The Principle of *Res Judicata*, Determination by "Necessary Implication," and the Settlement of Maritime Delimitation Disputes by the International Court of Justice

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Structured Abstract

Article Type: Research Paper

Purpose—This article seeks to examine the application of the principle of *res judicata*, generally and in connection with the settlement of maritime delimitation disputes by the International Court of Justice, with a particular focus on the condition for application of *res judicata* that a matter be determined if not expressly, "by necessary implication."

Design/Methodology/Approach—The article analyzes decisions of the International Court of Justice in which relevant aspects of the principle of *res judicata* have been examined, including most notably the character of a matter as having been determined "by necessary implication."

Findings—The article provides an account of the ways in which the principle of *res judicata* has been applied in connection with the settlement of maritime delimitation disputes and examines the significance of the condition of determination by "necessary implication" to the application of the principle of *res judicata* to decisions, generally and in proceedings concerning maritime delimitation disputes. Despite

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the express invocation of the condition of "necessary implication" in decisions concerning maritime delimitation, the article concludes that, given the openness of the condition of "necessary implication," there are no specific aspects of maritime delimitation disputes which lead to a differential application of *res judicata* where a matter is regarded as having been determined by "necessary implication." To conclude, the article suggests that, like in other proceedings, the application of the principle of *res judicata* to matters determined by "necessary implication" depends upon the proper determination of the scope of the decisions at issue, leaving room for a significant use of "necessary implication" in the particular instance of maritime delimitation proceedings.

Practical Implications—The article may provide criteria for the proper treatment of the principle of *res judicata*, including the condition of determination by "necessary implication," in connection with the settlement of maritime delimitation disputes.

Originality, Value—The article presents the first comprehensive and most up to date analysis of the interaction between the principle of *res judicata* and the condition of determination by "necessary implication," in general and as applied in connection with the settlement of maritime delimitation disputes.

Keywords: International Court of Justice,
maritime delimitation disputes, necessary implication, *res judicata*

I. Introduction

The International Court of Justice ("ICJ") has addressed the character, source, scope, conditions for application and effects of *res judicata* in several decisions. An aspect of the treatment of *res judicata* in decisions of the ICJ is the condition of determination of a matter by express means or "necessary implication." The latter means, in turn, raise questions of interpretation having a bearing on the diverse aspects of dispute settlement, including in relation to maritime delimitation.

1. The International Court of Justice on Res Judicata

Res judicata has been widely accepted by international courts and tribunals, and analyzed in scholarship.[1]

Decisions of the ICJ regarding the settlement of maritime delimitation disputes in which *res judicata* has been addressed include, most notably, the judgments in *Land Boundary and Maritime Delimitation (Costa Rica v Nicaragua)* and *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v Colombia)*.[2]

Other cases before the ICJ in which *res judicata* has been applied or denied, and related aspects have been analyzed, include *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v Albania)*,[3] *Haya de la Torre (Colombia v Peru)*,[4] *South West Africa (Ethiopia v South Africa; Liberia v South Africa) Second Phase*,[5]

Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria), *Preliminary Objections (Nigeria v Cameroon)*,[6] and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*.[7] By virtue of these decisions, among others, *res judicata* "is now firmly established in the jurisprudence of the Court."[8]

Res judicata had been considered in cases before the Permanent Court of International Justice ("PCIJ"), including *Interpretation of Judgments Nos. 7 and 8 (The Chorzow Factory)*[9] and *Société Commerciale de Belgique*.[10]

Res judicata has also been applied by various international tribunals conducting both inter-state,[11] and mixed,[12] most notably investor-state,[13] arbitrations.

Most recently, the ICJ examined *res judicata* in connection with a dispute involving a maritime delimitation. In the judgment delivered in *Land Boundary in the Northern Part of Isla Portillos (Costa Rica v Nicaragua)*,[14] joined to *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v Nicaragua)*,[15] the ICJ analyzed *res judicata*.[16]

The present article is principally concerned with the relevant decisions of the ICJ.

2. The Character and Source of Res Judicata

Res judicata has been described as a "doctrine,"[17] a "principle,"[18] or both[19]; more specifically, it has been characterized as a general principle of law,[20] a principle of customary international law,[21] or a "rule of international law."[22] Being part of general international law, most notably as a general principle of law, it would be applicable in relation to decisions of an international court or tribunal in the absence of an express provision in the court or tribunal's constitutive instrument.[23] In the particular case of the ICJ, the source of *res judicata* is the ICJ Statute, and the ICJ relies solely on *res judicata* as a principle of conventional international law.[24]

The ICJ has noted that *res judicata* is reflected in Articles 59 and 60 of the ICJ Statute.[25] Provisions of various treaties contain rules to the effect that decisions are "final" and, in some cases, also "without appeal,"[26] such as Article 53(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States,[27] Article 67 of the American Convention on Human Rights,[28] Article 52 of the Convention for the Protection of Human Rights and Fundamental Freedoms,[29] Article 33 of Annex VI of the United Nations Convention on the Law of the Sea ("UNCLOS"),[30] and Article IV(1) of the Claims Settlement Declaration,[31] concerning the Iran–United States Claims Tribunal, among other statutes of various international tribunals,[32] among others.[33]

Res judicata performs a function of avoiding contradictory decisions, alongside other procedural rules,[34] in circumstances in which a "plurality of courts and tribunals" operate.[35] *Res judicata* operates not merely where there is a plurality of proceedings, but, more precisely, where a proceeding is completed, with regard to any subsequent proceedings.[36]

The ICJ has indicated that *res judicata* "protects" both an international court's or tribunal's "judicial function" and the parties to a "case which has led to a judgment that is final and without appeal."[37] The ICJ has stated that the principle of *res judicata* "establishes the finality of the decision adopted in a particular case."[38]

These two functions are related, in turn, to purposes which provide "the rationale" for the principle of *res judicata*.[39] Two purposes are said to underlie *res judicata*, as a principle, namely a general purpose and a specific purpose.[40]

The "general" purpose is the "stability of legal relations."[41] This purpose concerns the judicial function, as set out in Article 38 of the ICJ Statute,[42] and is regarded as a public policy.[43] The function to "decide" entails the function "to bring to an end" a dispute submitted to the ICJ.[44] This function is performed by other doctrines in national legal orders.[45] Other related purposes include "legal certainty."[46]

The "specific" purpose pertains to the "interest of each party" in precluding arguments about an adjudicated issue in that party's favour,[47] thus having a private aspect, by contrast to the aforementioned "general" purpose.[48] This purpose relates to the "finality of judgments," as provided for in Article 60 of the ICJ Statute,[49] and implies that "[d]epriving a litigant" of this interest would be a "breach of the principles governing the legal settlement of disputes."[50] This aspect of *res judicata* is stated in Article 60 of the ICJ Statute.[51]

The remainder of this article proceeds in four parts. Part II examines other aspects and elements of *res judicata*, particularly as set out in relevant decisions of the ICJ. Part III analyzes in more depth the conditions under which the ICJ has applied *res judicata*, with a particular focus on the condition of determination of a matter by express means or "necessary implication." Part IV discusses selected aspects and recent developments in the application of *res judicata* in connection with the settlement of maritime delimitation disputes by the ICJ. Part V concludes.

II. The Object, Scope and Effects of *Res Judicata*

Part I has examined the concept of *res judicata* and stated that it operates under international law as a principle among other general principles of law. Having addressed the character and source of *res judicata*, this part examines the object, scope and effects of *res judicata*.

1. The Object and Scope of Res Judicata

The object of *res judicata* is a decision which is final.[52] While a final decision undoubtedly has binding effect, not every act of an international court or tribunal having binding effect has *res judicata* effects.[53]

The requirement that a decision be final implies that, in general, decisions on provisional measures,[54] and on preliminary objections,[55] among others,[56] are not the object of *res judicata*.[57]

The scope of *res judicata* has various aspects, which may be analyzed most

notably in terms of the scope *ratione materiae* and *ratione personae* of the decision at issue.

The scope *ratione personae* of *res judicata* is limited, given the relativity of decisions of international courts and tribunals, including those having *res judicata* effects. The relativity of judgments of the ICJ, pursuant to ICJ Statute Article 59, implies that *res judicata* effects are confined to the case at issue. This implies that the ICJ may reconsider its position on "the substance of the law as embodied in a previous decision."[58]

In particular, the limited scope *ratione personae* of *res judicata* provides a means of protection of third states,[59] particularly in the context of boundary disputes.[60]

The scope *ratione materiae* of *res judicata* is determined by the operative clause of the decision having *res judicata* effects. The ICJ has expressly stated that "[t]he decision of the Court is contained in the operative clause of the judgment."[61] Consequently, only the *dispositif* of a judgment has force of *res judicata*.[62]

Hence, a decision dealing with "issues of substance" is not necessarily object of *res judicata* on the merits, if such issues are not a decision proper on the merits of the dispute.[63] Likewise, a judgment on preliminary objections remains devoid of *res judicata* effects even if it contains considerations on the merits, since such considerations are "part of the motivation," but not "the object of" the decision.[64]

The scope of the decision is confined to the dispute, as set out by the parties in their pleadings and submissions.[65] Being both conclusive and preclusive with respect to the parties' claims and defenses, in their entirety, the *res judicata* effects of a decision extend beyond merely discrete "issues" dealt with in the decision.[66]

Nevertheless, "it may be necessary to determine the meaning of the operative clause."[67] This need arises "in order to ascertain what is covered by *res judicata*."[68] The need may arise, in particular, when "the Parties disagree as to the content and scope of the decision" having *res judicata* effects.[69]

There may be a degree of complexity involved in determinations as to the scope *ratione materiae* of *res judicata* of a judgment.[70] This determination poses a "methodological issue."[71] The method of examination of the precise meaning and scope of a decision comprises a study of the context of the decision, in particular of contextual elements within the decision.[72]

For the purposes of determining the scope *ratione materiae* of *res judicata*, it may be necessary to do so "by reference to the reasoning set out in the judgment in question."[73] The reasoning set out in the *motif* may be taken into account, to the extent that it is indispensable to understand the *dispositif* of a decision.[74]

A determination of the meaning and scope of a judgment's operative clause requires to have regard to the reasoning where such a determination cannot be made "from the text of the *dispositif* alone."[75] The identification of "each element" of the "reasoning" which constituted "a condition essential" to a judgment is required to establish a "precise" understanding of the meaning and scope of the judgment.[76] The identification of "these essential elements," in turn, serves as "a basis to ascertain

the points […] "determined, expressly or by necessary implication" by" the ICJ.[77] Those "points" are to be "given *res judicata* effect."[78]

2. The Effects of Res Judicata

The effects of *res judicata* have been described as "far-reaching."[79] The effects of *res judicata* may be both procedural[80] and substantive[81]; "negative" and "positive."[82]

Procedural effects extend to the parties to a decision, and preclude that a matter already settled be "reopened" in the ICJ or in another international court or tribunal.[83] Procedural effects, being preclusive, are often referred to as "negative effects."[84] Procedural effects comprise the inadmissibility of claims in relation to which *res judicata* applies.[85]

Procedural effects extend to rulings on burden of proof.[86] The evidentiary aspects of *res judicata* are related, in particular, to the application of the rule that the applicant bears the burden of proof, according to the adversarial nature of proceedings before the ICJ.[87] Failure to prove a fact "does not automatically prove the opposite fact,"[88] nor does the rejection of an argument which has not been proven "warrant upholding the contrary argument."[89]

In relation to the burden of proof, a situation in which a party fails to fully use its opportunity to prove a claim calls for the application of *res judicata*.[90] In this situation, a party is not given an "opportunity to prove the same facts for a second time in a second case against the same respondent."[91] Consequently, a party is prevented from requesting that the ICJ ascertains anew the same facts.[92] The application of *res judicata* in this situation would be grounded on "reasons of procedural fairness"[93] and "sound administration of justice."[94]

The effects of *res judicata*, nevertheless, "are not confined to litigation."[95] While the "primary effect" of *res judicata* is "procedural," a decision having *res judicata* character may also have substantive effects.[96] Such substantive effects derive from the decision's character as a source of obligation.[97] In particular, a judgment on the merits sets out substantive rights and obligations of the parties to the proceedings,[98] and the parties have an obligation to "carry out the judgment in good faith."[99] As a source of obligation, the decision with *res judicata* character establishes the substantive position of the parties, "as an individualization of objective law."[100] The character of a decision as a source of obligation only implies that the principle of *res judicata* affords no basis for incorporating the doctrine of *stare decisis* into international law.[101]

Substantive effects have been formulated in relation to entitlements to maritime areas object of a judgment with *res judicata* effects,[102] pursuant to Articles 59 and 60 of the ICJ Statute.[103] Article 59 provides that judgments are binding on the parties.[104] Substantive effects are often referred to as "positive," being concerned with the character of the judgment with *res judicata* effects as binding.[105]

Article 60 provides that judgments are final and without appeal.[106] *Res judicata*, therefore, implies that, under Article 59 of the ICJ Statute, a decision on a given

"point in issue" is binding on the parties, and, under Article 60 of the ICJ Statute, cannot be called into question by either party "as a matter of law."[107]

Substantive effects, thus, preclude that a party asserts, vis-à-vis another party to proceedings concluded by a decision with *res judicata* effects, an entitlement in relation to the object of the decision with *res judicata* effects.

Substantive effects may indirectly derive from procedural effects. Turning again to the effects of *res judicata* upon evidentiary rulings, a ruling that a party "has not discharged its burden of proof" in relation to certain facts may have *res judicata* effects.[108] Where a claim to a legal entitlement is "dependent upon" the existence of the facts in relation to which the burden of proof has been ruled, with *res judicata* effects, not to have been discharged, the "entitlement (or the lack thereof)" would be a question also ruled with "*res judicata* effects between those parties."[109]

Substantive effects may concern the implementation of an obligation, not merely its existence and legal force. In particular, substantive effects would extend to "self-help measures,"[110] as means of implementation of international responsibility which may arise from a breach of the obligation upon which *res judicata* may have a substantive effect.

III. Conditions for Application of *Res Judicata* and Determination by Express Means or "Necessary Implication" as Necessary and Sufficient Condition for Application

Part II has set out the scope and effects of *res judicata*. This part is primarily concerned with the conditions for application of *res judicata*.

1. The Condition for Application of Identity of Parties, Object and Legal Ground as Necessary Condition

The identity of three elements is required for *res judicata* to apply[111]: *res judicata* applies where the parties (*persona*), the object (*petitum*) and the legal ground (*causa petendi*) are the same.[112] These elements have been taken into account by the ICJ by reference to, most prominently, the opinion of Judge Anzilotti in *Interpretation of Judgments Nos. 7 & 8 (Chorzow Factory)*.[113]

The International Law Association added to the aforementioned elements a condition, to be met concurrently with the other three, that the proceedings at issue be "conducted before courts or tribunals in the international legal order."[114] Since the international legal order is not institutionalized in its entirety, and the application of international law by a court or tribunal constituted under international law allows to appropriately determine whether a decision of such a court or tribunal is capable of having *res judicata* effects under international law, if the necessary and sufficient

conditions are met, it seems unnecessary to add a condition that the court or tribunal issuing the decision be international. Furthermore, unlike the widely recognized three elements, the proposed additional condition has not been required in state practice or in decisions of international courts and tribunals.[115]

The existence of the above three elements distinguishes *res judicata* from other principles or rules with preclusive effects.[116] For instance, the doctrine of issue estoppel does not require identity of cause.[117]

The identity of elements is a condition for application.[118] The above three elements are often referred as separate and concurrent conditions. Since the requirement is that the three elements be met concurrently, the fact that they are met may be regarded as a single "condition of identity" for the application of *res judicata*.

The existence of the condition of identity is necessary for *res judicata* to apply.[119] The condition of identity as to the above three elements, is, nevertheless, not sufficient.[120] The ICJ has expressly stated that "[i]t is not sufficient, for the application of *res judicata*, to identify the case at issue," as "characterized" by the aforementioned three elements.[121] Consequently, the "identity between requests successively submitted to it by the same parties" and of their object and legal grounds is unsatisfactory.[122]

The ICJ has set out further conditions for the application of *res judicata* to a "given case."[123] In order to establish the applicability of *res judicata*, the ICJ is, thus, called upon to determine "whether and to what extent" a claim "has already been definitively settled."[124]

The ICJ is precluded from considering a matter in a second proceedings if the same matter has been decided in the first proceedings.[125] Therefore, the ICJ "must determine whether and to what extent the first claim has already been definitively settled."[126]

In this vein, a second condition for application is the character of a matter as having "in fact been determined, expressly or by necessary implication."[127] The failure to establish that a matter has not been so determined implies that "no force of *res judicata* attaches to" the decision in question.[128]

2. The Condition of Being Established "expressly or by necessary implication" in International Law, and the Condition of Express Determination or Determination by "necessary implication" as Necessary and Sufficient Condition for Application of Res Judicata

The ICJ has indicated that in order to apply *res judicata*, "it is also necessary to ascertain the content of the decision, the finality of which is to be guaranteed."[129]

The ICJ has further stated that "a general finding may have to be read in context in order to ascertain whether a particular matter is or is not contained in it."[130]

A "finding" which "must as a matter of construction be understood, by necessary implication, to mean" a certain perception of the ICJ as to a respondent's "position

to participate in cases before the Court" has served as a basis to proceed to make a finding on jurisdiction which would have the force of *res judicata*.[131]

An issue not raised by the parties, nor expressly addressed in a decision, may be found to have "in fact been decided" in a subsequent decision.[132] The subsequent decision may, in turn, be contradictory with decisions in other proceedings having some relation to the proceedings in question. Such contradiction does not necessarily raise questions as to potential *res judicata* implications.[133] That contradiction, given the lack of a rule of binding precedent in international law generally, does not have any legal consequences.[134]

The above propositions raise the general question of the condition of "necessary implication" as a general matter in international law.[135] The use by the ICJ of "necessary implication" in connection with its application of *res judicata* has drawn criticism by dissenting members in cases such as *Genocide*.[136]

The phrase "expressly or by necessary implication" is employed regarding a variety of fields of international law,[137] including general regimes, such as the law of treaties,[138] the law of international responsibility,[139] and special regimes governing various fields,[140] including the law of international organizations[141] and human rights.[142]

The phrase "necessary implication" is also used in various ways. "Necessary implication" may attribute logical necessity to general or particular propositions. In general, "necessary implication" is used in propositions regarding alleged necessary properties of international law.[143] In a general sense, it also denotes the logical necessity of, or the process leading to, inferences drawn from various propositions.[144] "Necessary implication" may be predicated of relations between international law and domestic law,[145] as well as between general and special international law regimes operating in various fields.[146] Other general uses include determinations of the scope of application of treaties.[147] In particular, "necessary implication" might have a place in the application of international human rights[148] and international criminal law.[149]

The condition of "necessary implication" is of relevance to the law of international organizations. The character of powers as being "conferred upon […] by necessary implication" is a question which continues to raise "the difficult issue of implied powers of international organizations."[150] The nature of powers and functions of an international organization, by contrast to those of a state, is described as being limited under its constituent instrument, by virtue of limitations set out in the instrument "expressly or by necessary implication."[151]

In this vein, positions in favour of restricting the power of international organizations, and in particular the potential for expansion of its scope, rely on the claim that international organization only have powers which "were clearly granted to them, either expressly or by necessary implication, by the founding States."[152]

A subsidiary power of an organization may arise by "necessary implication," where the power is "essential" for the performance of the organization's duties.[153] The condition that a function be "essential" has arguably been construed "widely" by the ICJ[154] and in scholarship.[155] The specific content of "necessary" remains somewhat unsettled in scholarship on the law of treaties generally.[156] In particular, the

"principle of necessary implication" is regarded as providing a basis for the existence of "administrative powers" exercised by United Nations organ in connection with the maintenance of international peace and security.[157]

The condition of "necessary implication" has been examined in a variety of situations in which law of treaties issues have arisen.[158] In general, "necessary implication" has a place in the interpretation of treaties, as recognized in scholarship, early[159] and contemporary.[160] It has been argued that "necessary implication" is in itself an act of treaty interpretation,[161] which is grounded on the principle of effectiveness and based on the object and purpose of the treaty.[162]

Nevertheless, the foregoing analysis shows that "necessary implication" is, instead, an element of the process leading to, or the consequences of, an interpretation of a treaty from which the implication is inferred.[163] For instance, where an implied power is derived "by necessary implication," the implication is a legal consequence of interpreting the respective constituent instrument, not the interpretation itself, which necessarily precedes the implication of the power.[164]

The question of whether a term in an instrument has been given a special meaning would depend on the intention of the author of the instrument, "manifested […] expressly or by necessary implication."[165] In connection with its consent to the ICJ's jurisdiction, a state may exclude in its declaration "principles and rules of international law in any sphere of international relations," by means of a reservation.[166] The reservation must be set out in the declaration "either expressly or by necessary implication."[167] In the absence of such a reservation, express or by necessary implication, the declarant state's silence would not be an obstacle to the operation of international law in force, in its entirety.[168]

The law of treaties issues which involve "necessary implication" include the operation of multilateral treaties setting out territorial regimes. This was the case of the treatment of the Act of Algeciras, a multilateral convention. The Act of Algeciras was arguably superior to prior bilateral treaties according to its Article 123.[169] A "scheme of rights and obligations" was described as having been "established, whether expressly or by necessary implication" by the Act of Algeciras in the relations between Morocco and the United States of America.[170] This scheme could not, arguably, be "impaired" by mere "transactions" between any of the signatories other than Morocco and the United States of America concluded without the consent of the Morocco and the United States of America.[171] The consular system of the Act was primarily adopted "by necessary implication."[172] Adoption by implication was the only means of adoption, because the consular system was "part of the established order at that time."[173] Giving effect to the provisions while ignoring the "basic implication" of consular jurisdiction could "result in anomalies."[174] In order to maintain the Act of Algeciras in a manner having "a logical and coherent structure" it was necessary to have a "full consular system" in operation.[175] The adoption of the consular system was a question independent of the duration of the system as a whole.[176] The latter question concerned the termination of the "agreement by conduct" upon which the system was based, among others.[177]

In relation to a treaty regime having an impact on the protection of the

environment, it has been argued that, "[b]y necessary implication," a finding that risk of causing harm is necessary in order to determine the need for an environmental impact assessment amounts to rejecting the argument that the test is not the risk of harm but its likelihood or probability.[178] Relatedly, it has been argued that a prohibition preventing personnel from Costa Rica from accessing disputed territory, in spite of a finding that Costa Rica's title to territory was plausible, arguably followed "[b]y necessary implication" from an ICJ order concerning "any personnel," whether Nicaraguan or Costa Rican.[179]

The condition of "necessary implication" has been examined in connection with procedural matters. In general, it must be born in mind that requirements under international law for jurisdiction and admissibility may be excluded "expressly or by necessary implication."[180]

The ICJ relied upon "necessary implication" in connection with its "substantial assessment of *jus standi* in two cases."[181] While the ICJ found that the Federal Republic of Yugoslavia ("FRY") was deprived of *jus standi* given that it was not a member of the United Nations in the period 1992–2000, the ICJ found that Serbia had *jus standi* "through the form of decision by "necessary implication."[182] The treatment of *jus standi* in the merits phase of *Genocide* arose from the needs of "an *ad hoc* construction of decision by necessary implication."[183] This treatment arguably consisted in "equalizing […] jurisdiction *ratione personae* and *jus standi*."[184] Relatedly, the 2008 judgment, in contrast to the 1996 judgment, treated the 1992 declaration as "the basis of the jurisdiction *ratione materiae*."[185] This "turn in the treatment of the declaration," regarded in the 1996 judgment as being also "a proper basis of the jurisdiction of the Court *ratione personae*," was likewise arguably dictated by the needs of the 2007 judgment "*ad hoc* construction of […] by necessary implication."[186]

The need to address, "as a matter of logical construction … by necessary implication," whether the FRY had capacity to appear before the ICJ, has been discussed.[187] The "necessary implication" of the "logical construction" of the 2007 judgment in *Bosnia and Herzegovina v Serbia and Montenegro* was a set of findings as to the character of the FRY as State party to the ICJ Statute and member of the United Nations in 1996.[188] This finding stood in contrast to the "novel idea" advanced in the 2008 judgment.[189] According to the 2008 judgment, a jurisdictional "obstacle" in the 2004 judgment in *Legality of Use of Force* "became a minor procedural issue" in the 2007 judgment.[190]

Lastly, "necessary implication" may be involved in determinations of the law applicable to the merits in the case of a treaty setting out obligations of *ius cogens*. It has been questioned whether it can be inferred "by necessary implication" from the basic principle underlying the Genocide Convention, concerning the definition of genocide as a crime which states are obligated to prevent and punish, that the Convention "should […] be deemed to impose" an obligation "to accept direct international responsibility […] and be held to account under the Convention, despite the fact that the article does not contain any provision imposing such an obligation."[191]

IV. *Res Judicata*, the Settlement of Maritime Delimitation Disputes, and the Condition of Determination by "Necessary Implication"

Part III has examined the conditions for application of the principle of *res judicata* in general. Part III has also examined the second, and necessary and sufficient, condition for application of *res judicata*, namely determination of a matter by express means or "necessary implication." In order to shed light on the content of the second condition of application of *res judicata,* Part III has focused on the latter means of determination and has analyzed the condition of "necessary implication."

The substantive effects of *res judicata* are of special relevance to boundary disputes. As pointed out in *Northern Cameroons*, *res judicata* implies the impossibility of changing the legal position created by the judgment with *res judicata* effects.[192]

The ICJ has had an opportunity to examine and apply *res judicata* in connection with proceedings of maritime delimitation. In *Delimitation of Continental Shelf beyond 200 nautical miles (Nicaragua v Colombia)*, Colombia claimed that the decision adopted by the ICJ in its Judgment of 19 November 2012 "was both expressly and by necessary implication a final one."[193] More specifically, the effect of the 2012 Judgment claimed by Colombia concerned the *res judicata* effect of a ruling on burden of proof.[194] Colombia's claim of *res judicata* concerned paragraph 3 of the dispositif of the 2012 Judgment.[195] This paragraph included the phrase "cannot uphold," in relation to Nicaragua's final submission, regarding its entitlement to a continental shelf beyond 200 nautical miles from the Nicaraguan mainland.[196] Colombia maintained that this phrase amounted to a rejection, whereas Nicaragua considered that, by not stating that its claims were rejected, the ICJ had refrained from deciding on the merits of its final submission.[197] Colombia claimed that Nicaragua was ruled to have failed to discharge its burden of proving that it has an entitlement to a continental shelf beyond 200 nautical miles from the Nicaraguan mainland.[198]

Colombia sought to preclude Nicaragua from contesting the absence of an entitlement to a continental shelf beyond 200 nautical miles as between Nicaragua and Colombia, "in perpetuity."[199] Colombia also sought to preclude Nicaragua from asserting an entitlement to a continental shelf beyond 200 nautical miles as a basis to allege that Colombia had engaged in illegal conduct in the area claimed by Nicaragua.[200] Colombia only claimed, nonetheless, that an entitlement to a continental shelf beyond 200 nautical miles was not opposable to it.[201] Nicaragua, according to Colombia's claim, was not precluded from taking forward its submission before the Commission on the Limits of the Continental Shelf, vis-à-vis "all parties to UNCLOS."[202]

Since *res judicata* is created only as between the parties to a case, the 2012 Judgment did not preclude Nicaragua from asserting an entitlement to a continental shelf beyond 200 nautical miles against "other neighbouring States."[203] Despite the effects of *res judicata*, Nicaragua could pursue the delineation of the outer limits of

its continental shelf "within the framework of UNCLOS."[204] Nor did the 2012 Judgment have any implications regarding the burden of proof regarding third States.[205]

Neither Nicaragua's nor Colombia's analysis of paragraph 3 of the *dispositif* of the 2012 Judgment was "persuasive."[206] As for Colombia's claim, the reason for not upholding a submission may arise from the inexistence of a dispute over a section of a boundary to which the submission not upheld related, thus preventing the ICJ from exercising its judicial function. The inexistence of a dispute, as a primary condition for the exercise of the ICJ's jurisdiction, is not related to a supposed failure to "establish a factual predicate" for claims.[207] Where the issue of a submission not upheld is one in relation to which the ICJ may exercise its judicial function, a finding that the submission cannot be upheld is not necessarily the same as rejecting the submission.[208] This case called for "[a] more fruitful inquiry," concerning why the ICJ decided in paragraph 3 of the dispositif that Nicaragua's final submission could not be upheld.[209] The reasoning indicating the "scope" of paragraph 3 of the *dispositif* of the 2012 Judgment is set out in paragraph 129.[210] Paragraph 129 is limited to a claim to an outer continental shelf overlapping with Colombia's 200-nautical-mile entitlement from Colombia's mainland coast.[211] Paragraph 129, and, "therefore," paragraph 3 of the *dispositif* did not make any determination as to "the area more than 200 nautical miles from either mainland coast."[212]

The application of *res judicata* to the 2012 Judgment was susceptible of separate rulings: in relation to claims relating to areas beyond 200 miles from the Colombian mainland only, and in relation to claims relating to areas beyond 200 miles from the Colombian mainland, but within 200 nautical miles of the Colombian islands.[213] The 2012 Judgment did not distinguish between these two areas of "overlapping entitlement."[214] The 2012 Judgment was susceptible of different interpretations.[215]

In part, *res judicata* could have barred Nicaragua's request.[216] This dissent is confined to a difference over the interpretation of the *dispositif* in the 2012 Judgment.[217] *Res judicata* would have barred Nicaragua's submission relating to Colombia's entitlement as measured from Colombia's mainland coast.[218] The ICJ would have determined in its 2012 Judgment that Nicaragua did not prove that its continental shelf entitlement extended so as to overlap with Colombia's entitlement measured from Colombia's mainland coast.[219] Nicaragua should have been barred from making its claim regarding the Colombian mainland entitlement in application of *res judicata*, for "procedural fairness" reasons.[220]

The "text of the *dispositif*" does not provide an answer to the question as to why the ICJ determined that it was not in a position to delimit as requested in Nicaragua's "submission I (3)," leading to its decision that this submission could not be upheld.[221] One reading of the essential considerations in support of the *dispositif* in the 2012 Judgment is that the ICJ concluded that Nicaragua had failed to establish the facts it asserted as a basis of its submission I (3), although it did not "set out in its reasoning the specific inadequacies of Nicaragua's evidence."[222] This decision was not a decision as to admissibility, but rather on the merits.[223] The 2012 Judgment had a *res judicata* effect only with respect to "any overlap between Nicaragua's entitlement and Colombia's mainland entitlement."[224] This created no *res judicata* effect regarding claims

as to "any overlap between Nicaragua's entitlement and Colombia's insular entitlement in the area beyond 200 nautical miles of Nicaragua's coast."[225] The latter claims, according to this analysis, were admissible.[226]

Nicaragua was regarded as having introduced a "reformulated claim" after the 2007 Judgment.[227] To the extent that the ICJ stated that it needed not address arguments as to the effects of an extended continental shelf of one party on the entitlement to a continental shelf of the other party, it would be impossible to conclude that the ICJ "made a final and binding decision on the merits that can be said to constitute *res judicata*."[228] That such a "final and definitive determination of the merits" was not made is further shown by the structure of the 2012 Judgment.[229] Unlike the conclusion stated in operative paragraph 251 (4) of the 2012 Judgment, based on a scrutiny of evidence in Part V, the statement in operative paragraph 251 (3) was "not a conclusive determination of the subject-matter requested by Nicaragua in its submission I (3)."[230] Therefore, the latter could not constitute *res judicata*.[231] The question of burden of proof was not essential, and it would "read too much" into a *dictum*.[232]

V. Conclusions

The article has sought to provide an account of the ways in which the principle of *res judicata* has been applied generally and in connection with the settlement of maritime delimitation disputes by the ICJ. The article has examined the significance of the condition of determination by "necessary implication" to the application of the principle of *res judicata* to decisions, generally and in proceedings concerning maritime delimitation disputes.

Despite the express invocation of the condition of "necessary implication" in decisions concerning maritime delimitation, given the openness of the condition of "necessary implication," there are no specific aspects of maritime delimitation disputes which lead to a differential application of *res judicata* where a matter is regarded as having been determined by "necessary implication."

To sum up, it is suggested that, like in other proceedings, the application of the principle of *res judicata* to matters determined by "necessary implication" depends upon the proper determination of the scope of the decisions at issue, leaving room for a significant use of "necessary implication" in the particular instance of maritime delimitation proceedings.

Notes

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4. Judgment, 13 June 1951, ICJ Reports 1951, p. 71 ("*Haya de la Torre*").

5. Judgment, 18 July 1966, ICJ Reports 1966, p. 6 ("*South West Africa*").

6. ICJ Reports 1999, p. 31.

7. ICJ Reports 2007, p. 43 ("*Genocide*"). For a commentary on this judgment's analysis of *res judicata*, see Ottolenghi and Prows, 2009, p. 37.

8. 2016 Separate Opinion, Greenwood, para. 2, citing opinion of Judge Anzilotti in *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)*, Judgment No. 11, 1927, P.C.I.J. Series

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12. French-Venezuelan Commission, *Company General of the Orinoco*, 31 July 1905 (vol. X, RIAA), pp. 184–285 ("*Company General of the Orinoco*").

13. *Amco Asia Corporation and others v Republic of Indonesia*, 20 November 1984 (Case No ARB/81/1) (1993) 1 ICSID Rep 413 ("*Amco v Indonesia*"); *Amco Asia Corporation and others v Republic of Indonesia: Resubmitted Case*, Decision on Jurisdiction, 10 May 1988 (Case No ARB/81/1) (1993) 1 ICSID Rep 543 ("*Amco v Indonesia: Resubmitted Case*"); *Robert Azinian, Kenneth Davitian, & Ellen Baca v The United Mexican States*, 1 November 1999 (NAFTA Chapter 11 Arbitration Tribunal, Case No. ARB[AF]/97/2) (2000) 39 ILM 537 ("*Azinian v Mexico*"); *Waste Management, Inc. v United Mexican States* (ICSID Case No. ARB[AF]/00/3), Mexico's Preliminary Objection concerning the Previous Proceedings, Decision of the Tribunal.

14. Initiated by an application of 25 February 2014, http://www.icj-cij.org/en/case/157.

15. Jointly *"Land Boundary and Maritime Delimitation (Costa Rica v Nicaragua),"* initiated by an application of 16 January 2017, and joined to the proceedings initiated on 25 February 2014 by the Order of 2 February 2017, http://www.icj-cij.org/en/case/165.

16. *Land Boundary and Maritime Delimitation (Costa Rica v Nicaragua)*, Judgment, 2 February 2018 ("*Costa Rica v Nicaragua*, Judgment"), para. 51, http://www.icj-cij.org/files/case-related/165/165–20180202-JUD-01–00-EN.pdf.

17. 2016 Separate Opinion, Greenwood, para 2, adding that, as a doctrine, it would have "its origins" in "general principles of law"; 2016 Dissenting Opinion, Donoghue, para. 1. It appears that no difference is drawn between "doctrine" and "principle," when used to describe *res judicata*. See also Kolb, 2003, p. 295; Pauwelyn, 2003, p. 115; Dodge, 2006, para. 1; Pauwelyn and Salles, 2009, p. 86 (referring to *res judicata* and *lis pendens* as "preclusion doctrines"); Yang, 2011, p. 355; Focarelli, 2012, p. 329; Martinez-Fraga and Samra, 2012, p. 421; Boisson de Chazournes, 2017, p. 16.

18. *Company General of the Orinoco*, p. 276 (citing *Southern Pacific R. Co. v U.S.*, 168 Sup. Gt. Rep., 1, and holding that "[t]he general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed"). See also 2016 Separate Opinion, Greenwood, para 2; 2016 Dissenting Opinion, Donoghue, para. 1. See also Conway, 2003, 217 (noting that *ne bis in idem* is "the criminal law application of a broader principle, aimed at protecting the finality of judgments, encapsulated in the doctrine *res judicata*"); Pauwelyn, 2004, p. 303 (referring to "principles that may be useful to avoid duplication of proceedings, such as *res judicata*, abuse of process, and *lis alibi pendens*"); Biehler, 2008, p. 157; Yang, 2011, p. 355.

19. Scobbie, 1999, p. 299 ("[t]he doctrine of *res judicata* is perhaps most frequently seen as a general principle of law").

20. *Costa Rica v Nicaragua*, Judgment, para 68, citing *Delimitation of Continental Shelf beyond 200 nautical miles (Nicaragua v Colombia)*, Preliminary Objections, Judgment, ICJ Reports 2016, pp. 100, 125, para. 58 "and authorities cited therein," namely *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, ICJ Reports 2007 (I), pp. 90 91, para. 116; *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Judgment (Application by Honduras for Permission to Intervene), ICJ Reports 2011, p. 420 ("well-established and generally recognized principle of law that a judgment rendered by a judicial body has binding force between the parties to the dispute"), cited by ILA, 2016, p. 8, para. 23 (adding "i.e., the principle of *res judicata*"); *Amco v Indonesia: Resubmitted Case*, para. 26 ("[t]he principle of *res judicata* is a general principle of law"); *Waste Management v Mexico*, para. 39 ("[t]here is no doubt that *res judicata* is a principle of international law, and even a general principle of law within the meaning of Article 38 (1) (c) of the Statute of the Inter-

national Court of Justice"), cited by ILA, 2016, p. 20, para. 63*n*124, and Yang, 2011, p. 356*n*105. See also Ciobanu, 1975, p. 135 ("[o]ne of the general principles of law recognized by nations is *res judicata pro veritate habetur*"); Scobbie, 1999, p. 299 (referring to "[t]he doctrine of *res judicata* […] as a general principle of law, imported into public international law by virtue of the operation of Article 38.1c of the Statute of the International Court"); Amerasinghe, 2003, p. 200 (stating that "[t]he principle of *res judicata* as a general principle of law of international adjudication, whether arbitral or otherwise, seems to be well accepted"); Kim, 2004, p. 30; White, 2004, 109 (referring to Phillimore's view that "general principles accepted by States in a domestic context included the principles of good faith and *res judicata*"); Fontanelli, 2012, p. 125, n 28 (referring to Phillimore, who included *res judicata* among general principles of law "already accepted in *foro domestico*"); Nguyen, 2013, p. 135.

21. Boisson de Chazournes, 2017, p. 64.

22. Dodge, 2006, para. 3.

23. *Petrobart Limited v The Kyrgyz Republic*, SCC Case No. 126/2003, Award, 29 March 2005, p. 64 ("[t]he Treaty contains no provisions about *res judicata*, but the notion of *res judicata* is undoubtedly recognised in international law"), cited by ILA, 2016, p. 18, para. 56*n*109. See also Amerasinghe, 2003, p. 427 (stating, in relation to the question of whether it applies "in the absence of clear indications in the constitutive instrument […] it is likely that the doctrine is generally applicable as a general principle of law, pursuant to the reference in Article 38[1] of the state to the ICJ"); Nguyen, 2013, pp. 133 and 165 (arguing that "inherent powers might be a practical alternative basis on which non–WTO norms, including *res judicata* and *lis pendens*, can be applied in WTO disputes," but concluding that they may not be so applied, as they fail to meet WTO-consistency criteria).

24. *Corfu Channel, Compensation*, p. 248 ("in accordance with the Statute [Article 60], which, for the settlement of the present dispute, is binding upon the Albanian Government, that Judgment is final and without appeal, and that therefore the matter is *res judicata*"). See Ottolenghi and Prows, 2009, p. 38 (observing that "the *Genocide* case did provide one important clarification on the source of res judicata in the Court's jurisprudence, as the Court clearly noted its application of *res judicata* was based solely on its Statute and did not rely on any 'general principle of law'").

25. *Delimitation of Continental Shelf beyond 200 nautical miles (Nicaragua v Colombia)*, Preliminary Objections, Judgment, ICJ Reports 2016, pp. 100, 125, para. 58; *Costa Rica v Nicaragua*, Judgment, para 68. See Amerasinghe, 2003, p. 201 (stating that "[i]n the case of the ICJ, Article 60 of its statute incorporates expressly the principle of *res judicata* (subject to Article 61)"); Jacob, 2011, p. 1019 (noting that the ICJ's proposition that a "positive statement" is contained in Article 59 meant "situating Article 59 within the distinctive context of *res judicata*"); Boisson de Chazournes, 2017, p. 65 (commenting on the aforementioned judgment).

26. Amerasinghe, 2003, p. 426*n*1 (listing various treaty provisions).

27. 17 UST 1270, TIAS 6090, 575 UNTS 159. See Stanivuković, 2015, p. 224 (arguing that "Article 53 may be said to embody the principle of *res judicata* within the particular legal order existing under the Convention").

28. OAS Treaty Series No. 36; 1144 UNTS 123; 9 ILM 99 (1969).

29. ETS 5; 213 UNTS 221.

30. 1833 UNTS 3; 21 ILM 1261 (1982).

31. Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, 20 ILM 223, 230 (1981); 1 Iran-U.S. CTR 9 (1983); 75 AJIL 422 (1981).

32. Amerasinghe, 2003, p. 426, n 1.

33. Pauwelyn, 2004, pp. 291–292 (referring to WTO Appellate Body reports to that effect).

34. Brown, 1996, p. 375 (noting that "[a]long with collateral estoppel, res judicata is part of the procedural world of the common law"); Guillaume, 2000, 4 (referring to the use in "[s]ystems of national law" of *lis pendens* and *res judicata*, and noting the lack of relevant rules under international law); Pauwelyn, 2003, p. 115 (referring to "other general principles of law, in particular those of *lis alibi pendens* and abuse of process"); Focarelli, 2012, p. 329 (adding that, unlike *res judicata*, "[t]he principle of *lis pendens* is not part of general international law"); Baldwin, 2014, p. 236 (referring to "the closeness between the doctrines of *lis alibi pendens* and *res judicata*");

Boisson de Chazournes, 2017, p. 16 (referring to various "doctrines" including "lis alibi pendens, connexité, res judicata or electa una via," among other "well-known procedural mechanisms"); Gaillard, 2017, p. 15*n*68 (citing *Henderson v Henderson* [1843] 3 Hare 100, and arguing that it "allows a judge to exercise […] discretion" as to "whether the party should subsequently be barred from bringing the matter or claim in the subsequent one").

35. Guillaume, 2000, 4 (adding that *res judicata* effects of decisions issued by "different judicial fora" may pose challenges to "coherence"); Boisson de Chazournes, 2017, p. 64.

36. Pauwelyn and Salles, 2009, p. 85; Martinez-Fraga and Samra, 2012, p. 435*n*59 ("[t]hough conceptually similar to *res judicata*, *lis pendens* applies when the parallel proceedings are ongoing. *Res judicata*, in contrast, relates to the binding and preclusive effects of completed proceedings"); Stanivuković, 2015, p. 220 ("*res judicata* ensures conclusive and preclusive effects of prior decisions in subsequent proceedings"); Collins of Mapesbury, 2016, p. 284, para. 67 (referring to the "*res judicata* effect" of a decision as concerning "i.e., whether they are conclusive in subsequent proceedings").

37. *Delimitation of Continental Shelf beyond 200 nautical miles (Nicaragua v Colombia)*, Preliminary Objections, Judgment, ICJ Reports 2016, pp. 100, 125, para. 58, citing *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, ICJ Reports 2007 (I), pp. 90 91, para. 116; *Costa Rica v Nicaragua*, Judgment, para 68.

38. *Delimitation of Continental Shelf beyond 200 nautical miles (Nicaragua v Colombia)*, Preliminary Objections, Judgment, ICJ Reports 2016, pp. 100, 125, para. 58, citing *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, ICJ Reports 2007 (I), pp. 90 91, para. 115; *Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)*, Preliminary Objections (Nigeria v Cameroon), Judgment, ICJ Reports 1999 (I), p. 36, para. 12; *Corfu Channel (United Kingdom v Albania)*, *Assessment of Amount of Compensation*, Judgment, ICJ Reports 1949, p. 248. See also Rosenne, 1997, p. 1656 (referring to *Barcelona Traction [Preliminary Objections])*; Gal-Or, 2008, p. 46.

39. 2016 Separate Opinion, Greenwood, para 3. See also Dodge, 2006, para. 1 ("[t]he rationale for the doctrine of res iudicata is two-fold").

40. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, I.C.J. Reports 2007 (I), pp. 90–91, para. 116, quoted in 2016 Separate Opinion, Greenwood, para 3. See also Amerasinghe, 2003, p. 426 (noting that, since "[t]he constitutive instruments of established courts generally expressly state that the judgments of the tribunals shall be final [and binding] and, sometimes, without appeal, and the compromis of arbitral tribunals may have the same or similar language," it follows that "it is clear that the doctrine of *res judicata* is applicable").

41. *Bosnia and Herzegovina v Serbia and Montenegro*, para. 116.

42. *Ibid.*, para. 116. Dodge, 2006, para. 1

43. Dodge, 2006, para. 1 (noting that "as a matter of public policy, there must be an end to litigation").

44. *Ibid.*

45. Brown, 1996, p. 375 (citing the maxim "*interest reipulicae ut sit finis litium*," and stating, in relation to collateral estoppel and res judicata that "[t]he function of these principles […] is to bring an end to litigation").

46. Palombino, 2015, p. 516 (referring to "*res judicata*, as an expression of legal certainty").

47. *Bosnia and Herzegovina v Serbia and Montenegro*, para. 116. See also Jacob, 2011, p. 1023 (stating that "*res judicata* is specifically concerned with […] assuring a litigant the benefit of an obtained judgment").

48. Dodge, 2006, para. 1 (noting that "as a matter of private justice, no one should be proceeded against twice for the same cause [*Ne bis in idem*]").

49. *Ibid.*

50. *Ibid.*

51. 2016 Separate Opinion, Greenwood, para 5 (referring to the Bosnia case and to Article 59 of the ICJ Statute as well).

52. *Trail Smelter*, p. 1950 ("[t]hat the sanctity of *res iudicata* attaches to a final decision of an international tribunal is an essential and settled rule of international law"), quoted by 2016 Separate Opinion, Greenwood, para 2; Dodge, 2006, para. 3; *South West Africa*, pp. 36–37, para. 59 (determining "whether a decision on a preliminary objection constitutes a *res judicata* in the proper sense of that term,—whether it ranks as a 'decision' for the purposes of Article 59 of the Court's Statute, or as 'final' within the meaning of Article 60"). See also Dodge, 2006, para. 1 (referring to "a final adjudication by a court or arbitral tribunal"); Boisson de Chazournes, 2017, p. 64.

53. See Torres Bernárdez, 2006, p. 61; Collins of Mapesbury, 2016, p. 284, para. 67 ("It is important to note that both in international law and in national law there is a difference between the binding character of orders for interim measures [i.e., whether they must be obeyed] and their *res judicata* effect [i.e., whether they are conclusive in subsequent proceedings]. Because of their provisional nature, orders for provisional measures do not create a *res judicata*").

54. *City Oriente Ltd v Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/06/21, Decision on Revocation of Provisional Measures, May 13, 2008, para. 96 ("[t]he decisions on provisional measures do not constitute *res judicata*, so that the provisional measures ratified hereby may be amended, expanded or revoked at the request of either party at a later stage of the proceedings"), cited by Collins of Mapesbury, 2016, p. 284, para. 73. See also Torres Bernárdez, 2006, p. 61.

55. *South West Africa*, p. 37, para. 59 (concluding that "a decision on a preliminary objection can never be preclusive of a matter appertaining to the merits, whether or not it has in fact been dealt with in connection with the preliminary objection"). See Dodge, 2006, para. 13.

56. See Torres Bernárdez, 2006, p. 61 (referring to the effects of a decision for "an Article 62 intervening State," and noting that "binding effects should not be confused with res judicata effects as recognised in Article 63").

57. But see *Waste Management v Mexico*, para. 45 ("at whatever stage of the case it is decided, a decision on a particular point constitutes a res judicata as between the parties to that decision if it is a necessary part of the eventual determination and is dealt with as such by the tribunal") and noting that this diverges from the proposition in *South West Africa*, p. 37, para. 59. See Dodge, 2006, para. 13 (noting that *Waste Management v Mexico* "recognized an exception […] where a decision on jurisdiction necessarily decides an identical issue later raised on the merits"). Nevertheless, in *Waste Management v Mexico* the tribunal ultimately decided that "there was no decision by the first Tribunal between the parties which would constitute a res judicata as to the merits of the claim now before us." *Waste Management v Mexico*, para. 46.

58. Lauterpacht, 1982, p. 19 (arguing that, although ICJ Statute Article 59 "limits the formal authority of the decision to the case" at issue, the ICJ's freedom to reconsider the law meant it "is not without usefulness").

59. Panel Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R (June 20, 2005), cited by Yang, 2011, p. 358 (commenting that "the new dispute is triggered by EC and not just the original disputants, Uruguay and Brazil. Therefore, it is logical to state the nonapplicability of the principle of *Res Judicata*").

60. Pellet, 2011, pp. 257–259 (arguing that "[t]he means to ensure the protection of third States may seem diverse […] the international court or tribunal may take shelter under Article 59 of the Statute of the ICJ and, more generally the principle of *res judicata*," in spite of the insufficiency of *res judicata* in certain cases).

61. *Delimitation of Continental Shelf beyond 200 nautical miles (Nicaragua v Colombia)*, Preliminary Objections, Judgment, ICJ Reports 2016, pp. 100, 126, para. 61.

62. 2016 Separate Opinion, Greenwood, para 7 (adding that this is so "strictly speaking"). See also Palombino, 2015, p. 511.

63. *Waste Management v Mexico*, para. 39.

64. *South West Africa*, p. 37, para. 59 (adding that "[i]t cannot rank as a final decision on the point of merits involved").

65. Amerasinghe, 2003, p. 435 (stating that "the Court's approach to the scope of *res judicata* can only be determined by reference to the pleadings, and particularly, the submissions of the parties").

66. Brown, 1996, p. 376 (observing that "[i]ssue preclusion prevents a party from raising

issues which have been previously adjudicated, whereas res judicata prevents a party from readjudicating an entire claim which has already been decided").

67. *Delimitation of Continental Shelf beyond 200 nautical miles (Nicaragua v Colombia)*, Preliminary Objections, Judgment, ICJ Reports 2016, pp. 100, 126, para. 61.

68. *Ibid.*

69. *Ibid.* (referring, in this instance, to the decision "adopted in subparagraph 3 of the operative clause of the 2012 Judgment").

70. 2016 Separate Opinion, Owada, para 8.

71. 2016 Separate Opinion, Owada, para 9.

72. "[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." See *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, quoted in 2016 Separate Opinion, Owada, para 8.

73. *Delimitation of Continental Shelf beyond 200 nautical miles (Nicaragua v Colombia)*, Preliminary Objections, Judgment, ICJ Reports 2016, pp. 100, 126, para. 61.

74. 2016 Separate Opinion, Owada, para 8.

75. 2016 Dissenting Opinion, Donoghue, para. 6, quoting *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.

76. 2016 Dissenting Opinion, Donoghue, para. 6, quoting para. 34 of the 2013 Judgment, alongside *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)*, Judgment No. 11, 1927, P.C.I.J., Series A, No. 13, p. 20, cited in para. 34 of the 2013 Judgment.

77. 2016 Dissenting Opinion, Donoghue, para. 7, referring to "the Court's 2012 Judgment" and quoting 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, citing 2016 Judgment, para 60.

78. 2016 Dissenting Opinion, Donoghue, para. 7.

79. 2016 Separate Opinion, Greenwood, para 5 (referring to "consequences" instead of "effects").

80. Kreća, 2014, p. 18 (noting that "[t]wo components may be discerned in the substance of *res judicata* as provided in the Statute of the Court," including a "procedural" aspect, under ICJ Statute Article 60).

81. 2016 Separate Opinion, Greenwood, para 5 ("One consequence is that the effects of *res judicata* are substantive, rather than procedural"); Kreća, 2014, p. 18 (referring to a "substantive" aspect, of the "two components" of *res judicata*, under ICJ Statute Article 59).

82. Dodge, 2006, para. 1 (noting that *res judicata* "is said to have both a positive and a negative effect" and "is most commonly associated with its negative effect").

83. *Ibid.*

84. Dodge, 2006, para. 1 ("[t]he negative effect is that an issue decided in a judgment or award may not be relitigated"); Focarelli, 2012, p. 329 (referring to the character of "a final judgment or award" as "incapable of re-litigation in other courts [negative effect]"); Martinez-Fraga and Samra, 2012, p. 421*n*3 (noting that the "use of res judicata with the aim of proscribing a further or subsequent contention is often referred to as 'negative res judicata'").

85. 2016 Dissenting Opinion, Donoghue, para. 3. See also Amerasinghe, 2003, p. 429 (noting that "[t]he doctrine of *res judicata* has been applied specifically […] to render applications 'inadmissible'").

86. 2016 Separate Opinion, Greenwood, para 5.

87. 2016 Separate Opinion, Owada, para 30 (noting 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").

88. 2016 Dissenting Opinion, Donoghue, para. 45.

89. *Frontier Dispute (Burkina Faso/Mali)*, Judgment, I.C.J. Reports 1986, p. 588, para. 65, quoted in 2016 Dissenting Opinion, Donoghue, para. 45.

90. 2016 Dissenting Opinion, Donoghue, para. 2.

91. *Ibid.*, para. 42 (referring to the situation of Nicaragua).

92. *Ibid.*

93. 2016 Dissenting Opinion, Donoghue, para. 2.

94. *Ibid.*, para. 42.

95. 2016 Separate Opinion, Greenwood, para 5.

96. Dodge, 2006, para. 1 ("*Res iudicata* is most commonly associated with its negative effect"); Kreća, 2014, p. 18 (adding that the procedural effect consists in "claim preclusion—meaning that a future lawsuit on the same cause of action is precluded [*non bis in idem*]").

97. Pellet, 2015, p. 11 ("the judgments and other legally binding decisions of the ICJ [as opposed to advisory opinions] impose obligations on the Parties. They might accordingly be seen as sources of obligations, but not as sources of international law: they derive from a reasoning *based on sources* of international law and lead to a decision binding for the Parties only." [Italics in the original]).

98. Kreća, 2014, p. 28 (stating that, by contrast to a decision on jurisdiction, "a judgment on the merits of a case possesses binding effect in terms of creating legal duties for the parties").

99. *Société Commerciale de Belgique*, Judgment, 1939, P.C.I.J., Series A/B, No. 78, p. 176, cited Kreća, 2014, p. 28*n*34. While Kreća appears to infer from the creation of "legal duties for the parties" the obligation to comply with a judgment, the latter obligation is separate from the former obligations, contained in the judgment.

100. Kreća, 2014, p. 18 (referring to substantive effects as being concerned with "the legal validity of the Court's decision as an individualization of objective law in the concrete matter—*pro veritate accipitur*").

101. *Ibid.* (substantive effects are said to be "to the exclusion of the application of the principle of *stare decisis*").

102. 2016 Separate Opinion, Greenwood, para. 5. ("Thus, if a court or tribunal, in a case between two States, determines that one of those States has no entitlement to a continental shelf in a particular area, international law does not permit that State thereafter to assert such an entitlement in that area vis-à-vis the other State party").

103. *Ibid.*

104. *Ibid.*

105. Dodge, 2006, para. 1 ("[t]he positive effect is that a judgment or award is binding upon the parties and must be implemented in good faith [*bona fide*]"); Focarelli, 2012, p. 329 (referring to the character of "a final judgment or award" as "binding between the parties [positive effect] […]"); Martinez-Fraga and Samra, 2012, p. 421*n*3 (observing that "'positive res judicata,' […] concerns the use of an award to enforce its terms").

106. 2016 Separate Opinion, Greenwood, para. 5.

107. *Ibid.*

108. *Ibid.*

109. *Ibid.* ("then a finding that that party has not discharged its burden of proof amounts to a determination of whether or not it has that entitlement").

110. *Ibid.*, quoting French-Venezuelan Mixed Claims Commission, *Company General of the Orinoco Case*, 31 July 1905 (United Nations, Reports of International Arbitral Awards [RIAA], Vol. X, p. 276): "a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed."

111. 2016 Separate Opinion, Greenwood, para 4. See also 2016 Separate Opinion, Owada, para. 2 (referring to "essentially formal criteria"). See also Pauwelyn, 2004, p. 291; Stanivuković, 2015, p. 221. But see Bermann, 2012, p. 44 (noting in the context of international commercial arbitration, that "application of the res judicata principle is not always straightforward"); Nguyen, 2013, p. 146 (stating that "[t]he application of *res judicata* is also far from settled in international law […]. It is sometimes argued that 'the excessive insistence' on formal identity of the parties is unsatisfactory, as this will preclude the application of res judicata in most cases").

112. *Trail Smelter*, p. 1952. See also 2016 Separate Opinion, Greenwood, para 4 (namely identify of parties (*personae*), the object (*petitum*) and the legal ground (*causa petendi*); 2016 Dissenting Opinion, Donoghue, para. 40 (referring to "the well-known requirements for the appli-

cation of *res judicata*—same parties, object and legal ground"); 2016 Separate Opinion, Owada, para. 2 (referring to the "the existence of three traditional elements, namely the identity of '*persona*, *petitum*, [and] *causa petendi*'"). See also Pauwelyn, 2004, p. 291 (referring to "[1] identity of parties; [2] identity of object or subject matter [it must be the very same issue that is in question]; and [3] identity of the legal cause of action"); Martinez-Fraga and Samra, 2012, p. 421 ("arbitral tribunals accept what is referred to as the "triple identity" test as the determinative standard for the application of *res judicata* to a further proceeding. The triple identity test in *res judicata* prevents relitigation of claims [1] between the same parties [2] regarding the same subject matter, and [3] on the same legal grounds"); Pellet, 2015, p. 12 (referring to "the "triple identity test"; namely, that the "*persona, petitum, causa petendi*" are identical").

113. Opinion of Judge Anzilotti, para. 1. *Trail Smelter*, p. 1952. See also Dodge, 2006, para. 4 (noting that "the question is sometimes divided into […] the object or relief […] and […] the grounds"); Ottolenghi and Prows, 2009, pp. 48–49.

114. ILA, Res Judicata *and Arbitration, Interim Report of the Seventy-First Conference*, Berlin (2004), p. 19 (stating that "[b]roadly speaking, there are four preconditions for the doctrine of res judicata to apply in international law, namely proceedings must: [i] have been conducted before courts or tribunals in the international legal order […]") cited by Yang, 2011, p. 356*n*156. The ILA, under the heading "[s]ame legal order," explains that "*Res judicata* in international law relates only to the effect of a decision of one international tribunal on a subsequent international tribunal. International dispute settlement organs are not considered to be bound by decisions of national courts or tribunals."

115. ILA, *ibid.*, p. 19*n*120 ("[t]he requirement that items [ii] to [iv] must exist was confirmed by the tribunal in *CME Czech Republic BV v The Czech Republic* […], in Final Award, dated 14 March 2003"). No authority other than Brownlie, *Principles of Public International Law*, 6th ed. (Oxford: Clarendon Press, 2003) at p. 50, is provided by the ILA in support of the additional requirement. Cf., *ibid.*, p. 19*n*121.

116. Farnham, 2014, p. 210 (referring to the "Common Law jurisdictions […] theory of issue preclusion [alternatively titled 'collateral estoppel' or 'issue preclusion']" as being "related to, but narrower than, the *res judicata* doctrine," and adding that "Civil Law jurisdictions also tend to apply *res judicata* principles more restrictively by requiring firm adherence to the triple-identity criteria").

117. Pauwelyn, 2004, p. 292 (noting that "under English law, the requirements for issue estoppel are identical to the requirements for traditional *res judicata* to apply, minus the requirement of identity of cause").

118. 2016 Separate Opinion, Greenwood, para 4. See also 2016 Separate Opinion, Owada, para. 2 (referring to "the prerequisite for the application of this principle of *res judicata*").

119. *Ibid.*

120. *Ibid.*

121. *Delimitation of Continental Shelf beyond 200 nautical miles (Nicaragua v Colombia)*, Preliminary Objections, Judgment, ICJ Reports 2016, pp. 100, 126, para. 59 (namely as "characterized by the same parties, object and legal ground").

122. *Ibid.*

123. *Costa Rica v Nicaragua*, Judgment, para 68, citing *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v Colombia)*, Preliminary Objections, Judgment, ICJ Reports 2016, p. 125, para. 60, "quoting," in turn, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, ICJ Reports 2007 (I), p. 95, para. 126.

124. *Costa Rica v Nicaragua*, Judgment, para 68. See also 2016 Dissenting Opinion, Donoghue, para. 40.

125. 2016 Separate Opinion, Greenwood, para 4 (a matter must have been decided in "earlier proceedings"); 2016 Dissenting Opinion, Donoghue, para. 40 ("the doctrine of *res judicata* bars an application in a second case").

126. *Delimitation of Continental Shelf beyond 200 nautical miles (Nicaragua v Colombia)*, Preliminary Objections, Judgment, ICJ Reports 2016, pp. 100, 126, para. 59.

127. *Application of the Convention on the Prevention and Punishment of the Crime of Geno-*

cide (Bosnia and Herzegovina v Serbia and Montenegro), Judgment of 26 February 2007, ICJ Reports 2007 (I), p. 95, para. 126, quoted in *Delimitation of Continental Shelf beyond 200 nautical miles (Nicaragua v Colombia)*, Preliminary Objections, Judgment, ICJ Reports 2016, pp. 100, 126, para. 60. *Costa Rica v Nicaragua*, Judgment, para 68.

128. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment of 26 February 2007, ICJ Reports 2007 (I), p. 95, para. 126, quoted in *Delimitation of Continental Shelf beyond 200 nautical miles (Nicaragua v Colombia)*, Preliminary Objections, Judgment, ICJ Reports 2016, pp. 100, 126, para. 60.

129. *Delimitation of Continental Shelf beyond 200 nautical miles (Nicaragua v Colombia)*, Preliminary Objections, Judgment, ICJ Reports 2016, pp. 100, 126, para. 59 (namely as "characterized by the same parties, object and legal ground").

130. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment of 26 February 2007, ICJ Reports 2007 (I), p. 95, para. 126, quoted in *Delimitation of Continental Shelf beyond 200 nautical miles (Nicaragua v Colombia)*, Preliminary Objections, Judgment, ICJ Reports 2016, pp. 100, 126, para. 60.

131. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, ICJ Reports 2007 (I), pp. 98–99, para. 132.

132. 2016 Separate Opinion, Owada, paras 6–7 (referring to *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).

133. 2016 Separate Opinion, Owada, para 7 (noting that "despite a seemingly contradictory decision of the Court in the 2004 Legality of Use of Force cases […] this precedent did not constitute *res judicata* for the 2007 case, though it could have had *stare decisis* implications for the 2007 issue [I.C.J. Reports 2004 (III), Preliminary Objections, Judgment, p. 1337, para. 76]").

134. *Contra*, 2016 Separate Opinion, Owada, para 7 (suggesting that there may be "*stare decisis* implications").

135. Cecil J. Olmstead, "Economic Development Loan Agreements—Part I—Public Economic Development Loan Agreements; Choice of Law and Remedy," *California Law Review* 48(3) (1960), p. 424, https://doi.org/10.2307/3478806; Chittharanjan F. Amerasinghe, "The Rule of Exhaustion of Domestic Remedies in the Framework of International Systems for the Protection of Human Rights," *Heidelberg Journal of International Law* 28(2) (1968), p. 257; Delbert D. Smith, "The Conclusion of International Agreements by International Organizations: A Functional Analysis Applied to the Agreements of the World Meteorological Organization," *Loyola University Chicago Law Journal* 2(1) (1971), p. 27; B. G. Ramcharan, *The International Law Commission: Its Approach to the Codification and Progressive Development of International Law* (The Hague: Martinus Nijhoff, 1977); Ian Sinclair, *The Vienna Convention on the Law of Treaties,* 2nd ed. (Manchester: Manchester University Press, 1984); Dapo Akande, "The Competence of International Organizations and the Advisory Jurisdiction of the International Court of Justice," *European Journal of International Law* 9 (1998), p. 437, https://doi.org/10.1093/ejil/9.3.437; Judith Gardam, "Necessity and Proportionality in *Jus ad Bellum* and *Jus in Bello*," in Laurence Boisson de Chazournes and Philippe Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (Cambridge: Cambridge University Press, 1999), p. 275; Gavan Griffith and Christopher Staker, "The Jurisdiction and Merits Phases Distinguished," in Laurence Boisson de Chazournes and Philippe Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons* (Cambridge: Cambridge University Press, 1999), p. 59; Anthony Aust, "*Treaties, Territorial Application*," in *Max Planck Encyclopedia of Public International Law* (Oxford Public International Law, 2006), http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1492, accessed May 14, 2018; Sieg Eiselen, "Proving the Quantum of Damages," *Journal of Law and Commerce* 25 (2006), p. 375; Ulf Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (The Netherlands, Dordrecht: Springer, 2007), https://doi.org/10.1007/978–1-4020–6362–6; Jillaine Seymour, "Jurisdiction and Responsibility by Necessary Implication: Genocide in Bosnia," *The Cambridge Law Journal* 66(2) (2007), p. 249, https://doi.org/10.1017/S0008197307000384; John H. Knox,

"Horizontal Human Rights Law," *The American Journal of International Law* 102(1) (2008), p. 1; Giorgio Sacerdoti, "WTO Law and the 'Fragmentation' of International Law: Specificity, Integration, Conflicts," in Merit E. Janow, Victoria Donaldson, Alan Yanovich (eds.), *The WTO: Governance, Dispute Settlement & Developing Countries* (New York: Juris Publishing, 2008), p. 595; Tarcisio Gazzini, "Personality of International Organizations," in Jan Klabbers and Åsa Wallendahl (eds.), *Research Handbook on the Law of International Organizations* (Edward Elgar, 2011), p. 33, https://doi.org/10.4337/9780857931290.00009; Mark Retter, "*Jus Cogens*: Towards an International Common Good?," *Transnational Legal Theory* 2(4) (2011), p. 537, https://doi.org/10.5235/TLT.2.4.537; Chile Eboe-Osuji, *International Law and Sexual Violence in Armed Conflicts* (Leiden: Martinus Nijhoff, 2012); Bart M.J. Szewczyk, "Customary International Law and Statutory Interpretation: An Empirical Analysis of Federal Court Decisions," *The George Washington Law Review* 82(4) (2014), p. 1118; Michael Wood, "International Organizations and Customary International Law: 2014 Jonathan J. Charney Distinguished Lecture in Public International Law, Presented at Vanderbilt University Law School on November 4, 2014," *Vanderbilt Journal of Transnational Law* 48(3) (2015), p. 609; Dapo Akande and Antonios Tzanakopoulos, "The Crime of Aggression in the ICC and State Responsibility," *Harvard International Law Journal/Online Journal* 58 (2017), p. 33; Martins Paparinskis, "MFN Clauses and Substantive Treatment: A Law of Treaties Perspective of the 'Conventional Wisdom,'" *American Journal of International Law Unbound* 112 (2018), p. 49, https://doi.org/10.1017/aju.2018.28.

136. Ottolenghi and Prows, 2009, p. 48 (adding that, according to the dissenters, "[t]he scope of a judgment's *res judicata* should be discernable from its actual text, rather than by 'necessary implication[s]' to be drawn therefrom, since Article 56 of the Statute requires that '[t]he judgment shall state the reasons on which it is based'").

137. This phrase has also been used regarding relations between international law and systems of internal law. From the standpoint of the significance of an instrument of domestic law in the context of international law proceedings, it has been stated that it would be "unnecessary to argue" in favour of the binding character of a domestic law which has been "validly passed" and is made applicable "either expressly or by necessary implication." Separate Opinion of Sir Percy Spender in *Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v Sweden)*, Judgment of 28 November 1958, http://www.icj-cij.org/files/case-related/33/033–19581128-JUD-01–05-EN.pdf ("1958 Separate Opinion, Spencer"), p. 74. From the standpoint of the application of international law within a system of internal law, it has been argued that power conferred by domestic law provisions may encompass powers "by necessary implication" to apply international law. A claim to this effect has been made, but conflating power-conferral with permission. See David Haljan, *Separating Powers: International Law before National Courts* (The Hague: Springer, 2013), p. 83 (arguing that "a judge may resort to international law except where the constitution prohibits, and not only where the constitution permits [expressly or by necessary implication]").

138. Phillimore, 1854, p. 72, para. LXIX; Linderfalk, 2007, pp. 287 *et sq*.

139. Joanne Foakes, *The Position of Heads of State and Senior Officials in International Law* (Oxford: Oxford University Press, 2014), pp. 111–112 (referring to Article 41[2] of the Vienna Convention on Diplomatic Relations of 1961, and arguing about in favour of the importance of a states' designation of a government organ primarily responsible for the conduct of the state's international relations, lest the state be prevented in practice from fulfilling treaty obligations requiring "expressly or by necessary implication" that a Foreign Ministry exist).

140. Such fields would include rules of private international law contained in public international law instruments, such as the United Nations Convention on Contracts for the International Sale of Goods, S. Treaty Doc. 98–9 (1983); A/CONF.97/18 (1980); 19 ILM 668 (1980); 52 Fed. Reg. 6262–6280, 7737 (1987); 1489 UNTS 3 ("CISG"). See Eiselen, 2006, p. 381 (arguing that issues not regulated "directly or by necessary implication" in the CISG include procedural issues concerning the *onus probandi* as to the extent of damage).

141. Henry G. Schermers and Niels M. Blokker, *International Institutional Law: Unity Within Diversity, Fifth Revised Edition* (Leiden: Martinus Nijhoff Publishers, 2011), p. 183 https://doi.org/10.1163/ej.9789004187962.i-1273.

142. Knox, 2008, p. 13 (concerning specific limitation clauses).

143. Ramcharan, 1977, p. 175 (arguing that the International Law Commission, in "pro-

pounding the doctrine of the supremacy of international law over the power of States has, by necessary implication, eliminated the consent theory").

144. Gardam, 1999, p. 289 (arguing that "[t]here is a necessary implication" flowing from the majority's decision in *Nuclear Weapons* and discussing the content of such implication); Eboe-Osuji, 2012, p. 208 (on "the reasoning process of necessary implication" by which Article 3 of the ICTY Statute has been interpreted); Knox, 2008, p. 13 (arguing as to the necessity "by necessary implication" of the absence of any limitation of rights not addressed in "specific limitation clauses").

145. Szewczyk, 2014, pp. 1133–1134, 1171 (discussing the presumption that Congress does not intend to violate customary international law "unless that intent be manifested by express words or a very plain and necessary implication," as set out in *Murray v Schooner The Charming Betsy, 6 U.S. [2 Cranch] 64, 118 [1804])*.

146. Sacerdoti, 2008, p. 595 (arguing that the relevance of "rules and principles" of international law "[b]y necessary implication […] goes beyond the application of customary rules of interpretation in WTO dispute settlement proceedings, as explicitly provided by Article 3.2 of the DSU").

147. Aust, 2006, para 1 ("[o]ther treaties will, by their terms, identify explicitly or by necessary implication the territory of the parties to which they relate"); Paparinskis, 2018, p. 50 (arguing that states determine "whether explicitly or by necessary implication" the application of MFN clauses to other treaties' substantive rules).

148. Amerasinghe, 1968, pp. 278, 281, 300 (arguing that the rule of exhaustion of domestic remedies does not apply where human rights are violated, unless required expressly or "by necessary implication").

149. "Necessary implication" might be involved in certain determinations of responsibility, particularly under individual responsibility under international criminal law. Seymour, 2007, p. 249 *et sq*. Nonetheless, "necessary implication" has been distinguished from the existence of a separate prerequisite, Akande and Tzanakopoulos, 2017, p. 34 (distinguishing "a direct determination of state responsibility as a prerequisite" for finding "individual criminal responsibility under international law" for a crime of aggression, from "an implication—even a necessary implication—that emerges from the finding that a state organ has committed an act of genocide or a crime against humanity").

150. James Crawford, *Brownlie's Principles of Public International Law, 8th ed.* (Oxford: Oxford University Press, 2012), p. 188, https://doi.org/10.1093/he/9780199699698.001.0001.

151. Wood, 2015, p. 614.

152. Nigel D. White, *The Law of International Organisations, 2nd ed.* (Oxford: Manchester University Press, 2005), p. 106.

153. See, generally, Gazzini, 2011, p. 44. As for particular international organizations, see, *i.a.*, Griffith and Staker, 1999, p. 65 (commenting on the World Health Organization's "subsidiary powers"); Olmstead, 1960, pp. 426–427 (referring to "powers necessary and proper to effectuate the organization's purposes and objectives" under the Articles of Agreement of the World Bank, and arguing for the existence of an implied power to "to bring an international claim against a State that may default upon a loan obligation to it").

154. Akande, 1998, p. 444 (adding that, according to Lauterpacht, the ICJ "has not regarded the criterion of essentiality as meaning 'absolutely essential' or 'indispensable'"); Eli Lauterpacht, "The Development of the Law of International Organizations by the Decision of International Tribunals," 152 *RdC* (1976, IV) 387 at 430–432, cited by Akande, 1998, p. 444*n*34.

155. Smith, 1971, p. 32 (relying on "necessary implications" associated to an organization's ability to "function effectively" as a basis for the World Meteorological Organization's treaty-making power).

156. Linderfalk, 2007, p. 292 (arguing that, while for Skubiszewski and Lauterpacht "necessary" has a "weaker sense of *essential* or *vital*," it would rather have a "stronger sense of *indispensable*; *absolutely imperative*").

157. Crawford, 2012, pp. 248–249 (adding that their existence, which "legitimately rests" on necessary implication, "is not incompatible with the view that the UN cannot have territorial sovereignty").

158. Sinclair, 1984, p. 33, n 14 (concerning the rejection of a Malaysian proposal to include the phrase "expressly or by necessary implication" in VCLT Article 8).

159. Phillimore, 1854, p. 72, para. LXIX (noting that "necessary implication" may have a bearing on the meaning attributed to a treaty provision in "the practice of nations," the basis of any "usual interpretation").

160. Linderfalk, 2007, pp. 287 *et sq* (commenting on the work of Gordon, Schwarzenberger, and Merrills, among others, in support of his proposition that "necessary implication" is a form of interpretation in itself).

161. Linderfalk, 2007, p. 287 (arguing that "[n]ecessary implication […] means an act of interpretation based on the assumption that the parties to the interpreted treaty have expressed themselves through implication").

162. Linderfalk, 2007, pp. 289–291 (referring to the work of Amerasinghe and Waldock).

163. Linderfalk's formulation of implementation shows that interpretation is distinguishable from implication. Linderfalk, 2007, p. 293 ("In the rule of necessary implication, an implication is necessary if [and only if] it can be considered indispensable either to ensure that the application of the interpreted treaty provision does not result in a state of affairs which is not among the teloi of the treaty […]").

164. *Contra*, Linderfalk, 2007, p. 287 (arguing as to "necessary implication" that "such an act of interpretation is denoted using two different terms" and that "[a] first term, implied powers, is used when the content of the interpreted treaty provision is a norm that confers a power on an international organisation").

165. Dissenting Opinion of Judge Torres-Bernárdez, Judge ad hoc (translation) in *Fisheries Jurisdiction (Spain v Canada)*, Judgment of 4 December 1998, http://www.icj-cij.org/files/case-related/96/096–19981204-JUD-01–09-EN.pdf ("1998 Dissenting Opinion, Torres-Bernárdez"), para. 278.

166. *Ibid.*, para. 415.

167. *Ibid.* See also Sinclair, 1984, p. 73.

168. *Ibid.*

169. Dissenting Opinion by Judges Hackworth, Badawi, Levi Carneiro and Sir Benegal Rau in *Rights of Nationals of the United States of America in Morocco (France v United States of America)*, Judgment of 27 August 1952, http://www.icj-cij.org/files/case-related/11/011–19520827-JUD-01–01-EN.pdf ("1952 Dissenting Opinion"), p. 217.

170. 1952 Dissenting Opinion, p. 217 (referring to the Act of Algeciras' "status in regard to the old bilateral treaties, as an independent and superior act" pursuant to Article 123 thereof).

171. *Ibid.* (adding that this was "fundamental").

172. *Ibid.* ("The consular system has been adopted in the Act, not so much by express provision as by necessary implication.")

173. 1952 Dissenting Opinion, p. 218 ("It would have occurred to no one to do so except by implication […]").

174. *Ibid.* (referring to the "bare provisions" of the Act of Algeciras).

175. *Ibid.*

176. *Ibid.*

177. *Ibid.* ("even without the Act, the system, being based inter alia upon long-established usage, which is only another name for agreement by conduct, can only be terminated in the way in which international agreements can be terminated").

178. Separate opinion of Judge ad hoc Dugard in *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)*, Judgment of 16 December 2015, http://www.icj-cij.org/files/case-related/152/18868.pdf ("2015 Separate Opinion, Dugard"), para. 19.

179. Dissenting Opinion of Judge ad hoc Dugard in *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)*, Order of 16 July 2013, para. 9.

180. Crawford, 2012, p. 717.

181. Dissenting opinion of Judge ad hoc Kreća in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, Judgment of 18 November 2008, http://www.icj-cij.org/files/case-related/118/118–20081118-JUD-01–10-EN.pdf ("2008 Dissenting Opinion, Kreća"), para. 9.

182. 2008 Dissenting Opinion, Kreća, para. 9.

183. *Ibid.*, paras. 63, 116.

184. *Ibid.*, para. 63.

185. *Ibid.*, para. 116.

186. *Ibid.*

187. Separate opinion of Judge Skotnikov in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, Judgment of 3 February 2015, http://www.icj-cij.org/files/case-related/118/118–20150203-JUD-01–04-EN.pdf ("2015 Separate Opinion, Skotnikov"), para. 7.

188. 2015 Separate Opinion, Skotnikov, para. 7 (namely, "at the time of the filing of the relevant Application instituting proceedings, namely, 20 March 1993").

189. *Ibid.* ("namely that, although the Court was open to the FRY only as of 1 November 2000, the date of its United Nations membership […] this did not matter, since Croatia could simply have refiled its Application of 2 July 1999 after 1 November 2000").

190. *Ibid.*

191. Separate opinion of Judge Owada in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, Judgment of 26 February 2007, http://www.icj-cij.org/files/case-related/91/091–20070226-JUD-01–05-EN.pdf, para. 44.

192. Cited by Kreća, 2014, p. 19 (stating that "the effect of *res judicata* also extends to the judgment of the Court establishing the impossibility of changing the created legal situation").

193. *Delimitation of Continental Shelf beyond 200 nautical miles (Nicaragua v Colombia)*, Preliminary Objections, Judgment, ICJ Reports 2016, pp. 100, 127, para. 66 (namely, the "decision, whereby the Court effected a full delimitation of the maritime boundary between the Parties").

194. 2016 Separate Opinion, Greenwood, para 6.

195. *Ibid.*, para 7.

196. *Ibid.* (namely Nicaragua's "final submission I [3]").

197. *Ibid.*

198. *Ibid.*, para 6.

199. *Ibid.*

200. *Ibid.*

201. *Ibid.*

202. *Ibid.*

203. *Ibid.*

204. 2016 Dissenting Opinion, Donoghue, para. 45.

205. *Ibid.*, para. 46.

206. 2016 Separate Opinion, Greenwood, para 8.

207. *Ibid.* (referring to *Burkina Faso/Niger*).

208. *Ibid.* (referring to *Oil Platforms* relevance, albeit limited, to Colombia's arguments).

209. *Ibid.*, para 9.

210. *Ibid.*, para 11.

211. *Ibid.*, para 12. Neither did the ICJ assess what Nicaragua had proved, nor did the ICJ decided what it "had to prove" in connection with the claim to an outer continental shelf overlapping with Colombia's entitlement as measured from the Colombian mainland coast. 2016 Separate Opinion, Greenwood, para 20.

212. *Ibid.*, para 12. Unlike the 2012 proceedings, Nicaragua's claim concern a delimitation of an entitlement to areas "irrespective of whether […] measured from the Colombian mainland coast (in the east) or the coasts of Colombia's islands (in the west)." 2016 Separate Opinion, Greenwood, para 13.

213. *Ibid.*, para 21; 2016 Dissenting Opinion, Donoghue, para. 1.

214. 2016 Dissenting Opinion, Donoghue, para. 4.

215. *Ibid.* (adding that her interpretation of the 2012 Judgment, being at odds with the one reached by the majority, "gives rise to [her] partial dissent").

216. *Ibid.*, paras. 1, 4 (adding that her dissent is "partial"). *Contra*, 2016 Separate Opinion, Greenwood, para 21.

217. *Ibid.*, para. 41 (having noted that she did "not take issue with the Court's summary of the law").

218. *Ibid.*, para. 1.

219. *Ibid.*

220. *Ibid.*, para. 2.

221. *Ibid.*, para. 25.
222. *Ibid.*, para. 36. This is without prejudice to her view that the ICJ's formulation of its reasoning in this regard is "entirely in line with its traditions of judicial drafting." 2016 Dissenting Opinion, Donoghue, para. 38.
223. *Ibid.*, para. 52.
224. *Ibid.*, para. 44.
225. *Ibid.*
226. *Ibid.*
227. 2016 Separate Opinion, Owada, para 10.
228. *Ibid.*, para 24, quoting Judgment, I.C.J. Reports 2012 (II), pp. 669- 670, para. 130.
229. 2016 Separate Opinion, Owada, para 26.
230. *Ibid.*, para 28.
231. *Ibid.*
232. *Ibid.*, para 31, quoting, and describing as a "*dictum*," a statement in *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Judgment, I.C.J. Reports 2012 (II), p. 669, para. 129, to the effect 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."

Biographical Information

Diego Mejía-Lemos is a Post-Doctoral Fellow at the National University of Singapore Faculty of Law. He has held positions in both academia and practice. Recently, at the Permanent Court of Arbitration (PCA), in The Hague, he provided support to investment treaty arbitrations conducted under the PCA's auspices. While based in Paris, he participated in Freshfields Bruckhaus Deringer's advice and representation of a state in a maritime delimitation dispute before the International Court of Justice.