicaragua.

36. Of course, there are other means by which a rule codified by an international agreement can be opposable to a State which has not ratified that agreement. That is to say that such a rule may be applied to and bind a third State when the rule at issue is a rule of customary international law. Thus the important question for the purpose of this case is whether the provisions of UNCLOS relied on by Colombia in its fifth preliminary objection, i.e., Article 76 in its entirety, could be opposable to Nicaragua.

37. Legally, it would be a totally different situation for the Court to prescribe as it did in its 2012 Judgment that Nicaragua as a party to the Convention has to carry out its obligation under these provisions of Article 76, in order for Nicaragua to establish that it indeed has an extended continental shelf which goes beyond 200 miles of its mainland coast and which may create overlapping entitlements to the continental shelf with Colombia, and ask Nicaragua to comply with its obligation before the Court can proceed further. In the 2012 Judgment, the Court identified this issue and stated that “since Colombia is not a party to UNCLOS, only customary international law may apply in respect to the maritime delimitation requested by Nicaragua”, but did not go further than stating that “the definition of the continental shelf set out in Article 76, paragraph 1, of UNCLOS forms part of customary international law”. It categorically stated that “it does not need to decide whether other provisions of Article 76 of UNCLOS form part of customary international law” (*Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, *I.C.J. Reports 2012 (II)*, p. 666, paras. 114, 118).

38. On the basis of this logic, the present Judgment of the Court, which in my view represents an accurate assessment of the 2012 Judgment, proceeds to state that the Court in the 2012 Judgment did not reject Nicaragua’s claim to an extended continental shelf on the merits, but instead found that it was “not in a position” to definitively decide this claim because of Nicaragua’s failure to submit adequate information to the CLCS pursuant to Article 76, paragraph 8, of UNCLOS. In doing so, the Court in 2012 did not affirm that this provision stood as a customary rule

of international law, even though it had decided earlier in the 2012 Judgment that the applicable law was customary international law. While the Court referred to its dictum in the case concerning the *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, it involved a dispute between two States parties to UNCLOS and thus entailed the application of the treaty law. It is a different proposition for the Court to state that Nicaragua is bound by Article 76 of UNCLOS, as a party to the Convention, irrespective of whether Colombia is also a party. The Court, emphasizing that the Convention “is intended to establish ‘a legal order for the seas and oceans’”, did this and concluded that “[g]iven the object and purpose of UNCLOS, as stipulated in its Preamble, the fact that Colombia is not a party thereto does not relieve Nicaragua of its obligations under Article 76 of that Convention” (*I.C.J. Reports 2012 (II)*, p. 669, para. 126).

39. This can be accepted a correct statement of the law, as far as Nicaragua is concerned in its relationship with the Court. But when it comes to the question as to whether Colombia, as a State not a party to the Convention, can oppose Nicaragua in terms of the latter’s non-compliance with the provisions of Article 76, this becomes an entirely different issue of applicable law. In any event, the important point is that, at the present stage of the proceedings, the Court is answering this question neither in an affirmative way nor in a negative way. While I concur with the reasoning of the Court in rejecting the fifth preliminary objection of Colombia, it appears to me there is yet another reason to reject this objection: the relevant provisions of Article 76 of UNCLOS are not opposable by Colombia to Nicaragua, unless Colombia can establish that the rules contained in Article 76 are rules of customary international law.

(Signed) Hisashi OWADA.
