

SEPARATE OPINION OF JUDGE RANJEVA

[Translation]

Correspondence between Nicaragua's requests and the subject-matter of the Judgment — Interim decision on the merits or judgment on a preliminary objection — Declaration of the validity of the 1928 Treaty — Status of the three islands and ending of the dispute — Closeness of links between the merits and the procedural law — Nicaragua's dual claim: possessory and petitory — Combination of actions in Colombia's objection — Colombia's objection not of an exclusively preliminary character — Risk of conflict of decisions on the exercise of jurisdiction — Article VI of the Pact of Bogotá and Article 36, paragraph 2, of the Statute — Inadequate grounds for exclusion of the optional clause.

1. In its Memorial, Nicaragua requests the Court, in the main proceedings, to adjudge and declare that:

“(1) the Republic of Nicaragua has sovereignty over the islands of San Andrés, Providencia, and Santa Catalina and the appurtenant islets and cays.

.....
 (4) the Bárcenas-Esguerra Treaty signed in Managua on 24 March 1928 was not legally valid and, in particular, did not provide a legal basis for Colombian claims to San Andrés and Providencia”.

Colombia, in its first preliminary objection, requests the Court to adjudge and declare that:

“(1) under the Pact of Bogotá, and in particular in pursuance of Articles VI and XXXIV, the Court declares itself to be without jurisdiction to hear the controversy submitted to it by Nicaragua under Article XXXI, and declares that controversy ended”.

Paragraph 90 of this Judgment states that:

“the Court finds that it can dispose of the issue of the three islands of the San Andrés Archipelago expressly named in the first paragraph of Article I of the 1928 Treaty at the current stage of the proceedings. That matter [sovereignty over the islands of San Andrés, Providencia and Santa Catalina] has been settled by the Treaty.”

2. The correspondence and similarity in terms of subject-matter being immediately obvious even to an uninformed reader, the Court has made its decision to reject these two claims by Nicaragua. It may be pointed out that the Court has not upheld Colombia's request by means of a direct action or ruling, but by dealing with it as an objection. In view of the submissions in the main proceedings, Colombia could have requested

a confirmatory decision *in limine* both on the validity of the 1928 Treaty and the attribution of the three islands to Colombia. The Court could have delivered a preliminary interim finding on the legal merits, in certain circumstances: if the two Parties were in agreement, if one of the Parties requested such a decision, and if the Statute and the Rules of Court allowed it. However, the Respondent did not act in that way; it chose the path of preliminary objections, pursuant to Article 79 of the Rules of Court. The present Judgment responds to Colombia's first objection by deciding part of the main proceedings, concerning sovereignty over the three islands and the validity of the 1928 Treaty. However, this decision is not a definitive one, since it does not settle the whole of the dispute or rule on all the claims made in the main proceedings.

3. Does Colombia's first preliminary objection possess an exclusively preliminary character? The Court has answered this question in the affirmative. It sees no legal obstacle to prevent it from exercising its jurisdiction. To arrive at this finding, the Judgment has chosen to regard maritime delimitation as the only real subject of the dispute between the Parties. The 1928 Treaty, by recognizing Colombia's sovereignty over the three islands, put an end to that dispute, so there is no need for a ruling on the validity or possible nullity of the 1928 Treaty with regard to the maritime delimitation that has been requested. In the absence of a dispute, and the territorial status of the three islands having been settled by treaty, there is consequently no reason to adjudicate on the fourth submission.

4. In formal and textual terms, the lack of correspondence between the submissions and the direct consequences of the Judgment leads one to reflect on the jurisprudence of the Court, as established in the *Lockerbie* cases:

“That objection relates to many aspects of the dispute . . . [T]he United Kingdom seeks to obtain from the Court a decision not to proceed to judgment on the merits, which would immediately terminate the proceedings. However, by requesting such a decision, the United Kingdom is requesting, in reality, at least two others which the decision not to proceed to judgment on the merits would necessarily postulate . . . The Court therefore has no doubt that Libya's rights on the merits would not only be affected by a decision, at this stage of the proceedings, not to proceed to judgment on the merits, but would constitute, in many respects, the very subject-matter of that decision. The objection raised by the United Kingdom on that point has the character of a defence on the merits. In the view of the Court, this objection does much more than ‘touch[ing] upon subjects belonging to the merits of the case’.” (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, *Preliminary Objections, Judgment*, *I.C.J. Reports 1998*, pp. 28-29, para. 50.)

The Court pointed out that, by raising an objection, the United Kingdom was indirectly seeking a reply which concerned the rights of the Applicant in the main proceedings and which would have put an end to the proceedings and the dispute. If the Court ruled on the objection by the United Kingdom, according to which the resolutions of the Security Council had rendered the Libyan claims without object, it would inevitably be ruling on the merits; that would have been the consequence whether the British objection had been upheld or rejected. However, by invoking Article 79, the Respondent set in train a procedure which is designed precisely to prevent the Court from doing this. It found that the objection did not possess an exclusively preliminary character, not because of the effects of the decision on the merits of the dispute, but because the decision would dispose of the merits of the rights at issue, in the context of a procedure relating to questions of jurisdiction and admissibility.

5. In the present case, the issue is whether, by closing the debate on the validity of the 1928 Treaty, the Court was not ruling incidentally on the merits of Nicaragua's claims. Clearly, the territorial delimitation first entailed a response concerning the territorial status of the islands. However, Colombia's objection sought to prevent the Court from giving one, in other words from discussing the substantive provisions of the Treaty whose validity Nicaragua was contesting, maintaining it to be null and void. The problem was then twofold: the claim that the Treaty was null and void, and the blocking of such a finding by the use of Article 79 of the Rules of Court.

6. The questioning of the validity of the 1928 Treaty is closely linked to the territorial status of the islands in the archipelago, San Andrés, Providencia and Santa Catalina, but it is presented as an independent claim in Nicaragua's strategy. Can a State be challenged, through the courts, as regards the basis for its territorial titles? The problem stems from the fact that Nicaragua explicitly stated that its arguments on nullity were confined solely to the jurisdictional debate, and reserved further complementary arguments on the same issue for the merits phase. But neither the Respondent nor the Court has questioned it on that issue, whereas two grounds for nullity have been invoked: coercion and the violation of the treaty provisions. By ruling *in limine* and, it would seem, definitively on the question of the nullity of the 1928 Treaty, the Court's decision has been taken without regard for the rule of procedural fairness.

7. The Court could have upheld such an objection without an exclusively preliminary character if, on the one hand, the Applicant had brought an improper action — a debatable notion, indeed a non-existent one, in terms of the Statute and the Rules of Court — and if, on the other, the Respondent in the main proceedings had put forward such an argument. These two presumed conditions were not met in the present case. Assuming that such an action might exist in international law, it can only be of such a kind, in so far as the rights on the merits are established in advance, that it cannot have an exclusively preliminary character. It

would be an abuse of process to seek to re-open before the courts an issue which had already been resolved and to challenge the rights that had been established. Challenging the very basis of those rights then becomes a question associated with the legal merits; it would not be limited to merely touching upon these, but would go to the very substance of the right of the Applicant. Since the right of action before the Court has a consensual basis, it is the consent of the Parties which allows the Court to exercise its jurisdiction.

8. By regarding as exclusively preliminary in nature the first part of the reply to the first preliminary objection concerning the territorial status of the three islands, so as to settle the dispute on that subject by conventional means, the Judgment incidentally disposes of Nicaragua's fourth submission on the merits. The Judgment has ruled directly on the question of the validity of the Treaty at the preliminary objections stage. Relying upon Article XXXIV of the Pact of Bogotá in order to declare the controversy ended was conceivable, if the nullity of the Treaty as defective had not been claimed as a separate formal submission. The formalistic analysis pursued in the Judgment does not accurately reflect the overall structure of Nicaragua's claim, and the Judgment does not consider the real links between the first and fourth submissions.

9. Nicaragua, in its first submission, was asking the Court to protect its possession. The request is for a ruling on a possessory claim, its sovereignty over the three islands and the appurtenant islets and cays, and is an independent submission, aimed at establishing whether or not it holds a valid legal title. Here, though, Nicaragua's possessory action was accompanied by a petitory one. In the main proceedings, the Applicant is questioning the basis in law: by claiming the nullity of the 1928 Treaty, Nicaragua is asking the Court to reply to a dual question — is there a territorial title, and who holds it? For the same 1928 Treaty is claimed by Colombia as providing a legal title to San Andrés, Providencia and Santa Catalina.

Nicaragua has combined two actions. Colombia opposed this request with a negative petitory action, seeking the implicit recognition by the Court, at the incidental proceedings stage, of the validity of the 1928 Treaty, with the inferred consequence that the controversy between the Parties shall be declared ended, to use the words of the Pact of Bogotá.

10. The simultaneous presence of two conflicting petitory actions and a possessory action will have helped to create confusion. In this case, these disagreements were closely linked to the substance of the procedural law. Indeed, at a procedural level one can envisage a solution dealing with the possessory aspect, because of its nature. As regards the petitory aspect, however, the questions are framed in different terms. In relation to sovereign title and the 1928 Treaty, the Court was faced with one action in the form of a claim and another contradicting it. The Parties made no mistake in this respect, as reflected by the importance

given in their exchanges to the issue of the nullity or validity of the 1928 Treaty. This debate brought into question the substance of the law on sovereignty that is in dispute.

The Court, by dismissing Nicaragua's possessory and petitory actions and acceding to Colombia's request, has preserved intact this combination of actions. By a single decision, both sovereign possession and the title to sovereignty have been determined. It has thus taken the view that the question of sovereignty over the islands of San Andrés, Providencia and Santa Catalina was settled by the 1928 Treaty, without noting that the seemingly procedural actions of the Parties were linked to the dual nature of the dispute's subject-matter in this respect. By adopting this approach, the Judgment has implicitly decided an issue which formed part of the subject-matter of the dispute: the validity of the territorial title. Consequently, the question arises of whether a treaty rendered null and void *ex tunc* and not *ex nunc* may still be regarded as in force, in particular in 1948 and on the date the Application was filed. The Judgment's consideration of Nicaragua's conduct is an essential parameter for determining whether the Treaty was in force in the eyes of the Applicant, but inasmuch as the objection concerns the nullity and not the opposability of the said Treaty, the Judgment decides an argument relating to the legal merits. However, it is absurd to think for a moment that a treaty could be in force if it is flawed by nullity, notwithstanding the provisions of Article VI of the Pact of Bogotá.

11. In these circumstances, the first preliminary objection could not possess an exclusively preliminary character.

12. The result of the combination of actions has been the choice of the Pact of Bogotá alone as the basis of jurisdiction, the effect of which has been the ending of the controversy between the Parties and the decision not to entertain the second basis: the optional clauses of Article 36 of the Statute of the Permanent Court of International Justice.

13. This latter decision in the Judgment requires some further explanation. An international court is free to choose from among the proposed bases the one which seems to it the most appropriate for the exercise of its jurisdiction; even so, the reasons for its preference have to be explained. In political terms, the Pact of Bogotá is plausible, but in legal and judicial terms, the Court, in view of the conclusion reached in the Judgment, needed to apply the test of non-conflict, in a situation where two independent bases of jurisdiction were being claimed. The right of access to the Court is subject to strict conditions, on the one hand laid down by the Statute and the Rules of Court, and on the other developed through its jurisprudence. The law and the exercise of the Court's jurisdiction are of a peremptory nature; when the necessary conditions are met in contentious proceedings, the Court may not dispose of its own jurisdiction. In this case, therefore, it needed to ensure that there was no risk of conflict in its decisions. That would have been so if the consideration of the respective optional declarations had reached a different conclusion: that the first objection did not possess an exclusively preliminary character.

14. In paragraph 138, the Judgment sets against the applicability of the optional clause the absence of a legal dispute in the sense understood by the Judgment. Logically, in theoretical terms, the optional clause may still be of use. Since the dispute over the islands is regarded as settled in the Judgment by a treaty which has already been declared “valid”, does the Court have jurisdiction to return, by other means, to a matter which has already been decided?

It was essential to give an unequivocal answer to this question in order to eliminate a possible conflict of decisions.

The issues thus described and all the arguments set out by the Parties confirm that the first preliminary objection raised by Colombia does not possess an exclusively preliminary character.

(Signed) Raymond RANJEVA.
