OBLIGATIONS CONCERNING NEGOTIATIONS RELATING TO CESSION OF THE NUCLEAR ARMS RACE AND TO NUCLEAR DISARMAMENT (MARSHALL ISLANDS V. PAKISTAN)

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ABSTRACT

The Non-Proliferation Treaty (NPT) was adopted in order to call for the secession of the nuclear arms race and abandonment of nuclear weapons. The NPT recognizes some States Party to the treaty as nuclear-weapon states (NWS); however, there are non-NPT States that are also known to possess nuclear weapons. One of these is Pakistan, which has been rapidly developing and expanding its nuclear arsenal and has refused to adopt a no-first-use policy. Accordingly, the Republic of the Marshall Islands filed on April 24, 2014, individual applications against the NWS parties and the NWS not parties to the NPT. In the present case against Pakistan, the Applicant’s claims were based on the violation of Article VI of the NPT, of its customary international law counterpart, and of the obligation to perform their legal obligations in good faith. Thus, the ICJ judges must first decide if the obligation to pursue negotiations in good faith constitutes an international custom; then, on the definition of such an obligation and, finally, if Pakistan breached it.

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1 HISTORICAL BACKGROUND

There lies an apparent contradiction in understanding the role of nuclear weapons during the “long peace” maintained between the two poles of the Cold War, the United States and the Soviet Union (Sagan 1994). The pessimist conclusion rests on the argument that the main causes of war and peace are distribution and character of military power. The fact that two superpowers avoided factual war between them is widely attributed to the fact that each was armed with a large nuclear arsenal, as well as to their rough military equality (Mearsheimer 1990). Thus, it was stated that such weapons had a pacifying effect on international politics in the period that followed World War II. On the other hand, it is similarly widely believed that the spread of nuclear weapons will greatly increase the likelihood of a nuclear war, as emergent nuclear powers may not maintain such stable deterrence (Sagan 1994).

The United States was the first nation ever to develop and test nuclear weapons in 1945. The USA remained as the sole possessor until 1949, when the Soviet Union conducted its first nuclear test. The following were the United Kingdom in 1954, France in 1960, and China in 1964. Aiming to prevent further spread of nuclear weapons, these states negotiated the Treaty on the Non-proliferation of the Nuclear Weapons (NPT) in 1968 (Sagan 1994).

The production of nuclear weapons in Pakistan emerges from a context of complicated political dispute between this country and India. Both nations started their disagreements when the British India separated, in 1947, into the Muslim State of Pakistan and the largely Hindu India. Since then, the countries fought three wars: two of them, in 1947–48 and 1965, were over the disputed Kashmir territory (Charnysh 2009), and the another one, in 1971, resulted in East Pakistan becoming the new independent and separate state of Bangladesh (Izuyama and Ogawa 2003).

The 1971 Indo-Pakistan war, which resulted in the loss of half of the Pakistani territory, and the 1974 Indian detonation of a “peaceful” nuclear device, were the two main triggers for the initiation of Pakistan’s work on nuclear weapons (Dalton and Krepon 2015, Kerr and Nikitin 2016, Charnysh 2009). According to Dalton and Krepon (2015, 7), thus, “the perceived

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need to counter Indian regional hegemony and putative conventional military advantages became the foundational impulse behind Pakistan’s prior work on nuclear weapons”.

During the 1970’s, Pakistan started a program to produce highly-enriched uranium (HEU) and plutonium for use as fissile material for nuclear weapons (Kerr and Nikitin 2016). In 1979, Jimmy Carter, president of the United States at the time, alarmed by Pakistan’s nuclear ambiguity and quick technological progress (Kerr and Nikitin 2016), invoked the Glenn-Symington Amendment, which suspended economic and military aid to the country. However, in 1981, during the Reagan administration, the aid embargo was lifted and the US resumed economic and military assistance to Pakistan. However, with the beginning of the Pakistani production of weapon-grade enriched uranium and the suspicion that the country obtained blueprints for nuclear warheads from China (Izuyama and Ogawa 2003), in 1985 the US Congress approved the Pressler Amendment, prohibiting all US foreign aid to Pakistan until the state proved it possessed no nuclear explosive devices (Charnysh 2009). In other words, this amendment “specified that military aid to Pakistan could continue as long as there was no clear evidence of the production of nuclear explosive devices by that country” (Izuyama and Ogawa 2003, 65). Nonetheless, even though Pakistan proceeded with the nuclear production, both presidents Reagan and Bush (senior) continued providing military aid to the state until 1989.

Amidst strained relations with India in the end of 1989, Pakistan star-
ted producing the enriched uranium metal strips needed for the production of nuclear explosive devices (Izuyama and Ogawa 2003). This scenario led President Bush to cut the military and financial aid to the country in order to deter its nuclear program, under the Pressler Amendment (Charnysh 2009, Kerr and Nikitin 2016). Later on, in February 1996, the Brown Amendment was edited, which established exceptions to the previous document, thereby allowing the resumption of economic and military aid to Pakistan (Izuyama and Ogawa 2003).

India resumed its nuclear weapons tests on 11 May, 1998, occasion in which five nuclear devices were detonated (Charnysh 2009). As a response to this event, Pakistan conducted its first nuclear tests on May 28 and 30 (Kerr and Nikitin 2016), in which six nuclear devices were detonated (Charnysh 2009). “Seen from the perspective of Pakistan, which has an antagonistic relationship with India, it was necessary to demonstrate that Pakistan too had a capability comparable to that of India” (Izuyama and Ogawa 2003, 66). Based on the Nuclear Non-Proliferation Act of 1994, the Clinton administration imposed additional sanctions on Pakistan immediately after the nuclear tests (Izuyama and Ogawa 2003); which were lifted after the September 11, 2001, terrorist attacks on the US, nonetheless (Kerr and Nikitin 2016). Since then, the Bush administration spent almost $100 million on a highly classified program to help Pakistan secure its nuclear arsenal (Charnysh 2009).

“Pakistan has been producing highly enriched uranium or nuclear weapons since the 1980s and producing plutonium for weapons since the late 1990s” (International Court of Justice 2014a, 13). Currently, Islamabad can produce both HEU and plutonium for nuclear weapons and is developing and deploying a variety of weapons. The country “has two operating plutonium production reactors and a second reprocessing facility, and is building two additional production reactors and a second reprocessing facility” (International Court of Justice 2014a, 13). According to the Application made by the Marshall Islands in the present case,

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9 “Seven punitive measures were taken against Pakistan, including the suspension of economic aid except for humanitarian assistance, suspension of military aid and military ordinance exports, and the denial of credit by the U.S. government and commercial banks” (Izuyama and Ogawa 2003, 66).

10 “Pakistan continues to produce fissile material for weapons and appears to be augmenting its weapons production facilities as well as deploying additional delivery vehicles—steps that will enable both quantitative and qualitative improvements in Islamabad’s nuclear arsenal” (Kerr and Nikitin 2016, 1).
Pakistan has been rapidly developing and expanding its nuclear arsenal, increasing its capacity to produce plutonium, and testing and deploying a diverse array of nuclear-capable ballistic and cruise missiles. Pakistan is moving from an arsenal based wholly on highly enriched uranium to greater reliance on lighter and more compact plutonium-base weapons, which is made possible by a rapid expansion in plutonium production capacity. Pakistan is also moving from aircraft-delivered nuclear bombs to nuclear-armed ballistic and cruise missiles and from liquid-fueled to solid-fueled medium-range missiles. Pakistan also has a growing nuclear weapons research, development, and production infrastructure (International Court of Justice 2014a, 12).

In 2011, Pakistan was described as having “the world’s fastest-growing nuclear stockpile” (International Court of Justice 2014a): its arsenal has grown from an estimated two warheads in 1998 to an estimated 100 to 130 nuclear weapons in 2013, leaving it behind only China, France, Russia, and the US in terms of number of nuclear warheads (Kerr and Nikitin 2016). Some authors state it is possible that Pakistan will have a nuclear arsenal not only twice the size of India’s, but also larger than those of China and France within the next five to ten years if it keeps this speed, leaving it only behind the US and Russia (Dalton and Krepon 2015).

Pakistan’s nuclear policy, as well as its strategy, is mostly directed to India, and can be understood as a passive response to the nuclear program of the latter (Izuyama and Ogawa 2003, Kerr and Nikitin 2016). Regarding the possible use of nuclear weapons, Pakistan has released no official doctrine (International Court of Justice 2014a), and has not made the details about its nuclear strategy officially public (Izuyama and Ogawa 2003). Unofficially, however, the country has repeatedly described its nuclear doctrine as “credible minimum deterrence”, which can be interpreted as meaning the “nuclear use would be a ‘last resort’ under circumstances that are ‘unthinkable’” (Kerr and Nikitin 2016, 12). In this sense, some say Pakistan has refused to adopt a no-first-use policy, signaling the possibility of resort to nuclear weapons to preserve territorial integrity against Indian attack, prevent military escalation, and counter India’s conventional superiority (International Court of Justice 2014a, Kerr and Nikitin 2016).

11 “Islamabad’s nuclear doctrine is centered on a minimum deterrent and primarily aimed at deterring a conventional Indian attack” (Charnysh 2009, 2).
There are four policy objectives for Islamabad’s nuclear weapons: deter all forms of external aggression; deter through a combination of conventional and strategic forces; deter counter-force strategies by securing strategic assets and threatening nuclear retaliation; and stabilize strategic deterrence in South Asia (Kerr and Nikitin 2016, 10).

As for its use against non-nuclear-weapon states, Pakistan has pledged no-first-use; however, it has not ruled out first-use against a nuclear-armed aggressor, such as India. It can be said thus that its nuclear program is unidimensional: its only goal is to deter Indian aggression before it happens, not for starting war (Kerr and Nikitin 2016).

Over the years, in face of Pakistan and some other countries’ nuclear power growth, a major concern has emerged in the international community about the improper use of nuclear weapons, which could give rise to an imminent war, resulting in political, social and humanitarian crises never seen.

Since 1998, as perceived and real disparities between Indian and Pakistani conventional military capabilities began to grow, Pakistan has built up its bomb-making capacity at a pace exceeding India’s. Pakistan’s growing reliance on nuclear weapons has, in turn, sparked international concerns about the safety and security of its nuclear arsenal, which cannot be divorced from societal conditions. The increased reliance on nuclear capabilities also raises concerns that these weapons might be used through intentional, inadvertent, or accidental launch in a crisis or in limited warfare with India (Dalton and Krepon 2015, 9).

Many international treaties have emerged to prevent the nuclear arms race, once the potential of mass destruction of these weapons is widely acknowledged. The most important of them is, undoubtedly, the Nuclear Non-Proliferation Treaty of 1968 (NPT), which allows countries that conducted nuclear tests before January 1, 1967, to possess nuclear weapons as “nuclear-weapon states” (NWS) and classifies all other countries as “non-nuclear-weapon states” (NNWS), prohibiting the development or pos-

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12 They are: the United States, the United Kingdom, Russia, France, and China (Dalton and Krepon 2015, 12). Aspects related to this treaty will be addressed more specifically in later section of this paper.
session of these weapons by them (Izuyama and Ogawa 2003). “The NPT regime is framed by several bargains and promises that order the relations between nuclear-weapon states and non-nuclear-weapon states” (Dalton and Krepon 2015, 12). So far, Pakistan has not signed the NPT, but has made it clear that it will join the treaty on the condition that India becomes a signatory too (Izuyama and Ogawa 2003).

Regarding the 1996 Comprehensive Nuclear-Test-Ban Treaty (CTBT)\textsuperscript{13}, Pakistan is one of the 44 countries that must ratify the treaty for it to enter in force (International Court of Justice 2014a). In the post-1998 test period, the United Nations, as well as the US, put strong pressure on Pakistan to sign the CTBT (Dalton and Krepon 2015). Nevertheless, the country “has not signed or ratified the treaty, nor has it in recent years given any indication that it intends to do so” (International Court of Justice 2014a, 11). Just as in the case of NPT, Pakistan refuses to sign the CTBT until India does (Dalton and Krepon 2015).

Pakistan is also widely regarded as the main opponent to the start of negotiations about the Fissile Materials Cut-off Treaty (FMCT)\textsuperscript{14} (Kerr and Nikitin 2016). Since 2009, Pakistan has been blocking consensus in the Conference on Disarmament (CD)\textsuperscript{15} on commencing negotiations about the FMCT (International Court of Justice 2014a). Pakistan has two main objections:

\begin{quote}
The first is that the negotiating mandate does not specify that the treaty would address the reduction of existing stocks of fissile materials. The second is that the program of work envisaging negotiation of an FMCT provides only for discussions short of negotiations on other items, namely complete nuclear disarmament, assurances of non-use of nuclear weapons against non-nuclear weapon States, and prevention of an arms race in outer space. Pakistan maintains that the Conference on Disarmament should
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\textsuperscript{13} The Comprehensive Nuclear-Test-Ban Treaty (CTBT) is a legally binding global ban on nuclear explosive testing and the final step in the vision laid out fifty years ago by President John F. Kennedy. The CTBT was opened for signature in 1996” (United States of America 2016, online).

\textsuperscript{14} The Fissile Materials Cut-off Treaty (FMCT) is an international treaty proposed in order to ban the production of fissile material for nuclear weapons or other explosive devices (Kerr and Nikitin 2016).

\textsuperscript{15} The Conference on Disarmament (CD), established in 1979 as the single multilateral disarmament negotiating forum of the international community, was a result of the first Special Session on Disarmament of the United Nations General Assembly held in 1978. The CD meets in an annual session” (United Nations 2016, online).
first and foremost address negotiation of complete nuclear disarmament (International Court of Justice 2014a, 11–12).

Currently, Pakistan has stated, at the CD, that is not contributing to the spread of nuclear weapons. Similarly, the country has affirmed that “it has adopted effective polices, laws, and regulations in accord with international efforts such as export control regimes to prevent the acquisition of nuclear weapons by additional States and by non-state actors” (International Court of Justice 2014a, 13–14). Pakistan also has voted, at the UN General Assembly, calling for the establishment of a convention prohibiting and eliminating nuclear weapons (International Court of Justice 2014a).

However, the country has not signed the NPT as a NNWS, the only option possible to it under the terms of the Treaty. Pakistan also maintains that commitments and calls made in conferences of NPT States Parties do not apply to it, rejecting calls made by NPT State Parties, as well as the General Assembly and the Security Council, for it to join the NPT as a NNWS (International Court of Justice 2014a).

Pakistan was still welcomed into ancillary bodies associated with the NPT regime by virtue of its membership in the United Nations. It joined the IAEA when it was established in 1957. And it became a member of what is now known as the Conference on Disarmament (CD) when this group was expanded in 1969. Pakistan remains an active participant in the UN General Assembly First Committee on Disarmament and International Security. […] Participation in these UN bodies has not, however, been sufficient to bring Pakistan into the nonproliferation mainstream. In particular, by not joining the NPT, Pakistan was frozen out of the treaty’s regular review process […] (Dalton and Krepon 2015, 27).

Finally, it is noteworthy that Pakistan has continually told India that, regarding to the NPT and other global nuclear arms control and non-proliferation treaties, it would join these treaties provided that India did the same. Moreover, Pakistan has made it clear that it will continue to develop nuclear weapons as long as India keeps to do so (Izuyama and Ogawa 2003).

2 STATEMENT OF THE ISSUE
In this section, it will be presented, in general terms, core aspects of the dispute in question, in order to report the allegations brought by each party, Marshall Islands and Pakistan, in court.

2.1 MARSHALL ISLANDS’ ALLEGATIONS

The allegations brought by Marshall Islands in its Application, as well as clarified in its Memorial, will be addressed here in three main axes: (i) jurisdiction of the ICJ and admissibility; (ii) Pakistan’s alleged violations under customary international law; and (iii) Pakistan’s violations to the obligation to perform its obligations in good faith.

2.1.1 JURISDICTION OF THE COURT AND ADMISSIBILITY

On April 24, 2014, the Republic of the Marshall Islands (RMI) filed individual applications before the International Court of Justice (ICJ) against the five nuclear weapon states (NWS) parties to the 1968 Treaty on the Non-proliferation of Nuclear Weapons (NPT) (United States, United Kingdom, France, Russian Federation, China) and the NWS not parties to the NPT (Israel, India, Pakistan, North Korea). Its claims were based on the violation of Article VI of the treaty, of its customary international law counterpart, and of the obligation to perform their legal obligations in good faith (Roscini 2015).

Usually, the first step to be faced in a judicial procedure before ICJ is the question whether the Court has jurisdiction to address the case. If it does, the parties can proceed with the oral and written parts. If it does not, the case is withdrawn from ICJ’s list and there is no analysis on the matter. One of the most common ways for a State to be able to become a party before the ICJ is filling a declaration under article 36(2) establishing that it accepts its jurisdiction ipso facto and with no necessity of a special agreement. This is the so called optional clause declaration and may—and normally does—contain reservations, which means that the country is able to determine in which conditions the case can or cannot be judged. Some examples of these reservations are the prohibition of addressing a specific matter or litigate with some specific States as opposing party, such as the ones who belong to the same commonwealth. Article 36(5) of its statu-

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te clarifies that the conflict on this matter (*kompetenz-kompetenz*) will be solved by the judges themselves as a Preliminary Objection, for which a sentence will be delivered.

The RMI sustains that the ICJ exerts jurisdiction over the present case by virtue of the operation of the optional clause Declarations submitted by the Marshall Islands, dated from 15 March 2013, and deposited on 24 April 2013, and the Declaration of Pakistan, dated from 12 September 1960 and deposited 13 September 1960, in accordance to Article 36(2) of the Statute of the International Court of Justice (International Court of Justice 2014a).

Currently only three of the nine respondent States to the present case recognize the jurisdiction of the ICJ by means of an optional clause declaration under Article 36(2) of the Statute of the International Court of Justice, namely India, Pakistan and the United Kingdom. As common in optional clause declarations, each of these three states recognizes the jurisdiction of the Court under its own terms and conditions, having appended particular reservations thereto. The Respondent of the case in analysis, for instance, stated that would not allow the ICJ to address the cases in which (a) the parties, to resolve the dispute, shall entrust to other tribunals by virtue of agreements already in existence or which may be concluded in the future; (b) the disputes concern matter of domestic jurisdiction; or, when the latter is related to the present case; and (c) the disputes arise under a multilateral treaty unless:

1. all parties to the treaty affected by the decision are also parties to the case before the Court, or
2. the Government of Pakistan specially agree to jurisdiction; and provided further, that this Declaration shall remain in force till such time as notice may be given to terminate it (International Court of Justice 1960, online).

As for the remaining six applications where the respondent states have not accepted the *ipso facto* jurisdiction of the Court, the Marshall Islands has included an invitation as foreseen in Article 38(5) of the Rules of Court. This invitation to appear, attracting the so-called *forum prorogatum* jurisdiction of the Court, can only work if the respondent state accepts the Court’s jurisdiction in the present case expressly, through for instance sending a letter to the Court stating that it accepts jurisdiction, or simply by appearing before the Court and arguing on the merits. The People’s
Republic of China was the only of the remaining six respondent states to formally respond to the RMI’s Application, notifying the Court that they do not consent to its jurisdiction. The United States of America, the French Republic, the Russian Federation, the State of Israel and the Democratic People’s Republic of Korea have not made any pronouncements on the issue (International Court of Justice 2015a).

However, if those countries are considered necessary third parties by the judges of this Court, their participation in the judgment of the case becomes essential, which means that the decision on the merits would not only affect them directly, but would also be the judgment object. In other words, the conduct to be determined by the Court should be adopted by these third parties, so that if they do not participate in the trial, are not bound to the award establishments (Bekker 2001).

Yet, the Marshall Islands argues that the fact that not all of the respondent states are accepting to appear before the Court in their respective cases should be considered a hindrance. It would be unreasonable for the ICJ to refuse to consider and adjudge each one of the three cases that are indeed being taken under deliberation (i.e. the present case against Pakistan as well as the cases against India and the United Kingdom). While each of the six remaining respondent states may seek to frustrate the case against them by not appearing before the Court, it would be unacceptable to allow their refusal to have a negative impact on the RMI’s right to pursue the enforcement of the obligations involved by submitting a case to the Court (International Court of Justice 2015a).

The Court’s jurisdiction depends on the will of the parties. This principle is not only enshrined in Article 36 of the Statute of the International Court of Justice (Crawford 2012), but elaborated upon and upheld in the Court’s jurisprudence. It is arguable that, even if some Respondent States were to consent to the Court’s jurisdiction, the present case cannot be decided without the consent and intervention of the other eight respondent states, as their rights and obligations would be the very subject-matter of the decision. Thus, should the ICJ judges decide, on Preliminary Objections, if these countries are considered necessary third party. If it does, the participation of these States is mandatory since the present case requires the resolution of rights and obligations of these third states.

18 Article 36, 1: “The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force” (International Court of Justice 1945).
2.1.2 PAKISTAN’S ALLEGED VIOLATIONS UNDER CUSTOMARY INTERNATIONAL LAW

Before listing the Pakistan’s breaches of customary international law, it is necessary to explain the Applicant’s reasoning on the origins and content of the alleged customary rule on nuclear disarmament. The Applicant contends (1) there are two legal obligations of a customary nature, namely the obligation to engage in negotiations to disarm in good faith and the obligation to disarm, and (2) that Pakistan is in breach of these obligations. This is important because, as mentioned above, Pakistan is not a party to the NPT, and thus is not bound by its provisions unless they are also part of customary international law.

In its first considerations before the Court, the Applicant makes submissions on the basis of the obligation present in Article VI of the NPT\textsuperscript{20}, which provides:

> Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control (United Nations 2005, online).

The Applicant argues that Article VI of the NPT, which establishes the obligation to negotiate in good faith towards disarmament, has a corresponding obligation under customary international law, which exists simultaneously to the NPT obligation. It bases its contention on statements made by the ICJ in its Advisory Opinion of 8 July 1996 on the Legality of the Threat or Use of Nuclear Weapons\textsuperscript{21}. In this occasion, the judges observed that the fulfillment of the obligation expressed in Article VI is of vital importance to the whole of the international community:

> This twofold obligation to pursue and to conclude negotiations formally concerns the 182 States parties to the Treaty on the Non-


\textsuperscript{20} The NPT and its Article VI will be best studied, posteriorly, in specific section.

\textsuperscript{21} The 1996 ICJ’s Advisory Opinion will be addressed more specifically in Relevant Judicial Precedents section.
The Applicant draws from this assertion that the Court has read Article VI of the NPT as containing an obligation *erga omnes*, which extends beyond treaty and which is owed to the international community as a whole. This obligation would be customary in nature, thus binding non-parties to the NPT such as Pakistan. The Applicant further contends that “every State has a legal interest in [the obligation to negotiate towards disarmament in good faith’s] timely performance, therefore, and a corresponding legal obligation to help bring it about” (International Court of Justice 2014a, 15–16).

In this sense, the central issue for the Marshall Islands’ submission, in the present case, is its statement that the obligations listed in Article VI are not merely treaty obligations, but also exist separately under customary international law (International Court of Justice 2014a). This would mean that Pakistan, although not a party to the NPT, would be bound by an overlapping corresponding customary obligation to negotiate in good faith aiming towards disarmament.

The RMI, in its Application, also highlights the section of the ICJ’s Advisory Opinion that states the need for global cooperation in relation to effective search for a broad and complete nuclear disarmament (International Court of Justice 2014a): “Indeed, any realistic search for general and complete disarmament, especially nuclear disarmament, necessitates the cooperation of all States” (International Court of Justice 1996, 99). According to the Applicant, this declaration is an expression of customary international law on disarmament itself—not only the negotiation in good faith obligation—as it stands today and, therefore, all States are under that obligation, not only parties to the NPT. The customary feature in Article VI’s obligation to pursue and to conclude negotiations toward the nuclear disarmament, according to the Application, can be observed in the repeatedly UN Security Council’s called for the implementation of Article VI by all States, not only parties to the NPT, as well as in its description of the proliferation of weapons of mass destruction as a threat to the internatio-

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22 “In Resolution 1887 of 24 September 2009, after calling upon States Parties to the NPT to implement Article VI, the Council called on ‘all other States to join in this endeavour’” (International Court of Justice 2014a, 17).
nal peace and security\textsuperscript{23} (International Court of Justice 2014a). Regarding the obligation of cessation of the nuclear arms race at an early date, also set forth in Article VI, “it stands on its own as a customary international law obligation based on the very widespread and representative participation of States in the NPT and is inherent in the customary international law obligation of nuclear disarmament”\textsuperscript{24} (International Court of Justice 2014a, 17).

The Applicant, after attempting to establish the customary nature of these obligations, alleges the Respondent was in breach with both of them. The first one, to pursue negotiations in good faith and bring to a conclusion negotiations leading to nuclear disarmament, was violated by Pakistan “by engaging in a course of conduct, the quantitative build-up and qualitative improvement of its nuclear forces, contrary to the objective of nuclear disarmament” (International Court of Justice 2014a, 20); despite country’s express support for the start of nuclear disarmament negotiations and joining the Open-Ended Working Group\textsuperscript{25}.

The Applicant submits that Pakistan has also breached the customary international law obligation of cessation of the nuclear arms race at an early date, rooted in Article VI of the NPT and resolutions of the General Assembly and the Security Council, as well as inherent in the obligation of nuclear disarmament enunciated by the ICJ. In fact, they argue that Pakistan is actively engaged in an all-out nuclear arms race by taking actions to diversify, quantitatively build up, and qualitatively improve its nuclear forces; by planning and preparing to maintain them for the indefinite future; and by blocking negotiations on a FMCT (International Court of Justice 2014a).

2.1.3 PAKISTAN’S VIOLATIONS TO THE OBLIGATION TO PERFORM

\textsuperscript{23} As the Application pointed out, “the UN General Assembly has been deeply engaged in working for universal disarmament of weapons of mass destruction since its very first resolution in 1946” (International Court of Justice 2014a, 17).

\textsuperscript{24} According to the Applicant, the customary character of this obligation can be also noted in the UN General Assembly’s declarations toward the necessity of cessation of the nuclear arms race. As example, it is worth mentioning the Final Document of UN first Special Session on Disarmament, held in 1978 (International Court of Justice 2014a).

\textsuperscript{25} “In December 2012, the UN General Assembly decided through resolution 67/56 to convene an open-ended working group (OEWG) to develop proposals to take forward multilateral nuclear disarmament negotiations for the achievement and maintenance of a world without nuclear weapons. The group met throughout 2013 and produced a final report” (Reaching Critical Will 2016, online).
ITS OBLIGATIONS IN GOOD FAITH

Regarding its allegations on the violation of the principle of good faith, the Applicant firstly establishes its existence in international law. In its view, good faith can be seen as a fundamental principle of international law, based on Article 38(1)(c) of the ICJ Statute and on Articles 26 and 31 of the Vienna Convention on the Law of Treaties. In the same way, the Applicant supports that this obligation to perform all obligations in good faith, mentioned in Article 2(2) of the UN Charter under the interpretation of the 1970 Declaration on Principles of International Law, applies not only to obligations ascending under the UN Charter, but also has also crystalized into a recognized principle of international law (International Court of Justice 2014).

Furthermore, the Marshall Islands invokes the ICJ’s dicta in Nuclear Tests, in which it was concluded that the principle of good faith is “one of the basic principles governing the creation and performance of legal obligations” (International Court of Justice 1974, 268).

The Applicant also contends that this customary international law obligation to act in good faith towards disarmament is not only an obligation of conduct, but one of result, pursuant to its reading of the Final Document of the first Special Session on Disarmament from the UNGA (International Court of Justice 2014). The Applicant argues that, according to the Gabcíkovo-Nagymaros Project case which related to the principle of good faith and the performance of treaty obligations, an obligation to perform obligations in good faith binds the Parties to apply treaties in a reasonable way, in order to realize its object and purpose (International Court of Justice 2014).

26 “Article 38: 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: [...] c. the general principles of law recognized by civilized nations [...]” (International Court of Justice 1945, online).
27 “Article 26 (Pacta sunt servanda): Every treaty in force is binding upon the parties to it and must be performed by them in good faith” (United Nations 1969, 339).
28 “Article 31 (General rule of interpretation): 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose” (United Nations 1969, 340).
29 “Article 2: The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles. 2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter” (United Nations 1945, 3).


The Applicant sustains the Respondent violated the principle of performing international obligations in good faith when it engaged in conduct that conflicts directly with its customary obligations to partake in nuclear disarmament and cease the nuclear arms race (International Court of Justice 2014). This allegation was based in the fact that Respondent is allegedly involved “in the quantitative build-up, diversification, and qualitative improvement of its nuclear arsenal, and is blocking negotiations on a Fissile Materials Cut-off Treaty”, which could be considered as vertical nuclear proliferation in the Applicant’s submission (International Court of Justice 2014).

2.2 PAKISTAN’S ALLEGATIONS

In its Order of July 10, 2014, the Court, through its President, decided that the written proceedings in the present case should begin by addressing questions of jurisdiction and admissibility (International Court of Justice 2014b). Thus, on December 1, 2015, Pakistan, as Respondent in this dispute, submitted its Counter-Memorial, claiming that the Court should adjudge and declare that it lacks jurisdiction to entertain the RMI’s complaints, or that the Application is inadmissible (International Court of Justice 2015b).

2.2.1 JURISDICTION OF THE COURT AND ADMISSIBILITY

In its Counter-Memorial, Pakistan brings several issues relating to the jurisdiction of the Court and the admissibility of the Application in order to defend itself from RMI’s allegations—especially those provided in the Applicant’s Memorial. For this reason, the Respondent invokes seven main arguments about the jurisdiction issue and other two related to the admissibility.

Firstly, Pakistan contests the Court’s jurisdiction by invoking the reservation to its optional clause declaration which excludes matters within Pakistan’s exclusive domestic jurisdiction from ICJ disputes. According to Pakistan, issues of national security, which include nuclear disarmament matters, are matters within its domestic jurisdiction that cannot be adjudi-

31 “Vertical proliferation refers to nation-states that do possess nuclear weapons and are increasing their stockpiles of these weapons, improving the technical sophistication or reliability of their weapons, or developing new weapons” (Sidel and Levy 2007, 1589).

Secondly, Pakistan asserts that the Marshall Islands lacks standing before the ICJ in the present case, since there is no suggestion that Pakistan was involved in the weapons testing carried out in the Marshall Islands\(^{33}\), or indeed that the Marshall Islands has suffered any damage caused by Pakistan by any weapons testing. Pakistan contends that this case is only part of a plan of the Marshall Islands to achieve its objective of global nuclear disarmament by applying pressure on states that are in possession of nuclear weapons (International Court of Justice 2015b).

Thirdly, the Respondent alleges that the RMI’s Application has been made in bad faith, since the Applicant instituted proceedings against Pakistan in the absence of a dispute, which is unreasonable and constitutes an abuse to the Court’s process. It stated, fourthly, that RMI’s claims are manifestly without legal merit or substance, since its Application and Memorial are based upon (a) multilateral treaties to which Pakistan is not a party, and (b) non-binding General Assembly resolutions and a non-binding ICJ’s Advisory Opinion (International Court of Justice 2015b).

Fifthly, it is argued that the Applicant’s Memorial does not conform to the Rules of Court and ICJ Practice Directions. That is because, according to this Memorial, it is expressed that “at the present time it will not submit a Memorial that conforms to Article 49(1) of the Rules of Court” (International Court of Justice 2015b, 7)\(^{34}\). In Respondent’s vision, the Applicant’s Memorial provision clearly violates the ICJ Practice Direction III, which provides that:

The parties are strongly urged to keep the written pleadings as concise as possible, in a manner compatible with the full presentation of their positions. In view of an excessive tendency towards the proliferation and protraction of annexes to written pleadings, the parties are also urged to append to their pleadings only strictly selected documents (International Court of Justice 2001, online).

\(^{33}\) According to the Application, the RMI has a particular historic of dire consequences caused by nuclear weapons. The document also states that this scenario can be explained by the fact that, from 1946 to 1958, the Marshall Islands was the location “of repeated nuclear weapons testing, during the time that the international community had placed it under the trusteeship of the United States” (International Court of Justice 2014a, 5).

\(^{34}\) The Article 49(1), of the Rules of Court thus provides: “A Memorial shall contain a statement of the relevant facts, a statement of law, and the submissions” (International Court of Justice 1978, online).
According to the Counter-Memorial, the Marshall Islands’ allegation mentioned above is expressly contrary to the Rules of Court, so that “the RMI cannot arrogate to itself the power to vary the rules of procedure governing this proceeding” (International Court of Justice 2015b, 15). Similarly, the Respondent also states the Marshall Islands’ attempt to treat Pakistan’s Note Verbale as a jurisdictional pleading must be rejected by the Court, since the President’s Order already indicated that this Note does not constitute a form of a pleading (International Court of Justice 2015b).

Sixthly, Pakistan defends that the RMI has the burden of proving that the Court has jurisdiction and that its application is admissible, an obligation which the Applicant has failed to discharge. It is also argued that Pakistan’s Note Verbale does not alter the Applicant’s burden of proof on jurisdiction and admissibility (International Court of Justice 2015b).

Seventhly, Pakistan asserts that the Applicant’s claims do not come within the scope of the Parties’ consent to the ICJ’s jurisdiction. That is because, according to the Respondent:

(1) There is a lack of an unequivocal indication of Pakistan’s desire to accept the Court’s jurisdiction in a voluntary and indisputable manner; (2) The RMI’s 2013 Declaration expressly excludes the RMI’s claims from the scope of this Court’s compulsory jurisdiction in this case; (3) The domestic jurisdiction reservation to Pakistan’s 1960 Declaration expressly excludes the RMI’s claims from the scope of Pakistan’s acceptance of this Court’s compulsory jurisdiction as they involve issues of national security in Pakistan’s domestic jurisdiction, for which the ICJ is not the competent forum; and (4) The multilateral treaty reservation to Pakistan’s 1960 Declaration expressly excludes the RMI’s claims from the scope of Pakistan’s acceptance of this Court’s compulsory jurisdiction (International Court of Justice 2015b, 20).

Pakistan states, in its Counter-Memorial, that the reasons reported above confirm that, although both countries have accepted the compulsory jurisdiction of the Court in 1960 and 2013 Declarations, respectively, there is no reason or justification to look beyond Article 36(2) of the Statute of the ICJ, in order to establish jurisdiction in this case, considering the reservations included in that declarations.
On the admissibility of the claim, Pakistan submits that the Marshall Islands’ Application is inadmissible for the following reasons:

(1) The RMI’s Application involves issues of national security of Pakistan which are essentially issues of exclusive domestic jurisdiction of Pakistan and no other forum including ICJ is competent to discuss them; (2) The RMI has no jus standi in connection with the claims as formulated in the Application; (3) The RMI’s Application constitutes an impermissible attempt to re-open the 1996 advisory proceedings and to obtain what would, in effect, amount to an advisory opinion; (4) The RMI has failed to bring indispensable parties before this Court; (5) The judicial process is inherently incapable of resolving questions of nuclear disarmament involving multiple States; (6) The Court cannot grant the relief requested by the RMI because it has held that good faith is not in itself a source of obligation (International Court of Justice 2015b, 42).

Also in relation to admissibility, the Respondent affirms that the RMI’s complaints “would, if adjudicated upon, compromise the sound administration of justice and judicial propriety and integrity” (International Court of Justice 2015b, 7). According to Pakistan, the present case does not meet the most basic threshold test of justiciability and is, for this reason, inadmissible (International Court of Justice 2015b).

3 LEGAL THESES INVOLVED IN THE MERITS

Overcome issues related to jurisdiction and admissibility, in which the judgment will happen in preliminary objections, it is necessary that the ICJ judges pronounce on the merits of the case. This section therefore aims to analyze the main legal theses involved on the merits of this case, namely: Article VI of the NPT as an *erga omnes* obligation, obligations under customary international law, and obligation of performance of good faith in international law.

35 The Article 36(2) thus express: “The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: a. the interpretation of a treaty; b. any question of international law; c. the existence of any fact which, if established, would constitute a breach of an international obligation; d. the nature or extent of the reparation to be made for the breach of an international obligation” (International Court of Justice 1945, online).
3.1 ARTICLE VI OF THE TREATY ON THE NON-PROLIFERATION OF NUCLEAR WEAPONS (NPT) AS AN _ERGA OMNES_ OBLIGATION

The Treaty on the Non-proliferation of the Nuclear Weapons (NPT) is a milestone international treaty whose objective is to “prevent the spread of nuclear weapons and weapons technology, to promote co-operation in the peaceful uses of nuclear energy and to further the goal of achieving nuclear disarmament and general and complete disarmament” (United Nations 2015, online). In this sense, the NPT represents the only binding commitment in a multilateral treaty to the goal of disarmament by the nuclear-weapon States.

The question remains as to whether Article VI of the NTP is binding to States Not Parties to the NTP. In order to respond to the Applicant’s that Article VI of the NPT binds Pakistan albeit its status as a non-party, the Court needs to establish on the character of the norms contained therein as _erga omnes_ or not. Thus this section will analyze aspects related to the concept of _erga omnes_ obligations in international law.

The ICJ has developed the concept of _erga omnes_ obligations in the _Barcelona Traction_ case (Memeti and Nuhija 2013). The case deals with a dispute concerning the wrongful treatment of an investment made in Spain by a company incorporated in Canada—the Barcelona Traction Light and Power Company, Limited. Belgium claimed standing to exercise diplomatic protection on behalf of the vast majority of the shareholders of the company, and demanded reparations for the damage caused by Spain as a result of acts contrary to international law committed by its organs (Crawford 2012, Memeti and Nuhija 2013). The Court declined jurisdiction, stating that the company, incorporated in Canada, was the one affected, and that Belgium could not make a claim on behalf of its national shareholders against Spain in the form of diplomatic protection because they were not the injured party—thus lacking standing. In stating this, however, the Court _obiter dicta_ appointed cases in which states can have legal interest in the

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36 Diplomatic protection, as defined by the International Law Commission in its Draft Articles on Diplomatic Protection, “consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility” (International Law Commission 2006, online).
protection of a right albeit not meeting the standards for diplomatic protection, crafting thereby the concept of obligations that States have towards the international community as a whole (Memeti and Nuhija 2013):

33. When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes. 34. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination (International Court of Justice 1970, 32).

The concept of erga omnes obligations re-appeared in the East Timor case, in which the ICJ decided that the right of peoples to self-determination is irreproachable and has an erga omnes character. The Advisory Opinion on the Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, in turn, stated that obligations erga omnes include the right to self-determination and certain obligations under international humanitarian law. The term also appears in the Furundzija case before the International Criminal Tribunal for Yugoslavia (ICTY); whilst defending that the prohibition of torture is an erga omnes obligation (Memeti and Nuhija 2013), the ICTY clarifies the concept of such an obligation:

151. Furthermore, the prohibition of torture imposes upon States obligations erga omnes, that is, obligations owed towards all the other members of the international community, each of which then has a correlative right. In addition, the violation of such an obligation simultaneously constitutes a breach of the correlative right of all members of the international community and gives
rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfillment of the obligation or in any case to call for the breach to be discontinued (International Criminal Tribunal for the former Yugoslavia 1998, 58).

This debate on the right of states to bring claims in international law due to the \textit{erga omnes} nature of certain obligations creates the issue of the existence of \textit{actio popularis} in international law, and the potential instability that this would create in interstate relations. The concept of \textit{actio popularis} comes from Roman law and “indicates an action brought by a citizen asking the court to protect a public interest, without any need to show an individual interest in pursuing the claim” (Memeti and Nuhija 2013, 34). The ICJ itself in the \textit{South West Africa} case stated that this concept did not exist in international law, at least not at the time of that judgment (Memeti and Nuhija 2013):

The argument amounts to a plea that the Court should allow the equivalent of an “actio popularis”, or right resident in any member of a community to take legal action in vindication of a public interest. But although a right of this kind may be known to certain municipal systems of law, it is not known to international law as it stands at present (International Court of Justice 1966, 47).

States may have a legal interest in vindicating a principle of international law, even though they have, in the given case, suffered no material prejudice, or ask only for token damages [...] such rights or interests, in order to exist, must be clearly vested in those who claim them, by some text or instrument, or rule of law (International Court of Justice 1966, 32). As this was not the case, the claims were rejected (Crawford 2012, 582).

What can be included among these \textit{erga omnes} obligations itself remains an element of contention among states, courts and scholars, similarly to what the consequences of its existence for issues of standing.

\section*{3.2 Obligations under the Customary International Law}

The Marshall Islands’ submissions, before this Court, are guided by an alleged obligation by Pakistan under customary international law to pursue negotiations in good faith regarding the cessation of the nuclear arms race
at an early date, and ultimately act towards nuclear disarmament. Therefore, according to the Applicant, even though Pakistan is not a state party of the NPT, it can be held responsible for breaching its customary law obligations.

The judges of the Court in this case, before deciding whether the Respondent violated or not these alleged obligations, will have to establish whether the obligation to pursue negotiations in good faith, enshrined in Article VI of the NPT, is a norm of international custom. In this sense, the present section will address the concept of international custom as a source of international law, as well as the necessary elements for the formation of a custom according to ICJ jurisprudence.

Finally, this section will comment further on the notion of state responsibility for internationally wrongful acts. The idea of bringing it for this study aims at providing to the judges a minimum orientation on the subject; if they decide, first, that the obligation under Article VI constitutes a customary rule and, later, that Pakistan violated this standard.

### 3.2.1 CONCEPT AND ELEMENTS OF CUSTOMARY INTERNATIONAL LAW

The formally recognized sources of international law are those reflected in Article 38 of the Statute of the ICJ. This provision is expressed in terms of the function of the Court; however, the Article 38 is often put forward as a complete statement of the sources of international law (Crawford 2012).

Article 38.1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. **international custom, as evidence of a general practice accepted as law**; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law (International Court of Justice 1945, online).

This Article refers to “international custom, as evidence of a general practice accepted as law”. In this sense, Judge Read, in the *Fisheries*
(United Kingdom v. Norway) case, has described customary international law as “the generalization of the practice of States”\(^{37}\) (Crawford 2012, 23). Customary international law is unwritten, and binds all the members of the international community—“differently from treaties, which are binding only upon those States that gave their express consent through signature and ratification” (Ferreira, et al. 2013, 186).

Custom is composed, as widely accepted, of two elements: widespread and consistent State practice accompanied by an acceptance that the conduct is law, the so-called “psychological element” that is opinio juris (Ferreira et al. 2013, Greenwood 2008). A new rule of customary international law can be created only if both of these elements are present (Greenwood 2008). In this sense, in international law, the mere existence of a consistent practice does not suffice to create an international rule; said practice must be accompanied by a subjective element, which is the belief that adherence to the practice is a legal duty (Thirlway 2010, Greenwood 2008). An example often used is the rights of diplomats to immunities in foreign states.

It is widely accepted that the reiterated practice of States fulfills the objective element for the formation of customary rules (Ferreira et al. 2013). In this sense, even though the passage of time may evidence the generality and consistency of a practice, in international law, the formation of a customary rule requires no particular duration (Crawford 2012, Ferreira et al. 2013). The ICJ, in the judgment of the North Sea Continental Shelf cases, stated that the passage of only a short period of time was not an impediment to the formation of a customary norm, as long as, during that time, State practice was extensive and virtually uniform (International Court of Justice 1969).

With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected. \(\ldots\) Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of

\(^{37}\) It is worth noting also that the international custom arises as a collateral effect of the conduct of States in their international relations (Cassese 2001).
what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked;—and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved (International Court of Justice 1969, 42-43).

Regarding the uniformity of the practice, absolute unanimity is not required, but substantial uniformity is (Crawford 2012). The Court, also in the North Sea Continental Shelf decision, stressed the importance when regarding the objective element of custom of the practice of “States whose interests are specially affected” (International Court of Justice 1969). The concept of “most affected states” is important, in the present case, in view of the limited number of countries with nuclear weapons that can be especially affected, for instance; their practice in relation to the obligation to disarmament can be considered especially relevant.

The subjective element of custom, known by the Latin expression opinio juris sive necessitatis, is reflected in the text of Article 38.1.b, which provides that, for custom to exist, a general practice must be accepted as law (Ferreira et al. 2013). According to Greenwood, “it might be better to consider opinio juris as the assertion of a legal right or the acknowledgment of a legal obligation” (Greenwood 2008, 2). The ICJ often infers “the existence of opinio juris from a general practice, from scholarly consensus or from its own or other tribunals’ previous determinations” (Crawford 2012, 26). Regarding the opinio juris as subject element of custom, the Court, in the North Sea Continental Shelf judgment, thus stated:

Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the opinio juris sive necessitatis (International Court of

38 Likewise, the complete consistency of practice is also “not required; often the real problem is to distinguish mere abstention from protest by a number of states in face of a practice followed by others” (Crawford 2012, 25).
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Justice 1969, 44).

In the Nicaragua case—another important judgment that delimits the notion of custom as law—the Court expressly cross-referenced North Sea Continental Shelf:

In considering the instances of the conduct [...] the Court has to emphasize that, as was observed in the North Sea Continental Shelf cases, for a new customary rule to be formed, not only must the acts concerned ‘amount to a settled practice’, but they must be accompanied by the opinio juris sive necessitatis. Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is ‘evidence of a belief’ that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the opinio juris sive necessitatis (International Court of Justice 1986, 108-109).

Since the customary international law obligation evoked by the RMI coincides with Article VI of the NPT, the relationship between treaty and international custom is relevant here. In this sense, according to Crawford (2012, 33), “[when] norms of treaty origin crystallize into new principles or rules of customary law, the customary norms retain a separate identity even where the two norms may be identical in content”, meaning that an overlapping obligation may exist under treaty simultaneously to custom. Despite the traditional idea that a dispute can only arise under a treaty between parties to the treaty, when an identical customary rule overlaps with treaty a state non-party to a law-making treaty may find itself indirectly affected by the rules contained in the treaty. In the Nicaragua case39, for instance, the ICJ judges avoided the effect of the US jurisdictional reservation “by holding that it was free to apply customary international law” (Crawford 2012, 33).

3.2.2 STATE RESPONSIBILITY

A State may be held responsible for internationally wrongful acts violating rules of customary or conventional international law. Therefore, if, during the proceedings, this Court reaches the conclusion that Pakistan

violated customary international law norms, it will be necessary to declare the international responsibility of the country. This idea is found expressed in Article 1 of the International Law Commission Articles on State Responsibility for International Wrongful Acts (ARSIWA)\textsuperscript{40}, which itself was considered by the Court on numerous occasions part of customary international law: “Every internationally wrongful act of a State entails the international responsibility of that State” (International Law Commission 2001, 32). This is the fundamental proposition of the International Law of State Responsibility (Olleson 2007).

According to the ILC, for a State to be held responsible for internationally wrongful acts, it is necessary the observance of two elements, as expressed in Article 2 of ARSIWA:

\textbf{Article 2. Elements of an internationally wrongful act of a State:}
There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is \textbf{attributable} to the State under international law; and (b) constitutes a \textbf{breach of an international obligation} of the State (International Law Commission 2001, 34).

This Article sets out that, for a state’s responsibility to be engaged, there must be a conduct (act or omission) that is (i) attributable to that state and (ii) that is wrongful, because it violates one of its international obligations (Olleson 2007).

For an act to constitute a breach of an international obligation, Articles 12 and 13 of ARSIWA state:

\textbf{Article 12. Existence of a breach of an international obligation:}
There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character (International Law Commission 2001, 54).

\textbf{Article 13. International obligation in force for a State:}
An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs (International Law Commission 2001, 57).

\textsuperscript{40} ILC’s initiative to codify and development progressively the basic rules of international law concerning the responsibility of States for their internationally wrongful acts.
In order for another state to bring a claim for a breach of an international obligation, however, and obtain reparation, the state wishing to bring the claim must prove it has standing. This is to say a State may only invoke the responsibility for internationally wrongful acts in relation to other States to which the obligation is owed and which has some type of interest in its fulfillment—either because the obligation in question, owed to a group of States, protects a common interest if the group, or because it is an *erga omnes* obligation, which is due not to any state in particular but to the international community as a whole (Crawford 2012). In this sense, whereas the present discussion is also about the *erga omnes* character of obligations enshrined in Article VI, it is worth noting the Article 48 of ARSIWA:

Article 48. Invocation of responsibility by a State other than an injured State: 1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if: (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or (b) the obligation breached is owed to the international community as a whole. 2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State: (a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and (b) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached (International Law Commission 2001, 126).

3.3 OBLIGATION OF PERFORMANCE OF GOOD FAITH IN INTERNATIONAL LAW

The principle of good faith requires parties of a relation to deal honestly and fairly with each other, representing their motives and purposes truly, without taking unfair advantage (D’Amato 1992). This concept figures prominently in the Vienna Convention on the Law of Treaties, in which one can understand the principle of good faith as negation of unintended and literal interpretation of words that might result in one of the parties gaining an unjust advantage over other (D’Amato 1992). However, since there is no central legislative body in International Law, an all-pervading obligation of good faith is difficult to establish and to charge, even though
the International Court of Justice’s case law acts as a source of guidance in applying the principle (Reinhold 2013).

Nevertheless, it is important to underline the application of the principle of good faith to the general performance of a State’s obligations under International Law (D’Amato 1992). This aspect it settled in the “Declaration on Principles of International Law concerning Friendly Relations and Co-operation Among States” in its session regarding “The principle of sovereign equality of States”: “[e]very State has the duty to fulfill in good faith the obligations assumed by it in accordance with the Charter of the United Nations” (United Nations 1970, online).

The principle of good faith owes its present authority to natural law, to treaties, to customary international law, and especially to its global implementation in more or less all legal systems and cultures (Kotzur 2009). In this sense, although the good faith shows itself as a norm that guides the entire treaty interpretation process (Linderfalk 2007)—which means that the principle is part of a set of “general rules” used to interpreter treaties (Pauwelyn and Elsig 2013)—the analysis of good faith of interest to this case are those related to obligations outside the treaties, that is, one that does not deal with treaty interpretation.

In this context, bona fides (Latin expression for “good faith”) is an abstract principle that can be concretized in specific applicable rules such as acquiescence, estopple, or duties of information and disclosure (Kotzur 2009). The duties of loyalty and cooperation between the Europe Union and the Member States derived of the Article 10 of the Treaty Establishing the European Community, for instance, are not treaty obligations and, yet, can be considered expressions of the good faith. Regarding the procedural rules, “the general duty of loyalty between the parties can be seen as a crucial good faith standard” (Kotzur 2009, online), as well as the prohibition to wrongfully abuse procedural means. These examples also show us that the mutual duties and obligations of international actors cannot be determined in a purely formalistic way, such in the treaties (Kotzur 2009).

Thereby:

A dynamic and evolutive interpretation is indispensable for their effective implementation. Especially if and where little international law exists or rapidly changing economic conditions require flexibility, good faith assumes a gap-filling function. Good faith is a general and objective principle of international law. Given its consensual structures, the international community depends on
4 RELEVANT JUDICIAL PRECEDENTS

In this section, the previous pronouncements of the ICJ that were deemed the most relevant for the analysis of this case will be addressed. The examination of those previous decisions is important in order to indicate to the judges the Court’s relevant cases to be used in the resolution of the dispute in question, so that these are taken into account during this trial.

Despite no legal rule or principle can bind a judge of the International Court of Justice to a precedent, this body usually follows its own decisions. These constitute a repository of legal experience to which it is convenient to adhere, as well as embody what the Court has considered in the past to be good law. Also, the respect for decision given in the past makes for certainty and stability. Nonetheless, the judges are not free to discard precedents completely, since there is an obligation to adduce reasons for departing from the duty of consistency and observance of settled principles (Lauterpacht 1970).

4.1 ADVISORY OPINION ON LEGALITY OF THE THREAT OR USE OF NUCLEAR WEAPONS

On 6 January 1995 the United Nations General Assembly (UNGA) filed a request before the International Court of Justice for an Advisory Opinion regarding the NPT (United Nations 1995), taking into account resolutions the Assembly had issued so far on the issue of nuclear weapons, especially Resolution 3074 (XXVIII) from 3 December 1973, in which it declared that the use of nuclear weapons was a crime against humanity.

The ICJ issued its Advisory Opinion on 8 July 1996. In response to objections to its jurisdiction by states pleading before it, it ruled that it had jurisdiction to hear the case (International Court of Justice 1996) and issue an Advisory Opinion pursuant to Article 65(1) of the Court’s Statute. In response to challenges on the functional ability of the General Assembly to deal with matters of international peace and security such as the use of nuclear weapons, the ICJ stated that this had “relevance to many aspects of the activities and concerns of the General Assembly, including those relating to the threat or use of force in international relations, the disarmament pro-
cess, and the progressive development of international law” (International Court of Justice 1996, 95). In relation to challenges to its jurisdiction based on the political nature of the question proposed, the Court decided that it was still a legal question that could be answered by the Court (International Court of Justice 1996).

The opinion given by the Court proved to be one of its most controversial decisions. It firstly decided unanimously that “there is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons” (International Court of Justice 1996, 94). However, by eleven votes to three, the Court also decided that “there is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such” (International Court of Justice 1996, 94). In other words, the judges have not found a rule of general scope in custom or treaty specifically proscribing the threat or use of nuclear weapons per se.

Also unanimously, the Court decided that a threat or the use of force by means as nuclear weapons is a violation of the Article 2(4) of the United Nations Chapter (International Court of Justice 1996); as well as that:

A threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons (International Court of Justice 1996, 94).

In such way, the Court’s argumentation regarding the Application of International Humanitarian Law norms reads as follows:

Turning to the applicability of the principles and rules of humanitarian law to a possible threat or use of nuclear weapons, the Court notes that nuclear weapons were invented after most of the principles and rules of humanitarian law applicable in armed conflict had already come into existence; the Conferences of 1949 and 1974-1977 left these weapons aside, and there is a qualitative as well as quantitative difference between nuclear weapons and all conventional arms. However, in the Court’s view, it cannot be concluded from this that the established principles and rules of huma-
nitarian law applicable in armed conflict did not apply to nuclear weapons. Such a conclusion would be incompatible with the intrinsically humanitarian character of the legal principles in question which permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future. In this respect it seems significant that the thesis that the rules of humanitarian law do not apply to the new weaponry, because of the newness of the latter, has not been advocated in the present proceedings (International Court of Justice 1996, 98).

In this sense, it was observed by the ICJ that “the destructive power of nuclear weapons cannot be contained in either space or time” and that such weapons “have the potential to destroy all civilization and the entire ecosystem of the planet”. Also, according to the Advisory Opinion, it acknowledges “the unique characteristics of nuclear weapons, and in particular their destructive capacity, their capacity to cause untold human suffering, and their ability to cause damage to generations to come” (International Court of Justice 1996, 96).

By seven votes to seven, by the President’s casting vote, it was decided that

It follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law; However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake (International Court of Justice 1996, 94).

Considering the conclusion that any use of nuclear weapons would “generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law” (International Court of Justice 1996, 94), for any given use of nuclear weapons to satisfy the legal requirements, the circumstances of use would have to be truly exceptional. Nevertheless, such circumstances do exist in the Court’s
view, notably with respect to low-yield nuclear weapons, and that it is therefore unpersuasive that all nuclear weapons are either inherently indiscriminate or inherently disproportionate under international humanitarian law (International Law and Policy Institute and Geneva Academy 2014). In this sense, on its dissenting opinion, Judge Schwebel concluded that in “certain circumstances, such a use of nuclear weapons might meet the tests of discrimination and proportionality; in others not” (International Court of Justice 1996, 101). On this point:

The Court observes that, in view of the unique characteristics of nuclear weapons, to which the Court has referred above, the use of such weapons in fact seems scarcely reconcilable with respect for the requirements of the law applicable in armed conflict. It considers, nevertheless, that it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance. Furthermore, the Court cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defense, in accordance with Article 51 of the Charter, when its survival is at stake. Nor can it ignore the practice referred to as “policy of deterrence”, to which an appreciable section of the international community adhered for many years (International Court of Justice 1996, 98).

The Court’s conclusion on this issue is considered by most scholars as being controversial, because the judges decided on the legality of threat or use of nuclear weapons conflating the proportionality requirements under *jus ad bellum* and *jus in bello*41, which opened the door to the possibility that the first may override the second one in certain circumstances. In accordance with the decision mentioned above, in which it was necessary the President’s casting vote, the use of nuclear weapons may be justified in

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41 *Jus ad bellum* represents a body of the law of war that regulates the interstate use of force, allowing for weapons to be used in self-defense against an armed attack. Therefore, there is a necessity ad bellum when a state, exercising its right of self-defense, may lawfully use force, namely when there be no reasonable alternative to using force (International Law and Policy Institute and Geneva Academy 2014). *Jus in bello*, which works as a translation of “international humanitarian law”, on the other hand, “has as its aim the conciliation of the necessities of war with the laws of humanity by setting clear limits on the conduct of military operations” (Moussa 2008, 965).
“extreme circumstances of self-defense”, even if such use breaches international humanitarian law (Moussa 2008). In the same sense, on its separate opinion, Judge Fleischhauer concluded that nuclear weapons could be used in violation of international humanitarian law in an extreme situation of self-defense threatening the very existence of the state (International Court of Justice 1996, Moussa 2008). This understanding creates the threshold of “state survival”, that gives rise to a different level of self-defense, one in which state is no longer bound by the provisions of humanitarian law. This way, it would be allowed to the states to justify any violation of international humanitarian law in the face of so-called circumstances that threaten their survival. “This controversial pronouncement of a non-liquet is what opened the door to interpretations of the decision that subordinated jus in bello to jus ad bellum” (Moussa 2008, 972). The examination of these two bodies of law was responsible to take the ICJ to its main conclusion in this Advisory Opinion: there was nothing in international law that prohibited or permitted the use of nuclear weapons.

Largely based on its analysis of Article VI of the 1968 NPT, the court unanimously concluded (International Court of Justice 2014a): “There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all aspects under strict and effective international control” (International Court of Justice 1996, 94). In this sense,

[...] the Court appreciates the full importance of the recognition by article VI of the Treaty on the Non-Proliferation of Nuclear Weapons of an obligation to negotiate in good faith a nuclear disarmament. The legal import of that obligation goes beyond that of a mere obligation of conduct; the obligation involved here is an obligation to achieve a precise result-nuclear disarmament in all its aspects—by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith. This twofold obligation to pursue and to conclude negotiations formally concerns the 182 States parties to the Treaty on the Non-Proliferation of Nuclear Weapons, or, in other words, the vast majority of the international community. Indeed, any realistic search for general and complete disarmament, especially nuclear disarmament, necessitates the cooperation of all States (International Court of Justice 1996, 98-99).
In all its jurisprudence, the ICJ has commented on the interpretation of Article VI only once, in the Nuclear Weapons Advisory Opinion here addressed (International Law and Policy Institute and Geneva Academy 2014). As its main conclusion, the ICJ’s Advisory Opinion from 8 July 1996 decided that international law was at the time unclear on the issue. The Court did not conclude definitively and categorically, under the existing state of international law, whether the threat or use of nuclear weapons would necessarily be unlawful in all possible cases. In this sense, found that whereas recourse to nuclear weapons was scarcely reconcilable with humanitarian law, it could not ascertain that it would necessarily violate international humanitarian law in every circumstance (Moussa 2008), given the possibility of extreme circumstance of self-defense in which the very survival of a State would be a stake. This decision means, in other words, that “a use of nuclear weapons that violates the *jus in bello* may become lawful if it satisfies the *jus ad bellum*” (Sloane 2008, 91).

4.2 NORTH SEA CONTINENTAL SHELF (FEDERAL REPUBLIC OF GERMANY V. DENMARK AND FEDERAL REPUBLIC OF GERMANY V. THE NETHERLANDS)

The judgment resulting from the *North Sea Continental Shelf* cases represents one of the most important decisions of the Court’s jurisprudence. In this occasion, the ICJ issued verdict which analyzed deeply the theme of the formation and identification of customary international law. Therefore, the criteria used by the judges, in that case, to identify a custom and understand its formation process should be taken into account in the decision on the characterization, or not, of the obligation to pursue negotiations in good faith, enshrined in Article VI of the NPT, as international custom.

The case, submitted to the Court on February 20, 1967, was proposed by the Federal Republic of Germany against, separately, the Netherlands and Denmark. The dispute was related to the delimitation of the continental shelf between Germany and Denmark on the one hand, and between Germany and the Netherlands on the other, being reunited posteriorly in one single case by the ICJ (International Court of Justice 1969). In this sense, the parties requested the Court to decide the principles and rules of international law applicable to the above delimitation, since both disagreed on that applicable rules.

Whereas the Netherlands and Denmark relied on the principle of
equidistance—rule of delimitation of the continental shelf contained in Article 6 of the 1958 Geneva Convention on the Continental Shelf—Germany stated that the delimitation of the continental shelf was governed by the principle that each coastal State is entitled to a just and equitable share. Thus, contrary to the Netherlands and Denmark, the Federal Republic of Germany, who was not a party to said convention, argued that the principle of equidistance was neither a mandatory rule in delimitation of the continental shelf nor a rule of customary international law, so that such rule could not be binding on the country.

On February 20, 1969, the Court issued decision, holding that Germany was not legally bound by the provisions of Article 6 and that the equidistance principle was not a necessary consequence of the general concept of continental shelf rights, as well as was not a rule of customary international law (International Court of Justice 1969). In other words, the ICJ stated that, however a treaty rule can also be a rule of customary international law, this was not the case of Article 6, since the use of the equidistance method had not crystallized into customary law and was not obligatory for the delimitation of the areas in the North Sea related to the case’s proceedings.

Nevertheless, the judges, in the case’s judgment, were able to establish, for instance, in which ways custom and treaties may interact: they can be declaratory of pre-existing customary law, crystallize developing customary law, or give rise to a custom after its adoption. The judgment also highlighted the importance of the practice of the most affected States, since considered it a determining factor in the incorporation of treaty norms into the corpus of customary international law. Furthermore, the Court affirmed that, for the formation of a customary rule, it is necessary that State practice is, during a period of time—even though short—extensive and representative, including that of the States whose interests are specially affected (International Court of Justice 1969). In addition to the State practice—objective element of the custom—the ICJ judgment in this case also stressed the necessity of opinio juris, as the subjective element, for the formation of a customary rule.

4.3 BARCELONA TRACTION, LIGHT AND POWER COMPANY, LIMITED (BELGIUM V. SPAIN)

Belgium filed a first Application, before the International Court of Justice, against Spain in 1958. However, the case was removed from the
Court’s General List, after a notice, in 1961, of discontinuance of the proceedings, with a view to negotiations between the representatives of the parties. The subsequent negotiations broke down, which took, the Belgian Government, on June 19, 1962, to bring before the ICJ a new suit against the Spanish State. Belgium sought reparation for damage claimed to have been caused to Belgian nationals, shareholders in the Canadian Barcelona Traction, Light and Power Company, Limited, by the conduct of various organs of Spain. On behalf of those Belgian nationals who had invested in the company, the proceedings were instituted on the premise that Spain was responsible for acts in violation of international law that had caused injury to the Canadian corporation and its Belgian shareholders (International Court of Justice 1970).

In response to the Applicant’s allegations, the Spanish Government raised four preliminary objections. In the first one, Respondent contended that the discontinuance mentioned above precluded Belgium from bringing the proceedings in question, whereas, in the second one, stated that the Article 37 of the ICJ Statute applies only between States which had become parties to the Statute previously to the dissolution of the Permanent Court of International Justice—consequently, following this reasoning, the Court would not be competent, since the necessary jurisdictional basis requiring Spain to submit to the jurisdiction of the ICJ did not exist. The Court, in the judgment of July 24, 1964, rejected these two preliminary obligations by 12 votes to 4 and 10 votes to 6, respectively. However, in that same occasion, the third preliminary objection, which was to the effect that the Belgian Government lacked capacity to submit any claim in respect of wrongs done to a Canadian company, even if the shareholders were Belgian, and the fourth one, which was to the effect that local remedies available in Spain had not been exhausted, had been joined to the merits (International Court of Justice 1964).

In the judgment on second phase of the case, the judges found that Belgium lacked jus standi to exercise diplomatic protection of shareholders in a Canadian company with respect to measures taken against that company in Spain. Thus, the ICJ rejected Belgium’s claim by fifteen votes to one, stating that “is not of the opinion that, in the particular circumstances

42 “Article 37: Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice” (International Court of Justice 1945, online).
of the present case, jus standi is conferred on the Belgian Government by considerations of equity" (International Court of Justice 1970, 51).

In the course of the proceedings, the Parties have submitted a great amount of documentary and other evidence intended to substantiate their respective submissions. Of this evidence the Court has taken cognizance. It has been argued on one side that unlawful acts had been committed by the Spanish judicial and administrative authorities, and that as a result of those acts Spain has incurred international responsibility. On the other side it has been argued that the activities of Barcelona Traction and its subsidiaries were conducted in violation of Spanish law and caused damage to the Spanish economy. If both contentions were substantiated, the truth of the latter would in no way provide justification in respect of the former. The Court fully appreciates the importance of the legal problems raised by the allegation, which is at the root of the Belgian claim for reparation, concerning the denials of justice allegedly committed by organs of the Spanish State. However, the possession by the Belgian Government of a right of protection is a prerequisite for the examination of these problems. Since no jus standi before the Court has been established, it is not for the Court in its Judgment to pronounce upon any other aspect of the case, on which it should take a decision only if the Belgian Government had a right of protection in respect of its nationals, shareholders in Barcelona Traction (International Court of Justice 1970, 52).

The Court, also in the judgment on second phase of Barcelona Traction, mentioned the basic right of all human persons to be protected against slavery and racial discrimination as deriving from basic general international law. The paragraph 33 of that judgment clearly express such idea: “when a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them” (International Court of Justice 1970, 33). In this sense, it is possible to affirm that certain rights may derive from international instruments of a universal or quasi-universal character, which create obligations owed to the international community as a whole. These obligations are called erga omnes, that is, all states have a legal interest in their protec-
The analysis of this case is especially important to the judgment of the dispute between the Marshall Islands and Pakistan, since the judges, in that occasion, gave rise to the concept of *erga omnes* obligations in international law. Thus, it is strongly suggested that this Court use the understanding of *erga omnes* obligations adopted in the *Barcelona Traction* case in order to decide whether Article VI of the NTP is binding to States Not Parties to the treaty and, therefore, if such article constitutes, or not, an *erga omnes* obligation.

### 4.4 OBLIGATION TO NEGOTIATE ACCESS TO THE PACIFIC OCEAN (BOLIVIA V. CHILE)

The Plurinational State of Bolivia, on April 24, 2013, instituted proceedings against the Republic of Chile before the ICJ. In general, Bolivia claims that Chile, by failing to comply with its statements that recognized Bolivia’s right of access to the Pacific Ocean, has violated both treaty law and customary international law. In its Application instituting proceedings and in its Memorial, Bolivia requests the Court to adjudge and declare that:

(a) Chile has the obligation to negotiate with Bolivia in order to reach an agreement granting Bolivia a fully sovereign access to the Pacific Ocean; (b) Chile has breached the said obligation; (c) Chile must perform the said obligation in good faith, promptly, formally, within a reasonable time and effectively, to grant Bolivia a fully sovereign access to the Pacific Ocean (International Court of Justice 2015c, 8).

In its Application, Bolivia seeks to found the jurisdiction of the Court on Article XXXI of the Pact of Bogotá. Both Bolivia and Chile are parties

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43 This article thereby provides: “In conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice, the High Contracting Parties declare that they recognize, in relation to any other American State, the jurisdiction of the Court as compulsory ipso facto, without the necessity of any special agreement so long as the present Treaty is in force, in all disputes of a juridical nature that arise among them concerning: (a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute the breach of an international obligation; (d) the nature or extent of the reparation to be made for the breach of an international obligation” (International Court of Justice 2015c, 8).
to this treaty, which was adopted on 30 April 1948. On July 15, 2014, Chile presented its preliminary objections to jurisdiction and, on November 7, 2015, Applicant brought before the Court its written statement on the preliminary objection filed by Respondent. On September 24, 2015, the Court issued judgment on preliminary objections. Currently, this dispute is pending on the merits in the ICJ.

Bolivia’s Application states that the dispute in question relates to “Chile’s obligation to negotiate in good faith and effectively with Bolivia in order to reach an agreement granting Bolivia a fully sovereign access to the Pacific Ocean” (International Court of Justice 2015c, 12). Chile, in its preliminary objections, contends that the subject-matter of Applicant’s claim is territorial sovereignty and the character of Bolivia’s access to the Pacific Ocean. Also affirms that the obligation alleged by Bolivia is in fact an obligation to conduct negotiations; however, the outcome of which is predetermined, namely, the grant to Bolivia of sovereign access to the Pacific Ocean. In Chile’s view, therefore, Applicant is not seeking an open negotiation comprised of good faith exchanges, but rather negotiations with a judicially predetermined outcome. This way, according to respondent, “the alleged obligation to negotiate should be seen as an ‘artificial means’ to implement Bolivia’s alleged right to sovereign access to the Pacific Ocean” (International Court of Justice 2015c, 13). In its written statement, Bolivia refutes Chile’s allegations, responding that the country misrepresents the dispute that is the subject of the Application.

It emphasizes that the Application asks the Court to find that Chile has an obligation to negotiate sovereign access to the sea. Bolivia maintains that the result of those negotiations and the specific modalities of sovereign access are not matters for the Court but, rather, are matters for future agreement to be negotiated by the Parties in good faith (International Court of Justice 2015c, 13).

The Court, in its judgment on preliminary objections, considered that the disputed presented by the Application is in order to decide whether Chile has an obligation to negotiate Bolivia’s sovereign access to the sea and, if such an obligation exists, whether Chile has breached it. The judges also stated that, proceeding the case to the merits, Bolivia’s claim would place before the Court, for later decision, contention about the existence, nature and content of the alleged obligation to negotiate sovereign access. Thus,
ICJ concluded that the subject-matter of the dispute is exactly whether Respondent is obligated to negotiate in good faith Bolivia’s sovereign access to the Pacific Ocean, and, existing such an obligation, whether Respondent had breached it.

In this sense, it is possible to affirm that this case has a significant relevance for the dispute between Marshall Islands and Pakistan, since, on the merits of the latter case, this Court will decide, firstly, on the definition of the obligation to negotiate in good faith and, posteriorly, if Pakistan breached such an obligation. For this reason, it is extremely recommended that the judges take into account the Obligation to Negotiate access to the Pacific Ocean case during the trial.

5 SUBMISSIONS

The Republic of the Marshall Islands requests this Court to adjudge and declare that:

a) The Court has jurisdiction with respect to the present case and that the Application is admissible;

b) Pakistan has violated and continues to violate international obligations under customary international law, by failing to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control, in particular by engaging a course of conduct, the quantitative buildup and qualitative improvement of its nuclear forces, contrary to the objective of nuclear disarmament;

c) Pakistan has violated and continues to violate its obligations under customary international law with respect of the nuclear arms race at an early date, by taking actions to quantitatively build up its nuclear forces, to qualitatively improve them, and to maintain them for the indefinite future, and additionally by blocking negotiations on a Fissile Materials Cut-off Treaty;

d) Pakistan has failed and continues to fail to perform in good faith its obligations under customary international law by taking actions to quantitatively build up its nuclear forces, to qualitatively improve them, and to maintain them for the indefinite future, and by blocking negotiations on a Fissile Materials Cut-off Treaty; and

e) Pakistan has failed and continues to fail to perform in good faith obligations under customary international law by effectively preventing the great majority of non-nuclear-weapon States from fulfilling their part of the obligations under customary international law and Article VI of the NPT
with respect to nuclear disarmament and cessation of the nuclear arms race at an early date.

The Government of the Islamic Republic of Pakistan requests this Court to adjudge and declare that:

a) The claims set forth in the Republic of the Marshall Islands Application of April 24, 2014, are not within the jurisdiction of the Court (1) and are inadmissible (2).

REFERENCES


INTERNATIONAL COURT OF JUSTICE


ctc/uncharter.pdf.

ALLEGED VIOLATIONS OF SOVEREIGN RIGHTS AND MARITIME SPACES IN THE CARIBBEAN SEA (NICARAGUA V. COLOMBIA)

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ABSTRACT

Nicaragua went to the Registrar of the Court in order to establish the case called Alleged Violations of Sovereign Rights and Maritime Spaces as a response for a said non-compliance by Colombia with a previous sentence awarded by the ICJ itself, in the case Territorial and Maritime disputes. Besides not having adopted the content of the judgment, Nicaragua sustains that Colombia demonstrates explicitly that, in order to implement its intentions, it will make use of military force. The present controversy is, then, a matter, essentially, of understanding how enforcement if international decisions take place and the way the Law of the Sea might be connected to the issue, as well as the Law of the Treaties and other instruments of general international law.

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1 BACKGROUND OF THE CASE

Nicaragua and Colombia, both Latin American countries, have been litigating before the International Court of Justice (ICJ) for some decades. Usually, in controversies that involve Law of the Sea issues, they are used to resort to this tool in order to settle their disputes in a pacific manner.

The case under analysis, called Alleged Violations of Sovereign Rights and Maritime Spaces (Nicaragua v. Colombia), is not just one of the many situations when they have met in Court, but a very important one. This is a sort of a continuation of a previous case, because it was generated by an alleged non-compliance with this Court’s sentence. Hence, it is not a case that involves directly International Maritime Law issues: it is rather about the enforcement of international judicial decisions.

Furthermore, this time the Pacific aspect, which has always been present in the settlement of their disputes before, may be endangered—according to Nicaragua’s allegation of Colombia’s threat of use of the force in the Caribbean Sea. If Colombia indeed put its Navy or any other military power in action, Nicaragua shall have one more reason to call for a move by the United Nations Security Council, knowing that the simple lack of compliance with ICJ’s decisions can already be addressed for UNSC to enforce. These affirmatives, yet vague, will be properly addressed along the next pages.

The next section is concerned to very briefly expose some facts, which, even tough have taken place in the past, may have some repercussion in the present. Pre-colonial and colonial periods’ matters in both countries will be discussed, stressing its differences and similarities. Further, the case that originated the one under debate will be addressed.

1.1 HISTORICAL ASPECTS

As it is well known, both States—which are located in Central and South Americas—were allegedly “discovered” in late XV and early XVI centuries. They were colonized by Spain, which was, by that time, a great political, economic and naval power. Bearing this in mind, it may not be surprising that Nicaragua and Colombia share some structural characteristics as a consequence of this ancient period.

There are reports of people living where nowadays is Nicaragua’s territory for more than six thousand years. Not much is known about them,
besides that they were similar, somehow, to Mexican groups and dedicated themselves to fishing and hunting—as semi-nomadic—although the main economic activity until mid-1550 were the export of indigenous people as slaves. Estimates show some 500,000 individuals were traded and, when slavery was abolished, the indigenous population was already extremely reduced (Staten 2010).

Colombia, the South American country, has in its past an important relation with liberator Simon Bolivar. It was in Boyacá—a department of central Colombia—where the well-known Latin American leader defeated Spain and so founded the Republic of Gran Colombia, which comprised, besides the nation in question, the current countries Ecuador, Panama and Venezuela. Gran Colombia ceased to exist in 1831, as Venezuela and Ecuador had quitted the political union to become independent countries.

Colombia and its recent record of violence related to the Revolutionary Armed Forces of Colombia (FARC) are a key aspect to understand drug traffic in Americas. Since its independence, the country has a history of shifting between liberal and conservatives in its early republican period. The first ones were responsible for eradicating Colombia’s colonial heritage, which, by the time they rose to power (1860), was still a very present reality (Mazzucca and Robinson 2009).

Noteworthy is the country’s ability to keep its democracy in the period right following the Great Depression of 1929, while some of its biggest neighbors had suffered State coups, such as Argentina and Brazil (Mazzucca and Robinson 2009). Nicaragua, for instance, was not that diligent, since the referred international economic crisis was one of the factors that led to the Sandinist Revolution and then to Somoza’s dictatorship—which lasted until 1979 (Fraga 2010).

Nicaragua is known to have passed through a socialist turning with the end of Somoza’s rule. Colombia, on the other hand, is one of the most prominent US allies in South America and one of the few governments not considered left-wing at the moment.

Alongside their differences, however, they have some points in common, since they share their mother language, Spanish, and claim the same part of the Caribbean Sea to be their territory of their own. This is the object of the present paper: the maritime and frontier dispute for the contested islands in the Caribbean Sea by Nicaragua and Colombia.

1.2 THE CONTROVERSY BETWEEN NICARAGUA AND COLOMBIA
It is not the first time Nicaragua and Colombia go to Court to solve a judicial dispute. On the contrary, this situation has been seen several times at the International Court of Justice (ICJ) itself. In the present case, this interesting characteristic has a special significance, because Alleged Violations of Sovereign Rights and Maritime Spaces (Nicaragua v. Colombia) commenced as a product of what Nicaragua sustains to be Colombia’s non-compliance to a previous case’s decision.

The name of the case that originated the one under analysis in this paper is Territorial and Maritime Dispute (Nicaragua v. Colombia). As the name suggests, this was about Law of the Sea, applied to the west portion of the Caribbean.

Nicaragua brought to Court on that occasion, in 2001, generally speaking, an ancient problem with Colombia regarding their maritime space and the legitimate name of a group of islands and keys in the Caribbean Sea. In the application’s words: “The dispute consists on a group of related legal issues subsisting between the Republic of Nicaragua and the Republic of Colombia concerning title to territory and maritime delimitation” (ICJ 2001, 2).

Subsequently, after the Territorial and Maritime Dispute’s sentence, which took place in 2012, the repercussion in Colombia was severe. The country’s government did not receive the decision well: some statements opposing to it were made and Colombia even put its navy troops to patrol the waters around the islands. The government showed strong concern with the results of the award to the fishers and their families in San Andrés and Santa Catalina region, since this economic activity has been, for ages, one of the most important. Its sudden prohibition could jeopardize significantly the area’s lower-class population.

Colombia, thus, said it would not follow ICJ’s decision: the Pact of Bogotá had just been denounced (ICJ 2001). Due to its importance, the key aspects of the document will be addressed above, but, for now, it is interesting to bear in mind that this was the instrument through which the country accepted the Court’s jurisdiction, since it is about the settlement of controversies within the Organization of American States sphere.

Within this framework, and after Nicaragua’s allegedly diplomatic efforts to solve the impasse, this country came to the Registry of the Court once again, on 6 December 2001, to institute new proceedings. This time, instead of demanding the ICJ to set the boundaries or give the islands a name, the request was, basically, to declare that Colombia was in breach of its legal obligations concerning Nicaragua’s rights on the controversy (ICJ
In order to offer an introduction to the case, this first section is organized in a chronological manner, so that it is possible to comprehend what the 2012 sentence had defined, which commands are not being followed, and the reason for that—if so.

After Nicaragua and Colombia’s independence from Spain, both countries—as well as many others—had to solve the aspects related to the belonging of the non-continental territories in the Atlantic Ocean. More precisely in the Caribbean Sea, there are several insular territories, such as islands, archipelagos and keys, which may be capable of appropriation and, therefore, might generate a solid ground for disagreements.

Thereby, both States signed in 1928 (hereinafter the 1928 Treaty) an agreement that, together with its subsequent 1930 Protocol, established Colombia’s recognition of Nicaragua’s sovereignty over the Mosquito Coast, while Nicaragua agreed on the Colombian sovereignty over the islands of San Andrés, Providencia and Santa Catalina (Bekker 2013).

The problem involved, however, other islands and features. One other reason that gives a special character to this case is the fact that it took the longest time for the ICJ judges to reach a conclusion: 11 years.

The decision reached by the Court was, among other provisions, the one that follows:

(1) finds, unanimously, that the Republic of Colombia has sovereignty over the islands at Alburquerque, Bajo Nuevo, East-Southeast Cays, Quitasueño, Roncador, Serrana and Serranilla;
(4) decides, unanimously, that the line of the single maritime boundary delimiting the continental shelf and the exclusive economic zones of the Republic of Nicaragua and the Republic of Colombia shall follow geodetic lines connecting the points with co-ordinates: [...];
(5) decides, unanimously, that the single maritime boundary around Quitasueño and Serrana shall follow, respectively, a 12-nautical-mile envelope of arcs measured from QS 32 and from low-tide elevations located within 12 nautical miles from QS 32, and a 12-nautical-mile envelope of arcs measured from Serrana Cay and the other cays in its vicinity;
(6) rejects, unanimously, the Republic of Nicaragua’s claim contained in its final sub-missions requesting the Court to declare that the Republic of Colombia is not acting in accordance with its
obligations under international law by preventing the Republic of Nicaragua from having access to natural resources to the east of the 82nd meridian (ICJ 2012).

As it is possible to see in the Application, Nicaragua’s grounds to this case begin as early as the end of Territorial and Maritime Dispute. In the same day the Court delivered its judgment, Colombian President Juan Manuel Santos made a very serious statement in which, besides naming some of the decisions as errors, declared that those which were classified as inappropriate would not be accepted by Colombia (ICJ 2013).

Having these words from the Head of State, Nicaragua filled the application, together with other considered pieces of evidence, in order to enforce the sentence and, ultimately, take the benefits of the judgment previously done.

The first aspect brought for the Court to adjudicate was the question of whether the Court itself had or not jurisdiction to address the case. Colombia, in the so-called Preliminary Objections, presented the tribunal reasons to sustain its position that the merit should not be judged, because ICJ was not competent to. In other words, the demand presented by Colombia aimed at excluding this case from ICJ’s list and, therefore, keeping the situation untouched by its ruling.

Although the arguments raised in this Preliminary Objections will be approached forward, it is interesting to stress that the understanding of the Pact of Bogotá’s role in binding its high contracting parties to the Court’s jurisdiction is the one key factor in this matter.

The relation between the timing of the denunciation notification and the cessation of its effects is crucial to decide if the allegation proceeds or not. There is the fact that Nicaragua’s application dates of almost one year after Colombia was not part of the Pact of Bogotá anymore.

This was an overview of important previous legal and historical aspects. The next section will discuss the specific allegations that were direct or indirectly invoked by each part—knowing that Colombia has not presented its memorials yet. However, as several public declarations and acts of government concerning the matters of the case were made, the assumption of some allegations for the matter of this paper is significantly appropriate.

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3 The one interested in not having the case resolved is, naturally, the defendant.
2 STATEMENT OF THE ISSUE

Once the outline concerning the relevant previous periods was already presented, this section seeks to analyze which points were brought by each part. It is essential to mention, however, that, until the authors finalized this paper, Colombia had not yet sent its counter-memorials to the Court. Although its allegations here presented were not based on its real argumentation, they were taken out from official publications, political statements and other sources that confer them an excellent level of trust and reliance.

Besides presenting the parts’ views on the problem, the section will also address a judgment already delivered by the court: the so-called preliminary objections, which concerned Colombia’s claim of the Court’s lack of jurisdiction.

2.1 NICARAGUA’S ALLEGATIONS

The allegations presented by Nicaragua can be found in its Application filled in the Registry of the Court on 26 November 2013. As exposed before, they have tight relations with the previous case ended in 2012, Territorial and Maritime Dispute (ICJ 2012), although the alleged violation of this judgment was not the only reason that led the Central-American country to the World Court again.

Nicaragua’s allegations are threefold. First, it argues that Colombia is in breach of its international obligations by not complying with the 2012 judgment. In this regard, the Applicant maintains that paragraphs 4 and 5 of the aforementioned decision unani-mously established the course of the single maritime boundary that delimitates the continental shelf and the exclusive economic zones of both countries. Despite the Court’s order, Colombia would be refusing to accept the new maritime limits as the only legitimate ones (ICJ 2014).

Given that Court decisions have binding force between the parties involved, pur-suant to Article 59 of the Statute of the ICJ, Nicaragua submits that the simple non-agreement by Colombia to follow the conclusions reached by the judges is a violation of international law (United Nations 1945a).

Second, Nicaragua contends that Colombia is in violation of customary international law, as reflected in parts V and VI of the United Nations Convention on the Law of the Sea (hereinafter UNCLOS), which re-
The last question brought in the application is concerning Colombia’s attitude: the threat of use of force.

Nicaragua sustains that Colombia’s president said the country did not recognize its validity and, moreover, said openly that it would not comply with it in the immediate aftermath of the Court’s 2012 decision. Besides, it would be considering the use of military force in the region in order to enforce its plans. Even though Colombia denies this allegation, the Applicant suggests that the neighbor would be ready to call its navy to act to supposedly protect its fishers. The orientation from the government was for its national fishers to not stop fishing where they have always done, affirming that no special permission must be required.

Nicaragua argued, furthermore, that this conduct breaches Colombia’s obligation to refrain from the threat or use of force under Article 2(4) of the Charter of the United Nations (United Nations 1945b). There would not be, though, only an ICJ’s sentence the instrument being violated by the respondent, but International Law as a whole.

2.2 COLOMBIA’S ALLEGATIONS

In response to the allegations of Nicaragua in its Application filed before the International Court of Justice on 26 November 2013, the Republic of Colombia states that,

First, the allegation of noncompliance with the 2012 judgment in the Territorial and Maritime Dispute (Nicaragua v. Colombia) case is completely equivocated. This is because it would take a long time for Colombia to internalize the judgment’s dispositions, although its Constitutional Court had already confirmed the judgment terms on 2 May 2014. Moreover, the Republic of Colombia has a dual system to deal with international law, which means that all international regulation has to pass through internal processes to be enacted, especially when it is related with boundaries.

Second, Colombia sustains that the Applicant presented no evidence of any act amounting to threat or use of force within the meaning of Article 2: The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles:

4 All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Pur-poses of the United Nations (United Nations 1945a).

4 Article 2: The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles:

[...]

4 All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Pur-poses of the United Nations (United Nations 1945a).
The Respondent asserts that, on the contrary, it had given specific orders to its armed forces not to confront with Nicaraguan vessels. Colombia further emphasizes that, before the filing of the Application, the Nicaraguan navy had publicly and repeatedly stated that relations between the parties' armed forces were good and that they had been working together for the surveillance of the Caribbean Sea.

Finally, Colombia submits that there was no dispute between the parties before the filing of the Application of Nicaragua on 26 November 2013. At the time of the denunciation of the Pact of Bogotá by Colombia, the Applicant made no statements against it. According to Colombia, Nicaragua waited for almost one year to fill the Application before the Court, doing so on what it believed to be the very last day of the Court's jurisdiction over the Respondent.

2.3 PRELIMINARY OBJECTIONS

In ICJ’s cases, as well as in some ones of domestic jurisdictions, it is very common that, before the merits are analyzed, one or the two parties involved in the conflict ask the court to rule in a certain previous matter. These types of demands—called preliminary objections—can be of a vast range of kinds. One of the most interesting of them is the jurisdiction discussion.

The judgment already delivered by the Court in the present case has this nature: preliminary objections on the existence of jurisdiction. It was raised by Colombia and concerns exactly the allegation that the ICJ has not the competence anymore to address the merits. According to art. 36 (6) of the Statute, the appropriate organ to rule on a dispute of whether the ICJ has or does not have competence to adjudicate on a certain point of the case, or in the case as a whole, is the Court itself.

The country based its demand in five objections and all of them sustain, in a different manner, that the instrument that has allegedly given the Court the permission to conduct the judgment does not have the power to do so. This document is the American Treaty on Pacific Settlement, the already referred Pact of Bogotá.

Colombia denounced the aforementioned treaty on 27 November 2012 by a notification sent by the Ministry of Foreign Affairs to the General Secretariat of the Organization of American States (the former Pan American Union, hereinafter “OAS”), in fulfillment of the requirements of Article LVI of the Pact. After receiving that notification, the OAS sent
it to all other states parties of the organization, conferring it erga omnes effects.

Moreover, Colombia stated that it “has never taken any decision not to comply with the Judgment despite the disappointment of certain constituencies in Colombia with parts of it” (ICJ 2014, 22). It argues that it was necessary for Colombia to first internalize the 2012 judgment in order to comply with the requirements of Colombian law, especially Article 101, paragraph 2, of the Colombian Constitution. This process of implementation usually demands some time to be completely finished, in particular because the judgment in question deals with land and maritime delimitation, issues already regulated by a myriad of treaties and multilateral settlements that must be reviewed.

That said, it is also important to consider that President Santos has submitted an Actio Popularis of unconstitutionality (ICJ 2014) to the Constitutional Court of Colombia in an effort to define if Law 37 of 1961—which implemented the Pact of Bogotá—was a threat to the Colombian constitution, as well as the 2012 judgment. The Constitutional Court stated that neither Article LVI of the Pact of Bogotá nor the 2012 ICJ judgment were menaces to the constitutional order of Colombia. Meanwhile, the Constitutional Court of Colombia also decided that the terms of the 2012 judgment should be implemented by treaties negotiated by the interested parties, pursuant to Article 101, paragraph 2, of Colombia’s Constitution (ICJ 2014, 61).

2.3.1 FIRST OBJECTION: THE COURT LACKS JURISDICTION UNDER THE PACT OF BOGOTÁ RATIONE TEMPORIS

Although the Pact of Bogotá allows the High Contracting Parties to denounce it unilaterally, one must note that, out of fourteen signatory states, only two have taken this decision since the Pact was signed, in 1948: El Salvador, in 1973, and Colombia, in 2012. Article LVI of the Pact of Bogotá provides the framework for its denunciation. Thus, Colombia’s objection relates to the interpretation that Nicaragua gives to the second paragraph of Article LVI of the Pact. Allegedly, it is not in accordance with Articles 31 to 33 of the Vienna Convention on the Law of Treaties (hereinafter “VCLT”), which provides that the interpretation of treaties must be made

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5 Article 101, paragraph 2, of the Constitution of the Republic of Colombia provides that: “The boundaries fixed in the manner set forth in this Constitution may only be modified by virtue of treaties approved by Congress, duly ratified by the President of the Republic.”
in order to reach an *effet utile* of the text and to avoid absurd misunderstandings.

Then, Colombia asserts that the second paragraph of Article LVI of the Pact must be understood as a restriction to the institution of new proceedings before the International Court of Justice, even though the denunciation has no effect to pending procedures already initiated before the party’s withdrawal from the Pact.

In other words, although the Pact itself ceases its enforcement only one year after the party’s denunciation, the jurisdiction of the International Court of Justice on new procedures ends at the exact moment of the withdrawal from the Pact. Colombia maintains that this interpretation finds support in the *travaux préparatoires* of the Pact, in which the negotiating parties discussed questions concerning the period between the denunciation

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6 Article LVI of the Pact of Bogotá: “*The present Treaty shall remain in force indefinitely, but may be denounced upon one year’s notice, at the end of which period it shall cease to be in force with respect to the state denouncing it, but shall continue in force for the remaining signatories. The denunciation shall be addressed to the Pan American Union, which shall transmit it to the other Contracting Parties. The denunciation shall have no effect with respect to pending procedures initiated prior to the transmission of the particular notification.*”

7 SECTION 3. INTERPRETATION OF TREATIES

Article 31, GENERAL RULE OF INTERPRETATION

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32. SUPPLEMENTARY MEANS OF INTERPRETATION

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) Leaves the meaning ambiguous or obscure; or

(b) Leads to a result which is manifestly absurd or unreasonable (United Nations 1969).
and the effective withdrawal from the Pact.

For the reasons set out in this section, Colombia believes the Court has no jurisdiction in respect of the proceedings instituted by Nicaragua almost one year after the Pact’s denunciation by Colombia.

2.3.2 SECOND OBJECTION: THE CLAIMS REFERRED TO IN NICARAGUA’S APPLICATION WERE NOT THE SUBJECT MATTER OF A DISPUTE.

In order to achieve an objective determination of whether a genuine dispute between states really exist, verifying the real need of the Court’s intervention on the issue is necessary. The parties sometimes had not even tried to foster a common ground of understanding, which creates doubts over the real existence of the subject matter of the dispute.

According to Colombia, there is no dispute between the parties, as the Nicaraguan complaints were not even subject to a conversation between them. In Colombia’s view, prior to the Application by Nicaragua, no controversy existed between them, especially regarding the 2012 judgment. On the contrary, in the aftermath of the 2012 judgment, both countries made various statements regarding the need to implement the Court’s decision as soon as possible, through the negotiation of a treaty bearing in mind, inter alia, “(i) the protection of the historic fishing rights of the population of the Archipelago of San Andrés, Providencia and Santa Catalina; (ii) the protection of the Seafloorer Biosphere Reserve; and (iii) developing measures for ensuring security in the relevant waters, in particular in relation to the fight against organized crime and drug trafficking.(i)” (ICJ 2014, 97).

Colombia points out that, in the period between the Court’s decision of 2012 and the filing of its memorial on 13 September 2014—therefore, even after the filing of the Application—, no notification or diplomatic note was sent to complain about an alleged unlawful act or even threat of use of force by Colombia. Only on 13 September 2014 Nicaragua sent a Diplomatic Note in which made reference to the “infringe[ment] upon the sovereign rights of Nicaragua” and “the continuous threat to use force” by Colombia. In support of its allegations, Nicaragua attached to its Note, also for the first time, a list of alleged “incidents” (ICJ 2014, p. 99).

In the Respondent’s view, however, this event does not change the fact that, prior to the Application, no complaint had been recorded or informed to Colombian authorities.

Colombia thus submits that the claims raised by Nicaragua in its
Application to the Court were not the subject matter of a dispute between the two countries at the time of the filing of the case. Hence, it argues the Court cannot exercise jurisdiction with regard to these facts.

2.3.3 THIRD OBJECTION: THE PRECONDITION OF ARTICLE II OF THE PACT OF BOGOTÁ WAS NOT MET. THE MEANING OF ARTICLE II OF THE PACT OF BOGOTÁ.

Article II of the Pact of Bogotá provides in its first paragraph that “The High Contracting Parties recognize the obligation to settle international controversies by regional pacific procedures before referring them to the Security Council of the United Nations”. Thereafter, paragraph two of the same Article II clearly states that “in the event that a controversy arises between two or more signatories States which, in the opinion of the Parties, cannot be settled by direct negotiations through the usual diplomatic channels, the parties bind themselves to use the procedures established in the present Treaty”.

These provisions demonstrate the Treaty imposes a condition to be fulfilled prior to the filing of a claim before the International Court of Justice. The alleged failure by Nicaragua in showing the fulfillment of these preconditions constitutes Colombia’s third preliminary objection.

The Respondent submits that, in characterizing whether a negotiation reached a deadlock, both sides’ opinion on the controversy must be taken into account. On this point, Colombia sheds light on Article 31, paragraph 1, of the VCLT, in order to state that the proper interpretation of Article II of the Pact allows for an understanding as to the necessity of the opinion of both parties to the negotiation.

In addition, Colombia asserts the negotiation, if it ever existed, must had been exhausted in order for the plaintiff to be allowed to request the Court to intervene. It maintains one can only state that a controversy “cannot be settled” in an extreme situation, after a thorough attempt to establish a mutual agreement. Such a situation, in Colombia’s submission, never

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8 Pact of Bogotá, Article II. “The High Contracting Parties recognize the obligation to settle international controversies by regional pacific procedures before referring them to the Security Council of the United Nations. Consequently, in the event that a controversy arises between two or more signatories States which, in the opinion of the Parties, cannot be settled by direct negotiations through the usual diplomatic channels, the parties bind themselves to use the procedures established in the present Treaty, in the manner and under the conditions provided for in the following articles, or, alternatively, such special procedure as, in their opinion, will permit them to arrive at a solution.”
existed between it and Nicaragua.

2.3.4 FOURTH OBJECTION: THE COURT HAS NO “INHERENT JURISDICTION” UPON WHICH NICARAGUA CAN RELY IN THE FACE OF THE LAPSE OF JURISDICTION UNDER THE PACT OF BOGOTÁ.

What Nicaragua aims to promote in this point is that, even if the Pact of Bogotá is not applicable to the present situation, and also if the Court’s Statute does not provide a basis for the Court’s jurisdiction in this case, it is possible to understand that an inherent jurisdiction of the Court lies in a form of a compliment for Article XXXI of the Pact of Bogotá. This construction aims to prove that the Court would have the prerogative to enforce its judgments in the case of disputes arising from non-compliance with its judgments.

In this effort to demonstrate the existence of such jurisdiction, Nicaragua enlists case law of the European Court of Human Rights and the Inter-American Court of Human Rights, as well as case law from the former Permanent Court of International Justice, the PCIJ.

The Respondent objects that, in case these allegations are to be considered truth, it would cause undesirable results, once it “would strike at the foundation of consensual jurisdiction under Article 36, paragraphs 2 and 3, of the Statute for Nicaragua’s theory of ‘inherent jurisdiction’ ignores any conditions which States may have attached to their consent to jurisdiction” (ICJ 2014, 132).

For Colombia, since the Statute provides the baselines for the powers’ limits of the Court in its article 1, it is clear that the theory of inherent jurisdiction of Nicaragua fails to be included on the basis for jurisdiction

9 ARTICLE XXXI.

In conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice, the High Contracting Parties declare that they recognize, in relation to any other American State, the jurisdiction of the Court as compulsory ipso facto, without the necessity of any special agreement so long as the present Treaty is in force, in all disputes of a juridical nature that arise among them concerning:

a) The interpretation of a treaty;

b) Any question of international law;

c) The existence of any fact which, if established, would constitute the breach of an international obligation (OAS 1948).

10 Statute of the International Court of Justice, Article 1. “The International Court of Justice established by the Charter of the United Nations as the principal judicial organ of the United Nations shall be constituted and shall function in accordance with the provisions of the present Statute.”
provided by the Court’s Statute: special agreement, treaty, convention, optional clause declaration or even *forum prorogatum*.

**2.3.5 FIFTH OBJECTION: THE COURT HAS NO POST-ADJUDICATIVE ENFORCEMENT JURISDICTION.**

What Colombia tries to show in its last objection is that the Court has no jurisdiction to supervise or monitor compliance with its judgments. This post-adjudicative jurisdiction would be, as Nicaragua defends, an extension of the supposed “inherent jurisdiction” owned by the Court, already denied at the fourth objection of the Respondent.

Furthermore, Colombia asserts that this post-adjudicative power has never before happened in the jurisprudence of the Court, and that it is also out of the Court’s Statute and the Pact of Bogotá, once both assign the United Nations Security Council as the proper forum to grant enforcement in case of non-compliance. Also, it says that the Pact of Bogotá provides the need for a Meeting of Consultation of Ministers of Foreign Affairs before the Security Council’s analysis of the subject matter.

**3 LEGAL ASPECTS OF THE LITIGATION**

The main law principles and rules involved in this case concern either International Law of the Sea or enforcement of ICJ sentences. The first one, nowadays, is largely codified in the United Nations Convention on the Law of the Sea. The second is addressed by the UN Charter, as well as by international customary law and domestic legal practice.

Since very ancient times, the seas have played a crucial part in human life and history. Being it due to its commercial importance or to its role as a warfare theater, the waters are disputed by either State or non-State actors (such as pirates). Their role as a reserve of natural resources also contributes to the need to keep legal attention to the ocean in order to preserve its long-lasting life and economic potential.

Therefore, the initiatives to dominate and delimitate maritime space goes back for ages. In the seventeenth century, during the “Age of Discovery”, Portugal would claim a huge amount of maritime track as belonging to its territorial sea, which influenced Dutch jurist Hugo Grotius to elaborate the theory known as the Doctrine of the Open Seas, according to which oceans would be unable of appropriation (Shaw 2008).

This is just an idea of how much and for how long the international community has been discussing such issues and how diverse the proposals
may be. Nevertheless, the fundamental principle has not changed: the land dominates the sea (Shaw 2008).

Compliance with ICJ sentences, on the other hand, is not such an old matter as the struggle for the water spaces. One of the reasons, of course, is that even when considering the Permanent Court of International Justice (ICJ’s precursor), the foundation dates from 1929. Therefore, until this period, there were virtually no international sentences to enforce. It is more appropriate to say that instead of having kept its roots or having being changing much, the methods of ICJ’s decisions' enforcement are being established nowadays.

This section will bring some aspects of both legal questions related to this case, in order to promote an understanding of what is to be considered in the judgment,

**3.1 LAW OF THE SEA INSTITUTIONS AND CONCEPTS**

As it was already stated, the main source of maritime law, together with customary law, is the UN Convention on the Law of the Sea (UNCLOS). However, as it dates from 1982, its text is significantly new. Before this date, the international community has attempted to solve the codification issue in two previous conferences, which were the UN Conference on the Law of the Sea I (UNCLOS I), in 1958, and the UN Conference on the Law of the Sea II (UNCLOS II), in 1960 (Malanczuk 1997).

UNCLOS I, held in Geneva, originated four conventions: the Convention on the Territorial Sea and the Contiguous Zone; the Convention on the High Seas; the Convention on Fishing and Conservation of Living Resources of the High Seas; and the Convention on the Continental Shelf. Besides the four treaties, there was, also, the Optional Protocol on the compulsory settlement of disputes.

The document that received the biggest number of ratifications had fifty-seven states, which was the one about the high seas. Although this may seem not a great number, it is important to stress that most of these provisions were considered by that time customary law, which means they would bind either States-parties or States-nonparties (Malanczuk 1997).

The treaties, however, did not exhaust the problems with international maritime law existing when they were proposed, neither were they able to deal with some new issues that emerged with globalization, for example. The pressure for having what it was claimed to be an up-to-date convention was also related to the need of underdeveloped countries to have exclusive
economic rights over a bigger portion of its coastal waters, in order to prevent developed countries from inadvertently explore their natural resources (Shaw 2008, Malanczuk 1997).

Two years after UNCLOS I, then, it took place UNCLOS II, but it did not prosper. The current convention started to be produced in 1973 and took nine years to be finished, after many intermittent meetings, and then more twelve years to come into force—which happened, hence, only in 1994 (Malanczuk 1997).

Much of the content of the UN Convention on the Law of the Sea was already established in the earlier instruments or in the customs—however, there were indeed provisions added for the first time (Shaw 2008). Some of the new rules were one of the causes for the long duration of the work. The vast list of interrelated issues creates a situation in which some States would be keen to accept a couple of them if some others were out. This diplomatic bargain, naturally, took a lot of and time and effort (Malanczuk 1997).

Historically, the sea space used to be divided into three categories, which were: internal waters, territorial sea and high seas. The relation between States and the ocean increased, as well as their economic interest on it—involving oil for example—and this classification nowadays became less clear. Coastal States have a tendency of claiming rights over high seas adjacent to their land territory (Malanczuk 1997). As it is now codified in UNCLOS, the sea is divided into: (i) internal waters; (ii) territorial sea; (iii) exclusive economic zones/ exclusive fishery zones; and (iv) high seas (Malanczuk 1997, UN 1982).

Internal waters are the point from where the width of the territorial sea is measured and consist on, for example, ports, harbors and lakes. The Law of the Sea, however, does not rule freshwater rivers, since they are a matter of domestic jurisdiction mostly and are not of great interest to international law (Malanczuk 1997, Rezek 2005).

The territorial sea, also known as territorial waters and maritime belts, is the portion of the ocean on which the State can exercise most of its maritime sovereignty powers. The control over these miles of water is not absolute solely because of the right of innocent passage, which allows other States to go through it under certain circumstances. Beyond its land and its internal waters, a country has also under its command this adjacent sea, as well as its subsoil, air space and the seabed. How big should be the belt, is one of the most controversial issues in international law of the sea and has been under discussion for many years (Malanczuk 1997, Rezek
The exclusive economic zone has also changed its concept through time. It is of relative recent nature and its basis comes with the UNCLOS’ *Travaux Préparatoires*. Nowadays the established maximum width of the EEZ is 188 miles, counted from the end of the territorial sea. The rights of the coastal State are basically related to natural resources and jurisdiction (Malanczuk 1997, Rezek 2005).

Finally, the high seas are the other areas of the oceans, which are not under any State jurisdiction, nor are part of any State’s territory. It is of free use by ships of all nations, including those who do not have any sea of their own—the landlocked countries (Malanczuk 1997, Rezek 2005).

For purposes of understanding the aspects of this case, the most important juridical definition is, naturally, the territorial sea. More precisely, it is not exactly how the concept works, but how it presents itself in the case of conflict of spaces. In other words, when a certain portion of water is within the maximum length of 200 miles from the coast of more than one State, it must be defined in what part of the sea will be the end of the sovereignty and economic rights of one country and the beginning of the other ones. The next section will address some aspects of this issue.

3.2 QUESTION OF DELIMITATION OF MARITIME LIMITS

When it comes to understanding maritime boundaries, one must bear in mind that this is a very delicate issue within the international law field. As well as other law of the sea institutes, the ocean limits have been under discussion since old times and they are only starting to be considered as a well-established matter only recently.

One of the four conventions created during UNCLOS I, the Convention on the Territorial Sea and Contiguous Zone, addressed the boundaries issue. The 1982 document kept the provision in its Article 15. It reads as follows:

**Article 15**

*Delimitation of the territorial sea between States with opposite or adjacent coasts*

Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest
points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith (UN 1958).

The rules seem to be quite clear, establishing that States that would have sovereignty over the same piece of water must either agree concerning its boundaries, or accept that they are taken as the median. However, there are problems with this general rule, such as the existence of a historical reason that influences the limits or the presence of islands, which can make the task of finding the equidistant points very complicated (Malanczuk 1997, Shaw 2008). The present case is a clear example of this last-mentioned difficulty on finding a common ground, due to geographic and historic issues that are now being discussed in court.

### 3.3 Enforcement of International Court Decisions and the Denunciation of the Pact of Bogotá

The way the enforcement of an international decision works is one of the biggest questions made by non-familiarists to the international law field. Resolutions of either political nature or sentences from international tribunals must be effective and, in order to be so, there must be compliance. Since the international system lacks a complex governance structure that most of the countries nowadays possess, it is, indeed, at least interesting to reflect on this sort of issues.

Addressing ICJ sentences in particular, there is no such a thing as an independent judicial body responsible for making their orders followed. There is not either a specific measure to punish the States that do not cooperate. According to Al-Qhatani (2003), the only provision in the Statute is article 61(3) and, even so, it is not applicable in a wide range of situations (Al-Qahtani 2003). The rule reads as follows:

**Article 61**

1. An application for revision of a Judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming
revision, always provided that such ignorance was not due to neglect.

2. The proceedings for revision shall be opened by a judgment of the Court expressly recording the existence of the new fact, recognizing that it has such a character as to lay the case open to revision, and declaring the application admissible on this ground.

3. The Court may require previous compliance with the terms of the judgment before it admits proceedings in revision.

4. The application for revision must be made at latest within six months of the discovery of the new fact.

5. No application for revision may be made after the lapse of ten years from the date of the judgment (ICJ 1945).

It is possible to see that it is not about the compliance itself, but rather to a consequence of its absence—and this is why Al-Qhatani states about the Statute’s silence.

This option to not approach the matter may suggest that the Court’s role ends when the sentence is pronounced and its enforcement is the responsibility of another entity. Indeed, it is possible—and this indeed happens—that other institutions work in the enforcement of ICJ’s awards, such as domestic courts, regional international organizations and international specialized agencies (Shaw 2008).

The most common alternative, however, is to resort to the UN itself and, more precisely, to the United Nations Security Council. This is so due to a variety of reasons, most of them related to the perception of power intrinsically related to this organism in the international community’s eyes. Nevertheless, it is not pertinent to get deeper into this issue, but it is appropriate to mention that the UN Charter expressly authorizes the Security Council to do this task and then it would not be an overextending of its competences.

Article 94

1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.

2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be
This is the main written source of the obligation to follow the Court’s sentences. The treaty is very clear about the responsibility the States have, once they had accepted the ICJs jurisdiction, to comply with the decisions no matter how beneficial or not they may be. Hence, in order to verify if Colombia and Nicaragua must follow the 2012 judgment integrally or if are waived of this duty, it is only necessary to check if they both fit in article 36 of the Statute, about jurisdiction. If they do, they are obligated by article 94 to follow what it decides, no matter its terms.

The treaty that originated a big part of the issue and is known as the Pact of Bogotá is the American Treaty on Pacific Settlement, signed by Colombia on 30 April 1948 and ratified on 6 November 1968. Reading its article 2 is a good way of understanding its core goals:

ARTICLE II. The High Contracting Parties recognize the obligation to settle international controversies by regional procedures before referring them to the Security Council of the United Nations.

11 Article 36
1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.
2. The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
   a. the interpretation of a treaty;
   b. any question of international law;
   c. the existence of any fact which, if established, would constitute a breach of an international obligation;
   d. the nature or extent of the reparation to be made for the breach of an international obligation.
3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.
4. Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court.
5. Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.
6. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court (ICJ 1945).
Consequently, in the event that a controversy arises between two or more signatory states which, in the opinion of the parties, cannot be settled by direct negotiations through the usual diplomatic channels, the parties bind themselves to use the procedures established in the present Treaty, in the manner and under the conditions provided for in the following articles, or, alternatively, such special procedures as, in their opinion, will permit them to arrive at a solution (OAS 1948).

As both Parties of this litigation have signed the aforementioned treaty, the compliance with the 2012 judgment is nothing more than an observation of one of the bases of international law and international relations—the *pacta sunt servanda* principle. The signature of the treaty may be understood as the exercise of sovereignty, as long as this establishment of jurisdiction represents a giving up of the capacity to tackle with some of the controversies that may appear along the road of time. It is worth to say that this jurisdiction does not end with a denunciation of the Pact, concerning to the proceedings already established before the Pact’s denunciation.

Thus, an enforcement of the Court in relation to its judgments is not only necessary, but its absence would represent a violation to the rights of the High-Contracting Parties, once they have already chosen the ICJ as their impartial arbitrator.

### 4 CASE LAW

The implementation and enforcement of International Court of Justice’s judgments is of great importance to the stabilization of the international peace and security system, which States have been facing since the creation of the Permanent Court of International Justice (Mishra 2015). In this sense, the present case shows how difficult it is for States that wait for the implementation by the other parties of the judgment’s terms. This transformation from the theoretical binding of the Court’s decisions to the real and effective compliance of the parties with the judgment’s dispositions is a matter that international law pursues to understand in order to improve the United Nations’ mechanisms.

The Court has faced this specific problem of binding and enforcement of its decisions in three main situations (Tanzi 1995): in the *Anglo-Iranian Oil Company (United Kingdom v. Iran)* case; in the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* case; and in the *Application of the Convention on the Prevention*
and Punishment of the Crime of Genocide (Bosnia and Her-zegovina v. Serbia and Montenegro) case.

Understanding some key aspects of these cases may be useful for setting a decision in the present one and may strengthen ICJ’s power jurisprudence. This is why they will be addressed in this section.

4.1 THE ANGLO-IRANIAN OIL COMPANY (UNITED KINGDOM V. IRAN) CASE

The Anglo-Iranian Oil Company was the result of an agreement established by the governments of the United Kingdom and Iran in April 1933. This agreement has kept its force until 1951, when Iran declared the nationalization of the oil exploitation activity, resulting in losses for the Anglo-Iranian Oil Co. and the United Kingdom.

In this case, Iran requested the Court to declare no jurisdiction to judge the case, but before this preliminary objection could be analyzed, UK’s agent asked the Court to authorize some interim measures that would remain in force until the final decision regarding the jurisdiction of the ICJ. The intention was to assure that, during the time-lapse between the application and the final judgment, no more damage was done by what the United Kingdom considered Iranian unlawful actions.

These interim measures consisted of some dispositions such as: the prohibition to take any action capable to prejudice the rights of the other party in relation to an eventual decision on the merits; the obligation to avoid acts that might aggravate the dispute; the obligation to ensure the continuity of the commercial and industrial operations of the Anglo-Iranian Oil Co; the maintenance of the direction and management of the Company’s operations; and, finally, the establishment of a Board of Supervision composed by members appointed by each of the governments (ICJ 1952).

The court, in the preliminary judgment of 1951, authorized the measures asked by the United Kingdom and ordered Iran to follow them. Nevertheless, the country did not voluntarily enforce them. United Kingdom thus proposed a motion for the Security Council to enforce these orders requiring provisional measures, although article 94(2) of the United Nations Charter only provided the possibility of asking for enforcement to decisions and judgments of the Court.

As the United Kingdom has always been a permanent member to the Security Council, this proposition was rightly submitted to the analysis of
the Council. However, after a lot of discussion over the draft resolution submitted by the country, calling Iran to comply with the Court’s provisional measures, it was withdrawn.

This enforcement, however, if it had been approved by the Security Council, could not be understood as a revision of the judgment or a second instance of jurisdiction, as long as the Security Council does not have the power to question the Court’s decision, but only the responsibility to enforce the dispositions of its judgments in case it understands the parties had not complied with its obligations (Tanzi 1995).

When the Court decided, on July 22, 1952, that it had no jurisdiction to judge the case, the interim measures ceased its power, even though Iran had never respected it.

4.2 THE MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA (NICARAGUA V. UNITED STATES OF AMERICA) CASE

In its Application filed at the Registry of the Court on 9 April, 1984, the Republic of Nicaragua requested the Court to declare the United States of America guilty of a series of violations of principles of customary international law, to humanitarian law and other principles established in the UN Charter, as well as other rights established in other peace agreements. These violations included, although were not limited to, training, arming, equipping, financing and supplying the contra forces or otherwise encouraging, supporting and aiding military and paramilitary activities, as well as laying mines in the internal or territorial waters of the Republic of Nicaragua during the first months of 1984 (ICJ 1984).

In the aftermath of the final judgment on the merits, that took place on 27 June, 1986, the Permanent Mission of Nicaragua at the United Nations submitted a letter to the organization requesting a meeting of the Security Council as soon as possible in order to dispose about an urgent resolution that aimed at considering the non-compliance of the United States of America with the judgment’s dispositions. Being a political organ above all military issues, nonetheless, the Security Council would never approve a resolution against one of its permanent members.

As the United States used its veto power, no resolution was approved and the enforcement of the Court’s decision remained with no support of the Security Council. After the resolution was vetoed in the Security Council, the Republic of Nicaragua submitted an equal request to the General
Assembly of the United Nations, which approved almost unanimously. The only two States that voted with US against it were El Salvador and Israel (United Nations 1986).

**4.3 THE APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE (BOSNIA AND HERZEGOVINA V. SERBIA AND MONTENEGRO) CASE**

In this case, the Permanent Representative of Bosnia and Herzegovina to the United Nations addressed a letter to the President of the Security Council on 16 April, 1993, in order to inform that troops under the control of the Federal Republic of Yugoslavia were assaulting the city of Srebrenica, in a serious violation of the Court’s Order issued on 8 April, 1993, regarding the application of the Convention on the Prevention and Punishment of the Crime of Genocide.

The Order of the Court that Bosnia and Herzegovina claimed to be observed regarded to an obligation of the Federal Republic of Yugoslavia to “(…) ensure that military, paramilitary or irregular armed units which may be directed or supported by it as well as any organizations and persons which may be subject to its control, direction or influence do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide” (ICJ 1993b).

Again, the party, as in the Anglo-Iranian Oil Co. case, requested the Security Council to, under article 94(2) of the United Nations Charter, enforce an order that neither was a judgment nor a decision. The basis for the right to submit a provisional measure to the appreciation and enforcement of the Security Council is the probability of weakening of the Court’s power, as long as the “binding force of the final judgment would be frustrated if the interim measures aimed at preserving its efficacy were not legally binding” (Tanzi 1995, 564), in the words of the British representative in the Anglo-Iranian Oil Co. (United Kingdom v. Iran) case.

However, in this situation, the UNSC’s conduct was the opposite as it was seen concerning Anglo-Iranian case. The Security Council adopted quite immediately and unanimously the Resolution 819, demanding, among other actions, “the immediate cessation of armed attacks by Bosnian Serb paramilitary units against Srebrenica and their immediate withdrawal from the areas surrounding Srebrenica” (United Nations 1993).
The approval of this resolution without any judgment or decision of the Court represents a very strong and representative precedent, which cannot be left aside.

REFERENCES


INTERNATIONAL COURT OF JUSTICE

Press.


