Res Judicata and the Test of Finality[1]

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Structured Abstract

Article Type: Research Paper

Purpose—The aim of this paper is to provide a fresh analysis of the elements that compose the general principle of *res judicata*. On the basis of recent decisions of the ICJ, the Author argues that when dealing with *res judicata* the Court not only focuses on identifying the traditional elements of the principle, but it also engages in the task of determining whether it has, as a matter of law, decided the issue of the new proceeding in a previous one. This paper invites the reader to consider "*finality*" as a necessary condition for the principle to be activated, which can be established through a *test of finality*.

Design, Methodology, *Approach*—This paper presents a retrospective analysis of relevant cases of the Court that have dealt with the principle of *res judicata* and its traditional elements. It pays special attention to the judgment of the Court of 17 March 2016 concerning the *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia) (Preliminary Objection)*, which to a certain extent inspires this review of the traditional elements that compose the principle of *res judicata*.

Findings—The results provide support for the Author's hypotheses that even if the three traditional elements of the principle are present in a new proceeding, i.e., *personae*, *petitum* and *causa petendi*, the Court can still decide that *res judicata* does not apply if the issue at the heart of the dispute has not previously been decided.

Originality, Value—This paper presents for the first time the "*test of finality*" and "*finality*" as a necessary condition for *res judicata* to have an effect.

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I. Introduction

In 2016, the principle of *res judicata* was discussed by the International Court of Justice ("ICJ") in its Judgment in the case concerning the *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)* (hereinafter "NICOL II").[2] In this Judgment, the Court decided, among other points, that it had jurisdiction to entertain the first request put forward by Nicaragua which, according to Colombia, was barred by the principle of r*es judicata*.[3] This first request by Nicaragua consisted of the determination of the "precise course of the maritime boundary between Nicaragua and Colombia in the areas of the continental shelf which appertain to each of them beyond the boundaries determined by the Court in its Judgment of 19 November 2012."[4]

In a previous case in 2012, namely the *Territorial and Maritime Dispute* (*Nicaragua* v. *Colombia*) ("NICOL I"), the ICJ decided that at the time it was not in a position to delimit the continental shelf ("CS") beyond 200 nm from the Nicaraguan baselines as requested by Nicaragua.[5] In accordance with the reasoning of the Court, at that time Nicaragua had only submitted preliminary information[6] to the Commission on the Limits of the Continental Shelf ("CLCS") and, thus did 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."[7]

Indeed, the Court found in 2016, that in 2012 it could not uphold Nicaragua's claim, because Nicaragua "had yet to discharge its obligation," under paragraph 8 of Article 76 of UNCLOS and "deposit with the CLCS the information on the limits of its continental shelf beyond 200 nautical miles."[8] In response, on 24 June 2013 Nicaragua submitted its full submission to the CLCS and fulfilled its procedural obligation under Article 76(8) of UNCLOS.[9]

After fulfilling what has been termed by the Court as a *"prerequisite* for the delimitation of the continental shelf beyond 200 nautical miles"[10]; that is, a full submission to the CLCS, Nicaragua decided to initiate a new case against Colombia on the points that were not dealt with in the first case, i.e., "the delimitation of the boundaries between, on the one hand, the continental shelf of Nicaragua beyond the 200-nautical-mile limit from the baselines from which the breadth of the territorial sea of Nicaragua is measured, and on the other hand, the continental shelf of Colombia."[11]

Colombia contested the jurisdiction of the ICJ on the grounds that "the Court ha[d] already adjudicated on Nicaragua's requests in its 2012 judgment,"[12] in the realm of NICOL I. According to Colombia, the three elements for the application of *res judicata* were present in NICOL II: an identity between the parties *(personae)*,

the object *(petitum)* and the legal ground *(causa petendi)*.[13] However, and despite the presence of the three traditional elements of *res judicata*, the Court rejected Colombia's objection and confirmed that it "did not settle the question of delimitation in 2012."[14]

The decision of the Court was far from a harmonious one, as can be easily discerned from the fact that the Court was split and the decision was reached only with the vote cast by the President. Seven Judges of the Court considered that "[n]ot only does the rejection of Colombia's third preliminary objection constitute a misreading of the Judgment of the Court in [NICOL I] … but it also detracts from the values of legal stability and finality of judgments that the principle of *res judicata* operates to protect."[15] The group of seven Judges went further and stated:

> [t]he final submission I (3) of Nicaragua in the *Territorial and Maritime Dispute* case and the First Request in Nicaragua's Application in the present case have both the same object (the delimitation of an extended continental shelf entitlement that overlaps with Colombia's 200-nautical-mile entitlement, measured from the latter's mainland coast), the same legal ground (that such an entitlement exists as a matter of customary international law and under UNCLOS), and involve the same Parties. Nicaragua is therefore attempting to bring the same claim against the same Party on the same legal grounds. As explained above, the Court rejected Nicaragua's final submission I (3) in the 2012 Judgment. Nicaragua's First Request in the present Application is thus an exemplary case of a claim precluded by *res judicata*.[16]

The majority disagreed and the Court proceeded to the merits of the case. This contribution will broadly consider the elements of the principle of *res judicata* and its application by the Court. Moreover, the author will try to clarify if, as suggested by some judges, the recent approach adopted by the Court in NICOL II undermines the values of legal stability and the finality of judgments.

II. The Principle of *Res Judicata*

Res Judicata is "a general principle of law which protects … the judicial function of a court or tribunal and the parties to a case which has led to a judgment that is final and without appeal."[17] The foundation of the principle can be distilled down to two basic principles: the first concerning the finality of a litigation, which serves as a means to conclude a dispute and thus strengthens the legal security and the maintenance of international peace, and the second corresponding to the legal doctrine of "*Non bis in idem*."

Article 60 of the Statute of the Court is intended to "preserve the integrity of judgments of the Court."[18] It enshrines the formal aspect of the principle of *res judicata* by stating that "[t]he judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party." The first sentence of the Article pertains to the formal aspect of the principle, which establishes the finality of judgment and infers the non-

existence of an appeal mechanism. The second part of the sentence provides the "possibility for the parties to seize the Court to interpret its judgment."[19] The judgment of the Court is binding on the parties to a specific dispute[20] and can only be subject to revision under the conditions establish in Article 61 of the Statute. It is the combined effect of Articles 59, 60 and 61[21] that reflect the general principle of *res judicata*,[22] a principle which is "one of the most essential and settled rules of the law of international tribunals."[23]

As indicated above, the traditional and widely accepted approach to the principle identifies three elements that compose *res judicata*: *persona*, *petitum* and *causa petendi*.[24] However, the importance of one key element or condition of the principle is usually overlooked, and that is the condition of *finality*. Judge Greenwood explained in his separate opinion in NICOL II that "the identity of these three elements [*personae, petitum and casusa petendi]* is a necessary, but not a sufficient, condition for the application of *res judicata*."[25] Does this mean that finality is a required condition for the *res judicata* effect? The answer is not clear. However, the recent decisions of the ICJ seem to suggest that the condition of finality indeed has a pivotal role.

III. Application of the Principle

Res judicata does not operate automatically by the mere application of the three elements. For *res judicata* to apply, the Court must first determine if the issue at hand has been decided with the force of *res judicata*[26] in a previous proceeding. If, as the Court clearly stated in the *Genocide* case, "a matter has not *in fact been determined*, expressly or by necessary implication then no force of *res judicata* [is] attache[d] to it."[27] This broad understanding of the principle[28] can also be found in the Court's judgment of 4 May 2011, on the application of Honduras to intervene in the *Territorial and Maritime Dispute (Nicaragua v. Colombia)*[29] and more recently in the Court's judgment of 17 March 2016 in NICOL II, as discussed below. This broader approach toward the principle indeed suggests a more flexible understanding of *res judicata* that is not limited by the presence of the three traditional elements.

In the Interpretation of Judgments Nos. 7 and 8 Concerning the Case of *The Chorzów Factory (Germany v. Poland)*, Germany requested the Permanent Court of International Justice to rule that its earlier decision precluded Poland from acting to remove from the land registers the name of the owner of the Chorzów factory. The Court validated the German contention, and stated:

> [t]he Court's Judgment No. 7 is in the nature of a declaratory judgment, the intention of which is to ensure recognition of a situation at law, once and for all and with binding legal force between the Parties; so that the legal question thus established cannot again be called into question insofar as the legal effects ensuing therefrom are concerned.[30]

In accordance with the above, a legal question cannot be called into question again if the same legal question has already been decided by Court in a previous

case. This decision has been echoed by the ICJ in more recent cases. In the *Haya de la Torre* case, the Court rejected the *res judicata* effect because it considered that the question of whether Colombia was obliged to surrender Mr. de la Torre to Peru "was not submitted to the Court [in the *Asylum* case] and consequently was *not decided* [or answered] by it."[31] In other words, the legal question of the previous case was different from the legal question in the new case, which left the new issue undecided and with no binding force as far as the new proceedings was concerned.

In the aforementioned cases, the Court focused not only on identifying the three traditional elements of the principle, but also on determining if the issue at the core of those cases was truly decided. In support of the latter assertion, one can refer to the *Genocide case*, where the Court determined:

> [the] principle signifies that the decisions of the Court are not only binding on the Parties, but are final, in the sense that they cannot be reopened by the parties *as regards the issues that have been determined…*[32]

By using verbs such as determine, settle or decide, the Court engages in the task of determining whether it has, as a matter of law, decided the issue of the new proceeding in a previous one. In the *Genocide* case, Judge Owada elaborated on this and emphasized that the principle should not be applied in an automatic fashion. On the contrary, he emphasized the need for the Court to determine "the scope of what has been decided as *res judicata* in the concrete context of the case."[33]

Following its previous practice, the Court stated in NICOL II that it "is not sufficient … to identify the case at issue by the same parties, object and legal ground … it must determine whether and to what extent the first claim has already been *definitely* settled."[34] In this case, it is quite evident that the Court did not consider the elements as the only critical point, but also whether the issue at heart of the previous case was resolved in its previous Judgment.

As recognized in the doctrine and by the Court in its own jurisprudence, one of the two purposes of *res judicata* is to strengthen the stability of relations by bringing litigation to an end.[35] Under this assumption, the condition of finality seems to constitute the fertile soil needed for *res judicata* to apply. It is not possible to reach an end in an inter–State dispute if the issue at the heart of the dispute has not been definitively settled.

The finality test is scattered throughout the jurisprudence of the Court. For example, also in the *Genocide* case, the Court rejected the objection of Serbia on the basis that if it had upheld the contentions of Serbia in that case, the Judgment of 1996 would have effectively been reversed.[36] The position adopted by the Court in this case is similar to the one adopted by the Court in the application to intervene filed by Honduras in NICOL I. In its application for permission to intervene, Honduras stated that its request was:

> aimed at protecting Honduras's interests of a legal nature by eliminating the existing uncertainty in respect of the fixing of its maritime boundaries with Nicaragua in the maritime zone north of the 15th parallel that is the subject of these proceedings, with a view to enhancing legal security for all States wishing

> to carry on their legitimate activities in the region. These legal interests are at stake in the proceedings. The present Application for permission to intervene is aimed at ensuring that they are not affected by the Court's decision in the future.[37]

The Court rejected Honduras' intervention on the basis that "[w]hat was decided by the Court with respect to the maritime delimitation between Honduras and Nicaragua in the Caribbean Sea [was] definitive."[38] It is the understanding of scholars that "the Court clearly sought to prevent Honduras from re-litigating a matter that had already been considered by the Court."[39] Had the Court accepted the application to intervene of Honduras, the Court's Judgment of 2007 would have been affected and the authority of its prior judgment would have been undermined.

The decision adopted by the majority in NICOL II is also similar to the one adopted by the Court in the *Genocide* case and the request to intervene by Honduras. In its 2016 judgment, the Court recalled that the principle establishes the finality of the decision adopted in a particular case.[40] It then clarified its 2012 judgment "did not take a decision on whether or not Nicaragua had an entitlement to a continental shelf beyond 200 nautical miles from its coast." If the Court had upheld the objection of Colombia, the potential entitlement of Nicaragua would have been affected beyond repair. As the same Court acknowledged:

> It therefore follows that while the Court decided, in subparagraph 3 of the operative clause of the 2012 Judgment, that Nicaragua's claim could not be upheld, it did so because the latter had yet to discharge its obligation, under paragraph 8 of Article 76 of UNCLOS, to deposit with the CLCS the information on the limits of its continental shelf beyond 200 nautical miles required by that provision and by Article 4 of Annex II of UNCLOS.[41]

This suggests that a key question to ask in order to identify the *res judicata* effect is; will a decision on a new case contradict or affect a decision already taken by the Court in a previous case? If the answer is *yes,* and all the elements of the principle are met, then *res judicata* could apply. The Court had already determined that for it to be precluded by the *res judicata* principle:

> [i]t is not sufficient, for the application of *res judicata*, to identify the case at issue, characterized by the same parties, object and legal ground; it is also necessary to ascertain the content of the decision, the finality of which is to be guaranteed. The Court cannot be satisfied merely by an identity between requests successively submitted to it by the same parties; it must determine whether and to what extent the first claim has already been definitively settled.[42]

As indicated at the beginning of this contribution, the Court rejected the effect of *res judicata* in regard to the first request of Nicaragua in NICOL II. In its reasoning, the Court examined the application of the principle to subparagraph 3 of the operative clause of the 2012 Judgment and its correlation to Nicaragua's new claim. In its examination, it took into account the reasoning "of the motif as far as it [was] indispensable in understanding the *dispositif*,"[43] and found that in 2012 it had concluded that it was "not in a position to delimit the continental shelf boundary

between Nicaragua and Colombia"[44] and, as a result, it needed "*not [to] address* any other arguments developed by the Parties, including the argument as to whether"[45] Nicaragua has an entitlement to an extended CS beyond 200 nm. This part of the Judgment was pivotal for the determination of the scope of the principle. As Judge Greenwood clearly expressed it in his Separate Opinion:

> [i]f the court was taking a decision that Nicaragua had not proved that it had a continental margin beyond 200 nautical miles—a decision which would have had the most important consequences for both Nicaragua and Colombia and their peoples—it is hard to believe that it would have done so without making any analysis of the evidence put before it or without revealing at least the result of that analysis in its Judgment.[46]

Judge Owada shared the position of Judge Greenwood and explained that "[the] pronouncement was made in the absence of any substantive analysis of the factual and legal issues that would have been necessary for resolving the claim of entitlement."[47]

The Court concluded that in 2012 it did not decide on the merits of the request of Nicaragua, but on its own capability of being in a position to address the matter in the proceedings concerning NICOL I.[48] Effectively, in its 2016 Judgment the ICJ confirmed that the language used by the Court in 2012 (i.e., "in the present proceedings"[49]), "indicates that the Court did not take a decision on whether or not Nicaragua had an entitlement to a continental shelf beyond 200"[50] nm from its coast. In other words, the ICJ did not decide on the entitlements of Nicaragua beyond the 200 nm and thus, no force of *res judicata* was found to be attached to its new claim. It would be important to carry on further research on the competence of the Court to determine its own capability for deciding certain claims that are conditioned with certain procedural requirements or that required complex technical analysis. The latter could become more frequent in the future, especially due to the potential increase of cases that will concern complex matters that require the implementation of new technologies and new forms of evidence, such as climate change and sea level rise.

Another recent example of the potential importance of the *test of finality* has been recently confirmed in a dispute between Nicaragua and Costa Rica. In a land boundary delimitation case, Nicaragua asked the Court to declare that a stretch of "coast abutting the Caribbean Sea which lies between the Harbor Head Lagoon and the mouth of the San Juan River constitutes Nicaraguan territory."[51] For its part, Costa Rica asked the Court to reject Nicaragua's submission and to declare it inadmissible. The Costa Rican position was that the sovereignty over that part of the territory had already been settled by a previous judgment[52] of the Court (*Certain Activities* case)[53] and thus, the Court was barred by *res judicata*.

The Court delivered its decision on the admissibility of the claim together with the judgment on the merits of the case, and found that nothing in its previous judgment indicated that the Court had already taken a decision on the question of sovereignty over "the coast of the northern part of Isla Portillos, since the question had been expressly excluded"[54] and for that reason "it is not possible for the issue of

sovereignty over that part of the coast to be *res judicata*."[55] Similar to the *Haya de la Torre* case, the Court rejected the *res judicata* effect because it considered that the sovereignty over that part of the territory was not submitted to the Court in the *Certain Activities* case and, consequently, the matter had not previously been determined or "definitely settled." No *res* was *judicata* and Nicaragua's claim was considered to be admissible by the Court.

IV. Conclusion

The intention of this contribution was to clarify if, as suggested by some Judges,[56] the approach adopted by the Court in the NICOL II undermined the value of legal stability and finality of judgments. The answer seems to be no. For the legal stability and finality of judgments to be undermined, there would have to be a decision to undermine in the first place, and as acknowledged by the Court in its Judgment of 2016, it did not rule on the substance of Nicaragua's submission I (3) back in 2012. If the Court would have agreed with the objection of Colombia, the position of both countries would have been undermined, because in 2012 the Court did not carry out any substantive analysis of the factual and legal issues that would have been necessary for resolving the claim. The decision of the Court established an important balance between the elements of *res judicata* and the finality of the claim.

The cases mentioned above exemplified that even if the three traditional elements of the principle of *res judicata* are present in a new proceeding, the Court can still decide that the principle does not apply if the issue at the heart of the dispute has not previously been decided. The scope of the binding force of a decision of the Court is the starting point for determining which *res* has been *judicata*, or if any *res* has been *judicata*.

As demonstrated in this paper, even if there is no certainty that finality constituted an additional element to the principle of *res judicata*, the recent jurisdiction of the Court suggests a more flexible approach to the elements of the principle in contentious cases. Even if the existence of this fourth element is vague, one can find some guidance as to the minimum standard "which any judgment on the merits should meet in the ambit of maritime delimitation of the continental shelf"[57]or other similar cases.

The recent jurisprudence of the Court suggests the need to test the condition of finality for the application of the principle. It also emphasizes the weight of all the parts of a judgment for determining if a case is barred by *res judicata* due to the junction of its elements; *personae, petitu*, *causa petendi* and the condition of finality. That said, whether one would like to call finality an "element" or a "condition" seems to be a purely semantic question. The guide for the application of the principle must be the same as the objective of the Court, which is to settle dispute between States and thus strengthen the legal security and the maintenance of international peace.

Notes

1. The views expressed in this paper are strictly personal to the author.
2. *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 Rep. 2016, p. 100 ("Judgment of 2016").
3. *Territorial and Maritime Dispute (Nicaragua* v. *Colombia*), Judgment, ICJ Rep. 2012, p. 624.
4. Application, 16 September 2013, para. 12.
5. *Supra* note 2, at para 129.
6. *Supra* note 2, para. 127.
7. *Supra* note 2, para. 129.
8. *Supra* note 1, para. 84.
9. http://www.un.org/depts/los/clcs_new/submissions_files/submission_nic_66_2013.htm.
10. *Supra* note 1, para. 105.
11. Application, 16 September 2013, para. 2.
12. *Supra* note 1, para. 47.
13. *Supra* note 1, para. 56. *See* also Andreas Kulick, "Article 60 ICJ Statute, Interpretation Proceedings, and the Competing Concepts of Res Judicata," *Leiden Journal of International Law* 28(1) (2015), p. 74, https://doi.org/10.1017/S0922156514000545.
14. *Supra* note 1, para. 85.
15. *Judgement of 2016,* Joint Dissenting Opinion, para. 1.
16. *Ibid.,* para. 18
17. *Supra* note 1, para. 58. *See* also *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean* (*Costa Rica* v. *Nicaragua*), Judgment of 2 February 2018, para. 68.
18. Andreas Zimmermann, *The Statute of the International Court of Justice: A Commentary* (Oxford: Oxford University Press, 2006), p. 1276 referring to the *Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Preliminary Objections) (Nigeria/Cameroon*), Diss. Op. Koroma, ICJ Reports (1999), pp. 49, 52.
19. *See supra* note 12, p. 74.
20. Article 59 of the Statute of the Court
21. *See* Shabtai Rosenne, *The Law and Practice of the International Court 1920–2002, 4th ed.* (Leiden: Nijhoff, 2006), Vol. III, p. 1598.
22. Also, paragraph 1 of Article 94 of the UN Charter echoes the binding nature and the *res judicata* effect of the judgment of the Court.
23. Zimmermann, 2006, p. 1267.
24. *Factory at Chorzów,* Dissenting Opinion (M. Anzelotti), at 23. In his Dissenting Opinion Judge Anzelotti also characterized res judicata as one "of the general principle of law recognized by civilized nations."
25. *Judgment of 2016,* Separate Opinion of Judge Greenwood, para. 4.
26. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro*), Judgment, ICJ Rep. 2007, para. 126.
27. *Ibid.* (*emphasis added*).
28. Michael Ottolenghi and Peter Prows, "Res Judicata and the ICJ's Genocide Case: Implications for Other Courts and Tribunals?," *Pace International Law Review* 21(1) (2009), p. 50; "softening of the triple identity test for *res judicata*."
29. *Territorial and Maritime Dispute (Nicaragua v. Colombia*), Application by Honduras for Permission to Intervene, Judgment of 4 May 2011, [2011] ICJ Rep. 659.
30. *Interpretation of Judgments Nos. 7 and 8 concerning the Caw of The Chorzów Factory (Germany v. Poland), PCIJ Series A. No. 13, Judgment No. 11 of 16 December 1927*, p. 20. This paragraph states that for the principle to be applied, the legal question has to be clearly answered, and if the legal question has not been established or answered, *res judicata* does not apply.
31. *Haya de la Torre Case*, Judgment, 1951, ICJ Rep. 1951, p. 79.
32. *Supra* note 25, para. 115 (*emphasis added*).
33. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro*), Judgment, ICJ Rep. 2007, Separate Opinion

of Judge Owada, para. 15. *Ibid.*, Joint Dissenting Opinion of Judges Ranjeva, Shi and Koroma, para. 3 (stating: "simply put, *res judicata* applies to a matter that has been adjudicated and decided. A matter that the Court has not decided cannot be qualified as *res judicata*").

34. *Supra* note 1, para 59 (*emphasis added*).

35. *Supra* note 25, para. 116. The second purpose is to avoid the re-litigation of a case that has been already adjudicated by the Court.

36. *Supra* note 25, at 96, para. 128 (*emphasis added*).

37. *Application for Permission to Intervene by the Government of Honduras, Case concerning the Territorial and Maritime Dispute (Nicaragua v. Honduras)*, 10 June 2010, para. 13, p. 9.

38. *Territorial and Maritime Dispute (Nicaragua* v. *Colombia*), *Application for Permission to Intervene, Judgment, I.C.J. Reports 2011*, para. 64, p. 442.

39. *See supra* note 12, A. Kulick, at 86.

40. *Supra* note 1, at 125, para. 58. See also *Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria*), Preliminary Objections *(Nigeria* v. *Cameroon*), *Judgment, I.C.J. Reports 1999 (I)*, p. 36, para. 12; *Corfu Channel (United Kingdom* v. *Albania*), *Assessment of Amount of Compensation, Judgment, I.C.J. Reports 1949*, p. 248).

41. *Supra* note 1, para. 84.

42. *Supra* note 1, para. 59.

43. *Supra* note 1, *Judgment of 2016*, Separate Opinion Judge Owada, para. 8.

44. *Supra* note 1, para. 66.

45. *Supra* note 2, *Judgment of 2012*, para. 130 (*emphasis added*).

46. *Supra* note 1, *Judgment of 2016,* Separate Opinion of Judge Greenwood, para. 17.

47. *Supra* note 1, Sep.Op. Owada, para. 22.

48. *Supra* note 1, para. 82 (quoting the 2012 Judgment).

49. Referring to NICOL I.

50. *Supra* note 1, para. 83.

51. CR2017/16, Submission B 1(a), p. 27.

52. *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica Along the San Juan River (Nicaragua* v. *Costa Rica*), *Judgment,* I.C.J. Reports 2015, p. 665.

53. CR2017/14, Submissions 1 (a), p. 27.

54. *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica* v. *Nicaragua)* and *Land Boundary in the Northern Part of Isla Portillos (Costa Rica* v. *Nicaragua*), Judgment of 02 February 2018, p. 31, para. 69.

55. *Ibid.*

56. *Supra* note 15, para. 18.

57. Matteo Sarzo, "Res Judicata, Jurisdiction Ratione Materiae and Legal Reasoning in the Dispute Between Nicaragua and Colombia Before the International Court of Justice," *The Law and Practice of International Courts and Tribunals* 16(2) (2017), p. 224. https://doi.org/10.1163/15718034-12341355.

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