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Defiance: A Political Alternative Lost in the Sea of Juridical Traditionalism*

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El Desacato: una alternativa política perdida en la marea del tradicionalismo jurídico

Défi : une alternative politique noyée dans l'océan du traditionalisme juridique

Desacato: uma alternativa política perdida no mar do tradicionalismo jurídico

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Abstract. Some International Law scholars have tried to shut down the political side of the International Juridical System. The contentious case between Nicaragua and Colombia, submitted to the International Court of Justice (ICJ), is an example of how this type of reasoning leads to disregard relevant defense mechanisms that would enable Colombia to obtain convenient results in the dispute.
Comprehensive understanding of the International Juridical System should be based on a dynamic combination of law and power-based politics. Therefore, defiance of an ICJ´s ruling, followed by the possibility of the Security Council not taking action against the non-compliant State, configures a scenario that empowers Colombia to transform Nicaragua´s juridical leeway into a useful advantage, in the highly political post-adjudicative phase of ICJ´s judgments, in order to find a more viable and long-standing solution for such ongoing international conflict.

Key Words: Defiance, International Court of Justice, International System, Power, National Interests, Non-compliance, Security Council.

Resumen. Algunos académicos del Derecho Internacional han intentado desconocer el componente político del Sistema Jurídico Internacional. El litigio entre Nicaragua y Colombia ante la Corte Internacional de Justicia (CIJ) constituye un claro ejemplo de cómo ese razonamiento conduce a dejar de lado mecanismos de defensa relevantes, que pueden resultar vitales para que Colombia obtenga resultados positivos en la disputa. Un entendimiento comprehensivo del Sistema Jurídico Internacional debe basarse en una combinación dinámica entre la ley, por un lado, y la política del poder y la cooperación estratégica, por el otro. Así pues, el desacato a una sentencia de la CIJ, seguido de la posibilidad de que el Consejo de Seguridad se abstenga de tomar acción en contra del Estado que incurrió en dicho incumplimiento, configura un escenario que empodera a Colombia para transformar la ventaja nicaragüense, en el ámbito meramente jurídico, en una prerrogativa útil en la fase post-adjudicativa –y eminentemente política– de los juzgamientos de la CIJ, con el fin de encontrar una solución más viable y duradera a dicho conflicto internacional.

Palabras Claves: Consejo de Seguridad, Corte Internacional de Justicia, desacato, incumplimiento, intereses nacionales, poder, Sistema Jurídico Internacional.

Résumé. Certains spécialistes de droit international ont essayé de démanteler l'aspect politique du Système juridique international. Le cas litigieux entre le Nicaragua et la Colombie, soumis à la Cour de Justice internationale (CJI), est un bon exemple pour démontrer comment ce genre de raisonnement peut mener à une méprise des mécanismes de défense pertinents qui pourraient permettre à la Colombie d'obtenir des résultats favorables dans le contentieux. Une compréhension totale du Système Juridique International devrait être fondée sur une combinaison dynamique du droit et du pouvoir basé sur la politique. C'est pourquoi, défier les règles de la CJI ainsi que donner au Conseil de Sécurité de l'ONU la possibilité de ne pas agir contre un État qui n'est pas en conformité pourrait configurer un scénario qui donnerait plus de pouvoirs à la Colombie pour transformer la marge de manœuvre juridique du Nicaragua en un avantage utile, en particulier dans la phase post-adjudicative extrêmement politique des décisions de la CJI. Ainsi, cela permettrait de trouver une solution plus viable et efficace sur le long terme pour résoudre ce genre de conflit international continu.

Mots clés. Conseil de Sécurité, Cour International de Justice, défi, Intérêts nationaux, non-conformité, Pouvoir, Système International.

Resumo. Alguns estudiosos do Direito Internacional tentaram isolar o Sistema Jurídico Internacional do seu lado político. O caso contencioso entre a Nicarágua e a Colômbia, submetido à Corte Internacional de Justiça (CIJ) é um exemplo de como esse tipo de raciocínio leva à desconsideração de mecanismos de defesa relevantes que permitiriam à Colômbia obter resultados convenientes na disputa. Uma compreensão abrangente do Sistema Jurídico Internacional deve ser baseada em uma combinação dinâmica de direito e

poderes políticos. Portanto, o desafio de uma decisão da Corte Internacional de Justiça, seguido pela possibilidade de o Conselho de Segurança das Nações Unidas não agir contra o Estado incumpridor, configura um cenário que capacita a Colômbia para transformar a margem de manobra jurídica da Nicarágua em uma vantagem útil, numa fase pós-adjudicativa altamente política das decisões da CIJ, a fim de encontrar uma solução mais viável e duradoura para esse conflito internacional em curso.

Palavras-chave. Concelho de Segurança das Nações Unidas, Corte Internacional de Justiça, desacato, incumprimento, interesse nacional, poder, sistema internacional.

Introduction

The very essence of the International Juridical System goes beyond mere rules and legal conceptions. In the end, such essence is profoundly political. However, some international law scholars haven´t recognized such phenomenon. For them, the decisions from the International Court of Justice (ICJ) can only be interpreted as juridical in nature. Therefore, in their view, every sentence produced by the ICJ has an absolute character, which means that it is irrefutable (ex ante), without even regarding the costs associated with obedience.

We must not forget that sovereignty is a key concept and a fundamental value in the International Juridical System. Nonetheless, such concept has suffered some historical modifications. Nowadays, sovereignty must be understood as a dynamic concept. Sovereign State interests are affected by factors such as political convenience and strategic cooperation.

When the ICJ issues a ruling, it is not producing some kind of lex superior that binds all States parties to the dispute. ICJ´s judgments could be more accurately understood as qualified juridical decisions that, later on, must be analyzed and, more importantly, adequately balanced, by the Executive and Legislative branches of the States parties.

Therefore, States are the ones that ultimately take whatever decision they deem convenient regarding an ICJ´s ruling. In other words, States are not obliged to comply with ICJ´s rulings from an ex ante perspective; ICJ´s rulings, then, are only part of the collection of juridical and political factors that States have to take into account when taking a certain decision to tackle a specific problem.

Bearing in mind the aforementioned considerations, let's move on towards the specific case that concerns us. In September – 2013, the Nicaraguan Representative to the ICJ, Mr. Carlos Argüello, stated that Colombia had to recognize its obligation to comply with the ICJ´s ruling regarding the Territorial and Maritime Dispute Case (ICJ, 2012) "sooner or later" (El Espectador, 2013). Unexpectedly, sometime afterwards, recognized Colombian lawyers, such as Mr. Lozano Simonelli and Ms. Galvis Patiño, agreed with such arguments.

According to Galvis Patiño, law must not be disobeyed when it is contrary to the interest of one of the involved parties (Kien y Ke, 2012).

It seems that, according to those international law scholars, the International Juridical System is, as Kelsen would describe it, rigid and homogeneous[1]. Therefore, ICJ´s rulings acquire an irre-

[1] Hans Kelsen argued that Law should be understood as a positivist normative system. In his view, Law was a very clear, complete, coherent and differentiated system. Therefore, any association of Law with political, sociological or any other "foreign" consideration was seen as deeply inconvenient, since it would end up altering Law´s pure nature.

futable character. If we agreed with such theses we would end up establishing some kind of World Government that is both illusory and inconvenient. On the contrary, we must acknowledge that the International Juridical System differs from internal juridical systems –the ones in each State– because the former makes constant remissions to the political sphere. As Pierre Bordieu states, the International Juridical System is not isolated and it is not completely differentiated from other systems. On the contrary, it is constantly communicating with political considerations.

In fact, the link between law and politics is explicit in the International Juridical System. Article 94 (2) of the UN Charter establishes that "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 taken to give effect to the judgment". In that sense, the heart of the International Juridical System has everything to do with politics.

As one can deduce from what is stated in article 94 (2), the binding character of ICJ´s rulings is directly related to the action, or better, the lack of action, that can be conducted by the Security Council. In the end, the States that make up such Council are the ones that decide over the enforcement of ICJ´s rulings. The ruling per se has no binding force in a practical level because there are no peremptory measures that would automatically oblige States to comply with it.

As professor Forsythe states:

> All courts and specially the ICJ rely primarily on voluntary cooperation for implementation of their judgments … The ICJ needs to pay attention to … State´s cooperation … authoritative clarifications of the law will not mean much, outside of traditional law schools, if such judgments have little impact on policy and power. (Forsythe, 1997. p. 396).

The considerations stated above lead us to conclude that States have the capacity to submerge in the waters of defiance. However, this skill should be practiced with responsibility and always keeping an eye on the political convenience of such a drastic measure. In order to "keep it safe", States must perform a reasonability test (test de razonabilidad o ponderación), that would give as a result the absolute inconvenience of complying with the ruling, prior to selecting defiance as a viable course of action.

Strategic Cooperation, Internal Situation and Compared Political Balance

When we talk about a reasonability test, we are referring to a type of test that would include three basic criteria. The first one can be labeled as external political convenience.

It refers to the diplomatic and political pressure that other States (Third Parties) would excerpt, as a result of the decision to a) comply with the ruling or b) not to comply with it.

The most general interest of Third Parties is to somehow develop a more stable international environment. They can do this by pressuring the Debtor State to comply with the ICJ´s ruling. In that way, they are preventing harsh measures such as diplomatic reprisals, sanctions, economic

blockades, and –on the contrary– they are promoting an objective juridical adjudication in order to solve the dispute.

Nonetheless, there is an important consideration to be made at this point. When Third Parties have direct subjective interests that would be achieved either by the Debtor State´s compliance, or via its non-compliance, those Third Parties will do everything they can to fulfill their subjective interests, no matter if they have to somehow throw aside the importance of the system´s stability (general interest). An example of this situation can be seen when the possibility of exploiting natural resources arises, for instance, through concessions or transactional agreements. There can also be other scenarios that would enable Third Parties to either support compliance, or non-compliance. The possibility of defending or increasing the Sphere of Political Influence can be one of them. When taking the decision to comply or not, the Debtor State must take into account these meaningful variables, since they modify the external political convenience of complying –or defying– a ruling.

According to Mearsheimer (1995, pp. 5-49), strategic cooperation arises between two or more States when the political consequences caused by a governmental decision benefit those States and place them in a position of competitive superiority (Porter, 1990) with regards to other States that supported the contrary policy. Therefore, defying an ICJ´s ruling would trigger strategic international cooperation when such decision benefits a given Third Party and, at the same time, the aforementioned Third Party and the Debtor State would end up being in a position of competitive superiority with regards to other Third Parties or to the very State that won the dispute before the ICJ (Creditor State).

When the Debtor State perceives that this situation takes place, it should seriously consider defying the ICJ´s ruling, since there is an alignment of subjective interests that could end up benefitting the Debtor State if it doesn´t comply. In this situation, the ruling per se would probably boast juridical value, but it certainly would lack the necessary political value to comply with it.

The second criterion that should be analyzed is the internal political convenience. If an ICJ´s ruling is contrary to the popular feeling of the citizens of the Debtor State, then complying with it can be a source of internal turmoil, which is not recommendable. In fact, if such situation takes place, complying could generate a political back-fire-effect.

The very purpose of the International Juridical System is to facilitate a higher level of harmony in the different States' interactions. Hence, complying with a ruling that is a considerable fountain of inner social unrest –due to the popular perception of it being "unfair"– is both irresponsible and contrary to the essence of the System, since the ultimate consequence could be a violent confrontation between the Debtor State and the Creditor State.

The third criterion can be labeled as the international political balance. If the Debtor State complies with a ruling that is clearly unfavorable and, as a result, its Political Sphere of Influence considerably diminishes, it would be incurring in an undeniable political mistake. Both its international dominance and weight would be jeopardized. Therefore, its capacities of negotiation and persuasion would be negatively affected in the near future (Baldwin, 2013, pp. 275-298). The same thing happens whenever a ruling affects the State´s territorial integrity or when the natural resources in possession of that State are attacked in such a way by the ruling, that complying would result in sacrificing economic stability and trade capacity.

The political foundation of the possibility of defying such a ruling has to do with the Debtor State losing competitive power and, therefore, endangering its political status in the midst of the International Community. However, the loss of natural resources, territorial integrity or scope of the Sphere of Political Influence must be greater than the reprisals that could be undertaken by the State that won the dispute in the ICJ and wants full compliance with the ruling. Two questions are relevant: is it absolutely necessary to defy the ICJ´s ruling in order to protect higher national interests? And: Does the Debtor State have the means to counter reprisals from the Creditor State in such a way that the possibility of those reprisals being more damaging than the ruling itself can be utterly dismissed?

Defiance in Practice

Having already analyzed the theoretical and political panorama of defiance, it is convenient to go through two precedents that are related to the way in which a State is able to take advantage of defiance as a useful political and juridical alternative.

The first one is the Military and Paramilitary Activities in and Against Nicaragua Case (Nicaragua v. United States), Judgment (1986) ICJ Rep. 14. In this case, the ICJ argued that the US was responsible for coercing the Government of Nicaragua, forcing it to act in a determined way. This was supposedly achieved via the support that the US gave to the Contras. The Contras, then, prepared and executed numerous acts leading to social and political turmoil in Nicaragua (ICJ, 1986, para. 241).

The ICJ determined that the US was responsible for the violation of several international obligations under customary law, such as not to intervene in the affairs of another State, not to use force against another State and not to violate the sovereignty of another State. Thus, the Court decided that the US had to economically compensate Nicaragua.

After the stage of judgment was over, the US decided not to comply with the ruling. Nicaragua, then, chose to take the case to the Security Council, via Article 94 (2) of the UN Charter. At this point, the nature of the dispute had a profound change. Before the Security Council seized of the matter, the dispute was entirely juridical, but from the moment Nicaragua decided that it was necessary to force the US to comply, the dispute transformed into a political one. The binding force of the judgment, hence, depends on political considerations.

The rules of the game changed. Nicaragua passed from having an advantage (in objective – juridical terms) to having a profound disadvantage (in subjective – political terms). Theodore Lieverman, who was part of the US legal advisory team, illustrates the change that the dispute suffered: By the time the advisory rounds with the legal team were over, President Reagan knew that there was a high probability of losing the case in the ICJ.

The US Government, then, took the decision to stop submitting memoires and performing any type of juridical defense in that scenario (Lieverman, 1986, pp. 295-320). It was a vain loss of resources. The masterstroke did not rely on the juridical side of the dispute; it was political. In the Security Council, the US had the capacity and the necessary power to counter any effect of the decision taken by the ICJ, and so it did (Posner, 2009, pp. 147-148).

The US representatives before the Council exercised veto power two times. In that way, the Security Council did not take any action against the Debtor State and rejected every single one of Nicaragua´s allegations.

Afterwards, Nicaragua took the case to the UN General Assembly with hopes of obtaining a favorable Resolution. Notwithstanding, strategic cooperation between the US, El Salvador and Israel frustrated Managua´s plans. One year later, the US and its main ally, Israel, voted against a Resolution that signaled the US as directly responsible for not complying with ICJ´s rulings.

As we can see, the effective use of strategic cooperation gave positive results for the US. The strictly legal attacks could not affect US national interests. The external political convenience of defiance was evident, since Israel (Third Party) valued its ties with the US in such a way that it considered prudent voting in favor of its historical ally. The US took advantage of such alliance and, therefore, frustrated Managua´s plans. With joint efforts, the US and Israel obtained a very high competitive power, evidently higher than the one from their counterparts. On the other hand, Managua´s efforts for establishing any kind of reprisal or retortion mechanisms were exiguous, since they could not possibly affect the US powerful economy. Therefore, examining the case though the lens of the international political balance, defiance was both viable and advisable.

The second relevant case is the Land and Maritime Boundary Between Cameroon and Nigeria Case (Cameroon v. Nigeria), Judgment (2002), ICJ Rep. 303. The ICJ adjudicated the Bakassi Peninsula to Cameroon. As a result, it ordered to clear the area from all Nigerian military personnel "expeditiously and without condition" (Bassey, 2010, p. 104). In response, the Government of Nigeria issued a statement declaring the ruling unacceptable.

President Olusegun Obasanjo said: "we want peace, but the interests of Nigeria will not be sacrificed" (BBC News, 2002).

During the post-judgment period, the British Government made a declaration reminding countries that ICJ´s decisions were obligatory in nature. Diplomatic pressure from London was substantial at the beginning. Nonetheless, later on, it decreased. In fact, some time afterwards, the United Kingdom merely asked Nigeria to "establish a dialogue with Cameroon to find a political way forward" (allAfrica, 2002).

The Obasanjo Administration did a great job in terms of putting into practice what professor Joseph Nye has labeled Soft Power, which is an essential concept for both political and juridical realism. By Soft Power we refer to a cluster of public policies and governmental declarations coming from the Debtor State that persuade Third Parties, or even persuade the State that won the dispute in international tribunals, to adopt a more convenient policy stance, closer to the Debtor State´s claims. In this case, Nigeria persuaded the UK into changing its diplomatic stance until the point that the latter became a mediator in the dispute, and not a State that favoured the ruling to be applied immediately and without further consideration.

In 2006, after years of mediation efforts by the UK and the UN Secretary General, Kofi Annan, Nigeria and Cameroon reached a comprehensive agreement by which the differences between the two countries were surmounted and both States agreed to a joint resolution of issues previously considered as highly conflictive.

Besides the clever use of persuasive power by the Government of Nigeria, it is important to note that, even setting apart from the apparent "legal path", Nigeria achieved a much more

solid and enduring solution for the contentious matter. At the same time, Nigeria never failed to protect its national interests. Complying, ex ante, with the ICJ´s ruling, would have jeopardized Nigeria´s interests and would have probably led to a future violent conflict between the two States.

The level of internal political convenience of the ruling was worryingly low. Obasanjo was under a lot of pressure from important political groups and tribal leaders that advocated for defending Nigeria´s national integrity and sovereignty. In that sense, naïvely complying with the ruling would have generated a great deal of internal quarrels. Even tough defiance of the ICJ´s ruling could be interpreted, a priori, as too risky or even "illegal", it was precisely that alternative, lost in the sea of juridical orthodoxy, the one that led to the construction of a peaceful, proactive and consensual dialogue between the two governments. In the end, defiance opened the door for a long-lasting solution.

In terms of international political balance, we can conclude that Nigeria conserved a privileged negotiating position and it exploited its comparative competitiveness so that, even when it directly defied the ICJ´s ruling, it was able to develop public policies of consociational (Lijphart, 1969, pp. 207-225) nature, to find common criteria with Cameroon that enabled both nations to take advantage of the Bakassi area, and to avoid any type of reprisal from the Creditor State or its political allies.

Finally, in terms of external political convenience, Nigeria decided to defy the ruling since, even when it did not have a great deal of significant allies and supports before starting the post-adjudicative phase (for instance, political support from a veto power), it trusted its capacities for changing the panorama by exercising Soft Power over the UK. Through a skillful persuasion strategy, Nigeria was able to transform the UK´s stance, from the one of an adversary, to the one of an strategic ally in order to find a solution that would, ultimately, favour –in a certain way– Nigeria´s national interests.

The Colombian Case

The ICJ´s ruling in the Territorial and Maritime Dispute Case was tough for Colombia. The borders it had with Nicaragua changed in a substantial manner. In the beginning, Colombian authorities were sure that the 82nd meridian was the historical limit that separated both countries. In fact, there were very old property titles that dated back to colonial times, and they all signaled a clear trend: historical Colombian sovereignty. In particular, the *Esguerra - Bárcenas Treaty* established limits between both countries. However, the Court gave little importance to this historical Treaty while adjudicating maritime territory. Therefore, Colombia lost a vast extension of such territory, calculated between 75,000 and 90,350 square kilometers (Stephens, 2012)[2].

[2] According to professor Tim Stephens, of the University of Sydney: "[There is a] tendency for the ICJ to reach Solomonic decisions that seek to keep both parties equally happy, or unhappy".

The most preoccupying consequence of the ruling was the loss of natural resources, including flora, fauna and oil reservoirs that are likely to have substantial capacities (Portafolio, 2014).

The map below shows the 82nd meridian –thick blue line–, as opposed to the thin red line, which represents the new boundary established by the Court. In an unexpected move, the ICJ broke the territorial integrity of the Colombian set of islands by generating enclaves for Quitasueño and Serrana, both of them completely surrounded by what, according to the Court, must be considered as Nicaraguan maritime territory. In practice, this means that every Colombian sailor and fisherman that wants to travel between Serrana, Quitasueño and the rest of the islands has to inevitably cross waters controlled by the Nicaraguan Navy. (See Figure 1).

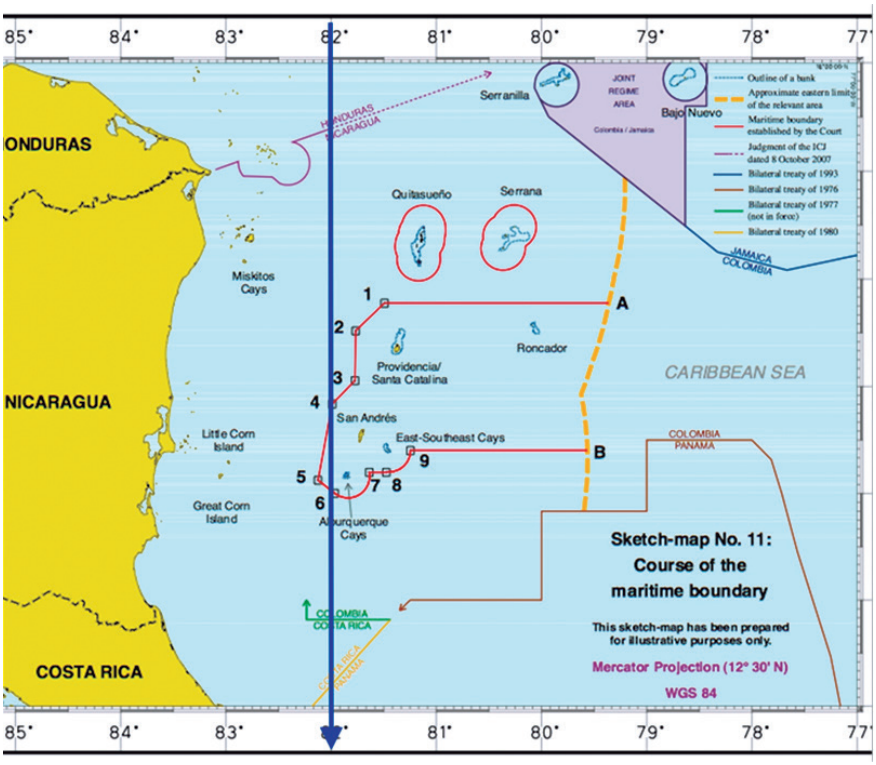

Figure 1. Course of the maritime boundary.

As a result, on November 27-2012, Colombia denounced the Pact of Bogotá, which was the basis for ICJ´s jurisdiction. However, the denunciation only took effect one year later, and it paved the way for another dispute with Nicaragua, which could result in the adjudication of an even greater portion of maritime territory to the latter. Taking into account that this last submission by Nicaragua to the ICJ took place within the one-year-period in which the denunciation did not have effects yet, the Court has jurisdiction and, therefore, it can seize of the matter.

According to the Application Instituting Proceedings, Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the

Nicaraguan Coast (Nicaragua v. Colombia), Filed in the Registry of the Court (September 2013), General List number 154, paragraph 2, Nicaragua expects the ICJ to decide about the following: i) the "precise course of the maritime boundary between Nicaragua and Colombia in the areas of the continental shelf which appertain to each of them beyond the boundaries determined by the Court in its Judgment of 19 November 2012" and ii) the "principles and rules of international law that determine the rights and duties of the two States in relation to the area of overlapping continental shelf claims and the use of its resources, pending the delimitation of the maritime boundary between them beyond 200 nautical miles from Nicaragua's coast".

Deep discomfort was felt in the streets of San Andrés and Providencia regarding the ICJ´s measures. The 2012 ruling was a common topic for islanders in coffee shops and restaurants, in the white-sand-beaches and even in Sunday family meals. Inside churches, priests prayed for divine courage to be brought down and gifted to Colombian leaders, in order to confront such distressing situation.

Aury Guerrero, Governor of San Andrés, and Arturo Robinson, Mayor of Providencia, expressed emphatic disagreement towards the ICJ´s ruling in a meeting with UN Secretary General, Ban Ki-moon. They asked for protection of both islanders' traditional way of life and maritime commercial activities.

Notwithstanding, the Government of Colombian President Juan Manuel Santos did not defy the ruling, but established its inapplicability. Such term is ambiguous. It could be interpreted as tacit defiance, but –at the same time-, it intends to show rhetorical respect for ICJ´s considerations. In the empirical plane, however, the aforementioned term is a source of uncertainty regarding sovereignty.

First, such uncertainty can be easily perceived due to the fact that Nicaragua´s President, Daniel Ortega, handed significant petroleum exploration concessions, as stated in the Petroleum Promotional Folder of Nicaragua–2012 and in the Acuerdo Presidencial 140 – 2013 3. Moreover, Ortega declared that "there isn´t any problem if the petroleum exploration takes place in the area adjudicated by the ICJ to Nicaragua" (Semana, 2013). If President Santos was trying to protect Colombia´s territorial integrity and its natural resources, his strategy was innocuous because, even when the Colombian Government declared the ruling´s inapplicability, Nicaragua is already benefitting from the practical consequences of such ruling.

Second, both the Colombian Navy and the Nicaraguan Navy have conducted military maneuvers in the area adjudicated by the ICJ. Empirically, sovereignty over the maritime territory is still being disputed between both countries. Jurisdictional control over the area is also disputed, with both Colombian and Nicaraguan migratory and police authorities conducting operations in the same area.

Major General Óscar Balladares (Nicaragua) stated that forces under his command have deployed operations and have exercised sovereignty well beyond the 82nd meridian (La Voz del sandinismo, 2012). In contrast, Admiral Hernando Wills, commander of the Colombian Navy, expressed that Colombian naval forces have been operating until the 82nd meridian, protec-

[3] Colombia´s Ministry of Foreign Affairs presented *Protest Note S-GAMA-29899 dated 29 July 2013*, and insisted through *Protest Note S-GAMA-28330 dated 13 August 2013*, in order to express deep discomfort towards Nicaragua´s exploration concessions, since they contravene Colombia´s sovereignty and hinder the protection of the *SeaFlower Natural Reservoir*.

ting the historical rights of the raizal fishermen that inhabit the set of islands and preventing Nicaraguan fishermen from incurring in predatory techniques. Moreover, the Colombian Navy has set a special objective in regards to protecting the stability of the SeaFlower Natural Reservoir. Also, Admiral Wills argued that Colombian forces are conducting tactical operations against drugs and arms trafficking, even in the disputed area.

Third, there are States that assure that the ruling affected their own borders, even when those borders were already established via bilateral treaties. In fact, Costa Rica, Honduras and Jamaica were not even parties in the dispute before the ICJ. Therefore, the situation as a whole is a source of juridical uncertainty and the affected States have already expressed discomfort towards the ICJ´s decision.

In conclusion, President Santos' strategy has proven to be a source of diplomatic, juridical and even economic instability. The door is still opened for Colombia to adopt a more straightforward stance. This assertive scenario must be labeled, not as mere inapplicability, but as direct defiance. Defiance, therefore, should be understood as significant and direct departure form prescribed behaviour (Young, 1979, p. 104). Even when this strategy may seem extreme, to the point that some might interpret that it as a call for anarchy in the International System, we must recognize that defiance is a source of juridical certainty, since the State´s position is transmitted in a way that there is no room for doubt. At the same time, defiance is a possibility under the dynamics of the International Juridical System and it should be regarded as a possible strategic path when a Court´s decision is not only unfavorable and unequivocally uncertain for Third Parties, but also an incentive for the perpetuation of conflict and confrontation between States.

Defiance, in that way, responds to the adequate mixture between Law and Politics that is evident from the relationships between States, since there is not any kind of "World Legislator" in the International System. Moreover, the possibility of defiance is contemplated in juridical terms, as we can clearly see in article 94 (2) of the UN Charter, which states that ICJ´s rulings have binding character, but such character depends on the enforcement task that can only be promoted by the Security Council. Therefore, defiance is the passage that links the juridical and the political sides of the System, and when political convenience dictates the inadequacy of abiding to an ICJ´s ruling, defiance becomes not only a possibility, but a recommendable course of action.

Through the Light of an International Realist System

Professor Philippe Couvreur has a good point about the true nature of the International Juridical System. According to him, ICJ´s judgments can be "tempered by the action of political alliances which, depending on the case, will be expressed in the fate reserved for the procedures set in motion before the Security Council or the General Assembly" (Couvreur, 1997, p. 111).

We agree with Couvreur´s reasoning. In fact, these conclusions can be applied to the Nicaragua v. Colombia Case. In order to demonstrate the prior affirmation, let´s analyze each of the Realist factors that are part of the reasonability test being applied to the case that concerns us.

First, let´s discuss the international political balance. It is clear that Colombia has incentives to defy the ruling. The country´s integrity is being threatened because of the ICJ´s decision. If

the judgment is complied with, then the unity of the set of islands that includes San Andrés and Providencia, as well as all the Cays (i.e. Quitasueño, Serrana, etc.), will be broken. The historical rights that the raizal people have been having for centuries will be erased. Their modus vivendi will forcefully change, and even their ancient traditions and their cosmology will be modified.

At the same time, Colombia´s economic preponderance will be affected by the judgment. As a consequence, its negotiating capacity will be undermined. There will be a significant loss of opportunity (*perte d'opportunité*) to exploit highly valued natural resources such as oil. As if there were not enough incentives to defy the judgment with what we expressed until now, we need to sum the loss of the enormous ecologic diversity present in the SeaFlower Natural Reservoir. To state it briefly, if the judgment was accepted, Colombia would judgment lose influence both in the political and in the economic sphere.

On the other hand, the military balance situation is another important incentive to defy the judgment. Rational choice indicates that Colombia wouldn´t be a responsible actor if it decided to defy a ruling that could easily be enforced by a foreign power. This decision could lead to disastrous consequences, equivalent to those suffered by Argentine in the Maldives Dispute (1982). There would be a doubtful - greyish scenario if Colombia did the same thing in relation with another State with similar military capacity, since the costs of defiance could well surpass its benefits. However, in the sub examine case, Colombia has a clear military advantage over Nicaragua. In fact, the message that would be sent by conducting military operations that would show defiance towards the ruling works as a dissuasive mechanism to halt Nicaragua´s expansionist claims.

Meanwhile, if Colombia complies with the ruling, it would diminish its military, police and migratory capacity to work against drug, arms and black market trafficking. At the same time, Colombia would have little margin in the Caribbean to conduct joint operations with its allies in order to diminish the financial capabilities of illegal groups such as the FARC and the emerging criminal cells (Bacrim)4.

Second, let´s analyze the internal political convenience. As mentioned before, both the Governor of San Andrés and the Major of Providencia expressed deep discomfort and reluctance to comply with the ruling. Therefore, if the Central Colombian Government continues to show an ambiguous stance, such action would be interpreted, in the mid-term, as lack of consideration for the raizal people, which are the true inhabitants of the set of islands and, at the same time, have a Constitutional right to self-determination. Therefore, President Santos would not only be violating its Constitutional obligation to preserve the integrity of the national territory, but also would be denying a Constitutional right to a vulnerable ethnic group, subject to enhanced legal protection.

Besides that, the Colombian President would be endangering the power-balance inside the Government itself. He would be disregarding strong announcements by high-ranking officials that perceive the ICJ´s ruling as inconvenient. As stated by the President of the Consejo de Estado, a very important judicial organ: "We lost sea, we lost maritime platform, and we were left with an enclave in San Andrés and the Cays, something that could be predicted since 2007, when the Government decided to let a Court decide over a Treaty that was already recognized by both parties. This is another event in which we lost territory [besides the Panamá loss]. With the ICJ´s decision, we lost waters that generate richness" (El Tiempo, 2012).

4 This consideration also affects the *internal political balance* factor.

Additionally, the most important opposition party in Colombia, the Centro Democrático, with more than 45 % of votes in the last presidential elections, would be ready to politically capitalize on such course of action. One of the most important political initiatives that the Centro Democrático´s Chief, Óscar Iván Zuluaga, has been supporting is sending a whole contingent of military ships to the 82nd meridian, to state a clear line of defense of Colombia´s sovereignty. The desires and thoughts of such a great percentage of people cannot be easily disregarded, not in the short run, and even less in the long run.

Third, it is important to take into account the external political convenience of defying the ICJ´s ruling. This is a substantial point that will be analyzed in the next two chapters. For now, it is necessary to understand that, even when the international political balance and the internal political convenience were factors that pointed towards the clear advantages of defying the ICJ´s ruling, the external political convenience can be highly complex and needs to be analyzed in depth before concluding that points in the same direction.

The Security Council: Link between International Law and International Politics

The UN Security Council is the only institutional enforcer in the International Juridical System, as it is clearly stated in article 24 of the UN Charter (Charter of the UN, 1945, Chapter 5, Article 24) 5. Moreover, article 25 contains the obligation of all UN members to accept and comply with every decision taken by the Council.

The internal dynamics of the Security Council are completely political. Each of the five permanent members has veto power. Therefore, if a State –such as Nicaragua– uses the provision in article 94 (2) in order for the Security Council´s members to determine that non-compliance is a "threat to international peace and security" and, consequently, decide to impose sanctions or take measures that force the Debtor State to comply (Aust, 2010. p. 427), there is a risk that the Pleading State (Nicaragua) must be subjected to. Citing professor Attila Tanzi, such risk is that "the political evaluations of the Council on a given case might differ from the stand taken by the ICJ on the basis of purely legal reasoning" (Tanzi, 1995, p. 542).

It is precisely here where strategic cooperation comes into play. As professor Joseph Nye states, Colombia can use Soft Power to persuade the US in order for it to support the South American country´s defiance position (Nye, 2011, p. 22).

For that purpose, it is useful to take a look back at the Nicaragua v. USA Case. During the dispute, the US used diplomatically convincing tactics to reinforce its relationship with Israel. Israel, then, supported the US in the two General Assembly meetings. Thanks to strategic cooperation, Israel and the US overcame the pressure of tens of States that were searching for US compliance with the ICJ´s ruling.

[5] Charter of the UN, (1945, Chapter 5, Article 24) "in order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf".

It is reasonable to recommend the same course of action for Colombia. The South American country should take advantage of the close relationship it has built with the US for the last decades. In fact, the US perceives Colombia as a commercial partner, since both countries recently signed an FTA. The US also perceives Colombia as a military ally, since both have developed anti-drugs and anti-insurgence policies –moreover, from the beginning of Plan Colombia in the 90´s, the military relationship between the two countries has developed in astounding proportions–. Finally, the US sees Colombia as a trusted political ally, since the latter is one of the only South American countries that oppose the "anti-yankee" and the "anti-imperialism" policies promoted by the ALBA Group 6. Hence, Colombia should implement active diplomacy with the US. Active diplomacy refers to the satisfaction of both States' subjective interests thanks to action taken by both States, cooperatively, to achieve their goals. In that sense, Colombia could establish US support in the Nicaragua v. Colombia Case as conditio sine qua non for Bogotá to keep supporting the US anti-drug agenda. The US would, in turn, consider that handing support for Colombia in this matter is essential if it wants to keep a Sphere of Political Influence in such a volatile context as the Latin American one. Without Colombia´s support, the ALBA´s radical-leftist agenda could penetrate and dominate the Latin American political reality in a deeper and dangerous way.

Therefore, the subjective interests of a Third Party (the US) and the ones of Colombia gather around the same axis. Thanks to the Third Party's subjective indirect motivations, there can be enough incentives to defy the ICJ´s ruling.

A priori, the US might not have a significant interest in using its veto power and its political influence to favour Colombia both in the Security Council and in the UN General Assembly. However, a posteriori, given the numerous indirect US subjective interests, the political convenience scenario can tilt to the side of defiance. Even more so when taking into account that Colombia has another negotiation technique at hand. Due to the fact that there are oil reservoirs at stake, the Colombian Government could propose that US companies could start the exploration of such reservoirs. In that way, the external political convenience of defiance is greater, since it provides a comparative advantage for Colombia and the US, in detriment of Nicaragua and its petroleum exploration partners. At the same time, the US would have a direct economic interest involved in the dispute (oil exploration concessions). If Colombia effectively triggers both direct and indirect interests of a Third Party (the US), via Soft Power diplomatic persuasion techniques, the political convenience factor of defiance can increase in a substantial way.

At the end of the day, purely juridical considerations are not useful to determine the outcome of an ICJ´s judgment. A realist approach should focus on strategic cooperation, since merely juridical considerations can become superfluous when subjective interests come into play and when those interests mold the external political convenience factor. Taking that into account, US support, expressed via its veto power, can lead to a completely different scenario because of its ability to halt actions intended to force Colombia´s compliance with the ruling. As professor Urueña states: "power, in its most efficient version, is not imposed via decisions, but via the non-adoption of certain decisions" (Urueña, 2008, p. 51), as could happen in the Security Council if we give enough weight to the political (realist) side of the International System.

6 Alianza Bolivariana para los Pueblos de Nuestra América, whose members are: Antigua and Barbuda, Bolivia, Cuba, Dominica, Ecuador, Nicaragua, Saint Lucia, Saint Vincent and the Grenadines, Suriname and Venezuela.

Reprisals, Action and Reaction

Last, but not least, it is convenient to evaluate the consequences that defiance would imply for Colombia. These consequences are derived from the pacta sunt servanda principle (ICJ, 2013, para. 7). Even though a traditionalistic view interprets this principle as irreversible and immutable, as Galvis Patiño and Lozano Simonelli exposed on their view about this Case, we consider it to be ductile and ponderable, as stated by Robert Alexy on his general theory about principles (Alexy, 2000). On the one hand, the principle is ponderable in light of national interests and the capacity to exercise power (both in its Hard and Soft variables). On the other hand, it is ductile when we relate it to factors such as external and internal political convenience and international political balance. All of this is based on that essential consideration that the International Juridical System is not centralized and it lacks an objective juridical enforcer, as well as a "World Legislator". Therefore, international cooperation and the constant search for competitive advantages are the true characteristics that rule the International System, even more so in controversial cases such as the Nicaragua v. Colombia one.

Nicaragua, being attached to the restrictive vision of the pacta sunt servanda principle, and certainly expecting ICJ´s rulings to be observed as erga omnes laws for all States, has developed a series of actions to force Colombia´s compliance. In addition to its 2013 Application Instituting Proceedings to the ICJ, in October – 2014 it presented a Memoire before the Court to sustain another legal controversy against Colombia. This new controversy has a sui generis nature because the Central American State expects the ICJ to decide upon Colombia´s inapplicability of the 2012 ruling, which is unprecedented.

The Court could pronounce a ruling in terms of stating the "obligation" of Colombia´s compliance. Nevertheless, Managua´s strategy could become harmless when analyzing the binding character of a ruling of this nature. Again, if Nicaragua really wants to oblige –in realist terms, and not merely in symbolic ones– Colombia to comply, the final decision would be, again, in the hands of the Security Council.

Apart from that, Nicaragua could try to use the principle of Self-Defense. At first sight, we must remember that according to article 2 (4) of the UN Charter, the use of force is strictly prohibited as a tool to yield compliance to an ICJ´s ruling. Even so, the controversial element is that there are Colombian military forces beyond the border established by the ICJ on the 2012 judgment, in what appears to be Nicaraguan territory. Hence, Nicaragua could argue that the presence and constant activity of foreign forces in its territory constitutes an aggression (GA Res. 29, 3314, 1974, December)[7] [8].

[7] According to the *GA Res. 29/3314, 14 December 1974* definition of *aggression* [interpreted as customary law by the ICJ in the *Military and Paramilitary Activities In and Against Nicaragua Case* (Nicaragua v. USA), Judgment (1986) ICJ Rep. 14, paragraph 195] an act of *aggression* includes: "The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof". Based on that definition by the GA, summed up with the considerations of the SC when it "condemned South Africa for military incursions into Angola", labeling them as "hostile and unprovoked *acts of aggression*" (*SC Res. 577, 6 December 1985*), Colombia´s constant military presence and operations beyond the limit that the ICJ established on its 2012 Judgment, could be interpreted as acts of *aggression*.

[8] For more information about a precise definition of aggression, it is recommendable to read the following article: Ohlin, Jens. Aggression. [Online]. Oxford Public International Law. [Consulted: December 3 – 2014]. Available at: <http://opil.ouplaw.com/view/10.1093/law/9780199238323.001.0001/law-9780199238323-div1-229>

Nonetheless, this argument can be easily refuted from a juridical point of view. First, according to professor Vaughan Lowe, "it is necessary to distinguish attacks from simple violations of sovereignty. An attack must be intentional. The reference to the aim for which force is threatened or used seems to me to be necessary in order to distinguish an attack from a broader category of cross-frontier violence" (Vaughan, 2005, p. 16).

Second, in the Case Concerning United States Diplomatic and Consular Staff in Tehran, the ICJ concluded that even when a direct order emanated from an ICJ´s ruling was violated, the Creditor-State was not legitimated to use force to yield the Debtor´s compliance:

"No doubt the United States Government may have had understandable feelings of frustration at Iran's long-continued detention of the hostages, notwithstanding (…) the Court's own Order of 15 December 1979 calling expressly for their immediate release. Nevertheless (…) the Court cannot fail to express its concern in regard to the United States' incursion into Iran (…) no action was to be taken by either party which might aggravate the tension between the two countries" (ICJ, 1980, para. 93).

Now, regarding the strategic and military aspect, it is evident that the presence of the Colombian frigates patrolling areas which are adjacent to the 82nd meridian represents an act of dissuasion against any Nicaraguan attempt to conduct operations whose objective would be to forcefully portray Nicaragua´s sovereignty over that territory. Nicaragua´s desires are completely blocked by what is known as inaction by dissuasion (Úbeda-Portugués, 2010, p.134). Rational choice leads Managua to believe that any violent action against Colombia would be a source of immediate and devastating retaliation. Human, military and economic losses would be so high that Nicaragua prefers not to act. Furthermore, if Colombia defied the ruling and placed a whole group of frigates and corvettes in place, all along the 82nd meridian, the dissuasive technique would have an even greater effect.

Another possible consequence derived from defiance is the extension of a pre-existing Nicaraguan strategy, which is trying to discredit Colombia in the eyes of the International Community. This strategy could be labeled as a type of retortion from the juridical point of view, since it is not an illegal nor an aggressive act against Colombia, but an act of unfriendliness (Rosenne and Ronen, 2006, p. 225).

The Nicaraguan Minister of Foreign Affairs, Francisco Aguirre, declared that if Colombia failed to comply with the ICJ´s ruling, the case would be taken to the Organization of American States (OAS) and to the UN General Assembly. He also said that Nicaragua had an international lobbying plan to prevent governments from supporting Colombia (El Espectador, 2012). This is a predictable consequence since "a State that has suffered prejudice through the failure of the judgment debtor to comply with a judgment to which the two States are parties, has broad possibilities of diplomatic action" (Rosenne and Ronen, 2006, p. 230).

Colombia, therefore, must be prepared to bring together diplomatic efforts with other States whose borders were illegitimately modified by the 2012 ICJ´s ruling. In this way, a Diplomatic Pressure Group can be created. Its objective would be to demonstrate the inconvenience of the entry into force of the 2012 ruling[9], before international fora.

[9] Which was, at the same time, the trigger for the most recent dispute between Nicaragua and Colombia before the ICJ.

Also, it would be useful that Colombia combined Hard Power techniques, such as military dissuasion, the strategic alliance with the US in the Security Council or the formal declaration of defiance towards the ICJ´s 2012 ruling and towards every other ruling derived from that one, with Soft Power actions such as the integration of the Diplomatic Pressure Group. In that way, the adequate blend of power and influences can give rise to what Professor Nye defined as Smart Power. But, which other actions can be taken in order to accompany or reinforce diplomatic pressure, so that the Soft Power techniques would be more effective? At this point, Colombia could think about trying to convince Third Parties, such as Chile and Peru, about the necessity of cooperation towards the decision of not complying with the ICJ´s ruling.

Chile and Peru were involved in a recent dispute brought to the ICJ. Both States decided, in unison, to comply with the corresponding ruling (ICJ, 2014, General List Number, 137). According to Gustavo Meza Cuadra, Peruvian Ambassador to the United Nations, "both parties determined, in a joint manner, the geographical coordinates of the maritime boundary … within two months from the moment the Court´s ruling took place. This constitutes an example from Peru and Chile to the rest of the world" (El Peruano, 2014).

Apparently, the position exhibited by Peru and Chile is contrary to the defiance stance that Colombia could adopt. Nonetheless, we must not forget that Nigeria was able to influence the United Kingdom in such a way that the latter completely changed its position in regards to the ICJ´s Bakassi ruling. Nigeria´s diplomatic measures were effective. In the same way, Colombia could use diplomatic channels to try and convince Chile and Peru that Bogotá is open to negotiating with Managua, as any other democratic and reasonable State in that same situation. Colombia should demonstrate that it is ready to discuss border policies with Nicaragua, if and only if the integrity of the set of islands is thoroughly respected, alongside with the ancestral rights of the raizales to navigate and fish freely. At the same time, respect for Colombia´s natural resources is fundamental if Nicaragua wants to negotiate, and those resources include oil deposits, along with flora and fauna present in the SeaFlower Reservoir. The last essential condition for negotiation would be the possibility of conducing joint operations against black market trafficking and other illegal activities in the Caribbean area.

Taking into account all of the above, defiance should not be interpreted as a unilateral and arbitrary act, but as a call for the States involved so that they can proceed to find common ground to negotiate and so that they can assume the responsibility to dialogue in order to find deeper solutions that would be more viable in the long run. For that purpose, the international cooperation of countries that Colombia considers its brother nations, such as Peru and Chile, is fundamental.

Conclusion

The exiguous view that some scholars exhibit about the apparently limited nature of the International Judiciary System leads to a very shortsighted understanding of the relationships between States and the decisions taken by the ICJ and the Security Council. According to these scholars, States are obliged to blindly comply with ICJ´s rulings, regardless of the costs of obe-

dience. In reality, ICJ´s rulings only have binding character when the juridical plane overlaps with the political one. Therefore, the UN Security Council is the only institutional enforcer of ICJ´s rulings, and the mechanics of such Organ are entirely political. As perceived in the Nigeria v. Cameroon Case and in the Nicaragua v. USA Case, both strategic cooperation and political convenience must be the guiding concepts for States involved in controversial or greyish ICJ´s decisions. At the same time, a pondered balance of the three factors involved in the reasonability test is vital.

Defiance of ICJ´s decisions has to stop being a taboo topic, perceived as illegitimate or illegal. Contrary to what some believe, naïve compliance of ICJ´s rulings can lead to protracted conflict and violence between nations. In the long run, such ingenuity is punished with political instability.

Defiance has to be understood as an ultima ratio scenario of defense of the rights of States, when a ruling has deeply affected their national interests. Far from being a source of anarchy, the idea that the International Juridical System has a political component that is both inherent and fundamental, as it can be inferred from article 94 (2) of the UN Charter, must be the source of new developments and techniques that give rise to long-term solutions when sovereignty is threatened.

Maybe, a remission to versatile diplomatic channels, instead of walking the steep path of juridical rigidity, would lead us to understand that the post-adjudicative phase of ICJ´s rulings is highly political and that such nature should be exploited to reveal controversial matters in public fora, such as the UN General Assembly or regional stances, so that States can find consociational solutions for exacerbated international conflicts (Guzzini, 1998) 10.

The stability of the International System depends on alliances and the legitimate use of power, both in its Soft and in its Hard nature, or even in a combination of both. The veil of juridical enforcement should be pierced since it is only an illusion. International Relations are not guided by a "World Legislator" who creates binding rules for all States. Only through the use of both power and cooperation, States can develop solid and deeper solutions to their controversies, solutions that will prove to be real in the long run, and not merely short-term illusions that lead to greater disputes.

10 Juridical Realism understands diplomacy as a practice that leads to achieve an adequate balance of power. Such balance is necessary to find ways to overcome conflicts; ways that are always based on dialogue and mutual cooperation. The Realist view that we favour contrasts with the usual critique of Realism that tends to disqualify it as anarchic or bellicose. For deeper understanding of Realism and its relationship with Law and International Relations, the following text could be insightful: Guzzini, Stefano. Realism in International Relations and International Political Economy. Bristol, Routledge, 1998.

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