Constitutions Challenging the International Court of Justice's Jurisdiction to Adjudicate Territorial Disputes in Latin America

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Abstract

Latin America has shown an increment in litigation before the international Court of Justice (ICJ) in cases related to territorial and maritime delimitation disputes. The ICJ has been their 'natural' jurisdiction thanks to broad competence clauses included in regional dispute settlement treaties such as the Pact of Bogotá. As a consequence of this increased litigation and the variety of results attained in judgements by the ICJ defining boundaries and sovereign rights around Latin America, a strange behaviour has become common place between the litigating States when they are not pleased with

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the result. Several Latin American States have opposed their constitutions to the ICJ judgements, invoking a particular constitutional clause, common in the regional historic embrace of the uti possidetis iuris principle, known as the 'constitutional territory clause'.

Keywords

International Court of Justice – Territorial Disputes

I. Introduction

There has been an increase in litigation before the International Court of Justice originating in Latin America in cases related to territorial and maritime delimitation disputes.[1] The ICJ has been their 'natural' jurisdiction thanks to broad competence clauses included in regional dispute settlement treaties[2] such as the Pact of Bogotá[3]. As a consequence of this increased litigation and the variety of results attained in judgements by the ICJ defining boundaries and sovereign rights around Latin America, a strange behaviour has become commonplace between the litigating States when they are not pleased with the result. Several Latin American States have set their constitutions in opposition to the ICJ judgements, by invoking a particular constitutional clause, common in the regional historic embrace of the *uti possidetis iuris* principle, known as the 'constitutional territory clause'.

This clause, which defines the national territory from a constitutional law point of view, has been invoked before constitutional courts or even amended to challenge the jurisdiction of the ICJ to resolve territorial disputes through

1 The present chapter is an update and a continuation of the research started in a recent contribution entitled Walter Arévalo-Ramírez, 'Resistance to Territorial and Maritime Delimitation Judgements of the International Court of Justice and Clashes with "Territory Clauses" in the Constitutions of Latin American States' LJIL 35 (2022), 185-208, which analyses the notion of constitutional resistance to international law under the concept of authority and backlash to international courts. The ongoing research developed in this paper, which includes the most recent cases of resistance to the ICJ, like the case of Venezuela (2019-Ongoing) and Colombia (2012-2022) was presented in the AjV Event at the University of Bonn in 2021 about 'Jurisdiction in International Law'. The author wishes to express his gratitude to MPIL for the research stay granted in 2022, in which a substantial portion of this contribution was developed.

2 Maria Teresa Infante Caffi. 'The Pact of Bogota: Cases and Practice', Anuario Colombiano de Derecho Internacional 10 (2017), 85.

3 Article XXXI. American Treaty on Pacific Settlement of Disputes. Pact of Bogotá signed at Bogotá, 30 April 1948.

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an international court judgement. This article studies these local challenges to international jurisdiction through the lens of the notion of constitutionalised forms of resistance to international jurisdictions. These constitutional challenges to international dispute settlement pose a threat not only to the jurisdiction of international tribunals, but also to the compliance with and authority of their judgements.

This article analyses the jurisdictional challenges to international law arising from the Latin American experience before the ICJ[4] through the application of such specific behaviours as the reinterpretation of constitutional territory clauses to challenge the jurisdiction of international courts; the 'domestic nullification' of international judgements by invoking local judicial review of an international judgement under the territory clause; the selective and improper 'cherry-picking' process of constitutionalisation of international judgements in the territory clause via constitutional reform to challenge the jurisdiction of the ICJ over disputes not mentioned in the constitution (considering some States have either 'constitutionalised' certain ICJ judgements in their territory clause and neglected others), and the enactment of legislation against the international jurisdictions and the content of their judgements.

Accordingly, this contribution first explains the nature of the territory clauses in Latin American constitutions, their relevance to domestic law, and their use as the source for diverse jurisdictional challenges.

Secondly, the article explores examples of the national constitutional challenges to the jurisdiction or implementation of ICJ judgements by presenting five cases: Nicaragua, Honduras, El Salvador, Colombia, and Venezuela. In these cases, national constitutions have been used to challenge the exercise of jurisdiction by the ICJ or to challenge, *ex post facto,* the outcome of an international dispute. The article aims to describe the particular mistakes in the legal reasoning of opposing the constitution against the ICJ in each case.

II. The Constitution as a Source of Jurisdictional Challenges to International Law

Delimitation disputes in Latin America and their international settlement must face a constitutional reality: territory clauses are common in Latin American constitutions. Whether as particular articles or as complex sections

4 Paula Wojcikiewicz Almeida, Júlia Rodrigues Costa de Serpa Brandão and Ananda Menegotto Weingärtner, *A Latin American Guide to the International Court of Justice Case Law* (Newcastle upon Tyne, UK: Cambridge Scholars Publishing 2016).

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that formally describe the geographical features of the State, they often constitutionalise the boundaries that the State recognises by reference to other domestic norms or sources of international law such as boundary treaties. When describing the national territory, they also refer to international law concepts such as the extent of the territorial sea.

Several authors of constitutional theory and comparative law, such as Miller, Kelsen, or Cassese[5] have envisaged categories of constitutional clauses that relate to international law or foreign policy. Nonetheless, these classifications usually refer to clauses related to the ratification of treaties or to the hierarchy of treaties within domestic law. They do not consider territory clauses or other references to territory within the constitution as clauses that could be used by local stakeholders to defy international law by challenging the competence of dispute settlement mechanisms to entertain territorial claims, as has happened in reaction to the growing litigation in this field before the ICJ.

Territory clauses are not simple references to territory incorporated in the constitutions merely for historical purposes. They have deep legal roots as part of the region's heritage concerning *uti possidetis iuris*.[6] As remarked by the ICJ in the *Case Concerning the Frontier Dispute* (Burkina Faso v. Republic of Mali), 22 December 1986, p. 20, the principle originated in Latin America as a proclamation of the preservation of the internal boundaries of the different colonies that emerged as States following each of their independence from the Kingdom of Spain, when these internal boundaries became their international delimitations. The achievement of such territorial rights and limits, further embedded the practice of Latin American States to include both the principle and the description of their territory in their declarations of independence and their resulting constitutions. (i. e. Constitution of Colombia, 1886),thus leading to strong territorial clauses.

These clauses can interface with international law in negative or positive ways. They can constitute express remissions to fundamental concepts of international law such as those contained in the law of the seas, but they can also define territorial spaces in a way that might they appear constitutional, but which can collide with customary international law (fundamental for the compliance with ICJ judgements regarding territory in the region). An example of this would be the manipulation of internationally recognised concepts into locally-expanded notions, like 'mar patrimonial' in contradic-

5 Antonio Cassese, 'Modern Constitutions and International Law (Volume 192)' in: *Collected Courses of the Hague Academy of International Law* (Leiden: Martinus Nijhoff 1985). See also Jonathan Miller, 'A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process', Am. J. Comp. L. 51 (2003), 839-886.

6 Malcolm N. Shaw, 'The Heritage of States: The Principle of uti possidetis juris Today', BYIL 67 (1997), 75-154.

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tion to 'territorial sea', or using 'aguas territoriales' rather than the widely accepted different zones of up to 200 miles from the coastline, as understood by modern international law and the ICJ.

III. The Nature and Content of the Territory Clause and Its Wide Presence in Latin American Constitutions

References to the concept of 'territory' are commonplace in modern constitutions for many purposes.[7] Mostly, such references to the concept are included in relation to other principles of municipal law that have territorial effects or derive their consequences from a particular territorial situation. Several constitutions in the world include the word 'territory' for matters of nationality (*ius soli*), or when describing the right of asylum. In administrative sections related to the branches of government, constitutions often mention the 'territory' when describing federal and municipal jurisdictions, or the reach of the government agencies. It is also commonplace for constitutions to mention the territory in regard to which body is competent to participate in boundary treaties.

All 35 American constitutions are among the 168 constitutions in the world that mention the notion of territory. Their use of the notion goes further than noted above, and is not only a mere textual mention of the word for municipal purposes. 32 Latin American Constitutions include a specific 'Artículo sobre el Territorio', which we have categorised under the concept of 'territory clause'.[8] Several of these territory clauses can be traced to earlier versions of the constitutions (e. g. Article 3 of the 1886 Colombian Constitution),[9] which included the recognition of the *uti possidetis* doctrine in Latin

7 See Project Constitute. A detailed database of all the available constitutions of the world. <https://www.constituteproject.org/>, accessed September 2018.

8 Relevant Territory Clauses in Latin American Constitutions Include: Belize (Section 1), Bolivia (Article 267), Brazil (Article 20 ss), Costa Rica (Article 6), Colombia (Article 101), Cuba (Article 11), Ecuador (Article 4), El Salvador (Article 84), Granada (Article 2), Guatemala (Article 142), Haiti (Article 8), Mexico (Article 27), Nicaragua (Article 10), Dominican Republic (Section I, Chapter III), Honduras (Article 9), Venezuela (Chapter I), Trinidad and Tobago (Title I).

9 Article 3, Colombian Constitution 1886
'The limits of the Republic are the same that in 1810 separated the Viceroyalty of New Granada from the Captaincy General of Venezuela and Guatemala, the Viceroyalty of Peru, and the Portuguese possessions of Brazil; and provisionally, with respect to Ecuador, those designated in the Treaty of July 9, 1856. The dividing lines of Colombia with the neighboring nations will be definitively established by Public Treaties, and these may be separated from the principle of uti possidetis of law of 1810.'

America.[10] The territory clauses nowadays formally and expressly prescribe the geographical composition of the State, including detailed lists of landforms and topography, listing mountains, islands, rivers, etc.[11] Although their primary function is to describe and constitutionalise the territorial features as resources of the State, these clauses usually mention international law notions that acquired relevance to the State resulting from recent developments arising out of particular international law regimes; this includes mentioning fishing zones, the continental shelf, the geostationary orbit, the airspace and many other spaces regulated by international law as part of the national territory.

The way in which States interpret their constitution and their territory clause in Latin America is crucial to the authority of the ICJ and to the compliance with ICJ judgements, just as a proper interpretation of the constitutional norms regarding human rights[12] has been crucial to understanding challenges to such other tribunals in the region as the Inter-American Court of Human Rights[13]. Even though several Latin American regimes include 'supremacy clauses', which state that international treaties and principles are binding, delicate issues like sovereignty or territory have led national authorities to invoke the territory clause and produce a movement of resistance against international judgements when such judgements modify the boundaries or territorial features of the State.

Article 6 of the Constitution of Costa Rica (1975), provides an example of a typical territorial clause. It includes formal mentions of landforms, boundaries, and spaces recognised by international law, and the treaty powers related to boundary treaties.

This sort of clause includes the key to challenging ICJ judgements in cases such as Colombia and El Salvador. It includes an apparently 'immovable' formulation of the territory as a State feature. This is bound to collide with international judgements, given that the State territory can be modified under

10 Ricardo Abello-Galvis and Walter Arévalo-Ramírez, 'The Influence of the Latin American Doctrine on International Law: The Rise of Latin American Doctrines at The Hague Academy During the Early Twentieth Century' in: Paula Wojcikiewicz Almeida and and Jean-Marc Sorel (eds), *Latin America and the International Court of Justice* (London and New York: Routledge 2016), 37-49.

11 Arévalo-Ramírez (n. 1).

12 Ximena Soley and Silvia Steininger, 'Parting Ways or Lashing Back? Withdrawals, Backlash and the Inter-American Court of Human Rights', International Journal of Law in Context 14 (2018), 237-257.

13 Walter Arévalo-Ramírez and Andrés Rousset Siri, 'Inter-American Commission on Human Rights (IACHR) and Inter-American Court of Human Rights (IACtHR)' in: Tony Carty (ed.), *Oxford Bibliographies in International Law* (Oxford: Oxford University Press 2021).

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many proceedings in international law, while the constitution imposes special congressional requirements on said proceedings.

In the following sections, we will examine five cases in which the constitutional territory clause was the focus of national challenges to the jurisdiction of the ICJ.

IV. Honduras and the Constitutionalisation of the ICJ Judgement and the Spanish Award

The Constitution of Honduras was amended in 2013. Its section on territory, boundaries, and natural resources includes five articles, including several of the constitutional formulations present fertile ground for current and future challenges to international jurisdictions. They selectively constitutionalise ICJ judgements (Article 9), expressly enunciate territorial features, and refer to concepts of international law. These international law concepts can be altered by ICJ judgements and therefore, said judgements can be seen by local stakeholders as opposed to their constitution.

> 'Constitution of Honduras. (1982, amd. 2013) CHAPTER II. THE TERRITORY
>
> Article 9
>
> The territory of Honduras is situated between the Pacific and Atlantic Oceans and the Republics of Guatemala, El Salvador, and Nicaragua. Its boundaries with these republics are:
>
> 1.With the Republic of Guatemala, those established by the arbitral award issued in Washington, D. C., United States of America, on January 23, 1933.
>
> 2.With the Republic of Nicaragua, those established by the Mixed Honduran-Nicaraguan Boundary Commission, in 1900 and 1901, according to the description of the first section of the dividing line, contained in the second act of June 12, 1900, and in later acts, to Portillo de Teotecacinte, and from that place to the Atlantic Ocean, in accordance with the arbitral award handed down by His Majesty the King of Spain, Alfonso XIII, on December 23, 1906, and declared valid by the International Court of Justice on November 18, 1960.'[14]

The constitutional regime of Honduras, which includes its particular territorial feature of a 'historic bay', relies heavily on international law.[15] Its constitutionalisation of judgements of the International Court of Justice

14 <https://www.constituteproject.org/constitution/Honduras_2013.pdf?lang=en>.

15 Andrea Gioia, 'The Law of Multinational Bays and the Case of the Gulf of Fonseca', NYIL 24 (1993), 81-137.

involving the State in territorial disputes[16], can be represented here as the originating model of the Latin American phenomenon of deferring the effectiveness of the ICJ jurisdiction, *ex post*, to constitutional norms. In the case of Honduras, this has not led to open objections against certain judgements, but has contributed to the regional mindset that ICJ judgements can be 'accepted or rejected' in matters of territory through constitutional norms.

Articles 9 to 13 of the Constitution of Honduras were drafted during the 1980 National Assembly, which is well recognised as having been a successful, democratic, and modernising process that inspired several other constitutional reforms in Latin America in the 1990s.[17] The territory clause in the case of Honduras, therefore, is not *per se* a reactive statement undertaken by the State after an undesired result before the international jurisdiction. This is contrary to the case of Nicaragua, where the constitution has been continuously amended so to include judgements favourable to Nicaragua and to exclude others,[18] or to the case of Colombia, in which the interpretation of the territory clause has been manipulated both by the executive and by the Constitutional Court immediately following an ICJ judgement, with the wrongful intent to challenge it as 'non applicable'.[19]

Articles 9 and 10 of the Constitution of Honduras constitutionalise the ICJ Judgement in the *Case concerning the Arbitral Award made by the King of Spain on December 1906* (Honduras v. Nicaragua), Judgement of 18 November 1960, which was adjudicated 20 years before the constitutional reform.

On the other hand, the territory clause of Honduras from 1982 refers to territorial features that were to be subject to a dispute in a future ICJ case, the *Land, Island and Maritime Frontier Dispute* (El Salvador v. Honduras – Nicaragua intervening), Judgement of 11 September 1992, even though in this situation the way in which the constitution described the territorial features was going to be later ratified by the ICJ judgement.[20]

16 David Johnson, 'The International Court of Justice: Case Concerning the Arbitral Award made by the King of Spain on December 23, 1906', ICLQ 10 (1961), 328-337.

17 Jorge Ramón Hernández, *Comentarios a la Constitución de la República de Honduras de 1982* (Tegucigalpa, Honduras, C. A.: Editorial Universitaria 1988).

18 Carlos Salgar and Eric Tremolada, 'El Caribe Occidental en la Corte Internacional de Justicia; Comentarios a las últimas decisiones de la Corte a las demandas interpuestas por Nicaragua Contra Honduras y Colombia', Revista Derecho del Estado 21 (2008), 223-246.

19 Alberto Lozano Simonelli, 'La sentencia inejecutable. La demanda de Nicaragua contra Colombia. Colombia y la Corte Internacional de Justicia', International Law: Revista Colombiana de Derecho Internacional 1 (2003), 91-163.

20 Malcolm D. Evans and Malcolm N. Shaw, 'Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening), Judgement of 11 September 19921', ICLQ 42 (1993), 929-937.

 DOI 10.17104/0044-2348-2022-2-425

Under general principles of international law and the Statute of the ICJ, a State does not need to enact domestic legislation, or constitutionalise judgements for them to become binding or for them to be executable.[21] This is a common response to local challenges to international law by domestic courts, as seen in the *Medellin v. Texas* and *Avena* cases.[22] Developing a practice of 'constitutionalising' international judgements in itself constitutes a challenge to international law jurisdictions, since it imposes an additional legal requirement for the compliance with, and enforceability of, such judgements under domestic law.[23] Additionally, under the widespread system of constitutional judicial review present in modern constitutions, an undesired consequence of this constitutionalisation, is the fact that the content, bindingness, or efficacy of ICJ judgements will later fall under the review of the Constitutional Court of each of these national systems. In Colombia, for example the Constitutional Court can exercise judicial review *ex ante* and *ex post* on the content of ratified treaties, including the ones that include the competence clause that led the case before the ICJ.[24] This consequence of constitutionalisation is dangerous, even if it is done in order to 'incorporate' the judgement in domestic legislation to facilitate compliance with it by local authorities following the theories that argue in favour of several instruments of incorporation of international law into domestic law.[25]

The constitution of Honduras originates this trend, but we must recognise that the Honduran constitutional territorial clauses mention all the judgements available by 1982, and that the constitution also incorporates the international law of the sea regime[26] devised for the Gulf of Fonseca[27] shared

21 Robert Kolb, 'The Relationship Between the International and the Municipal Legal Order: Reflections on the Decision no. 238/2014 of the Italian Constitution Court', Quest. Int'l L. 1 (2014), 5-16.

22 Philip V. Tisne, 'The ICJ Municipal Law: The Precedential Effect of the Avena and Lagrand Decisions in US Courts' Fordham Int'l L. J. 29 (2005), 865-914.

23 Mikael Rask Madsen, Pola Cebulak and Micha Wiebusch, 'Backlash Against International Courts: Explaining the Forms and Patterns of Resistance to International Courts', International Journal of Law in Context 14 (2018), 197-220.

24 Julián Huertas-Cárdenas, 'Monismo moderado colombiano: examen a la teoría oficial de la Corte Constitucional desde la obra de Alfred Verdross', Vniversitas. Bogotá (Colombia) 132 (2016), 197-234.

25 Dinah Shelton (ed.), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford: Oxford University Press 2011).

26 Rafał Soroczyński, '"Judge-made" Regime of the Gulf of Fonseca and the Question of Binding Effect of Judgments of International Courts' Studia Europaea Gnesnensia 3 (2011), 95-105.

27 Christopher R. Rossi, '*Jura novit curia*? Condominium in the Gulf of Fonseca and the Local Illusion of a Pluri-State Bay', Hous. J. Int'l L. 37 (2015), 793-840.

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in community[28] with El Salvador, by the Central American Court of Justice of 1917.[29] For this reason, the Honduran constitution, at first, seems to suggest that territory clauses can be aligned with international law and can work as a device to promote compliance with the contents of international judgements by domestic authorities. Even if this is true in the case of Honduras, we will see that, in other cases, the territory clause can be easily tampered with so as to promote conducts of resistance to, and defiance of, international law, even if once it was in line with the decisions of international courts.

It is also very relevant to describe a section of the Honduran territorial constitutional clauses that are absent in the constitutions of other States; Article 12 of the Honduran Constitution recognises that other jurisdictions, procedures and judgements under international law or under its own provisions can create rights for third parties.[30] This can be understood as a recognition of the binding power of the 1992 ICJ judgement *Land, Island and Maritime Frontier Dispute* (El Salvador v. Honduras: Nicaragua intervening).[31] As we will see in the cases of Nicaragua, Colombia, El Salvador, and, more recently, Venezuela, their constitutions lack this express mention to the right of third parties that might affect the territory as described in the clause. We will even see how some clauses have been interpreted to expressly deny those rights, implying that the State position is that only the constitution can modify its sovereign rights.

The territorial clause articles of Honduras are a reflection of a narrative in favour of international law as developed by the ICJ. It must be taken into account, however, that in international judgements involving Honduras, the International Court of Justice was favourable to the Honduran submissions and validated them in the case of the *Spanish award* (1960). A differentiating element will be present in the following cases, where we will study the behaviour of the State when it considers that the ICJ procedures were not in its favour and decides to use and interpret the territory clauses against ICJ jurisdiction.

28 Rosa Riquelme, 'Latin America and the Central American Court of Justice' in: Paula Wojcikiewicz Almeida and Jean-Marc Sorel (eds), *Latin America and the International Court of Justice* (London and New York: Routledge 2016), 61-71.

29 Iain Scobbie, 'The ICJ and the Gulf of Fonseca: When Two Implies Three but Entails One', Marine Policy 18 (1994), 249-262.

30 Gideon Rottem, 'Land, Island and Maritime Frontier Dispute', AJIL 87 (1993), 618-626.

31 Evans and Shaw (n. 20).

 DOI 10.17104/0044-2348-2022-2-425

V. The Selective Use of the Territory Clause in the Nicaraguan Constitution

The ICJ judgement of 2012 in the case *Territorial and Maritime Dispute* (Nicaragua v. Colombia), had different receptions by public opinion in each country. The theory of 'backlash and resistance'[32] has recognised said reception as essential for the authority of international courts and tribunals. Nicaraguans considered the judgement as a legal victory that partially recognised its maritime claims.[33] In Colombia, on the contrary, the 2012 judgement was understood as a direct hit on the nation's territorial sovereignty and presented a fundamental change in its idea of the extent of Colombia's maritime spaces in the Caribbean. Nicaragua's perception of the judgement was so positive that the country proceeded to constitutionalise it, i. e. incorporate it directly into the Constitution by a reform of Article 10 of the 1987 Constitution (Law No. 854 of partial reform of the political constitution of the Republic of Nicaragua, 2014):

> 'Constitution of Nicaragua. (1987, amd. 2014)
> Article 10
> The national territory is located between the Caribbean Sea and the Pacific Ocean and the Republics of Honduras and Costa Rica. Nicaragua fixes its maritime boundaries with Honduras, Jamaica, Colombia, Panama and Costa Rica in the Caribbean Sean in accordance with the rulings of the International Court of Justice of October 8 2007, and of November 19, 2012.
> The sovereignty, jurisdiction and rights of Nicaragua extend to the islands, keys, banks and rocks, located in the Caribbean Sea, the Pacific Ocean and the Gulf of Fonseca; and to the internal waters, the territorial sea, the contiguous zone, the exclusive economic zone, the continental platform, and the corresponding airspace, in accordance with the rules and provisions of International Law, and the sentences issued by the International Court of Justice.
> The Republic of Nicaragua only recognizes international obligations on its territory that have been freely consented to and in accordance with the Political Constitution of the Republic and the rules of International Law. Likewise, it does

32 Madsen, Cebulak and Wiebusch (n. 23).

33 Yoshifumi Tanaka, 'Reflections on the Territorial and Maritime Dispute Between Nicaragua and Colombia Before the International Court of Justice', LJIL 26 (2013), 909-931. The ICJ declared that there was no previous delimitation binding the parties, and it had to be established by the Court, a result that was not perfect for Nicaragua, but that Colombia's politicians had considered almost impossible. (See also: Lucie Delabie, 'Le fragile équilibre entre prévisibilité juridique et opportunité judiciaire en matière de délimitation maritime: l'arrêt de la Cour internationale de Justice du 19 novembre 2012 dans l'affaire du différend territorial et maritime (Nicaragua c. Colombie)', Annuaire Français de Droit International 58 (2012), 223-252).

not accept any treaties signed by other countries to which Nicaragua is not a Contracting Party.'[34]

This text and the ninth paragraph of Article 5 of the Nicaraguan Constitution[35] imply a specific practice regarding the usage of the territorial clause to selectively adopt or challenge the results of the jurisdiction of the ICJ and to 'manipulate' at the local level the compliance with judgements of the ICJ while selectively choosing between favourable and unfavourable international law.

Focus must be centred on the first of the paragraphs of Article 10 of the Nicaraguan Constitution. It constitutionalises two ICJ judgements in which Nicaragua appears to consider that in respect to its boundary its maritime and territorial claims were resolved in their favour. At the same time it leaves behind other judgements where the ICJ rejected Nicaragua's or gave advantage to the position of the counterpart (i. e. the recognition of several maritime formations of Colombia in the Caribbean, deemed as islands and entitled to maritime spaces).[36]

In the case of the ICJ judgement of 8 October 2007 regarding the *Territorial and Maritime Dispute* (Nicaragua v. Honduras), the ICJ decision did not produce a clear winner, since it adjudicated that Honduras had effectively exercised postcolonial sovereignty over the Bobel Islands, Savana, Port Royal and Cayo Sur, thus constituting an important blow against Nicaragua's argument of *uti possidetis juris*.[37]

However, the ruling, when assessing the delimitation claims, accepted the position of Nicaragua, as a result of difficulties the Court found in applying the provisional equidistant line directly. The Court decided to recognise several special circumstances[38] that it considered to be in favour of Nicaragua, such as the extension of Nicaragua's territorial sea, the overlap of the territorial seas in Edinburgh Key, the water flood of Cabo Gracias a Dios and the sedimentation of the river Coco.[39] These circumstances that favoured the territorial and maritime delimitation proposed by Nicaragua were adjudi-

34 <https://www.constituteproject.org/constitution/Nicaragua_2014.pdf?lang=en>.

35 Article 5.9. Constitution of Nicaragua (1987) With Reforms (2014): 'Nicaragua adheres to the principles of American International Law as recognized and ratified sovereignly.'

36 Xavier Perez, *La mer de la discorde: observations juridiques à propos de la conclusion du différend maritime frontalier entre le Nicaragua et la Colombie*, Neptunus, revue électronique, Université de Nantes, Centre de Droit Maritime et Océanique 19 (2013).

37 Salgar and Tremolada (n. 18).

38 Jiuyong Shi, 'Maritime Delimitation in the Jurisprudence of the International Court of Justice', Chinese Journal of International Law 9 (2010), 271-291.

39 Martin Pratt, 'The Maritime Boundary Dispute Between Honduras and Nicaragua in the Caribbean Sea', IBRU Boundary and Security Bulletin 9 (2001), 108-116.

 DOI 10.17104/0044-2348-2022-2-425

cated in its favour. Since this element led to a victory, this judgement was constitutionalised.

Under the analysis of the practice surrounding the territory clause, Nicaragua has proceeded to constitutionalise in paragraph 1 of Article 10 only those judgements that are in favour of its positions, as occurred in the case against Colombia (2007-2012). In the *Nicaragua v. Colombia* case, the appraisal of the success of the litigation strategies and expectations of the parties was particularly difficult, considering the different issues entertained by the Court in the judgements on jurisdiction and merits which, to national observers, felt like a slippery slope of successes and defeats.[40] The ICJ did not find reasons to grant territorial sovereignty of the Islands and Keys of the San Andrés archipelago to Nicaragua as was argued in Nicaragua's memorial. However, the new maritime delimitation between the Archipelago and Nicaragua's continental coast produced by the Court was seen by the Colombian political scene and the public opinion,[41] as immensely favouring Nicaragua, since the line proposed by Colombia was to the East of the Archipelago, between the Islands and the continental coast of Nicaragua; in the end, however, several segments of that line were drawn by the ICJ to the west of the archipelago. Beyond this disappointment, that even some politicians in Colombia tried to explain by accusing some judges of partiality, the result, even if it had hard to implement features (such as, for example, the enclave of several Colombian maritime formations around Nicaraguan maritime spaces),[42] was just a clear exercise of the delimitation principles commonly applied by the ICJ.[43]

The maritime delimitation is favourable to the Nicaraguan interests especially because it reconfigures the maritime delimitation with several neighbours in the region: A Colombian practice of establishing its presence in the area consistently took place around the 82nd meridian. The ICJ judgement ruled that this practice at the meridian created no international boundary, and that the creation of an absent delimitation was under the jurisdiction of the Court. This was an exercise that adjudicated new maritime spaces to Nicaragua, as regards the exclusive economic zone spaces to the north and south of

40 M. Imad Khan and David J. Rains, 'Doughnut Hole in the Caribbean Sea: The Maritime Boundary Between Nicaragua and Colombia According to the International Court of Justice', Hous. J. Int'l L. 35 (2013), 589.

41 Walter Arévalo Ramírez and Andres Sarmiento Lamus, 'Consequences of Non-Appearance Before the International Court of Justice: Debate and Developments in Relation to the Case Nicaragua vs. Colombia', Revista Juridicas 14 (2017), 9-28.

42 Andrés Sarmiento Lamus, 'Impacto e implementación en Colombia de la decisión de fondo de la Corte Internacional de Justicia en el diferendo territorial y marítimo (Nicaragua c. Colombia)', Anuario Mexicano de Derecho Internacional 16 (2016), 401-423.

43 Yoshifumi Tanaka, 'Reflections on the Concept of Proportionality in the Law of Maritime Delimitation', Int'l J. Marine & Coastal L. 16 (2001), 433-463.

the Colombian archipelago.[44] Since new maritime spaces were acquired and a favourable delimitation was obtained, this judgement was constitutionalised by Nicaragua.

The territorial clause contained in Article 10 of the Nicaraguan constitution includes selective constitutionalisation of ICJ judgements, that can be regarded as the centre of a challenging behaviour to international courts and tribunals, considering that there are other territorial and maritime delimitation judgements binding upon Nicaragua that were not chosen to be constitutionalised and which were already adjudicated by the time of the 2014 reform (for example, the ruling of the ICJ *Arbitration Award Made by the King of Spain on 23 December 1906* [*Honduras v. Nicaragua*] of 1960 or the *Land, Island and Maritime Frontier Dispute* case with El Salvador in 1992. This can be seen as a challenge to the jurisdictions to international courts and tribunals since the object of an international dispute settlement mechanism is to be binding despite the result. Nicaragua has had a long experience before the ICJ,[45] with 15 cases before the Court, and is one of the most prominent actors within the system. The fact that at a constitutional level, the State considers as binding only those territorial judgements that are favourable, thus allowing local authorities to find arguments for noncompliance with the judgements that were not favourable (nor 'constitutionalised'), clearly affects the sound administration of justice and the relations with the litigating parties, usually neighbours, involved in these multiple boundary disputes.

The provision in Paragraph 3 of Article 10 of the Constitution of Nicaragua that,

> 'The Republic of Nicaragua only recognises international obligations on its territory that have been freely consented to and in accordance with the Political Constitution of the Republic and the rules of International Law. Likewise, it does not accept any treaties signed by other countries to which Nicaragua is not a Contracting Party.'[46]

has practical consequences that have led to further litigation: The State does not recognise other international judgements or treaties of third parties relative to its territorial rights. This is particularly difficult if we consider that Nicaragua does not recognise decisions or partially opposes decisions in favour of Costa Rica, Honduras and El Salvador. For example, Nicaragua was recently ordered by the ICJ (*Certain Activities Carried Out by Nicaragua in the Border Area* [Costa Rica v. Nicaragua] Judgement, 2018) to

44 Tanaka (n. 33).

45 Edgardo Sobenes Obregon and Benjamin Samson (eds), *Nicaragua Before the International Court of Justice*, (Cham: Springer International 2018.)

46 <https://www.constituteproject.org/constitution/Nicaragua_2014.pdf?lang=en>.

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dismantle military installations and tunnels in Isla Portillos and the San Juan River, that were adjudicated to Costa Rica in the 2010 ICJ Judgement. This was intentionally excluded from the constitution of Nicaragua. This behaviour of selectiveness shows the use of the constitution as a barrier to undesired results in judgements.

The delicate effect of this incorporation or rejection of judgements in the constitution deepens with the recent ICJ judgement in the case *Costa Rica v. Nicaragua* in 2018.[47] In this complex joined procedure the Court decided claims regarding maritime boundaries in the Caribbean and the Pacific, and a territorial boundary in the north of Isla Portillos. In this case, once again, several arguments from Nicaragua were rejected, and so the judgement has not been incorporated or constitutionalised: the practice seems obvious, a favourable judgement from 2012 was met with a fast-track constitutionalisation in 2014, yet, undesired results are left behind. The position of challenging these unsuccessful (from Nicaragua's perspective) cases that are not included in the territory clause is clear in the analysis of government officials and local scholars,[48] who point out that these decisions cannot be implemented because of their 'lack of correspondence' with the regime set in what Nicaragua considers successful rulings, and additionally, because they claim that other pending litigation, like Nicaragua's application for an extended continental shelf,[49] will modify or impact these rejected rulings.

VI. El Salvador: Challenging and Limiting the ICJ by Constitutionalising the CACJ: The 1917 Judgement of the Central American Court of Justice

Article 84 of the Constitution of El Salvador constitutionalises one international court judgement, in order to limit another international judgement: Rather than constitutionalising the ICJ judgements in which El Salvador is

47 Ricardo Abello Galvis, Walter Arévalo-Ramírez, Andrea Mateus-Rugeles and Bruno Abello-Laurent, 'Traducción de la Sentencia de Fondo de la Corte Internacional de Justicia, proferida el 2 de febrero de 2018, relativa a la Delimitación Marítima en el Mar Caribe y en el Océano Pacífico (Costa Rica c. Nicaragua) y Frontera Terrestre en la parte norte de Isla Portillos (Costa Rica c. Nicaragua)', ACDI-Anuario Colombiano de Derecho Internacional 13 (2020), 351-471.

48 El Nuevo Diario, Nicaragua (2018) <https://www.elnuevodiario.com.ni/nacionales/455605-todavia-no-se-pueden-hacer-mapas-nuestras-frontera/>.

49 Bernardo Pérez-Salazar and Ekaterina Antsygina, 'Sovereign Rights on the Extended Continental Shelf: The Case of the Nicaraguan Rise in the Western Caribbean', Int'l J. Marine & Coastal L. 354 (2020), 772-800.

involved, Article 83 constitutionalises the foundational international judgement around which all the State claims have been grounded in subsequent litigation before the ICJ: the Central American Court of Justice (CACJ) Judgement of 1917 in which the CACJ established the 'conjoined' regimen for the Gulf of Fonseca, which was later recovered and adopted by the ICJ in its definition and adjudication on *historical bays* in the region (though not without certain modifications).[50]

> 'Article 84
>
> The territory of the Republic over which El Salvador exercises jurisdiction and sovereignty is irreducible, and in addition to the continental part includes:
>
> The insular territory integrated by the islands, islets and cays enumerated by the Judgment of the Central American Court of Justice, pronounced on March 9, 1917, and also others which correspond to it according to other sources of International Law; likewise other islands, islets and cays that also correspond to it in conformity with international law.
>
> The territorial waters and including (y en comunidad) the Fonseca Gulf, which is a historic bay with the characteristics of an enclosed sea, whose regime is determined by International Law and by the judgment mentioned in the preceding paragraph. […]'[51]

The Constitution of El Salvador was amended in 1984 to include the territory clause that, as seen above, incorporated the CACJ judgement of 1917. This judgement has always been considered as the most favourable regime by El Salvador. It has been constantly objected to by Nicaragua and Honduras in later proceedings, which has led to further litigation before the ICJ. The results of these judgements have been objected to and their implementation delayed by El Salvador, thanks to the strong position it has taken to preserve the regime created by the CACJ as part of its constitution.[52] One of the challenged judgements of the ICJ in the region, using this territory clause, is the 1992 judgement, which resulted from a joint application and a subsequent application for revision.[53] As a consequence of several disputes arising from the Gulf of Fonseca Regime, El Salvador and Honduras filed a joint application in 1986, which led to undesired results for El Salvador, who claimed that the ICJ modified the CACJ regime. This situation was explained

50 Ricardo Abello Galvis, 'Eaux et baies historiques en droit international' Estudios Socio-Jurídicos 5 (2003), 33-76.

51 <https://www.constituteproject.org/constitution/El_Salvador_2014.pdf?lang=en>.

52 Aloysius Llamzon, 'Jurisdiction and Compliance in Recent Decisions of the International Court of Justice', EJIL 18 (2007), 815-852.

53 ICJ, *Application for Revision of the Judgment of 11 September 1992 in the Case concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* (El Salvador v. Honduras), judgement, ICJ Reports 2003, 392.

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by the ICJ as the consequence of applying the new rules of the law of the sea applicable to the parties 70 years after the CACJ judgement. El Salvador has complied with certain elements of the 1992 judgements that correspond to the CACJ regime while opposing others. This situation has led to repeated clashes between the involved parties[54] and an ongoing position of dissatisfaction with the ICJ judgement of 1992 that is based on the view that only the CACJ regime is constitutional. This led to an application for the revision of the Judgement of 11 September 1992 in the *Case concerning the Land, Island and Maritime Frontier Dispute* (El Salvador v. Honduras: Nicaragua intervening) (El Salvador v. Honduras).

VII. The National Territory Clause of Colombia: Challenging the Jurisdiction of the ICJ before the Colombian Constitutional Court Using Judicial Review – The *Case of the Territorial and Maritime Dispute (Nicaragua v. Colombia)* (2012) and the *Case Concerning Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)* (2022)

The final and most intense form of challenge to international jurisdictions by invoking the territory clause is the case observed in relation to the Colombian Constitutional Territory Clause. This clause includes all the previously examined common elements in Latin American constitutional territory clauses, i. e. provisions on the competent organs that can exercise treaty powers regarding boundary treaties, and on geographical features that constitute Colombia's sovereign territory, including remission to specific concepts defined by the international law of the seas:

> 'Article 101
>
> The borders of Colombia are those established in the international treaties approved by Congress, duly ratified by the President of the Republic, and those defined by arbitration awards in which Columbia takes part.
>
> The borders identified in the form provided for by this Constitution may be modified only by treaties approved by Congress and duly ratified by the President of the Republic.

54 Gustavo Adolfo González Bermúdez, Víctor Emilio Jara Calderón and Jeffry Alejandro Garro Fallas, 'El Golfo de Fonseca, más que un conflicto político. La perspectiva desde los actores locales y pobladores costeros', Pensamiento Actual 16 (2016), 147-161.

DOI 10.17104/0044-2348-2022-2-425 ZaöRV 82 (2022)

> Besides the continental territory, the archipelago of San Andrés, Providencia, Santa Catalina, and Malpelo are part of Colombia in addition to the islands, islets, keys, headlands, and sand banks that belong to it.
>
> Also part of Colombia is the subsoil, the territorial sea, the contiguous zone, the continental shelf, the exclusive economic zone, the airspace, the segment of the geostationary orbit, the electromagnetic spectrum and the space where it applies, in accordance with international law or the laws of Colombia in the absence of international regulations.'[55]

Article 101 has been invoked to argue that the judgement in the case *Territorial and Maritime Dispute* (Nicaragua v. Colombia), Judgement of 19 November 2012 was a wrongful exercise of jurisdiction, because the constitution only allowed the boundaries to be modified by a treaty under Congressional powers. The judgement was received in Colombia with great resistance considering that the country had a strong belief that the Colombian presence in the Caribbean meant that a delimitation existed. Additionally, it is true that the new maritime configuration presents new challenges to indigenous people – raizales – and to historical fishing rights.[56] This position was later softened by the Executive to argue, that without a treaty, the judgement was not applicable,[57] a position that Nicaragua, citing the ICJ Statute[58] and the UN Charter, rejects.

The legal conclusion reached by the ICJ under its jurisdiction to adjudicate a resolution of the dispute with Nicaragua is completely different in its fact pattern from what Article 101 regulates as a competence of Congress: The ICJ ruled that the Esguerra Barcenas (1928) treaty between Colombia and Nicaragua, included the Parties agreement on the sovereignty of several island formations, but did not create any maritime delimitation in the area between the continental coast of Nicaragua and the Archipelago of San Andrés and Providencia and that a delimitation was never established between the Parties. The ICJ, under its jurisdiction granted by the Pact of Bogotá and the claims of the Parties[59] proceeded to create the delimitation.

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55 <https://www.constituteproject.org/constitution/Colombia_2015?lang=en>.

56 Maria Andrea Bocanegra and Silvana Insignares Cera, 'Affectation of Collective Rights and Food Security in the Case Nicaragua v. Colombia in the International Court of Justice', Anuario Colombiano de Derecho Internacional 14 (2021), 1-34.

57 Lozano Simonelli (n. 19).

58 Walter Arévalo Ramírez, 'Sentencias de la corte internacional de justicia vs. Normas constitucionales: su obligatoriedad y ejecutoriedad. Reflexiones desde el caso Nicaragua vs. Colombia y comentarios al caso Perú vs. Chile' in: Juana Inés Acosta López, Paola Andrea Acosta Alvarado and Daniel Rivas Ramírez, *De anacronismos y vaticinios: diagnóstico sobre las relaciones entre el derecho internacional y el derecho interno en Latinoamérica* (Bogotá D. C.: Fundación Universidad Externado de Colombia 2017), 299-347.

59 ICJ, *Nicaragua v. Colombia*, proceedings, judgement of 13 December 2007 (jurisdiction) paras 118-120, and the ICJ judgement of 19 November 2012 (merits), paras 113-136.

 DOI 10.17104/0044-2348-2022-2-425

Therefore, the current boundary in the area is established by the judgement of 2012 under contemporary rules of delimitation such as the equidistance line. This delimitation was not present in a previous treaty ratified by Congress. Therefore, the Colombian argument around the territory clause invoking the treaty powers present in Article 101, which stipulates that pre-existing limits can only be modified by Congress, is not applicable because no treaty or delimitation is being *modified;* the ICJ *created* a maritime delimitation that was absent between the parties.

The challenge to the ICJ jurisdiction by invoking the territory clause against the 2012 judgement seems deceiving and instrumental because, beyond the argumentation regarding treaty powers or jurisdictional powers of international tribunals to modify or create delimitations, there is no contradiction between the content of the ICJ decision and the national territory clause. The judgement reflects Colombian sovereign territory in exactly the same geographical features mentioned in Article 101, including its references to international law, and the maritime features mentioned in the third paragraph.

Article 101, if interpreted correctly and not manipulated for political profit, does not represent an obstacle to compliance with the 2012 ICJ judgement. The negative public discourse in Latina America surrounding decisions of international courts has led to constitutional challenges to the jurisdiction of such courts, as has previously occurred with the Inter-American Court of Human Rights.[60] In this case, the negative response to the delimitation issue in the judgement incited internal responses to act against the judgement that only found a domestic legal basis in incomplete interpretations of the territory clause contained in Article 101.

Under the rubric of this resistance to ICJ jurisdiction and through motions for non-compliance with the judgement, by invoking the national jurisprudence on constitutional judicial review of treaties and their ratification instruments in Colombia, the President of the Republic of Colombia and other citizens, initiated a 'public action of unconstitutionality' (Colombian name for the action of judicial review), against the National Law (Ley aprobatoria de Tratado) that ratified the Treaty of the Pact of Bogotá, and against its article XXXI,[61] regarding as unconstitutional vis-à-vis the territory clause the judicial procedure and the competence clause included in the Pact of Bogotá, that allows any State of the Pact to take any dispute between parties before the ICJ.

60 Alexandra Huneeus, 'Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights', Cornell Int'l L. J. 44 (2011), 493-533.

61 Article XXXI. American Treaty on Pacific Settlement of Disputes. Pact of Bogotá signed at Bogotá, 30 April 1948.

Although the logic of the plaintiffs was that Article XXXI, as well as any judgement involving the territorial boundaries, was 'unenforceable' under the constitution, especially in light of Congress's exclusive powers to modify the boundaries, and that, according to them, Article 101 does not allow for judicial resolution as a method for the modification of the borders of the State, the Constitutional Court adopted a conciliatory position. Nonetheless, this decision maintains domestic and international law in tension:

First, the Constitutional Court was faced with the issue as to its own judicial review powers. Can a constitutional court review the law that ratifies a treaty after it has entered into force? Or should this process be only '*ex ante*' and during the ratification process, and before the State has expressed its consent to be bound by the treaty in the terms of the Vienna Convention[62] on the Law of Treaties. The constitutional Court of Colombia confirmed the possibility of a subsequent constitutional control of international Treaties (judicial review), under an action commenced by citizens that present charges of unconstitutionality against the law. Therefore, the Pact of Bogotá could be subject to judicial review. This is not new and a practice on the issue has emerged thanks to several cases where treaties are ratified and later collide with new constitutions or fundamental rights charters in domestic law.[63]

Second, the constitutional Court highlighted the country's recognition of the principle of *pacta sunt servanda*, which led the Court to declare that both the Pact of Bogotá and the ICJ judgement are binding. Third, however, the Court[64] did not go further in differentiating the legal reasons why ICJ judgements are binding and self-executory as regards the procedure contained in Article 101 to modify a boundaries treaty. The Court, in a manoeuvre that only leads to confusion of the legal regime controlling international rulings, decided that the procedure by which the 2012 ICJ judgement could become applicable in national law would be by negotiating a boundaries Treaty under Article 101 and in accordance with rules on modification of the boundaries. This ignores the fact that the ICJ judgement settles the controversy; the boundary has been set by the Court, with no need of further steps.

This constitutional court ruling served as a landmark for several other consequences arising from challenging the authority and the jurisdiction of the ICJ in the *Nicaragua v. Colombia* litigation: passage of domestic legisla-

62 Oliver Dörr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties* (Berlin and Heidelberg: Springer 2018).

63 Zachary Elkins, Tom Ginsburg and Beth Simmons, 'Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice', Harv. Int'l L. J. 54 (2013), 61-95.

64 Judicial Review Ruling C-269 (2014). Colombian Constitutional Court. (Corte Constitucional Colombiana).

tion that collides with the delimitation and the maritime spaces adjudicated by the Court (National Decree 1946 of 2013),[65] issuance of several political proclamations of noncompliance and supposed behaviours of maritime authorities in the area that led Nicaragua to present a new case, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (Nicaragua v. Colombia), 2013, which was received by Colombia with the denunciation of the Pact of Bogotá and threats of nonappearance[66] before the ICJ.

Finally, it must be highlighted that this new case, exemplifies the consequences of constitutional opposition. The dispute was recently decided by the Court (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (Nicaragua v. Colombia), Judgement, 21 April, 2022) and it established how constitutional opposition is contrary to international law and leads to international responsibility. Colombia was held internationally responsible for particular conducts of the Navy that acting under the constitution, breached the rights of Nicaragua in the exclusive economic zone and interfered with fishing activities. The Court ordered Colombia to modify the national legislation that is contrary to the 2012 ICJ judgement.

VIII. A Final Remark on Current Events: The Recent Case of Venezuela (2021)

Another Latin American territorial dispute that has provoked resistance due to constitutional territorial clauses is currently on the ICJ docket: the application of Guyana against Venezuela on the binding nature of the Award relating to the boundary between the Colony of British Guiana and the United States of Venezuela, of 3 October 1899. This is in the context of their dispute over the Esequibo, also known as the 'Guyana Esequiba territory', a territory of about 160,000 km^2, rich in natural resources, and currently under the sovereignty of Guyana, but claimed by Venezuela.

Guyana has presented to the Court an interesting request, alleging that under the 'Agreement to resolve the dispute between Venezuela and the United Kingdom of Great Britain and Northern Ireland on the border

65 National Decree 1946 of 2013. Colombia. 'Regarding the territorial sea, the contiguous zone, some aspects of the continental shelf of the Colombian island territories in the western Caribbean Sea and the integrity of the archipelago department of San Andrés, Providencia and Santa Catalina', available at <http://www.suin-juriscol.gov.co/viewDocument.asp?id=1374866>.

66 Walter Arévalo Ramírez and Andres Sarmiento Lamus, 'Non-Appearance Before the International Court of Justice and the Role and Function of Judges ad hoc', The Law and Practice of International Courts and Tribunals 16 (2017), 398-411.

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between Venezuela and British Guiana signed in Geneva on 17 of February 1966' (Geneva Agreement)[67] the parties mutually granted the Secretary General of the United Nations the power to choose the means of resolution of this controversy, which was exercised by the Secretary General on 30 January 2018, through the election of a judicial solution before the International Court of Justice.[68]

With this election, Guyana presented its claim in March 2018 requesting the Court to rule on the validity of the Award and the limits established by it, declaring it binding upon both Guyana and Venezuela, requesting the Court to judge and declare Guyana's sovereignty over the disputed territory, order the withdrawal of Venezuela from some parts of the territory such as Ankoko Island, order that Venezuela cease any threat or use of force in the area, and to declare Venezuela responsible for violations of the sovereign rights of Guyana. Guyana has been partially successful in its request and the Court considered that it had jurisdiction.[69]

Venezuela has rejected the jurisdiction of the Court, arguing that the Geneva Agreement does not constitute a jurisdictional basis under Article 36.1 of the ICJ Statute:[70] It has also objected to Guyana's assertions on the merits of the case. In June 2018, Venezuela declared that it would not participate in the proceedings. Venezuela's rejection of jurisdiction and its failure to appear before the Court are acts of constitutional resistance through the invocation of constitutional territory clauses and through acts of negative public discourse carried out through an unofficial communication with the Court.

The 1999 Constitution of the Bolivarian Republic of Venezuela (BRV) includes two articles that constitute territorial clauses. Article 10 directly references the Essequibo dispute, stating that the territory of the State is the one that was set by *uti possidetis iuris* in 1810 and those treaties and awards that are not currently void. This position contradicts the content of the 1899 award and reaffirms Venezuela's position about considering it void:

'The territory and other geographic spaces of the Republic are those that corresponded to the Captaincy General of Venezuela before the political transformation that began on April 19, 1810, with the modifications resulting from the treaties and arbitration awards not vitiated of nullity.'[71]

67 <https://peacemaker.un.org/guyana-venezuela-border66>.

68 ICJ, *Application instituting proceedings filed in the Registry of the Court on 29 March 2018 Arbitral Award of 3 October 1899* (Guyana v. Venezuela), 2018 General List No.171.

69 ICJ, *Arbitral award of 3 October 1899* (Guyana v. Venezuela), judgement of 18 December 2020 (jurisdiction).

70 Walter Arévalo-Ramírez, 'Constitutionalization of Territory: Jurisdictional Challenges to the ICJ Delimitation Judgements in Latin America', Völkerrechtsblog, 3 September 2021.

71 Constitución de la República Bolivariana de Venezuela (BRV) (1999).

 DOI 10.17104/0044-2348-2022-2-425

These clauses of constitutional territory have been used in several official statements of the Executive that reject the process before the ICJ, announce the non-appearance[72] of Venezuela, and oppose various developments in the case, such as deadlines for hearings and the Judgement on jurisdiction of December 2020.[73] Additionally, the Executive has used these territorial clauses to oppose different declarations of sovereign acts of Guyana and to produce legislation that directly affects the dispute.

The main consequence, the non-appearance, has already occurred. In any case, it is noteworthy that the ICJ's rulings are binding on the party that did not appear. The absent party may communicate informally with the Court; which Venezuela did by means of a memorandum. This memorandum notably does not mention its constitutional right and only refers to the State's interpretation of the Geneva Agreement. The fact that Venezuela exacerbates the use of the territory clause for consumption of the internal political jurisdiction, just as in all the previously explained cases, but reduces it when interacting with the Court, shows that this exercise of resistance has a very soft legal basis with regard to international law, as it instrumentalises domestic law, under the control of the Executive, to mobilise political power within the country and carry out behaviours of non-compliance.

As a final remark, although particular conclusions have been developed for each studied case, they have in common that the exploitation of territory clauses in Latin American constitutions has led to the development within the region of several forms of resistance to international law, from threats of non-appearance, non-compliance with particular points of complex international judgements and discursive opposition, to more dangerous behaviours such as the selective constitutionalisation of judgements, the production of national legislation contrary to international judgements and the denunciation of international treaties originally devised for the peaceful settlement of disputes.

These behaviours, as manifested by the recent case *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (Nicaragua v. Colombia) (April 2022) briefly mentioned above, have led to international wrongful acts, further litigation and the postponement of the full implementation of international decisions. These amount to conduct that can only be

72 República Bolivariana de Venezuela, Comunicado, Caracas, 18 de marzo de 2018, 8 March 2018. Available at <http://mppre.gob.ve/wp-content/uploads/2018/03/comunicado-guyana-30032018.pdf>.

73 República Bolivariana de Venezuela, Comunicado, Caracas, 18 de diciembre 2020, 18 December 2018. Available at <http://www.mppre.gob.ve/wp-content/uploads/2020/12/Venezuela-rechaza-decision-de-la-Corte-Internacional-de-Justicia-contraria-al-espiritu-del-Acuerdo-de-Ginebra-sobre-la-Guayana-Esequiba.pdf>.

countered by the correct alignment of international law principles with the national constitution (as explained with the *uti possidetis iuris*) and the political and social recognition of the authority of international courts, in order to avoid the national temptations to manipulate these clauses against undesired or unfavourable territorial judgements.

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