



INTERNATIONAL COURT OF JUSTICE

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Summary

Not an official document

Summary 2007/5
13 December 2007

Territorial and Maritime Dispute **(Nicaragua v. Colombia)**

Preliminary Objections

Summary of the Judgment of 13 December 2007

Chronology of the procedure and submissions of the Parties (paras. 1-14)

On 6 December 2001, Nicaragua filed in the Registry of the Court an Application instituting proceedings against Colombia in respect of a dispute consisting of “a group of related legal issues subsisting” between the two States “concerning title to territory and maritime delimitation” in the western Caribbean.

In its Application, Nicaragua sought to found the jurisdiction of the Court on the provisions of Article XXXI of the American Treaty on Pacific Settlement, officially known as the “Pact of Bogotá”, as well as on the declarations made by the Parties under Article 36 of the Statute of the Permanent Court of International Justice, which are deemed, for the period which they still have to run, to be acceptances of the compulsory jurisdiction of the present Court pursuant to Article 36, paragraph 5, of its Statute.

Since the Court included upon the Bench no judge of the nationality of either of the Parties, each Party proceeded to exercise its right conferred by Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case. Nicaragua first chose Mr. Mohammed Bedjaoui, who resigned on 2 May 2006, and subsequently Mr. Giorgio Gaja. Colombia chose Mr. Yves Fortier.

By an Order dated 26 February 2002, the Court fixed 28 April 2003 as the time-limit for the filing of the Memorial of Nicaragua and 28 June 2004 as the time-limit for the filing of the Counter-Memorial of Colombia. Nicaragua filed its Memorial within the time-limit so prescribed.

On 21 July 2003, within the time-limit set by Article 79, paragraph 1, of the Rules of Court, as amended on 5 December 2000, Colombia raised preliminary objections to the jurisdiction of the Court. Consequently, by an Order dated 24 September 2003, the Court, noting that by virtue of Article 79, paragraph 5, of the Rules of Court, the proceedings on the merits were suspended, fixed 26 January 2004 as the time-limit for the presentation by Nicaragua of a written statement of its observations and submissions on the preliminary objections made by Colombia. Nicaragua filed such a statement within the time-limit so prescribed, and the case thus became ready for hearing in respect of the preliminary objections.

Public hearings were held between 4 June and 8 June 2007. At the conclusion of the oral proceedings, the Parties presented the following final submissions to the Court:

On behalf of the Government of Colombia,

“Pursuant to Article 60 of the Rules of the Court, having regard to Colombia’s pleadings, written and oral, Colombia respectfully 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;

(2) under Article 36, paragraph 2, of the Statute of the Court, the Court has no jurisdiction to entertain Nicaragua’s Application;

and that

(3) Nicaragua’s Application is dismissed.”

On behalf of the Government of Nicaragua,

“In accordance with Article 60 of the Rules of Court and having regard to the pleadings, written and oral, the Republic of Nicaragua respectfully requests the Court, to adjudge and declare that:

1. The Preliminary Objections submitted by the Republic of Colombia, both in respect of the jurisdiction based upon the Pact of Bogotá, and in respect of the jurisdiction based upon Article 36, paragraph 2, of the Statute of the Court, are invalid.

2. In the alternative, the Court is requested to adjudge and declare, in accordance with the provisions of Article 79, paragraph 9, of the Rules of Court that the objections submitted by the Republic of Colombia do not have an exclusively preliminary character.

3. In addition, the Republic of Nicaragua requests the Court to reject the request of the Republic of Colombia to declare the controversy submitted to it by Nicaragua under Article XXXI of the Pact of Bogotá ‘ended’, in accordance with Articles VI and XXXIV of the same instrument.

4. Any other matters not explicitly dealt with in the foregoing Written Statement and oral pleadings, are expressly reserved for the merits phase of this proceeding.”

Historical background (paras. 15-32)

The Court gives a brief account of the history which forms the background of the dispute between the Parties (only parts of which are referred to below).

It notes that on 24 March 1928, a “Treaty concerning Territorial Questions at Issue between Colombia and Nicaragua” was signed at Managua (hereinafter the “1928 Treaty”), in which both countries expressed their desire to put “an end to the territorial dispute between them”. Article I of that Treaty provided as follows:

“The Republic of Colombia recognises the full and entire sovereignty of the Republic of Nicaragua over the Mosquito Coast between Cape Gracias a Dios and the San Juan River, and over Mangle Grande and Mangle Chico Islands in the Atlantic Ocean (Great Corn Island and Little Corn Island). The Republic of Nicaragua

recognises the full and entire sovereignty of the Republic of Colombia over the islands of San Andrés, Providencia and Santa Catalina and over the other islands, islets and reefs forming part of the San Andrés Archipelago.

The present Treaty does not apply to the reefs of Roncador, Quitasueño and Serrana, sovereignty over which is in dispute between Colombia and the United States of America.” [Translation by the Secretariat of the League of Nations, for information.]

The instruments of ratification of the 1928 Treaty were exchanged at Managua on 5 May 1930. The Parties signed on that occasion a Protocol of Exchange of Ratifications (hereinafter the “1930 Protocol”). The Protocol noted that the 1928 Treaty was concluded between Colombia and Nicaragua “with a view to putting an end to the dispute between both Republics concerning the San Andrés Archipelago and the Nicaraguan Mosquito Coast”. The Protocol stipulated as follows:

“The undersigned, in virtue of the full powers which have been granted to them and on the instructions of their respective Governments, hereby declare that the San Andrés and Providencia Archipelago mentioned in the first Article of the said Treaty does not extend west of the 82nd degree of longitude west of Greenwich.” [Translation by the Secretariat of the League of Nations, for information.]

In a diplomatic Note dated 4 June 1969, Colombia protested against the granting of certain oil exploration concessions and reconnaissance permits by Nicaragua, which allegedly covered Quitasueño and the waters surrounding it as well as maritime zones that surpassed the 82nd meridian to the east. With respect to Quitasueño, Colombia pointed out that the 1928 Treaty explicitly declared that the Roncador, Quitasueño and Serrana cays were in dispute between Colombia and the United States. Colombia also made “a formal reservation . . . of its rights over the referenced territory, as well as over the adjacent maritime zone”. With respect to the maritime zones over which oil exploration concessions had been granted, Colombia observed that the 82nd meridian had been noted in the 1930 Protocol as the western boundary of the Archipelago of San Andrés and Providencia.

In a diplomatic Note dated 12 June 1969, Nicaragua asserted, with respect to the oil exploration concessions, that the areas concerned were part of its continental shelf and that the concessions had therefore been granted “in use of the sovereign rights [Nicaragua] fully and effectively exercises in accordance with the norms of international law”. As to the reference to the 82nd meridian in the 1930 Protocol, Nicaragua asserted that “[a] simple reading of the . . . texts makes it clear that the objective of this provision is to clearly and specifically establish in a restrictive manner, the extension of the Archipelago of San Andrés, and by no valid means can it be interpreted as a boundary of Nicaraguan rights or creator of a border between the two countries. On the contrary, it acknowledges and confirms the sovereignty and full domain of Nicaragua over national territory in that zone”.

In a Note in response dated 22 September 1969, Colombia inter alia made a “formal declaration of sovereignty in the maritime areas located East of Meridian 82 of Greenwich”, relying on the 1928 Treaty and 1930 Protocol. Colombia also pointed to the exclusion in the 1928 Treaty of the Roncador, Quitasueño and Serrana cays “from any negotiations between Colombia and Nicaragua”.

On 23 June 1971, Nicaragua sent a memorandum to the Department of State of the United States formally reserving its rights over its continental shelf in the area around Roncador, Quitasueño and Serrana and noting that it considered those banks to be part of its continental shelf. It further stated that it could not accept Colombia’s contention that the 82nd meridian referred to in the 1930 Protocol set the dividing line between the respective maritime zones of the two States since it only constituted the limit of the San Andrés Archipelago.

On 8 September 1972, Colombia and the United States signed the Treaty concerning the status of Quitasueño, Roncador and Serrana (also known as the Vásquez-Saccio Treaty). Article 1 of the Treaty provided that “the Government of the United States hereby renounces any and all claims to sovereignty over Quita Sueño, Roncador and Serrana”. On the same day, there was an Exchange of Notes between Colombia and the United States concerning their “legal position respecting Article 1 of [the] Treaty”. The United States affirmed that its legal position was, *inter alia*, that “Quita Sueño, being permanently submerged at high tide, is at the present time not subject to the exercise of sovereignty” and that the 1928 Treaty did not apply to Roncador, Quitasueño and Serrana. For its part, Colombia stated that its position was that the “[t]he physical status of Quita Sueño is not incompatible with the exercise of sovereignty” and that “with the renunciation of sovereignty by the United States over Quita Sueño, Roncador, and Serrana, the Republic of Colombia is the only legitimate title holder on those banks or cays, in accordance with the [1928 Treaty and 1930 Protocol] and international law”.

On 4 October 1972, the National Assembly of Nicaragua adopted a formal declaration proclaiming Nicaraguan sovereignty over Roncador, Quitasueño and Serrana. On 7 October 1972, Nicaragua formally protested, in diplomatic Notes to Colombia and the United States, against the signing of the Vásquez-Saccio Treaty and maintained that “the banks located in that zone . . . [were] part of [Nicaragua’s] territory and therefore subject to its sovereignty”. It added that it could not accept Colombia’s contention that the 82nd meridian referred to in the 1930 Protocol constituted the boundary line of the respective maritime areas of the two States since it did not coincide with the letter or spirit of the Protocol, the clear intention of which was to specify that the San Andrés Archipelago did not extend west further than the 82nd meridian.

In July 1979 the Sandinista Government came to power in Nicaragua. On 4 February 1980, the Minister for Foreign Affairs of Nicaragua published an official declaration and a “Libro Blanco” (hereinafter “White Paper”) in which Nicaragua declared

“the nullity and lack of validity of the Bárcenas-Meneses-Esguerra Treaty [the 1928 Treaty] . . . [concluded] in a historical context which incapacitated as rulers the presidents imposed by the American forces of intervention in Nicaragua and which infringed . . . the principles of the National Constitution in force . . .”.

In a diplomatic Note sent to Nicaragua on 5 February 1980, Colombia rejected the declaration of 4 February 1980 as “an unfounded claim that counters historical reality and breaches the most elementary principles of public international law”. In the view of the Colombian Government, the 1928 Treaty “[was] a valid, perpetual instrument, and in full force in light of the universally recognized legal norms”.

The new government which came to power in Nicaragua in 1990 and subsequent governments maintained the position with regard to the meaning of certain provisions of the 1928 Treaty and 1930 Protocol which had been stated from 1969 onwards and the position with regard to the invalidity of the 1928 Treaty which had been set out in the 1980 White Paper.

Subject-matter of the dispute (paras. 33-42)

The Court initially notes that the Parties have presented different views about whether there is an extant dispute between them and, if so, the subject-matter of that dispute. Consequently, before addressing Colombia’s preliminary objections, it needs to examine these issues.

The Court recalls that according to Nicaragua, the dispute submitted to the Court concerned (i) the validity of the 1928 Treaty and its termination due to material breach; (ii) the interpretation of the 1928 Treaty, particularly regarding the geographical scope of the San Andrés Archipelago; (iii) the legal consequences of the exclusion from the scope of the 1928 Treaty of Roncador, Quitasueño and Serrana; and (iv) the maritime delimitation between the Parties including the legal significance of the reference to the 82nd meridian in the 1930 Protocol. In Nicaragua’s view, the

fourth element “imply[d] and encompass[e] all the others”. In this regard, Nicaragua contended that the question of sovereignty over the maritime features was both accessory and preliminary to that of maritime delimitation. Finally, Nicaragua also submitted that the question whether the 1928 Treaty has settled all questions between the Parties is “the very object of the dispute” and “the substance of the case”.

Colombia, for its part, denied that there was an extant dispute over which the Court could have jurisdiction, claiming that the matters in issue had already been settled by the 1928 Treaty. It further contended that the real purpose behind Nicaragua’s Application was maritime delimitation rather than the determination of sovereignty over the maritime features.

The Court notes that, while the Applicant must present its view of the “subject of the dispute” pursuant to Article 40, paragraph 1, of the Statute of the Court, it is for the Court itself to determine the subject-matter of the dispute before it, taking account of the submissions of the Parties. As a preliminary point, the Court recalls that the Parties disagree on whether or not the dispute between them had been “settled” by the 1928 Treaty within the meaning of Article VI of the Pact of Bogotá. The Court first notes that Article VI of the Pact provides that the dispute settlement procedures in the Pact “may not be applied to matters already settled by arrangement between the parties, or by arbitral award or by decision of an international court, or which are governed by agreements or treaties in force on the date of the conclusion of the present Treaty” (emphasis added). The Court also notes that according to Article XXXIV of the Pact controversies over matters which are governed by agreements or treaties shall be declared “ended” in the same way as controversies over matters settled by arrangement between the parties, arbitral award or decision of an international court. The Court considers that, in the specific circumstances of the case, there is no difference in legal effect, for the purpose of applying Article VI of the Pact, between a given matter being “settled” by the 1928 Treaty and being “governed” by that Treaty. In light of the foregoing, the Court decides to use the word “settled” in its Judgment.

After having examined Nicaragua’s arguments, the Court considers that the question whether the 1928 Treaty and 1930 Protocol settled the matters in dispute between the Parties concerning sovereignty over the islands and maritime features and the course of the maritime boundary does not form the subject-matter of the dispute between the Parties and that, in the circumstances of the case, the question is a preliminary one.

With respect to Colombia’s contention that Nicaragua’s true interest lay in the maritime delimitation rather than in sovereignty over the maritime features, the Court notes that nonetheless “the claim of one party is positively opposed by the other” as to sovereignty over the maritime features.

The Court thus concludes that the questions which constitute the subject-matter of the dispute between the Parties on the merits are, first, sovereignty over territory (namely the islands and other maritime features claimed by the Parties) and, second, the course of the maritime boundary between the Parties.

First preliminary objection (paras. 43-120)

— General overview of the arguments of the Parties

The Court recalls that in its first preliminary objection, Colombia claims that pursuant to Articles VI and XXXIV of the Pact of Bogotá, the Court is without jurisdiction under Article XXXI of the Pact to hear the controversy submitted to it by Nicaragua and should declare the controversy ended. In this regard, Colombia, referring to Article VI of the Pact, argues that the matters raised by Nicaragua were settled by a treaty in force on the date on which the Pact was concluded, namely the 1928 Treaty and the 1930 Protocol. Colombia adds that this question can and must be considered at the preliminary objections stage.

Nicaragua claims that the Court has jurisdiction under Article XXXI of the Pact of Bogotá. In this regard, Nicaragua argues that the 1928 Treaty and its 1930 Protocol did not settle the dispute between Nicaragua and Colombia within the meaning of Article VI of the Pact of Bogotá because the 1928 Treaty was invalid or had been terminated and that, even if that was not the case, the 1928 Treaty did not cover all the matters now in dispute between the Parties. Moreover, Nicaragua contends that the Court may not pronounce upon these issues at this stage of the proceedings since that would require an examination of the merits of the case.

— The appropriate stage of proceedings for examination of the preliminary objection

The Court recalls that, under Article 79, paragraph 9, of the Rules of Court, there are three ways in which it may dispose of a preliminary objection: the Court “shall either uphold the objection, reject it, or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character”. The Court further recalls that, in the Nuclear Tests cases (albeit in slightly different circumstances), it emphasized that while examining questions of jurisdiction and admissibility, it is entitled, and in some circumstances may be required, to go into other questions which may not be strictly capable of classification as matters of jurisdiction or admissibility but are of such a nature as to require examination before those matters.

The Court believes that it is not in the interest of the good administration of justice for it to limit itself at that juncture to stating merely that there is a disagreement between the Parties as to whether the 1928 Treaty and 1930 Protocol settled the matters which are the subject of the controversy within the meaning of Article VI of the Pact of Bogotá, leaving every aspect thereof to be resolved on the merits.

In principle, a party raising preliminary objections is entitled to have these objections answered at the preliminary stage of the proceedings unless the Court does not have before it all facts necessary to decide the questions raised or if answering the preliminary objection would determine the dispute, or some elements thereof, on the merits. The Court finds itself in neither of these situations in the case at hand. The determination by the Court of its jurisdiction may touch upon certain aspects of the merits of the case. Moreover, the Court has already found that the question of whether the 1928 Treaty and the 1930 Protocol settled the matters in dispute does not constitute the subject-matter of the dispute on the merits. It is rather a preliminary question to be decided in order to ascertain whether the Court has jurisdiction.

In light of the foregoing, the Court finds that it is unable to uphold Nicaragua’s contention that it is precluded from addressing Colombia’s first preliminary objection at this stage of the proceedings.

— Jurisdictional system of the Pact of Bogotá

The Court makes mention of the relevant provisions of the Pact of Bogotá in the case, beginning with Article XXXI, which reads as follows:

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

- (a) The interpretation of a treaty;
- (b) Any question of international law;
- (c) The existence of any fact which, if established, would constitute the breach of an international obligation; or

(d) The nature or extent of the reparation to be made for the breach of an international obligation.”

The other relevant provisions are Articles VI and XXXIV of the Pact.

Article VI provides that:

“The aforesaid procedures, furthermore, may not be applied to matters already settled by arrangement between the parties, or by arbitral award or by decision of an international court, or which are governed by agreements or treaties in force on the date of the conclusion of the present Treaty.”

Article XXXIV reads as follows:

“If the Court, for the reasons set forth in Articles V, VI and VII of this Treaty, declares itself to be without jurisdiction to hear the controversy, such controversy shall be declared ended.”

These provisions indicate that if the Court were to find that the matters referred to it by Nicaragua pursuant to Article XXXI of the Pact of Bogotá had previously been settled by one of the methods spelled out in Article VI thereof, it would lack the requisite jurisdiction under the Pact to decide the case.

— The question whether the 1928 Treaty and 1930 Protocol settled the matters in dispute between the Parties

The Court considers the arguments of the Parties and examines the factual background of the conclusion of the 1928 Treaty and the signature of the 1930 Protocol. It states that, in order to ascertain whether it has jurisdiction, it has to decide the question whether, on the date of the conclusion of the Pact of Bogotá in 1948, the matters raised by Nicaragua were, pursuant to Article VI thereof, “governed by agreements or treaties in force”. For this purpose, the first point for the Court to consider is whether the treaty, which Colombia alleges to have settled the matters constituting the subject-matter of the dispute, was in force in 1948.

The Court notes that, with respect to the validity of the 1928 Treaty, Nicaragua first contends that the Treaty was “concluded in manifest violation of the Nicaraguan Constitution of 1911 that was in force in 1928” and, secondly, that at the time the Treaty was concluded, Nicaragua was under military occupation by the United States and was precluded from concluding treaties that ran contrary to the interests of the United States and from rejecting the conclusion of treaties that the United States demanded it to conclude. Nicaragua submits in this respect that Colombia was aware of this situation and “took advantage of the US occupation of Nicaragua to extort from her the conclusion of the 1928 Treaty”. Nicaragua claims that it remained under the influence of the United States even after the withdrawal of the last United States troops at the beginning of 1933.

Colombia, for its part, maintains that Nicaragua’s assertion relating to the invalidity of the 1928 Treaty is unfounded. It observes that, even assuming that the 1928 Treaty was incompatible with Nicaragua’s 1911 Constitution or that Nicaragua lacked competence to freely conclude treaties due to occupation by the United States, these claims were not raised during the ratification process in the Nicaraguan Congress in 1930, nor for some 50 years thereafter. It points out that, in fact, these arguments were raised for the first time in 1980. Colombia further notes that in 1948, when the Pact of Bogotá was concluded, Nicaragua made no reservation with regard to the 1928 Treaty, despite the fact that Nicaragua knew that it had the right to make such a reservation and made a reservation with regard to the validity of an arbitral award. Finally, Colombia contends that, as a consequence, Nicaragua is now precluded from raising the question of validity of the 1928 Treaty and its 1930 Protocol.

The Court recalls that the clear purpose of Article VI of the Pact of Bogotá was to preclude the possibility of using the procedures provided for in the Pact, and in particular judicial remedies, in order to reopen such matters as were settled between the parties to the Pact, because they had been the object of an international judicial decision or a treaty. When ratifying the Pact, States envisaged bringing within its procedures matters not yet so settled.

States parties to the Pact of Bogotá would have considered that matters settled by a treaty or international judicial decision had been definitively resolved unless a specific reservation relating thereto was made under Articles LIV and LV of the Pact. Nicaragua did not enter any reservation regarding the 1928 Treaty when it became a party to the Pact of Bogotá, the treaty it now invokes as a basis of jurisdiction, although it did enter a reservation with regard to arbitral decisions the validity of which it contested. The Court notes that there is no evidence that the States parties to the Pact of Bogotá of 1948, including Nicaragua, considered the 1928 Treaty to be invalid. On 25 May 1932, Nicaragua registered the Treaty and Protocol with the League of Nations as a binding agreement, pursuant to Article 18 of the Covenant of the League, Colombia having already registered the Treaty on 16 August 1930.

The Court recalls that Nicaragua advanced “the nullity and lack of validity” of the 1928 Treaty for the first time in an official declaration and White Paper published on 4 February 1980. The Court thus notes that, for more than 50 years, Nicaragua has treated the 1928 Treaty as valid and never contended that it was not bound by the Treaty, even after the withdrawal of the last United States troops at the beginning of 1933. At no time in those 50 years, even after it became a Member of the United Nations in 1945 and even after it joined the Organization of American States in 1948, did Nicaragua contend that the Treaty was invalid for whatever reason, including that it had been concluded in violation of its Constitution or under foreign coercion. On the contrary, Nicaragua has, in significant ways, acted as if the 1928 Treaty was valid. Thus, in 1969, when Nicaragua responded to Colombia’s claim that the 82nd meridian, referred to in the 1930 Protocol, constituted the maritime boundary between the two States, Nicaragua did not invoke the invalidity of the Treaty but argued instead that the 1928 Treaty and 1930 Protocol did not effect a maritime delimitation. Similarly, in 1971 when Nicaragua made representations to the United States reserving its rights over Roncador, Quitasueño and Serrana, it did not call into question the validity of the 1928 Treaty. The Court thus finds that Nicaragua cannot today be heard to assert that the 1928 Treaty was not in force in 1948.

The Court accordingly finds that the 1928 Treaty was valid and in force on the date of the conclusion of the Pact of Bogotá in 1948, the date by reference to which the Court must decide on the applicability of the provisions of Article VI of the Pact of Bogotá setting out an exception to the Court’s jurisdiction under Article XXXI thereof.

The Court recalls that Nicaragua argues that, even if the 1928 Treaty was valid, it has been terminated due to Colombia’s interpretation of the Treaty in 1969, which Nicaragua characterized as a material breach thereof. This contention is denied by Colombia. The Court considers that the question whether the Treaty was terminated in 1969 is not relevant to the question of its jurisdiction since what is determinative, under Article VI of the Pact of Bogotá, is whether the 1928 Treaty was in force on the date of the conclusion of the Pact, i.e. in 1948, and not in 1969. Accordingly, there is no need for the Court to address the question of the purported termination of the 1928 Treaty in 1969 for the purposes of the ascertainment of its jurisdiction.

The Court then turns to the question whether the Treaty and its 1930 Protocol settled the matters in dispute between the Parties and consequently whether the Court has jurisdiction in the case under Article XXXI of the Pact. It recalls that it has already concluded that there are two questions in dispute between the Parties on the merits: first, territorial sovereignty over islands and other maritime features and, second, the course of the maritime boundary between the Parties.

The Court notes that the Parties disagree about whether various matters relating to territorial sovereignty were settled by the 1928 Treaty, namely sovereignty over the three islands of the San Andrés Archipelago expressly named in the Treaty, the scope and composition of the rest of the San Andrés Archipelago and sovereignty over Roncador, Quitasueño and Serrana. The Parties also disagree about whether the 1930 Protocol effected a maritime delimitation between them.

With respect to the question of its jurisdiction as regards the issue of sovereignty over the named islands of the San Andrés Archipelago, the Court considers that it is clear on the face of the text of Article I that the matter of sovereignty over the islands of San Andrés, Providencia and Santa Catalina has been settled by the 1928 Treaty within the meaning of Article VI of the Pact of Bogotá. In the Court's view there is no need to go further into the interpretation of the Treaty to reach that conclusion and there is nothing relating to this issue that could be ascertained only on the merits.

Nicaragua's contention that the 1928 Treaty is invalid has already been dealt with by the Court. With regard to Nicaragua's further assertion that the 1928 Treaty has been terminated by material breach due to the interpretation adopted by Colombia from 1969 onwards, that issue has not been addressed by the Court at this stage since it is not relevant to the question of its jurisdiction by reference to Article VI of the Pact of Bogotá. Even if the Court were to find that the 1928 Treaty has been terminated, as claimed by Nicaragua, this would not affect the sovereignty of Colombia over the islands of San Andrés, Providencia and Santa Catalina. The Court recalls that it is a principle of international law that a territorial régime established by treaty "achieves a permanence which the treaty itself does not necessarily enjoy" and that the continued existence of that régime is not dependent upon the continuing life of the treaty under which the régime is agreed.

In the light of the foregoing, 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 has been settled by the Treaty. Consequently, Article VI of the Pact is applicable on this point and therefore the Court does not have jurisdiction under Article XXXI of the Pact of Bogotá over the question of sovereignty over the three named islands. Accordingly, the Court upholds the first preliminary objection raised by Colombia in so far as it concerns the Court's jurisdiction as regards the question of sovereignty over the islands of San Andrés, Providencia and Santa Catalina.

As regards the question of the scope and composition of the rest of the San Andrés Archipelago, the Court recalls that there is agreement between the Parties that the San Andrés Archipelago includes the islands of San Andrés, Providencia and Santa Catalina as well as adjacent islets and cays. However, the Parties disagree as to which maritime features other than those named islands form part of the Archipelago.

The Court considers that it is clear on the face of the text of the first paragraph of Article I of the 1928 Treaty that its terms do not provide the answer to the question as to which maritime features apart from the islands of San Andrés, Providencia and Santa Catalina form part of the San Andrés Archipelago over which Colombia has sovereignty. That being so, this matter has not been settled within the meaning of Article VI of the Pact of Bogotá and the Court has jurisdiction under Article XXXI of the Pact of Bogotá. Therefore, the Court cannot uphold the first preliminary objection raised by Colombia in so far as it concerns the Court's jurisdiction as regards the question of sovereignty over the maritime features forming part of the San Andrés Archipelago, save for the islands of San Andrés, Providencia and Santa Catalina.

With respect to the question of its jurisdiction as regards the matter of sovereignty over Roncador, Quitasueño and Serrana, the Court observes that the meaning of the second paragraph of Article I of the 1928 Treaty is clear: this treaty does not apply to the three maritime features in question. Therefore, the limitations contained in Article VI of the Pact of Bogotá do not apply to

the question of sovereignty over Roncador, Quitasueño and Serrana. The Court thus has jurisdiction over this issue under Article XXXI of the Pact of Bogotá and cannot uphold the first preliminary objection raised by Colombia in so far as it concerns the Court's jurisdiction as regards the question of sovereignty over Roncador, Quitasueño and Serrana.

With respect to the question of its jurisdiction as regards the issue of the maritime delimitation, the Court, after examining the arguments presented by the Parties and the material submitted to it, concludes that the 1928 Treaty and 1930 Protocol did not effect a general delimitation of the maritime boundary between Colombia and Nicaragua. Since the dispute concerning maritime delimitation has not been settled by the 1928 Treaty and 1930 Protocol within the meaning of Article VI of the Pact of Bogotá, the Court has jurisdiction under Article XXXI of the Pact. Therefore, the Court cannot uphold Colombia's first preliminary objection in so far as it concerns the Court's jurisdiction as regards the question of the maritime delimitation between the Parties.

Second preliminary objection (paras. 121-140)

In addition to Article XXXI of the Pact of Bogotá, Nicaragua invoked as a basis of the Court's jurisdiction the declarations made by the Parties under Article 36 of the Statute of the Permanent Court of International Justice, which are deemed, for the period for which they still have to run, to be acceptances of the compulsory jurisdiction of the present Court pursuant to Article 36, paragraph 5, of its Statute.

In its second preliminary objection, Colombia asserts that the Court has no jurisdiction on this basis. It claims that jurisdiction under the Pact of Bogotá is governing and hence exclusive. In its view, since the Court has jurisdiction under Article XXXIV of the Pact to declare the controversy ended and must do so in the case at hand, the Court may not proceed further to consider whether it might have jurisdiction under the optional clause. In support of its claim, Colombia relies on the Court's Judgment in the Border and Transborder Armed Actions (Nicaragua v. Honduras) case, in which Nicaragua also asserted jurisdiction on the basis of Article XXXI of the Pact of Bogotá and on the basis of optional clause declarations. Colombia notes that, in the Armed Actions case, the Court declared that "in relations between the States parties to the Pact of Bogotá, that Pact is governing" and that

"the commitment in Article XXXI . . . is an autonomous commitment, independent of any other which the parties may have undertaken or may undertake by depositing with the United Nations Secretary-General a declaration of acceptance of compulsory jurisdiction under Article 36, paragraphs 2 and 4, of the Statute" (Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988, p. 82, para. 27 and p. 85, para. 36).

Colombia considers that the Court thus laid down the principle of primacy of the title of jurisdiction under the Pact of Bogotá. It concludes that, when an Applicant invokes both the Pact of Bogotá and optional clause declarations, it is the Pact of Bogotá, as lex specialis, which governs or, in other words, is determinative and conclusive.

Colombia claims that in the Armed Actions case, the Court held that the title of jurisdiction under the Pact of Bogotá prevailed over subsequent optional clause declarations. Colombia points out that, in the case at hand, the argument that the Pact of Bogotá takes precedence is even stronger since the optional clause declarations of Nicaragua and Colombia were made before the entry into force of the Pact of Bogotá. Therefore, the Pact of Bogotá is not only lex specialis but also lex posterior.

In Colombia's view, "it is the Pact of Bogotá which constitutes the Court's title of jurisdiction in our case" and were the Court to conclude that it had no jurisdiction to adjudicate upon the dispute, the application of the Pact would require the Court to declare the controversy

ended pursuant to Article XXXIV thereof, “not only for the purposes of the Court’s jurisdiction under the Pact, but for all purposes”. In this regard, Colombia claims that a dispute cannot be settled and ended and yet at the same time be a dispute capable of adjudication by the Court pursuant to jurisdiction accorded under the optional clause. Consequently, once the controversy between the Parties has been declared by the Court to be ended under the Pact of Bogotá, there would be no controversy outstanding to which jurisdiction could attach under any other title, including the declarations of the Parties under the optional clause.

Colombia further argues that, in any event, the Court would have no jurisdiction on the basis of the Parties’ optional clause declarations since Colombia’s declaration had been withdrawn (December 2001) by the date of the filing of Nicaragua’s Application. Colombia finally contends that even if its declaration were found to be in force at the time when Nicaragua filed its Application, the alleged dispute would fall outside the scope of the declaration as a result of a reservation which excluded disputes arising out of facts prior to 6 January 1932.

Nicaragua, for its part, submits that although the Court stated in its Judgment in the Armed Actions case that “in relations between the States parties to the Pact of Bogotá, that Pact is governing”, this cannot “destroy the value of the Optional Clause declarations as an independent basis of jurisdiction” since they “have an intrinsic value in and of themselves, and their operation is not predetermined by other titles of jurisdiction”. It considers that the primacy of the Pact does not signify exclusiveness. Nicaragua contends that this was recognized by the Court itself in the Armed Actions case when it stated that the commitment under the Pact of Bogotá is “independent of any other which the parties may have undertaken . . . by depositing . . . a declaration of acceptance of compulsory jurisdiction” (emphasis added). It points out that in the Armed Actions case, the Court did not rule out the possibility that it also had jurisdiction under the Parties’ optional clause declarations but simply concluded that it “[did] not need to consider” that question since it had already found that it had jurisdiction under the Pact of Bogotá.

In Nicaragua’s view, if the Court were to declare the controversy ended pursuant to Article XXXIV of the Pact, that finding would have to be understood within the framework of the Pact itself. Thus the controversy would be ended only to the extent that it would no longer be possible to invoke the Pact as a basis of jurisdiction. It underlines that such a finding pursuant to Article XXXIV of the Pact does not exclude the existence of other bases of jurisdiction such as the declarations by the Parties under the optional clause.

Nicaragua argues that the two bases of jurisdiction, namely Article XXXI of the Pact of Bogotá and the declarations made by the Parties under the optional clause are complementary and that it is for the Court to decide whether to rely upon only one of them or to combine them. It points out that the States parties to the Pact of Bogotá intended to broaden the jurisdiction of the Court not to limit existing obligations deriving from other instruments. In this context, Nicaragua refers to the statement of the Permanent Court of International Justice in the Electricity of Sofia and Bulgaria case regarding multiple agreements accepting compulsory jurisdiction.

Nicaragua denies that Colombia’s declaration was not in force at the time of the filing of the Application. It contends that reasonable notice is required for the withdrawal of declarations and that this condition was not complied with by Colombia. Nicaragua does not dispute that Colombia’s declaration applied only to disputes arising from facts subsequent to 6 January 1932; it argues, however, that the generating fact of the dispute, namely the interpretation of the 1928 Treaty and 1930 Protocol adopted by Colombia from 1969 onwards, arose after 6 January 1932. Finally, Nicaragua asserts, referring to the provisions of Article 79, paragraph 9, of the Rules of Court, that in any event the objection submitted by Colombia does not have an exclusively preliminary character.

The Court notes initially that the question of whether the optional clause declarations of the Parties can provide a distinct and sufficient basis of jurisdiction in the case now only arises in respect of that part of the dispute relating to the sovereignty over the three islands expressly named

in Article I of the 1928 Treaty: San Andrés, Providencia and Santa Catalina. Having first examined the preliminary objection raised by Colombia to jurisdiction under the Pact of Bogotá, the Court has concluded that it has jurisdiction on the basis of Article XXXI of the Pact to deal with all the other aspects of the dispute. Consequently, no purpose is served by examining whether, in relation to those aspects, the declarations of the Parties under the optional clause could also provide a basis of the Court's jurisdiction.

The Court recalls that in the Armed Actions case it stated that “[s]ince, in relations between the States parties to the Pact of Bogotá, that Pact is governing, the Court will first examine the question whether it has jurisdiction under Article XXXI of the Pact” (emphasis added). However, this cannot be interpreted in any way other than that the Court, faced with the two titles of jurisdiction invoked, could not deal with them simultaneously and decided to proceed from the particular to the more general, without thereby implying that the Pact of Bogotá prevailed over and excluded the second title of jurisdiction, namely the optional clause declarations.

The Court thus considers that the provisions of the Pact of Bogotá and the declarations made under the optional clause represent two distinct bases of the Court's jurisdiction which are not mutually exclusive. It notes that the scope of its jurisdiction could be wider under the optional clause than under the Pact of Bogotá.

The Court observes that neither Colombia nor Nicaragua has made a reservation to their respective optional clause declarations identical or similar to the restriction contained in Article VI of the Pact of Bogotá. Accordingly, the limitation imposed by Article VI of the Pact would not be applicable to jurisdiction under the optional clause.

The Court notes that its acknowledgment of the fact that sovereignty over the islands of San Andrés, Providencia and Santa Catalina was attributed to Colombia under the 1928 Treaty was made for the purposes of ascertaining whether or not the Court had jurisdiction over the matter under the Pact of Bogotá. However, it is equally relevant for the purposes of determining whether the Court has jurisdiction on the basis of the optional clause declarations. In this regard, the Court notes that Article 36, paragraph 2, of the Statute expressly requires that, in order for the Court to have jurisdiction on the basis of optional clause declarations, there must exist a “legal dispute” between the Parties.

Given the Court's finding that there is no extant legal dispute between the Parties on the question of sovereignty over the three islands, the Court cannot have jurisdiction over this question either under the Pact of Bogotá or on the basis of the optional clause declarations.

In the light of the foregoing, the Court finds that no practical purpose would be served by proceeding further with the other matters raised in the second preliminary objection filed by Colombia. The Court thus upholds the second preliminary objection relating to jurisdiction under the optional clause declarations raised by Colombia in so far as it concerns the Court's jurisdiction as regards the question of sovereignty over the islands of San Andrés, Providencia and Santa Catalina, and finds that it is not necessary to examine the objection in so far as it concerns sovereignty over the other maritime features in dispute between the Parties and the maritime delimitation between the Parties.

Subsequent procedure (para. 141)

In accordance with Article 79, paragraph 9, of the Rules of Court, time-limits for the further proceedings shall subsequently be fixed by Order of the Court.

Operative clause (para. 142)

“For these reasons,

THE COURT,

(1) As regards the first preliminary objection to jurisdiction raised by the Republic of Colombia on the basis of Articles VI and XXXIV of the Pact of Bogotá:

(a) By thirteen votes to four,

Upholds the objection to its jurisdiction in so far as it concerns sovereignty over the islands of San Andrés, Providencia and Santa Catalina;

IN FAVOUR: President Higgins; Judges Shi, Koroma, Parra-Aranguren, Buergenthal, Owada, Simma, Tomka, Keith, Sepúlveda-Amor, Skotnikov; Judges ad hoc Fortier, Gaja;

AGAINST: Vice-President Al-Khasawneh; Judges Ranjeva, Abraham, Bennouna;

(b) Unanimously,

Rejects the objection to its jurisdiction in so far as it concerns sovereignty over the other maritime features in dispute between the Parties;

(c) Unanimously,

Rejects the objection to its jurisdiction in so far as it concerns the maritime delimitation between the Parties;

(2) As regards the second preliminary objection to jurisdiction raised by the Republic of Colombia relating to the declarations made by the Parties recognizing the compulsory jurisdiction of the Court:

(a) By fourteen votes to three,

Upholds the objection to its jurisdiction in so far as it concerns sovereignty over the islands of San Andrés, Providencia and Santa Catalina;

IN FAVOUR: President Higgins; Judges Shi, Koroma, Parra-Aranguren, Buergenthal, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Skotnikov; Judges ad hoc Fortier, Gaja;

AGAINST: Vice-President Al-Khasawneh; Judges Ranjeva, Bennouna;

(b) By sixteen votes to one,

Finds that it is not necessary to examine the objection to its jurisdiction in so far as it concerns sovereignty over the other maritime features in dispute between the Parties and the maritime delimitation between the Parties;

IN FAVOUR: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Parra-Aranguren, Buergenthal, Owada, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judges ad hoc Fortier, Gaja;

AGAINST: Judge Simma;

(3) As regards the jurisdiction of the Court,

(a) Unanimously,

Finds that it has jurisdiction, on the basis of Article XXXI of the Pact of Bogotá, to adjudicate upon the dispute concerning sovereignty over the maritime features claimed by the Parties other than the islands of San Andrés, Providencia and Santa Catalina;

(b) Unanimously,

Finds that it has jurisdiction, on the basis of Article XXXI of the Pact of Bogotá, to adjudicate upon the dispute concerning the maritime delimitation between the Parties.”

*

Vice-President Al-Khasawneh appends a dissenting opinion to the Judgment of the Court; Judge Ranjeva appends a separate opinion to the Judgment of the Court; Judges Parra-Aranguren, Simma and Tomka append declarations to the Judgment of the Court; Judge Abraham appends a separate opinion to the Judgment of the Court; Judge Keith appends a declaration to the Judgment of the Court; Judge Bennouna appends a dissenting opinion to the Judgment of the Court; Judge ad hoc Gaja appends a declaration to the Judgment of the Court.

Dissenting opinion of Vice-President Al-Khasawneh

Vice-President Al-Khasawneh found himself unable to concur with the arguments and findings in the Judgment upholding Colombia's preliminary objections to jurisdiction in so far as they concern sovereignty over the islands of San Andrés, Providencia and Santa Catalina. While acknowledging that the Court may need to touch on the merits of a case in order to ascertain its jurisdiction at the preliminary objections phase of proceedings, Vice-President Al-Khasawneh is of the view that the circumstances of this case were such that a decision on jurisdiction under the Pact of Bogotá and under Article 36, paragraph 2, of the Statute of the Court did not possess an exclusively preliminary character (see Article 79, paragraph 9).

The particular circumstances of the case leading to this conclusion are as follows: in order to determine whether the Court has jurisdiction under the Pact of Bogotá in respect of the dispute relating to the three above-mentioned islands, the Court must decide upon the validity of the 1928 Treaty and the 1930 Protocol (which validity is contested by Nicaragua). This analysis is required because Article VI of the Pact of Bogotá excludes the jurisdiction of the International Court of Justice in respect of matters "governed by agreements or treaties in force on the date of the conclusion of the present Treaty". The validity of the 1928 Treaty and of the 1930 Protocol are, however, also central to resolving, on the merits, the dispute with respect to sovereignty over the three named islands of the San Andrés Archipelago. Thus, the finding in the Judgment that the Court lacks jurisdiction under the Pact of Bogotá, because the 1928 Treaty and 1930 Protocol are valid, has the effect of prejudging an important aspect of the merits of the dispute before this has been fully argued.

The finding also has the effect of disposing of a range of complex factual and legal issues raised by Nicaragua, via her allegation that the 1928 Treaty and 1930 Protocol are invalid because procured by coercion, without allowing the Parties the opportunity to fully argue the case before the Court, and without adequately setting out the reasons for the decision reached.

Vice-President Al-Khasawneh does not agree with the Court that Article 79, paragraph 9, of the Rules of the Court includes a presumption in favour of the party making a preliminary objection.

Finally, Vice-President Al-Khasawneh considers that the Court was only able to reach the position that deciding the question of the validity of the 1928 Treaty and the 1930 Protocol "would not determine the dispute on the merits" by defining the dispute narrowly and creating an artificial distinction between the subject-matter of the dispute and the questions in dispute. While acknowledging that the Court retains freedom to define the subject-matter of the dispute on the basis of the submissions of the parties, the Vice-President considers that in this case the Court has acted beyond the limits of that freedom; limits imposed by considerations of legitimacy and common sense.

Separate opinion of Judge Ranjeva

The first preliminary objection raised by Colombia does not possess an exclusively preliminary character, states Judge Ranjeva in his opinion. The arguments presented by the Parties confirm the intimate connections between the procedural issues. Indeed, by declaring that the 1928 Treaty put an end to the dispute between Nicaragua and Colombia when it attributed the three islands of San Andrés, Providencia and Santa Catalina, the Court in the Judgment adjudicates two of the Applicant's submissions on the merits: the claim to sovereignty over those islands and the nullity of the treaty owing to substantive defects resulting from coercion and infringement of internal constitutional provisions. Judge Ranjeva holds that the Judgment confuses enforceability

of the Treaty against Nicaragua and nullity as a sanction for the invalidity of the Treaty. Aside from failing to respect the adversary principle, the Judgment contains a lacuna: a statement of reasons for choosing Article VI of the Pact of Bogotá as the basis for jurisdiction rather than the optional clause.

Declaration of Judge Parra-Aranguren

1. Notwithstanding his vote in favour of the operative clause of the Judgment, Judge Parra-Aranguren does not agree with paragraph 136 which states: “the Court considers that the provisions of the Pact of Bogotá and the declarations made under the optional clause represent two distinct bases of the Court’s jurisdiction which are not mutually exclusive”.

2. The conclusion reached in paragraph 136 is supported by making reference to the Judgment in the case Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility (I.C.J. Reports 1988, p. 85, para. 36) and to a quotation from the 1939 Judgment of the Permanent Court in the case Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria) (P.C.I.J., Series A/B, No. 77, p. 76).

3. However, Judge Parra-Aranguren considers that the Armed Actions decision does not support this conclusion in the present Judgment, because as is indicated in paragraph 134, “the Court was merely responding to and rejecting the arguments by Honduras”; and the quotation from the Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria) Judgment of 1939 is not applicable, because in the present case there is no “multiplicity of agreements concluded accepting the compulsory jurisdiction” of the Court.

4. Judge Parra-Aranguren observes, as indicated in paragraph 122 of the Judgment, that Nicaragua and Colombia made declarations on 24 September 1929 and 30 October 1937 respectively, under Article 36 of the Statute of the Permanent Court of International Justice, which are deemed to be acceptances of the compulsory jurisdiction of this Court under Article 36, paragraph 5, of its Statute; they then made new declarations under Article 36, paragraph 2, of the Statute of the Court as prescribed in Article XXXI of the Pact of Bogotá when they ratified the latter in 1950 and 1968 respectively. In his opinion, it is not possible for two different declarations to continue to be simultaneously in force in the relations between Nicaragua and Colombia, because the second declaration necessarily replaced the first one in their reciprocal relations.

5. Therefore Judge Parra-Aranguren considers that the optional clause declarations made by Nicaragua and Colombia in 1929 and 1937 respectively are no longer in force, and for this reason they cannot be invoked as a basis for the jurisdiction of the Court.

Declaration of Judge Simma

While Judge Simma considers the present Judgment generally satisfactory, he expresses doubts whether the Court has applied Article VI of the Pact of Bogotá to the 1928 Treaty between Nicaragua and Colombia in a correct way. In the same context, Judge Simma has considerable difficulties with the Court’s reading of the relationship between, on the one hand, the notion of a matter being “governed by . . . treaties in force” at the time of the conclusion of the Pact in 1948 and that of the continued existence of a “legal dispute” as a precondition for the jurisdiction of the Court on the basis of a declaration of acceptance under the optional clause on the other.

The matter turns on the question of sovereignty over the islands of San Andrés, Providencia and Santa Catalina. The Court concludes that the 1928 Treaty has resolved this question definitively, whereas Nicaragua had argued, *inter alia*, the invalidity of this Treaty *ab initio*. However, according to the Judgment, Nicaragua, through its behaviour towards the Treaty for over 50 years, lost the right to invoke such invalidity; therefore the Treaty is to be regarded as having been “valid and in force” in 1948, with the consequence that the Court does not have jurisdiction under the Pact of Bogotá. In Judge Simma’s view, the loss of the right to assert the Treaty’s invalidity according to the conditions of the Pact of Bogotá can only be the end of the matter within the framework of that Pact; if a second, independent, basis of jurisdiction existed and actually yielded the jurisdiction of the Court, the issue of the invalidity of the 1928 Treaty would remain open and could be re-argued, this time fully, by Nicaragua. In the present instance, this could possibly have been the case, in view of the Article 36, paragraph 2, declarations of acceptance submitted by both Parties. According to the Court, however, its conclusion that there is no jurisdiction under the Pact of Bogotá at the same time also disposes of jurisdiction under the optional clause system, even though the Court recognizes that we are in presence of two distinct bases of jurisdiction which are not mutually exclusive. Judge Simma therefore considers that the Court should have continued the examination of its jurisdiction by turning to the optional clause declarations of the Parties and scrutinizing the effect of the reservation *ratione temporis* made to the Colombian declaration as well as that of Colombia’s denunciation of that declaration. If the Court had followed this course, either the issue of jurisdiction would have been decided in the negative once and for all, or the Nicaraguan law of treaties arguments would have experienced their due fate at the merits stage of the case.

Declaration of Judge Tomka

Judge Tomka concurs with the view of the Court that Nicaragua has treated the 1928 Treaty as valid for more than 50 years and thus acquiesced in its validity. Therefore, Nicaragua’s first argument alleging that the 1928 Treaty was invalid because it was concluded in violation of its Constitution then in force cannot be accepted.

Nicaragua also submitted that it was deprived of its international capacity during the pertinent period since it could not freely express its consent to be bound by international treaties. It seems that the majority has treated this second argument like the first, but Judge Tomka considers that it requires a distinct response.

The second ground of invalidity invoked by Nicaragua is not without difficulty. If it is to be understood broadly, then it would run counter to the other basis of the Court’s jurisdiction invoked by Nicaragua: the optional clause declaration under Article 36, paragraph 2, of the Statute. Indeed, Nicaragua made such declaration in 1929, exactly in the pertinent period when its government was allegedly deprived of its international capacity. Nicaragua however admits that it was not prevented from concluding international treaties in general. But then it is difficult to accept its contention that the Nicaraguan Government was deprived of its international capacity during the relevant period. Nicaragua therefore specifies that while it was under occupation by the United States, it was prevented from concluding treaties that ran against the interest of the United States and from rejecting the conclusion of treaties that the United States demanded it to conclude. The interests or demands of a third State are not however sufficient grounds to render a treaty null and void *ab initio*. Furthermore, the Court would not have been able to reach a decision about the alleged coercion without examining the lawfulness of the conduct of the United States which is not a party to these proceedings.

Judge Tomka therefore agrees with the conclusions of the Court that the issue of sovereignty over the islands of San Andrés, Providencia and Santa Catalina is not to be adjudicated at the merits stage.

Separate opinion of Judge Abraham

Judge Abraham expresses his agreement with the substance of the solutions adopted in the Judgment in respect of all aspects of the dispute other than sovereignty over the three islands referred to by name in Article I of the 1928 Treaty (San Andrés, Providencia and Santa Catalina). As to all such aspects, he approves of the Court's decision that the questions raised by Nicaragua's claim were not settled by the 1928 Treaty, that the Court therefore has jurisdiction over them pursuant to Article XXXI of the Pact of Bogotá, and that there is no need for the Court to determine whether it might also have jurisdiction pursuant to the two Parties' optional declarations recognizing the compulsory jurisdiction of the Court.

On the other hand, Judge Abraham distances himself from the way in which the Court has treated the question of sovereignty over the three islands referred to above.

First, in his view the Court should have found that Colombia's first objection — challenging the Court's jurisdiction under the Pact of Bogotá — did not, in this regard, possess an exclusively preliminary character, and that the examination of it should be deferred to the later phase of the proceedings, after the debate on the merits. Indeed, to rule thoroughly on this objection, the Court has had to take a position on Nicaragua's argument based on the alleged invalidity of the 1928 Treaty, specifically on the ground that it was concluded under coercion. According to Judge Abraham, the Court did not at this stage have before it all the information necessary to decide this question, and the manner in which it resolved the issue creates as many difficulties as it solves. Specifically, Judge Abraham regrets that, already at the preliminary stage, the Court, needlessly and without adequately explaining its reasoning, addressed the delicate question whether a State claiming to have been coerced through the unlawful use or threat of force can rely on that coercion as a cause for the nullity of a treaty, when, by its conduct after conclusion of the treaty, it manifested its acquiescence over a period of time in the validity of the treaty.

Secondly, in respect of Colombia's second preliminary objection — challenging the Court's jurisdiction under the optional declarations — Judge Abraham approves of the Court's decision that it is without jurisdiction on this basis over that part of the dispute concerning the three islands, but not of the grounds on which the Court justified its decision.

According to Judge Abraham, the Pact of Bogotá is the sole basis for jurisdiction applicable in the relations between the States parties to it, and the optional declarations are ineffective. On the other hand, in his view it is incorrect to say, as the Judgment does, that there is no extant dispute between the Parties over the three islands, any dispute having been settled by the 1928 Treaty. In Judge Abraham's opinion, this reasoning originates in a worrying confounding of the substantive issues — the 1928 Treaty may perhaps lead to deciding the dispute in favour of Colombia — and the issues of jurisdiction and admissibility — the foregoing observation should not, by itself, prevent the Court from exercising its jurisdiction over a very real dispute.

Declaration of Judge Keith

Judge Keith emphasized that, in accordance with the principle of the good administration of justice, the Court should decide at a preliminary stage a matter in dispute if it may properly be decided at that stage and if deciding that matter would facilitate the resolution of the case. In exercising that power and responsibility the Court must have before it the material it needs to decide that matter and it must accord to each party equal rights to present its case and rebut the case against it.

In the circumstances of this case, in Judge Keith's opinion, the Court could properly decide, as it has, that the matter of sovereignty over the three named islands has been settled in favour of Colombia. There is now no dispute in respect of that matter and the Court accordingly does not have jurisdiction in respect of it.

Dissenting opinion of Judge Bennouna

Judge Bennouna voted against the first decision of the Court, whereby it upheld the preliminary objection to its jurisdiction raised by Colombia on the basis of the Pact of Bogotá, in so far as it concerns sovereignty over the islands of San Andrés, Providencia and Santa Catalina (operative clause, sub-paragraph (1) (a)). In his view, this objection does not possess, in the circumstances of the case, an exclusively preliminary character within the meaning of Article 79, paragraph 9, of the Rules of Court. While the Pact of Bogotá excludes from the Court's jurisdiction issues "governed by agreements or treaties in force", Nicaragua has disputed the validity of the Treaty signed with Colombia in 1928 and ratified in 1930, on which the latter relies as the basis of its sovereignty over the three islands.

In so far as Nicaragua relies on the coercion to which it is said to have been subjected when it was under occupation by the United States in order to contend that the 1928 Treaty was invalid *ab initio*, Judge Bennouna considers that the Court could not at this stage investigate such coercion of the State and its consequences on the capacity of Nicaragua to enter into a treaty without addressing the merits of the dispute.

Judge Bennouna also voted against sub-paragraph (2) (a), of the operative clause, according to which the Court similarly lacks jurisdiction on the basis of the optional declarations of the Parties recognizing the compulsory jurisdiction of the Court (Statute, Art. 36, para. 2). In upholding this objection, the Court again declined to exercise its jurisdiction concerning the three islands. Judge Bennouna notes that the Court, after holding that it was before "two distinct bases of . . . jurisdiction which are not mutually exclusive", has nonetheless managed to reject the second of these, based on the optional declarations, by reference to an examination of the first, based on the Pact of Bogotá, by concluding that there is no dispute between the Parties.

For Judge Bennouna, the optional declarations must be appreciated *per se*, and can only be limited by the specific reservations made to them by the Parties. On that basis, there is indeed, in his opinion, a dispute, a conflict of legal argument between the Parties regarding the validity of the 1928 Treaty.

Declaration of Judge *ad hoc* Gaja

In his declaration Judge *ad hoc* Gaja criticized the Court's finding that it had no jurisdiction under the optional clause declarations because there was no "extant dispute" on the question of sovereignty over the islands that were expressly attributed to Colombia by the 1928 Treaty. However, he concurred with the Court's conclusions also on this point in view of the Colombian reservation to the effect that its declaration applied "only to disputes arising out of facts subsequent to 6 January 1932". He considered that all the facts relating to the content and validity of the 1928 Treaty predated 1932.
