DISSENTING OPINION OF JUDGE NOLTE

1. I am not persuaded that the Court has jurisdiction *ratione temporis* to adjudicate facts or events which took place after 27 November 2013, the date on which the Pact of Bogotá ceased to be in force with respect to Colombia. I therefore voted against subparagraphs (1) to (4) of the operative clause of the Judgment by which the Court recognizes and exercises jurisdiction with regard to such facts or events (Judgment, paragraph 261).

2. The jurisdiction of the Court with respect to events which occurred after 27 November 2013 turns on the interpretation of Articles XXXI and LVI of the Pact of Bogotá. Pursuant to Article XXXI, the States parties recognize the jurisdiction of the Court in "all disputes of a juridical nature" "so long as the present Treaty is in force". Article LVI provides that the Pact "may be denounced upon one year's notice, at the end of which period it shall cease to be in force with respect to the State denouncing it".

3. The Court has repeatedly emphasized "that its jurisdiction is based on the consent of the parties and is confined to the extent accepted by them"[1]. Thus, the Court does not, as a general rule, have jurisdiction over events occurring after the lapse of a treaty that is the basis of its jurisdiction. In the present case, however, the majority finds that this does not apply to such subsequent events if they "ar[i]se directly out of the question which is the subject-matter of the Application" and if they "are connected to the alleged incidents that have already been found to fall within the Court's jurisdiction", as long as "consideration of those alleged incidents does not transform the nature of the dispute between the Parties in the present case" (Judgment, paragraph 47). To reach this conclusion, the majority finds that "considerations that have been brought to bear on the adjudication of a claim or submission made after the filing of an application can be instructive in the present case" and that

> "the criteria that it has considered relevant in its jurisprudence to determine the limits *ratione temporis* of its jurisdiction with respect to such a claim or submission, or the admissibility thereof, should apply to the Court's examination of the scope of its jurisdiction *ratione temporis* in the present case" (Judgment, paragraph 43).

4. I do not find this reasoning convincing. The criteria to which the majority refers are not apposite in the present case. All but one of the decisions cited in support concern the admissibility of late claims, not the jurisdiction of the Court *ratione temporis*, while the one remaining decision offers an *obiter dictum* which only nominally addresses jurisdiction *ratione temporis*.

5. In its judgments regarding the admissibility of late claims, the Court indeed examined whether the claims in question "arose directly out of the question which is the subject-matter of the application" (Judgment, paragraph 47). In those cases, however, the applicant State would have been entitled to submit a new application in respect of the late claims, because the basis for the jurisdiction of the Court was still in force. The Court could thus accept the addition of those claims simply for reasons of judicial economy[2]. It is quite a different matter to extend the jurisdiction of the Court on

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[1] See e.g. *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 39, para. 88.

[2] See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 441, para. 85, and pp. 442-443, para. 89.

the basis of this criterion. The Court, after all, regularly emphasizes the importance of the distinction between jurisdiction and admissibility:

> "When . . . consent [to jurisdiction] is expressed in a compromissory clause in an international agreement, any conditions to which such consent is subject must be regarded as constituting the limits thereon. The Court accordingly considers that the examination of such conditions relates to its jurisdiction and not to the admissibility of the application"[3].

6. In addition to the jurisprudence of the Court on the admissibility of late claims, the majority refers to *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France)* (Judgment, paragraph 44). This case turned on an extraordinary basis of jurisdiction, *forum prorogatum*, and therefore did not involve the interpretation of either a compromissory clause or a declaration under Article 36, paragraph 2, of the Statute of the Court. *Djibouti* v. *France* concerned, *inter alia*, facts which occurred after the filing of the application, which were then examined by the Court to determine whether they had a "connect[ion] to the facts or events already falling within the Court's jurisdiction" and "whether consideration of those later facts or events would transform the 'nature of the dispute'"[4]. However, as the majority acknowledges (Judgment, paragraph 44), *Djibouti* v. *France* did not concern a limitation of the Court's jurisdiction *ratione temporis*, but rather the question of its jurisdiction *ratione materiae*[5]. The element from *Djibouti* v. *France* on which the majority relies in the present case is in fact an *obiter dictum*, which purports to summarize the jurisprudence of the Court regarding jurisdiction *ratione temporis* (see Judgment, paragraph 44, citing *Djibouti* v. *France*, para. 88: "recourse to jurisprudence relating to 'continuity' and 'connexity', which are criteria relevant for determining limits *ratione temporis* to its jurisdiction")[6]. However, such jurisprudence relating to jurisdiction *ratione temporis* did not exist when the Judgment in *Djibouti* v. *France* was rendered. The *obiter dictum* rather refers, in somewhat misleading terms unfortunately, to the established jurisprudence on the admissibility of late claims, discussed above. There is no indication that in *Djibouti* v. *France* the Court intended to go beyond this particular jurisprudence.

7. For these reasons, I do not think that the conclusion of the majority regarding jurisdiction *ratione temporis* finds significant support in the jurisprudence of the Court[7]. As the majority recognizes, the present case raises a question which has not previously been presented to the Court (Judgment, paragraph 43). Under these circumstances, it is not sufficient, in my view, for the Court to simply state that "the criteria that it has considered relevant in its jurisprudence" "can be instructive" and "should apply" in the present case (*ibid.*).

8. A better reason for the Court to assume jurisdiction in the present case with respect to events occurring after 27 November 2013 could be that the term "dispute" should be interpreted as necessarily including all events which take place before the opening of the oral proceedings, and

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[3] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 39, para. 88.

[4] Judgment, paragraph 40; see *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, pp. 211-212, para. 87.

[5] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, p. 212, para. 88.

[6] *Ibid*.

[7] Moreover, the Court has only recognized the possibility to present additional facts to a claim in situations in which it had jurisdiction *ratione temporis* with respect to such facts, see *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 318, para. 99; *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*, pp. 213-214, paras. 116-118.

which are encompassed by the legal claim submitted to the Court. Such an interpretation of the term "dispute" is conceivable, based on the assumption that, once a dispute is brought before the Court, it acquires an existence which is independent of temporal restrictions. However, it is also clear that the parties may limit such a temporal effect of the term "dispute".

9. Thus, the question in the present case is whether the parties to the Pact of Bogotá intended to limit the temporal scope of the jurisdiction conferred on the Court by excluding facts or events which occur after the treaty ceases to be in force for a State party. This question should, in my view, be answered by way of a specific interpretation of Articles XXXI and LVI of the Pact of Bogotá, and not by applying certain elements of the Court's jurisprudence which concern other legal questions.

10. The customary rules on the interpretation of treaties, which are reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, provide the means and a methodology for identifying the intention of the parties to a treaty[8]. In the present case, an application of the general rule of interpretation (Article 31) to Article XXXI of the Pact of Bogotá does not lead to a clear conclusion: the ordinary meaning of the term "dispute" may be broad; but the ordinary meaning of the phrase "so long as the present Treaty is in force" is also broad. Being each a part of the context of the other, both terms must be taken into account when determining their respective meaning. The object and purpose of the treaty, which is the pacific "settlement of controversies" (Article I), may speak in favour of a broad understanding of the term "dispute", but this should not override the weight to be given to a specific limitation to the jurisdiction of the Court which the States parties have chosen to include in Article XXXI, and the object and purpose of that limitation.

11. Supplementary means of interpretation (Article 32) include, but are not limited to, the *travaux préparatoires*[9]. It is not entirely clear why, when negotiating and concluding the Pact of Bogotá, the parties opted to include in Article XXXI the phrase "so long as the present Treaty is in force" or exactly how this phrase was intended to operate as a temporal limitation[10]. The *travaux* of the Ninth International Conference of American States held in Bogotá from 30 March to 2 May 1948, notably the debate of 27 April 1948, nevertheless suggest that a cautious approach should be taken by the Court. The *travaux* indicate that Article XXXI, which contains elements of Article 36, paragraphs 1 and 2, of the Court's Statute, has a hybrid character[11]. They also suggest that the formulation "so long as the present Treaty is in force" resulted from an attempt to convince reluctant OAS Member States to agree on the far-reaching step of establishing "a co-ordinated system of dispute settlement procedures"[12] on the basis of a multilateral treaty with the compulsory jurisdiction of the ICJ over all their legal disputes at its core. It is also noteworthy that the formulation "so long as the present treaty is in force" is contained neither in Article 36 of the Court's Statute nor in other important and well-known compromissory clauses which were adopted shortly after Article XXXI of the Pact of Bogotá, notably Article 17 of the 1949 Revised General Act for the Pacific Settlement of International Disputes and Article 1 of the 1957 European Convention for the Peaceful Settlement

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[8] *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, pp. 237-238, paras. 47-48; see also *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 19, para. 35.

[9] See *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, pp. 85-86, para. 37.

[10] See also *ibid.*, separate opinion of Judge Oda, pp. 119-123, paras. 11 and 12.

[11] *Novena Conferencia Internacional Americana, Actas y Documentos*, Vol. IV, pp. 161-164; see also C. Tomuschat, "Article 36" in Zimmermann et al. (eds.), *The Statute of the International Court of Justice (3rd Edition): A Commentary*, Oxford, Oxford University Press, 2019, p. 749.

[12] E Valencia-Ospina, "The Role of the International Court of Justice in the Pact of Bogotá", in C.A.A. Barea et al. (eds.), *Liber Amicorum "In Memoriam" of Judge José Maria Ruda*, The Hague: Kluwer 2000, pp. 291-329 and p. 299.

of Disputes[13]. Even if this observation does not lead to a clear conclusion either, it highlights the specific character of Article XXXI. This context should inform the Court's determination of the parties' presumed intention[14]. The context does not, for example, suggest that the Court held, or intended to hold, in *Border and Transborder Armed Actions (Nicaragua* v. *Honduras)*, that the significance of the phrase "so long as the present treaty is in force" is confined to "limit[ing] the period within which such a dispute must have arisen" (see Judgment, paragraph 37*bis*).

12. In my view, the preceding considerations and a good faith assessment of the parties' presumed intentions indicate that, in principle, a termination under Article XXXI has the effect of precluding the Court's consideration of facts or events which occur after the treaty has expired for a party, including events which would have been part of a dispute had the jurisdictional basis not expired. This conclusion is justified because the parties cannot be presumed to have intended to extend the jurisdiction of the Court to what are severable factual elements which could not have been submitted independently after the expiration of the Court's jurisdictional basis.

13. The specific role of the Court in the peaceful settlement of disputes and the distinct judicial character of its proceedings do not, in my view, require that a dispute over which the Court has jurisdiction cover all facts or events which occur before the opening of the oral proceedings. Facts or events which occur prior to the lapse of the Court's jurisdiction usually are an independent and sufficient basis for the adjudication of a claim by the Court. Moreover, applying the general effect of a lapse of jurisdiction to subsequent events does not risk a denial of justice[15].

14. This may not be the case if acts which occur before the lapse of jurisdiction are so closely connected to acts which occur after the lapse of jurisdiction that their legal significance is affected by the latter. Acts, or series of acts, which together constitute a "composite act" in the sense of Article 15 of the International Law Commission's Articles on State Responsibility may fall in this category. In the present case, however, the legal significance of the incidents alleged by Nicaragua to have taken place before 27 November 2013 is not affected by the incidents which allegedly took place after the lapse of the jurisdictional basis. The latter are merely additional incidents.

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15. Nicaragua has not proven any of the incidents alleged to have occurred before 27 November 2013. The *Miss Sofia* incident of 17 November 2013 is the only one of 13 incidents alleged to have taken place before 27 November 2013 which the Court considers to be worthy of a closer examination and not subject to an implicit dismissal.

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[13] See notably paragraph 47 of the "Handbook on accepting the jurisdiction of the International Court of Justice", Annex to the letter dated 24 July 2014 addressed to the Secretary-General of the United Nations, UN doc. A/68/963 (2014), p. 18, which refers to the 1957 Convention, the 1949 Revised Act and the 1948 Pact of Bogotá; see also *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, separate opinion of Judge Oda, pp. 111-112, para. 4.

[14] See *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 242, para. 64.

[15] See also *Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 30.

16. The Court finds it to be established that the alleged *Miss Sofia* incident was one of those in which Colombian frigates were operating at the locations indicated by Nicaragua and that "Colombia's own naval reports and navigation logs . . . corroborate the specific geographic co-ordinates presented by Nicaragua, which lie within . . . the maritime area that was declared by the Court to appertain to Nicaragua" (Judgment, paragraph 91). Significantly, however, the Court does not list the alleged *Miss Sofia* incident among those incidents with respect to which it considers it to be established that "Colombian naval vessels purported to exercise enforcement jurisdiction in Nicaragua's exclusive economic zone" (Judgment, paragraph 92). The mere fact that a Colombian naval vessel was operating within the exclusive economic zone of Nicaragua does not, as such, constitute a violation of Nicaragua's rights. Such conduct may have been a lawful exercise of its freedom of navigation. Thus, by — correctly — drawing only a very limited conclusion from the evidence presented by the Parties with respect to the alleged *Miss Sofia* incident, the Court in effect acknowledges that Nicaragua has not proven any of the incidents which allegedly took place before 27 November 2013, the date on which the Pact of Bogotá expired for Colombia.

17. I do not disregard the fact that Colombia, through various statements of high-ranking officials and communications from its naval vessels, did not recognize the 2012 Judgment of the Court, including the delimitation of Nicaragua's exclusive economic zone resulting therefrom, for at least one year. Such conduct is deeply regrettable and has even given rise to a plausible suspicion that its naval vessels have violated Nicaragua's sovereign rights and jurisdiction. Nevertheless, an initial public criticism of a judgment of the Court does not, as such, constitute a violation of the other party's rights, and a plausible suspicion is not sufficient to prove an incident.

(Signed) Georg NOLTE.
