Legal Consequences Of The ICJ's Decision In The Nicaragua V. Colombia Case On The Pact Of Bogota

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Abstract

International agreements in the practice of diplomatic relations are an important aspect. Where in its implementation, the role of international agreements in international law is based on the fact that international law mostly consists of international treaties. One example of an international treaties is the Pact of Bogota. The Pact of Bogota is the United States Agreement on the Settlement of the Pacific region signed by the independent American republics that gathered at the Ninth International Conference of American States in Bogota, Colombia. One of the member countries of this pact is Nicaragua and Colombia. The International Court of Justice from November 19, 2012, based on the Pact of Bogota agreement. The issue raised by the author is related to the decision of the international court in deciding cases between Nicaragua and Colombia based on the Pact of Bogota with the consideration that Colombia had withdrawn from the Pact of Bogota before Nicaragua filed a lawsuit to the International Court of Justice, namely on November 27, 2012.

Keywords: Treaty; International Court of Justice; Bogota Pact; Judgment.

Introduction

Along the written histories, Agreements between countries are foremost and form the basis for establishing diplomatic alliances or cooperative relations between countries, as a form of maintaining peace from issues between countries. However, relations between these countries do not always lead to positive matters, because diplomatic relations are essential for international security.

In international relations, there are institutions that accommodate interstate problems, one of which is The International Court of Justice (hereinafter referred to as "ICJ") (Powell, 2016). The ICJ is the replacement for the Permanent Court of International Justice (hereinafter referred to as “PCIJ”), which was established by the League of Nations (hereinafter referred to as “LBB”) in 1920. All matters tried at the ICJ refer to the Statutes of the ICJ Court. The Statutes of the ICJ courts are an integral part of the United Nations (hereinafter referred to as “UN”) Charter, in maintaining its continuity, expressly states that the Statutes of the ICJ are based on the Statutes of the PCIJ.

According to Article 7 of the UN Charter, the formation of this charter is as the main organs of the United Nations, including the General Assembly, Security Council, Economic, and Social Council, Trusteeship Council, International Court of Justice or ICJ, and Secretariat. This means that according to the authority of the ICJ as a UN Organ, the ICJ has the right to adjudicate on international issues for countries that are members of the UN (Ogbodo, 2012).

The ICJ is one of the six major organs of the UN whereby it consists of 15 judges with each having a different nationality (Amr, 2021). Judges are chosen independently by the United Nations Security Council and General Assembly. The ICJ has jurisdiction over disputes between countries and has decided dozens of cases since it began operating in 1946. During its 77 years of existence, the ICJ has settled 184 cases it has tried.

ICJ must certify that it acknowledges the issue as it is based on the fact itself (Ipso Facto) and without specific approval. Where in interstate issues or legal disputes, the disputing countries accept the same obligations by the
jurisdiction of the ICJ, one of which is the interpretation of an agreement.

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In terms of the ICJ's functions, according to Article 41 paragraph (1) of the Statutes, the ICJ can use its rights or powers to indicate, if the Court considers that circumstances require action. However, such action must be taken in order to protect the rights of each party. Furthermore, paragraph (2) of Article 41 of the Statute of the ICJ, emphasizes that while waiting for a final decision, the ICJ can make a notification of the recommended steps that must be given to the parties concerned and to the Security Council immediately.

The Pact of Bogota is the United States Treaty on the Settlement of the Pacific region signed by the independent American republics that gathered at the Ninth International Conference of American States in Bogota, Colombia, on April 30, 1948 (Penwick, 1948). In the formation of the Pact, there were 13 (thirteen) states that ratified it. However, currently, there are 2 (two) states that have not recognized the pact, namely Colombia on November 27, 2012, and El Salvador on November 24, 1973 (Infante Caffi, 2017a). The Pact of Bogota represents a consolidation of the framework agreements adopted in the Inter-American system since 1923 that established several mechanisms for a peaceful settlement (René Figueredo, 2012).

The scope and technicalities of the pact have been made systematically regarding how the judicial process, starting from interpretation, shows the complexity of the interaction between general principles to the jurisdiction of the court as one of its fundamental characteristics (Lynskey, 2014). This has been proven by significant reservations made by Bolivia, Ecuador, and Peru, and postulated by Argentina (signatories), as well as the position taken by Venezuela (signatories).

The jurisdiction of the ICJ under the Pact of Bogota (1948) is part of a system of norms attributing com-patience to the referenced tribunal along with other means of settlement. The system sets out principles and general exceptions applicable to all the means of peaceful settlement embodied in the Pact. The Pact follows the pattern of the Statute of the ICJ and allows for the recourse to arbitration in a residual situation. The role of the ICJ and the Pact of Bogota is evident when Article XXXI begins with the words in conformity with Article 36, paragraph 2. This sort of contractual expression of Article 36, 2 of the Statute of the ICJ, places the Pact under the provision of Article 36.1 of the said Statute, which refers to treaties and conventions in force by which States confer jurisdiction on the Court.

Colombia withdrew from the Pact of Bogota agreement in November 2012. Thus, Colombia should have the right to leave the court and should still be able to maintain the sovereignty held by it. The ICJ however stated that the court's jurisdiction extends to claims based on incidents that allegedly occurred after November 27, 2013, when the Pact of Bogota should no longer applied to Colombia.

On April 21, 2022, the ICJ decided that it had jurisdiction under the Pact of Bogota to resolve disputes regarding alleged violations of Nicaragua's rights in the maritime zone according to the 2012 Judgment as well as certain counterclaims that Colombia brought against Nicaragua.

First, the Court found that Colombia had violated Nicaragua's sovereign rights by (1) interfering with the scientific research activities of fisheries and maritime affairs of Nicaraguan naval vessels; (2) licensing for fishing activities in the EEZ; and (3) intended to enforce conservation measures in the zone. Therefore, the ICJ ordered Colombia to immediately stop its erroneous actions. However, the Court ruled that Colombia retained its right to patrol the territory in connection with drug trafficking and transnational crimes.

Second, the ICJ determined that two of the four counterclaims filed by Colombia were admissible. However, the first of the two counterclaims were rejected because the ICJ found that the people of the San Andrés Archipelago (including the Raziel community) did not enjoy artisanal fishing rights in the waters now in Nicaragua's EEZ and therefore had not violated those rights.

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the writer is interested in doing research on does the pact of Bogota is an applicable source of law for both Nicaragua and Colombia, especially Colombia.

Research Methods

This legal writing uses an analytical method with a normative juridical approach by focusing on problem formulation and hypotheses through sampling, measuring variables, and collecting related data and at the end of writing a conclusion will be explained (Amaratunga et al., 2002) (McNabb, 2017) Furthermore, the research approach used is a legal approach which is carried out by researching the law and analyzing regulatory provisions related to the legality of the pact of Bogota as a factor for a judicial decision and the issue with Colombia’s withdrawal from the pact.

The writing of this law also uses an approach with descriptive qualitative research methods and in-depth data analysis. The sources used in this paper consist of primary and secondary (Moser & Korstjens, 2018). Primary sources are obtained from laws and regulations and other types of regulations such as the statute of ICJ and the pact of Bogota. For secondary sources obtained from books, journals, and sources from the internet.

Results of Research and Discussion

The applicable jurisdiction of the pact of Bogota towards Colombia

Mochtar Kusumaatmadja shares his opinion that an international agreement is a form of an agreement made in the form of an agreement, and the agreement is carried out by the community which is a subject of international law (Kusumaatmadja & Agoes, 2021). International agreements are juridical instruments that contain the will and approval of countries or other international law subjects to achieve common goals, the making of which is regulated by international law and creates binding legal consequences for the parties who make it (Mauna, 2001). International agreements are generally known as one of the binding and legitimate sources of international law. Both general and special agreements containing legal provisions that are expressly recognized by the disputing countries. Article 36 paragraph 2 of the ICJ statutes requires that cases brought before the ICJ must be a legal dispute. The article explains that in making decisions on disputes submitted to it, the ICJ must apply international conventions or agreements, both general and specific, that are recognized by the parties. In this case, Colombia no longer recognizes the Pact of Bogota.

ICJ has mandatory jurisdiction where the disputing parties are bound by an agreement or convention where in the agreement they have agreed that if there is a dispute between the parties, they accept ICJ’s mandatory jurisdiction to decide on the case. According to Article XXXI of the Pact of Bogota, the agreement in question has been explained that if a dispute occurs between the parties, they accept the mandatory jurisdiction of the ICJ to decide on the case.

In considering the decision, the ICJ has a ratione temporis jurisdiction. Although Colombia accepts that the Court otherwise has jurisdiction in the case, argues that “The Court has no ratione temporis jurisdiction to consider any claim based on events that are alleged to have occurred after Colombia was no longer bound by the provisions of the Pact”. Ratione temporis jurisdiction refers to the effect of time on the power of the court under the agreement. Such effect is usually directly determined by the express language contained in the applicable agreement. The element of jurisdiction Ratione Temporis is considered by the Court to be a link in its position regarding lack of jurisdiction in special cases (Sinclair & Sinclair, 1984).

Legal Consequences from the usage of the pact of Bogota in the judicial decision

Based on the interview results, Dr. Gulardi Nurbintoro, argues that the ICJ decision is the same as the continental system, which means that the nature of the ICJ decision is always evolving so that the decision can indirectly become a law. Thus, of course, there is a legal consequence to a decision. As found in Article 38 paragraph (1) (d) of the ICJ statute, judicial decisions and teachings of the most highly qualified publishers from various nations, as an additional means of determining legal rules.

It is undeniable that the ICJ has no role in seeking the implementation of the ruling by the disputing countries. Where after the ICJ renders a decision, the country concerned is considered to have agreed to a commitment regarding its future behaviour.
Thus, the ICJ's decision indicates that in Article VI there are things that are non-negotiable agreements in the future (Pactum de Negotiando) but rather, agreements to reach a comprehensive understanding (Pactum de Contrahendo). Pactum de Negotiando is a legally binding instrument under international law whereby contracting parties assume a legal obligation to conclude or negotiate a future agreement.

Thus, the results of the decisions in the Nicaragua and Colombia cases can become a case approach race in subsequent cases. This is what is meant by creating a source of law and these are the legal consequences that may occur as a result of the decisions in the cases of Nicaragua and Colombia.

In terms of sovereignty, the impact of Colombia's withdrawal from this pact is that countries that are still signing this pact can no longer sue Colombia directly and must use a special agreement or jurisdictional clause. This also applies to vice versa. Colombia can no longer directly sue the signatories of the pact or use the Pact of Bogota as a race for litigation.

Hence, another one of the legal consequences in that Colombia are not legally binding anymore by the Pact of Bogota, and does not allegeable to use the pact of Bogota to insure an application to the ICJ under the Pact of Bogota.

The execution of the Judicial Decision by ICJ

The execution of a decision can result in a form of legal responsibility to carry out the contents of the decision. The execution in writing this thesis is based on the right of a country to file a lawsuit, in which the outcome of the lawsuit is based on a decision. The decision in question is an attempt by the rule of law. Another way to go to the ICJ ("Judicial Procedure") is one of the dispute resolution methods stipulated in the Pact. This is found in article XXXI of the Pact (Edgar Turlington, 2017). These provisions are a contractual expression of article 36(2) of the ICJ Statute and place the Pact under the provisions of article 36(1) of the ICJ Statute, which refer to the agreements and conventions in force by which states give jurisdiction to the World Court.

From the results of interviews conducted by the author with practitioners who were previously assistant judges at the ICJ and are now Republic of Indonesia Diplomats, namely Dr. Gulardi Nurbintoro S.H., LL.M., S.J.D., for self-execution, ICJ, like other courts, has no obligation to ensure the execution of a decision by ICJ itself. When the ICJ makes a decision, all disputing countries are obliged to comply with the decision, and if it is not implemented, one of the parties to the dispute is obliged to report to the security council, where the ICJ decision must be recognized and must be carried out. In its Decision which is final and without appeal, the Court, among others:

1. Reject, unanimously, the first preliminary objection submitted by the Republic of Colombia;
2. Reject, by eight votes to eight, by the President's vote, the preliminary three objections brought by the Republic of Colombia;
3. Reject, unanimously, the fourth preliminary objection submitted by the Republic of Colombia;
4. Found, unanimously, that there was no basis for setting up the second preliminary objection raised by the Republic of Colombia;
5. Reject, by a vote of eleven to five, the fifth preliminary objection filed by the Republic of Colombia so far as the First Request filed by Nicaragua is concerned in its Application;
6. Upholds, unanimously, the fifth preliminary objection submitted by the Republic of Colombia in so far as the Second Request submitted by Nicaragua is concerned in its Petition.

However, it should be denied that the structure of the national legal system and the structure of the international legal system are two different things. Where the meaning of execution itself can be interpreted from the submission of a country to sanctions and decisions given by international courts.

In Conclusion, the Bogotá Pact is a regional dispute resolution mechanism that builds bridges with the World Court, the universal judicial body of the United Nations, by giving the Court jurisdiction in disputes arising between conventional Americans. For the first time, the ICJ correctly interpreted the scope of Article XXXI of the Pact in the Border and Transboundary Armed Actions case, concluding that it was a conventional obligation, notwithstanding the unilateral
Is the Nicaragua and Colombia case a form of appeal?

On November 26, 2013, Nicaragua filed a Request for Appeal with the ICJ instituting proceedings against Colombia regarding the dispute in relation to "the violation of Nicaragua's sovereign Rights and maritime zone stated by the Judgment of the Court of November 19, 2012, in the case of the Territorial and Maritime Disputes and the threat of use of force by Colombia to commit this offence."

Basically, as stated in Article 60 of the ICJ statute: “The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party”. This article basically stated that The ICJ's decision is final and binding. Where the decision cannot be contested. Hence, neither Nicaragua nor Colombia has the right to issue and appeal.

Fundamentally, a country will not appeal if the decision is a favourable decision for that country. In this case Nicaragua felt disadvantaged in the previous 2012 decision, thus filing a lawsuit again and not an appeal. According to an interview with Dr. Gulardi Nurbintoro, a former assistant judge at the International Court of Justice and currently a diplomat of the Republic of Indonesia at Canberra, ICJ's decision is final and binding. Where the decision cannot be contested. But there is something called the Revision of Judgment.

Article 61 paragraph (1) of the ICJ statute states that: “An application for revision of a judgment may be made only when it is based on the discovery of some facts of such a nature as to be a decisive factor, which fact was when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence.”

According to Dr. Gulardi Nurbintoro throughout history, there have been 4 (four) cases that wished to submit a revision of the judgment. However, no country has met the threshold or requirements so that a revision of judgment can be carried out. The requirements referred to include: the emergence of new facts that were not known during the trial and became a strong key in terms of revising the decision, submitting a revision of judgment a minimum of 6 months after the decision was made, and a maximum of 10 years after the decision was declared.

Conclusion

Termination of a decision on an agreement in the ICJ must have been in all considerations and based on transparency by the judge. Where in deciding a case, ICJ judges decide based on what was submitted, presented, and given by the attorney during the trial. Thus there is no evidence outside the trial to be considered by the judge. However, the issue raised by the author is the legality of the Pact of Bogota as material for consideration of which decision.

The legal consequences of the ICJ's decision in the Nicaragua V. Colombia case against the Pact Agreement in Bogota are related to the outcome of a decision with the effect of that decision in other cases. As found in Article 38 paragraph (1) (d) of the ICJ statute, judicial decisions and teachings of the most highly qualified publishers from various nations, as an additional means of determining legal rules. This is the legal consequence that may occur, which is the result of the decisions in the cases of Nicaragua and Colombia.
References


