

DISSENTING OPINION OF JUDGE DONOGHUE

Scope and meaning of dispositive subparagraph (3) of the 2012 Judgment — Res judicata.

I. INTRODUCTION AND SUMMARY

1. In its third preliminary objection in this case, Colombia invoked the doctrine of *res judicata*, contending that the Judgment in *Territorial and Maritime Dispute (Nicaragua v. Colombia)* (hereinafter the “*Nicaragua v. Colombia I*” or the “2012 Judgment” (*I.C.J. Reports 2012 (II)*, p. 624)) renders the claims in Nicaragua’s present Application inadmissible. Today the Court rejects this contention and finds Nicaragua’s First Request to be admissible (subparagraphs (1) *(b)* and (2) *(b)* of the *dispositif*). I submit this dissenting opinion because I believe that *res judicata* bars Nicaragua’s First Request in part.

2. I consider that the Court determined in 2012 that Nicaragua had not proven that its continental shelf entitlement extended far enough to overlap with the 200-nautical-mile continental shelf entitlement “measured from Colombia’s mainland coast” (hereinafter, “Colombia’s mainland entitlement”) (*Nicaragua v. Colombia I, I.C.J. Reports 2012 (II)*, p. 669, para. 129). This determination was essential to the Court’s conclusion that it was not in a position to delimit continental shelf, as Nicaragua requested (*ibid.*), and thus that it could not uphold Nicaragua’s submission I (3) in that case (*ibid.*, p. 670, para. 131 ; p. 719, para. 251 (3)). Accordingly, this 2012 determination must be given *res judicata* effect. In *Nicaragua v. Colombia I*, Nicaragua made full use of the opportunity to prove its claim that its continental shelf entitlement extended far enough to overlap with Colombia’s mainland entitlement. It failed to do so. This is precisely the sort of situation in which, for reasons of procedural fairness, the doctrine of *res judicata* applies.

3. On the other hand, the Court did not determine in 2012 whether Nicaragua had proven the existence or extent of any overlap between its continental shelf entitlement and the continental shelf entitlement gener-

ated by Colombia's islands (hereinafter, "Colombia's insular entitlement") in the area more than 200 nautical miles from Nicaragua's coast. Thus, to the extent that Nicaragua's First Request is based on a claim of any such overlap, the doctrine of *res judicata* does not pose an obstacle to admissibility.

4. According to today's Judgment, the Court decided in its 2012 Judgment that Nicaragua's delimitation claim could not be upheld because Nicaragua had not yet submitted to the Commission on the Limits of the Continental Shelf ("CLCS" or "Commission") information on the limits of its continental shelf beyond 200 nautical miles. Consistent with this conclusion, the two relevant subparagraphs of today's *dispositif* do not draw a distinction between the two areas of overlapping entitlement that I describe above. The unfortunate consequence is that my dissenting votes with respect to these two subparagraphs do not accurately reflect my views. My position in respect of Colombia's third preliminary objection is, in fact, a partial dissent. I set out below my interpretation of the 2012 Judgment, which is at odds with the interpretation in today's Judgment, and which gives rise to my partial dissent. In so doing, I recall my 2012 separate opinion (*I.C.J. Reports 2012 (II)*, p. 751), in which I addressed the very paragraphs of the 2012 Judgment that divide the Court today.

5. I also indicate in this opinion the reasons why I am unconvinced by the Court's interpretation of the 2012 Judgment.

II. THE QUESTION BEFORE THE COURT TODAY

6. Colombia's contention that the doctrine of *res judicata* renders Nicaragua's First Request inadmissible requires the Court to specify the meaning and scope of paragraph 251, subparagraph (3), of the 2012 Judgment (hereinafter, "dispositive subparagraph (3)"). If this cannot be determined from the text of the *dispositif* alone, "[i]n determining the meaning and scope of the operative clause of the original Judgment, the Court, in accordance with its practice, will have regard to the reasoning of that Judgment to the extent that it sheds light on the proper interpretation of the operative clause" (*Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand), Judgment, I.C.J. Reports 2013*, p. 306, para. 68). Although the contentions that the parties advance in a case cannot be determinative of the interpretation of a judgment, "[t]he pleadings and the record of the oral proceedings . . . are also relevant to the interpretation of the Judgment, as they show what evidence was, or was not, before the Court and how the issues before it were formulated by each Party" (*ibid.*, para. 69). A precise understanding of the meaning and scope of a judgment requires, in particular, the identification of each element of the reasoning that constitutes "a condition essential to the Court's decision" (*ibid.*, p. 296, para. 34, citing *Interpretation of*

Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13, p. 20). Thus, the Court today must identify the elements of the Court's 2012 reasoning that were essential to its 2012 decision that it could not uphold Nicaragua's submission.

7. Identification of these essential elements provides a basis to ascertain the points that were "determined, expressly or by necessary implication" by the Court's 2012 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. 95, para. 126), which must be given *res judicata* effect (see paragraph 60 of today's Judgment).

III. THE CONTEXT FOR THE 2012 JUDGMENT

A. The Procedural Steps related to Establishment of the Outer Limits of the Continental Shelf

8. Because today's Judgment attaches singular importance to one step in the procedure for establishing the outer limits of the continental shelf that is contained in the United Nations Convention on the Law of the Sea ("UNCLOS"), I summarize here the three steps that apply to UNCLOS States parties, which are set out in Article 76, paragraph 8, of UNCLOS. First, a coastal State that intends to establish the outer limits of its continental shelf beyond 200 nautical miles of its coast is required to submit information regarding such limits to the CLCS. This document is usually called a "submission" (the term that I use today), although the 2012 Judgment sometimes refers to it as a "full submission". Secondly, the Commission makes recommendations regarding the outer limits to the coastal State. Thirdly, on the basis of the Commission's recommendations, the coastal State establishes the outer limits of its continental shelf. Such limits are final and binding.

9. Article 4 of Annex II to UNCLOS requires any submission to be made within ten years of entry into force of the Convention for a State party. In 2008, however, the UNCLOS States parties decided that this ten-year deadline could be met by a State's transmission to the Secretary-General of Preliminary Information indicative of the outer limits of the continental shelf beyond 200 nautical miles (UN doc. SPLOS/183, 2008; see also UN doc. SPLOS/72, 2001). Consistent with the 2012 Judgment, I refer to such a document as "Preliminary Information".

B Nicaragua's Submission I (3) and Colombia's Response

10. In *Nicaragua v. Colombia I*, Nicaragua's submission I (3) (hereinafter, "submission I (3)") requested 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.” (*I.C.J. Reports 2012 (II)*, p. 636, para. 17.) Nicaragua did not ask the Court to effect a delimitation in respect of any overlap of Nicaragua’s entitlement with Colombia’s insular entitlement in the area beyond 200 nautical miles of Nicaragua’s coast. Instead, it asked the Court to enclave the Colombian islands of San Andrés and Providencia and Santa Catalina by giving them maritime entitlements of 12 nautical miles (submission I (4); see sketch-map No. 2 in *ibid.*, p. 663 and the separate opinion of Judge Donoghue, *ibid.*, p. 755, para. 13).

11. Nicaragua recognized in *Nicaragua v. Colombia I* that “[d]elimitation can only take place after one has decided what is the area that needs to be delimited” (CR 2012/9, p. 23, para. 10 (Lowe)) and thus that the first step in those proceedings was for the Court to determine the area of overlapping entitlement to continental shelf. The next step would be the delimitation of any area of overlap identified by the Court.

12. When maritime entitlements claimed by the parties correspond to their respective 200-nautical-mile zones, the Court can normally identify the area of overlapping entitlement through an exercise that is largely mechanical, on the basis of coastal geography. This is not the situation, however, when a delimitation claim is predicated on the applicant’s asserted entitlement to continental shelf beyond 200 nautical miles from its coast, as was the case in *Nicaragua v. Colombia I*. In those circumstances, a court or tribunal is required, as a first step, to resolve the question of fact as to whether an overlap exists. Only if an overlap is found will the court or tribunal be in a position to proceed to the second step of delimitation.

13. Accordingly, as the 2012 Judgment notes, Nicaragua considered in that case that the existence of continental shelf “is essentially a question of fact” (p. 666, para. 119). Nicaragua did not question that a party bears the burden of proving the facts that it asserts (*Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*, Judgment, *I.C.J. Reports 2011 (II)*, p. 668, para. 72; *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, *I.C.J. Reports 2009*, p. 86, para. 68). It marshalled its evidence in an attempt to do so. Its Reply included a chapter entitled “The Continental Shelf in the Western Caribbean: The Geological and Geomorphological Evidence”, as well as a series of technical annexes taken from the Preliminary Information that it had transmitted to the Secretary-General and other scientific data and evidence regarding the geology and geomorphology of the area in question. During two sessions of the oral proceedings, a geologist on Nicaragua’s team presented evidence in support of

Nicaragua's assertion that its continental shelf entitlement overlapped with Colombia's mainland entitlement.

14. Nicaragua took the position that, if the natural prolongation of the coastal State's landmass extends beyond 200 nautical miles from its coast, that State has an entitlement to extended continental shelf "*ipso facto* and *ab initio*" (CR 2012/15, p. 17, para. 4 (Lowe)). Nicaragua pointed to Article 77, paragraph 3, of UNCLOS, which states that a coastal State's continental shelf entitlement does not depend on occupation or express proclamation. It emphasized that the Commission "has no role in establishing an entitlement to a continental shelf: it merely determines the precise location of the outer limits of a pre-existing entitlement" (*ibid.*, p. 19, para. 15 (Lowe)).

15. Colombia's primary response (see paragraph 19 below) was that Nicaragua's claim was inadmissible as a new claim. However, if the claim were found to be admissible, *quod non*, Colombia contended that the claim failed on the merits, both for legal and evidentiary reasons. As to the asserted legal defects, Colombia made two points. First, Colombia disagreed with Nicaragua's claim that entitlement of continental shelf exists "*ipso facto* and *ab initio*", stating that:

"Article 76, coupled with the Commission's Rules of Procedure, makes it mandatory for a coastal State to make an extended continental shelf submission to the Commission, for the Commission to make recommendations on that submission, and for the coastal State then to establish the outer limits of its shelf 'on the basis of' the Commission's recommendations. Rule 45 stipulates that the coastal State 'shall' submit particulars of its claims to the Commission. Nicaragua cannot be deemed to have established any rights to an extended continental shelf unless and until these steps are followed . . ." (*Nicaragua v. Colombia I*, Rejoinder of the Republic of Colombia, p. 141, para. 4.42.)

Thus, Colombia's position was that a coastal State that is a party to UNCLOS has no entitlement to extended continental shelf until the three steps set out in Article 76, paragraph 8, of UNCLOS are completed and the coastal State has established the outer limits based on Commission recommendations.

16. Colombia's second legal argument was that a State's entitlement to continental shelf based on the distance criterion always takes precedence over an extended continental shelf entitlement. Nicaragua disagreed on this legal point.

17. Turning to the evidence, Colombia had this to say: "Factually, the so-called 'evidence' that Nicaragua has adduced in its Reply is woefully deficient, and would not even begin to satisfy the Commission on the Limits of the Continental Shelf." (CR 2012/12, p. 53, para. 46 (Bundy).) To support this criticism of Nicaragua's evidence, Colombia emphasized Nica-

ragua's admissions as to the insufficiency of its evidence. To this end, Colombia called the Court's attention to the fact that Nicaragua had attached to its Reply technical annexes from the Preliminary Information that it had transmitted to the Secretary-General, but had not filed the Preliminary Information itself with the Court. Colombia informed the Court that Nicaragua's Preliminary Information itself (which is available on the Commission website) acknowledged that "some of the data and the profiles [contained therein] do not satisfy the exacting standards required by the CLCS for a full submission, as detailed in the Commission's Guidelines" (CR 2012/12, p. 56, para. 59 (Bundy); see also *ibid.*, p. 61, para. 81 (Bundy)). Colombia pointed to other admissions that appeared in the evidence that Nicaragua had submitted in the proceedings in *Nicaragua v. Colombia I*: "Nicaragua's technical annex to its Reply states that its foot-of-slope points 'should be treated as indicative only'. And it adds 'there are issues with the data quality in a few areas'." (*Ibid.*, p. 58, para. 65 (Bundy).)

18. As can be seen, therefore, the arguments of the Parties in *Nicaragua v. Colombia I* centred not on the methodology of delimitation, but on the question whether there was a basis in law and in fact for the Court to proceed to the step of delimitation.

IV. WHAT DID THE COURT DECIDE IN 2012?

19. In the 2012 Judgment, the Court took two decisions regarding Nicaragua's submission I (3). That submission was not a part of Nicaragua's Application; it appeared for the first time in Nicaragua's Reply. The Court first rejected Colombia's contention that the claim contained in submission I (3) was inadmissible because it was new (*Nicaragua v. Colombia I*, p. 719, para. 251 (2)). The reasoning in support of this decision appears in Section III of the 2012 Judgment, entitled "Admissibility of Nicaragua's Claim for Delimitation of a Continental Shelf Extending beyond 200 Nautical Miles". Section III concludes that the claim contained in submission I (3) is admissible (*ibid.*, p. 665, para. 112). The 2012 Judgment identifies no question of admissibility other than Colombia's objection to Nicaragua's new claim.

20. Section IV of the 2012 Judgment is entitled "Consideration of Nicaragua's Claim for Delimitation of a Continental Shelf Extending beyond 200 Nautical Miles". It contains the reasoning on which the Court bases its second decision on Nicaragua's submission, i.e., that the Court could not "uphold the Republic of Nicaragua's claim contained in its final submission I (3)" (*ibid.*, p. 719, para. 251 (3)). The structure of the Judgment and the absence of any indication that the Court was addressing an unspecified aspect of admissibility in Part IV therefore make clear that the Court's decision that it could not uphold Nicaragua's submission I (3) was a decision on the merits.

21. In the present case, each Party attached significance to the Court's use of the phrase "cannot uphold" to express its decision on the merits of submission I (3).

22. According to Nicaragua, in 2012 the Court neither ruled positively on Nicaragua's claim, nor rejected it. Instead, it "confine[d] itself, negatively, to 'not upholding' a submission — that is to say not ruling on it" (CR 2015/27, p. 39, para. 25 (Pellet)). However, Nicaragua did not identify any prior judgment in which the Court used the phrase "cannot uphold" to indicate that it would not rule on the merits of a claim that fell within its jurisdiction and was admissible.

23. Colombia's assertion was that the decision that the Court could not uphold Nicaragua's claim meant that the Court had rejected the delimitation requested in submission I (3). Colombia pointed to a series of judgments in which the Court used the phrases "cannot uphold" or "cannot be upheld" when it rejected a claim (see CR 2015/28, pp. 18-21, paras. 3-12 (Reisman)).

24. The judgments identified by Colombia undercut Nicaragua's suggestion that the Court used the phrase "cannot uphold" in dispositive subparagraph (3) in order to signal that it was not ruling on a claim. However, Colombia's contention that the Court rejected Nicaragua's delimitation claim in its entirety overlooks the fact that the Court in dispositive subparagraph (3) ruled on a claim with the two distinct steps described above (para. 12). The Court never proceeded to delimitation, so it cannot be understood to have "rejected" Nicaragua's proposed delimitation. Instead, the phrase "cannot uphold" indicates that Nicaragua's submission I (3) failed at the first of the two steps inherent in Nicaragua's claim; the Court was therefore not in a position to proceed to the second step of delimitation.

25. The question that divides the Court today is why the Court determined that it was not in a position to delimit as requested by Nicaragua, and thus decided that it could not uphold submission I (3). As the answer to this question cannot be found in the text of the *dispositif*, I turn now to my understanding of the reasoning that was essential to the Court's 2012 decision.

26. In the first paragraph of Section IV, the Court framed the question to be addressed as "whether it is in a position to determine 'a continental shelf boundary dividing by equal parts the overlapping entitlements to a continental shelf of both Parties' as requested by Nicaragua in its final submission I (3)" (*Nicaragua v. Colombia I*, p. 665, para. 113).

27. A court or tribunal is only "in a position" to effect a delimitation if the entitlements of the parties overlap (see *Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment of 14 March 2012, *ITLOS Reports 2012*

(hereinafter, “*Bangladesh/Myanmar*”), p. 105, para. 397). Thus, after indicating that customary international law governs the case (*Nicaragua v. Colombia I*, p. 666, para. 118), the 2012 Judgment turns to the Parties’ positions in respect of the first step of Nicaragua’s claim — the contention that Nicaragua’s continental shelf entitlement overlaps with Colombia’s mainland entitlement.

28. The Court’s summary of Nicaragua’s position begins with its factual claim — that the natural prolongation of its landmass, which it described as the “Nicaraguan Rise”, overlaps with Colombia’s mainland entitlement (*ibid.*, p. 666, para. 119). The Judgment notes that Nicaragua had transmitted Preliminary Information to the Secretary-General within the applicable ten-year period (*ibid.*, p. 667, para. 120).

29. The Judgment also lays out the ways in which Nicaragua sought to reassure the Court of the quality of its evidence, noting that, according to Nicaragua, the work needed to complete a submission to the Commission was “well advanced” and that it intended to acquire additional survey data in order to complete the information to be submitted to the Commission (*ibid.*, p. 667, para. 120). In addition, the 2012 Judgment recalls Nicaragua’s assertion that it had “established the outer limit of its continental shelf beyond 200 nautical miles on the basis of available public domain datasets” (*ibid.*).

30. When the Judgment turns to Colombia’s position, the Court’s summary captures that Party’s view that the inadequacy of Nicaragua’s evidence stood in the way of delimitation:

“Colombia contends that Nicaragua’s purported rights to the extended continental shelf out to the outer edge of the continental margin beyond 200 nautical miles have never been recognized or even submitted to the Commission. According to Colombia, the information provided to the Court, which is based on the ‘Preliminary Information’ submitted by Nicaragua to the Commission, is ‘woefully deficient’. Colombia emphasizes that the ‘Preliminary Information’ does not fulfil the requirements for the Commission to make recommendations, and therefore Nicaragua has not established any entitlement to an extended continental shelf. That being the case, Colombia asserts that Nicaragua cannot merely assume that it possesses such rights in this case or ask the Court to proceed to a delimitation ‘based on rudimentary and incomplete technical information’.” (*Ibid.*, p. 667, para. 122.)

As can be seen in the Court’s summary of Colombia’s views, the deficiencies in Nicaragua’s evidence were revealed, first, by the fact that the limits of its continental shelf had not been “recognized or even submitted” to the Commission and, secondly, because the Preliminary Information from which Nicaragua drew its evidence did not even meet the requirements for a submission to the Commission. According to Colombia, the

consequence of Nicaragua's "rudimentary and incomplete" evidence was that the Court could not proceed to delimitation.

31. Having summarized the Parties' positions, the 2012 Judgment then addresses the "jurisprudence" to which Nicaragua had referred (*Nicaragua v. Colombia I*, p. 668, para. 125). It begins with observations regarding the Judgment of ITLOS in *Bangladesh/Myanmar*, in which the Tribunal rejected the contention that it should not delimit areas of extended continental shelf. The Court first identifies circumstances that distinguished that case from the situation in *Nicaragua v. Colombia I* (e.g., ITLOS did not need to determine the outer limits of the continental shelf; the Bay of Bengal presents a unique situation; both States were parties to UNCLOS and had made submissions to the Commission). This enumeration of differences between the two cases might have suggested that the Court saw reasons not to proceed to delimitation in *Nicaragua v. Colombia I*, even though ITLOS had done so in *Bangladesh/Myanmar*. However, the discussion of *Bangladesh/Myanmar* closes with the observation that ITLOS had drawn a clear distinction between delimitation of continental shelf and delineation of its outer limits, a point that today's Judgment also embraces (para. 112). Taken as a whole, therefore, the Court's comments on *Bangladesh/Myanmar* suggest some openness to the delimitation of areas of extended continental shelf.

32. When the Court's review of jurisprudence moves from *Bangladesh/Myanmar* to its own 2007 Judgment in the case concerning *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (*Nicaragua v. Honduras*), however, the Court's reasoning points in precisely the opposite direction. Quoting from that 2007 Judgment, the Court states that "any claim of continental shelf rights beyond 200 miles [by a State party to UNCLOS] must be in accordance with Article 76 of UNCLOS and reviewed by the Commission" (*Nicaragua v. Colombia I*, p. 669, para. 126, citing *I.C.J. Reports 2007 (II)*, p. 759, para. 319). The clear implication (about which my 2012 separate opinion expresses misgivings) is that the Court would hesitate to entertain an application seeking delimitation of areas of extended continental shelf in the absence of review by the Commission. (Today's Judgment, however, reaches the opposite conclusion in rejecting Colombia's fifth preliminary objection.) The Court then observes that the fact that Colombia is not a party to UNCLOS does not relieve Nicaragua of its obligations under Article 76 of UNCLOS (*Nicaragua v. Colombia I*, p. 669, para. 126.)

33. Following its observations on jurisprudence, the Court addresses the evidence that Nicaragua had provided to the Court. It notes that Nicaragua's Preliminary Information "by [Nicaragua's] own admission, falls short of meeting the requirements for information" specified in paragraph 8 of Article 76 of UNCLOS and that Nicaragua had provided the Court with annexes to the Preliminary Information and had indicated that the entire Preliminary Information was available on the Commission's website (*ibid.*, p. 669, para. 127). There was no reason for the Court

to probe the details of Nicaragua's evidence or Colombia's criticism thereof because the evidence that Nicaragua had presented to the Court was facially deficient. In the absence of Commission recommendations, the Court could not rely on the assessment of an expert body, as it has done in other cases (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, *I.C.J. Reports 2015 (I)*, p. 76, paras. 190-191). Nicaragua had admitted that the evidence that it had introduced in *Nicaragua v. Colombia I* fell short of what the Commission requires, and the Court attaches particular evidentiary importance to admissions adverse to a party (see, e.g., *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, *I.C.J. Reports 1986*, p. 43, para. 69; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, *I.C.J. Reports 2005*, p. 201, para. 61). Thus, Nicaragua's reliance in the proceedings in the 2012 Judgment on evidence from its Preliminary Information, and not from a submission, was among the reasons why the Court concluded that Nicaragua had failed to prove the facts that it asserted in the first step of its claim.

34. After addressing Nicaragua's evidence, the 2012 Judgment recalls that, at the hearing, Nicaragua had suggested that, rather than specifying the precise location of the outer limits of Nicaragua's continental shelf, the Court had the option of proposing a formula for delimitation, which could then be applied after Nicaragua has established the outer limits of its continental shelf based on Commission recommendations (*Nicaragua v. Colombia I*, p. 669, para. 128). Following its summary of Nicaragua's alternative proposal, the Court concludes its reasoning on the merits with respect to Nicaragua's submission I (3) as follows:

“[S]ince Nicaragua, in the present proceedings, has not established [in French: *n'ayant pas . . . apporté la preuve*] that it has a continental margin that extends far enough to overlap with Colombia's 200-nautical-mile entitlement to the continental shelf, measured from Colombia's mainland coast, the Court is not in a position to delimit the continental shelf boundary between Nicaragua and Colombia, as requested by Nicaragua, even using the general formulation proposed by it.” (*Ibid.*, p. 669, para. 129.)

35. Thus, having begun its consideration of Nicaragua's submission I (3) with the question whether it was “in a position” to determine a continental shelf boundary as requested by Nicaragua (*ibid.*, p. 665, para. 113), the Court answered that question in the above-quoted paragraph. As that paragraph indicates, in the proceedings in *Nicaragua v. Colombia I*, Nicaragua had not proven the facts on which its claim was predicated — that its continental shelf entitlement extended far enough to overlap with Colombia's mainland entitlement. This conclusion as to the first step of Nicaragua's claim led the Court to determine that it was “not in a position” to proceed to the second step — delimitation of the conti-

mental shelf boundary requested by Nicaragua — either through identification of a specific median line or through articulation of a formula. This reasoning was essential to the Court’s decision that Nicaragua’s submission I (3) could not be upheld.

36. In my 2012 separate opinion, I observed that the evidence presented by Nicaragua did not provide a sufficient factual basis for the Court to proceed to delimitation, and I expressed regret that the Court did not set out in its reasoning the specific inadequacies of Nicaragua’s evidence (*I.C.J. Reports 2012 (II)*, p. 756, para. 17). In today’s Judgment (para. 82), the Court points to the fact that the 2012 Judgment did not analyse the evidence to support its conclusion that the Court made no determination about that evidence in 2012. As noted above, however, the deficiencies in Nicaragua’s evidence were obvious from the Parties’ positions, without examination of the underlying geological and geomorphological facts. In addition, today’s Judgment ignores the fact that, while the Court in some cases presents its own analysis of the evidence or legal positions presented by the parties, the Court’s style of drafting (sometimes described as “laconic”) often follows another pattern, in which party positions on a particular issue are summarized, followed only by a brief statement of the Court’s conclusion on that issue (e.g., that the evidence fails to establish an asserted fact). I have expressed my own concerns about this drafting style in the past, noting in particular the obscurity of reasoning that can result from it (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, *I.C.J. Reports 2015 (I)*, declaration of Judge Donoghue, p. 392, para. 9). However, there is nothing exceptional about the Court’s use of this style in *Nicaragua v. Colombia I* to indicate the Court’s conclusion that Nicaragua failed to establish the facts that it asserted.

37. (I also note that, during the proceedings in the present case, both Colombia (CR 2015/26, p. 31, para. 6 (Herdegen); CR 2015/28, pp. 43-44, paras. 17-23 (Bundy)) and Nicaragua (CR 2015/27, p. 41, para. 29; p. 44, para. 37 (Pellet); CR 2015/29, p. 25, para. 23; p. 26, para. 25; pp. 26-27, para. 27 (Pellet)) expressed the view that the Court had decided in 2012 that it could not uphold Nicaragua’s submission for want of evidence. Of course, the Parties disagreed about whether this lack of evidence meant that Nicaragua’s First Request in the present case was barred by the doctrine of *res judicata*.)

38. There is also nothing unusual in the fact that the Court in 2012 declined to address certain of the legal issues presented by the Parties, including the relationship between one State’s extended continental shelf entitlement and another State’s 200-nautical-mile zone and the question whether the various paragraphs of Article 76 of UNCLOS are part of customary international law (*Nicaragua v. Colombia I*, pp. 666-668, paras. 118, 121 and 123; pp. 669-670, para. 130). These legal questions had implications well beyond *Nicaragua v. Colombia I*. The Court would have had to

confront each of them in order to proceed to delimitation, but the facial inadequacy of Nicaragua's evidence meant that it was free to decline to address them. Once again, the Court's approach is entirely in line with its traditions of judicial drafting, pursuant to which it takes a flexible approach to the sequence in which it addresses questions presented by an application, which can obviate the need to decide questions of law not essential to settlement of the particular dispute before it.

39. Because the Court in its reasoning (*Nicaragua v. Colombia I*, p. 669, para. 129, quoted above in para. 34) referred only to Nicaragua's claim of an overlap with Colombia's mainland entitlement, I see no basis to conclude that the Court made a determination about the existence or extent of any overlap between Nicaragua's continental shelf entitlement in the area more than 200 nautical miles from its coast and Colombia's insular entitlement. This conclusion is consistent with Nicaragua's submissions in *Nicaragua v. Colombia I*.

V. THE IMPLICATIONS OF THE DECISION THAT THE COURT COULD NOT UPHOLD NICARAGUA'S SUBMISSION I (3) (*RES JUDICATA*)

40. Today's Judgment recites the well-known requirements for the application of *res judicata* — same parties, object and legal ground. The Court also quite correctly observes that, in order to decide whether the doctrine of *res judicata* bars an application in a second case, the Court must determine whether and to what extent a claim was definitively settled in the first case, or, as the Court has stated elsewhere, whether “a matter has . . . been determined, expressly or by necessary implication” (see paragraph 7 above).

41. I do not take issue with the Court's summary of the law. My differences with the Court stem from my disagreement with the interpretation of dispositive subparagraph (3) of the 2012 Judgment advanced by the Court today.

42. In its 2012 Judgment, the Court “determined, expressly or by necessary implication”, that Nicaragua had not established that its continental shelf extended far enough to overlap with Colombia's mainland entitlement and thus that the Court was not in a position to delimit. Under these circumstances, the doctrine of *res judicata* denies Nicaragua the opportunity to prove the same facts for a second time in a second case against the same respondent, in the hope that it will meet its burden of proof in the second case. Nicaragua took full advantage of the opportunity to prove the overlap of its entitlement with Colombia's mainland entitlement in *Nicaragua v. Colombia I*. In such a situation, it is unfair, and inconsistent with the sound administration of justice, to give a State a second chance to prove the same facts in a second case. Thus, the *res judicata* effect of the 2012 Judgment prevents Nicaragua from request-

ing a court anew to ascertain that its continental shelf entitlement overlaps with Colombia's mainland entitlement.

43. As the 2012 Judgment did not address the question whether there was an overlap between Nicaragua's entitlement and Colombia's insular entitlement in the area located more than 200 nautical miles from Nicaragua's coast, however, the Court did not make any determination on that issue. For that reason, there is no basis to apply the doctrine of *res judicata* in respect of any such overlap.

44. For these reasons, I consider that Nicaragua's First Request in the present case is inadmissible as to any overlap between Nicaragua's entitlement and Colombia's mainland entitlement (*res judicata* effect), but admissible as to any overlap between Nicaragua's entitlement and Colombia's *insular* entitlement in the area beyond 200 nautical miles of Nicaragua's coast (no *res judicata* effect).

45. Concerning the application of the doctrine of *res judicata* to the 2012 Judgment, I offer two final comments. First, the Court's determination that a party has failed to prove a particular fact that it alleged does not automatically prove the opposite fact. The Chamber of the Court recognized this in the case concerning the *Frontier Dispute (Burkina Faso/ Republic of Mali)*, wherein it observed that "the rejection of any particular argument on the ground that the factual allegations on which it is based have not been proved is not sufficient to warrant upholding the contrary argument" (*Judgment, I.C.J. Reports 1986*, p. 588, para. 65). In 2012, the Court did not make a determination, expressly or impliedly, as to the underlying geological and geomorphological facts in the area at issue. It neither decided that Nicaragua's entitlement did not overlap with Colombia's mainland entitlement, nor that Nicaragua had no entitlement beyond 200 nautical miles of its coast. It determined only that the evidence submitted by Nicaragua did not meet that Party's burden to prove that its continental shelf entitlement overlapped with Colombia's mainland entitlement. The doctrine of *res judicata* denies Nicaragua a second chance to meet its burden of proof in court, but it does not preclude Nicaragua from pursuing the delineation of the outer limits of its continental shelf within the framework of UNCLOS. Moreover, it remains open to the Parties, whether through negotiation or another agreed means of peaceful dispute settlement, to agree on the delimitation of any area of overlapping entitlement located more than 200 nautical miles from Nicaragua's coast.

46. Secondly, the Court's decision in 2012 that Nicaragua failed to meet its burden of proof in that case has no effect on third States.

VI. THE COURT'S INTERPRETATION
OF DISPOSITIVE SUBPARAGRAPH (3)

47. According to today's Judgment, the Court decided in 2012 that it could not uphold Nicaragua's claim because Nicaragua "had yet to discharge its obligation, under paragraph 8 of Article 76 of UNCLOS, to deposit with the CLCS the information on the limits of its continental shelf beyond 200 nautical miles required by that provision and by Article 4 of Annex II of UNCLOS" (para. 84). I offer some observations on this conclusion, with which I disagree.

48. To support its conclusion that the Court in 2012 held that it would not delimit continental shelf in the absence of a submission to the CLCS, today's Judgment apparently relies on the statement in the 2012 Judgment that "the fact that Colombia is not a party [to UNCLOS] does not relieve Nicaragua of its obligations under Article 76 of that Convention" (*Nicaragua v. Colombia I*, p. 669, para. 126). This remark, which does not even mention the requirement of a submission, cannot explain today's interpretation. To be sure, given that Nicaragua apparently intends to establish the outer limits of its continental shelf beyond 200 nautical miles of its coast, it has obligations under UNCLOS. However, in 2012, Nicaragua had met those obligations, due to its transmission of Preliminary Information to the Secretary-General within the applicable ten-year period. Nicaragua's failure to make a submission was not a failure to "discharge its obligation" (Judgment, para. 84); it was one of several indicators of the facial inadequacy of Nicaragua's evidence.

49. Moreover, the obligation to make a submission to the Commission applies only to the process of delineating the outer limits of the continental shelf. UNCLOS imposes no obligation on a State party to make a submission to the Commission prior to seeking judicial or arbitral delimitation of continental shelf beyond 200 nautical miles of its coast. On the contrary, it draws a distinction between delimitation of a maritime boundary, on the one hand, and delineation of the outer limits of the continental shelf, on the other hand (Art. 76, para. 10, of UNCLOS; see also *Bangladesh/Myanmar*, pp. 107-108, paras. 406-410). The Court embraces that very distinction today (para. 112) when it concludes that the absence of Commission recommendations does not render inadmissible an application seeking delimitation of continental shelf in areas located more than 200 nautical miles from the applicant's coast.

50. Even assuming, *arguendo*, that there is a basis for the Court to condition its consideration of an application for delimitation on the completion of a particular phase in the UNCLOS process for the establishment of the outer limits of the continental shelf, the interpretation of the 2012 Judgment that is contained in today's Judgment fails. As noted above, the 2012 Judgment (pp. 668-669, para. 126) expressly links delimi-

tation of extended continental shelf not to a unilateral submission by the coastal State to the Commission, but rather to such a submission having been “reviewed” by the Commission, reprising a point that the Court had made in 2007. In my 2012 opinion (*I.C.J. Reports 2012 (II)*, p. 756, para. 18; p. 758, para. 25), I expressed the concern that this quotation suggested a generally-applicable bar on delimitation applications in the absence of Commission recommendations or the establishment of the outer limits on the basis of those recommendations. (For this reason, I am pleased that the Court today rejects Colombia’s fifth preliminary objection, although I regret that the reasoning in Part VI of today’s Judgment does not mention the apparent inconsistency between today’s conclusion and statements that the Court made in 2007 and 2012.)

51. Had the Court decided in 2012 to impose a precondition on delimitation cases (submission to the Commission, according to today’s Judgment), this precondition could not have been found in the law governing the dispute between the Parties, which was customary international law, not UNCLOS (to which Colombia is not a State party). It would have been a consequence of a judicial policy entirely of the Court’s own making. If Nicaragua’s failure to meet this precondition has been the reason for the Court’s decision that it could not uphold submission I (3), one would have expected the 2012 Judgment not merely to quote without comment an earlier Judgment (in a case between two UNCLOS States parties) that expressly referred to a different precondition (“review . . . by the Commission”), but instead to set out its new approach (submission to the Commission as a precondition to delimitation) and the reasons for it. The 2012 Judgment, however, does nothing of the sort.

52. A final shortcoming in the interpretation of the 2012 Judgment that the Court sets out today is that the question whether any one of the procedural steps in the Commission process is a precondition to delimitation would be a matter of admissibility, not a question of the merits. This is clear from the Court’s analysis today of Colombia’s fifth preliminary objection, which the Court treats as a question of admissibility. Had the Court imposed a precondition at a different stage of the Commission proceeding (that of submission), the label of admissibility would also have applied. For the reasons set forth above (para. 20), however, the Court’s 2012 decision that it could not uphold Nicaragua’s claim was a decision on the merits, not a decision as to admissibility.

(Signed) Joan E. DONOGHUE.
