INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

ALLEGED VIOLATIONS OF SOVEREIGN RIGHTS AND MARITIME SPACES IN THE CARIBBEAN SEA

(NICARAGUA *v.* COLOMBIA)

PRELIMINARY OBJECTIONS

JUDGMENT OF 17 MARCH 2016

2016

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

VIOLATIONS ALLÉGUÉES DE DROITS SOUVERAINS ET D'ESPACES MARITIMES DANS LA MER DES CARAÏBES

(NICARAGUA c. COLOMBIE)

EXCEPTIONS PRÉLIMINAIRES

ARRÊT DU 17 MARS 2016

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ARRÊT

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INTERNATIONAL COURT OF JUSTICE

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17 March 2016

ALLEGED VIOLATIONS OF SOVEREIGN RIGHTS AND MARITIME SPACES IN THE CARIBBEAN SEA

(NICARAGUA *v.* COLOMBIA)

PRELIMINARY OBJECTIONS

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*

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*

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*

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JUDGMENT

Present: *President* Abraham; *Vice-President* Yusuf; *Judges* Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Gevorgian; *Judges* ad hoc Daudet, Caron; *Registrar* Couvreur.

In the case concerning alleged violations of sovereign rights and maritime spaces in the Caribbean Sea,

between

the Republic of Nicaragua,

represented by

H.E. Mr. Carlos José Argüello Gómez, Ambassador of the Republic of Nicaragua to the Kingdom of the Netherlands,

as Agent and Counsel;

Mr. Vaughan Lowe, Q.C., member of the Bar of England and Wales, Emeritus Professor of International Law, Oxford University, member of the Institut de droit international,

Mr. Alex Oude Elferink, Director, Netherlands Institute for the Law of the Sea, Professor of International Law of the Sea, Utrecht University,

Mr. Alain Pellet, Emeritus Professor at the Université Paris Ouest, Nanterre-La Défense, former member and Chairman of the International Law Commission, member of the Institut de droit international,

Mr. Antonio Remiro Brotóns, Professor of International Law, Universidad Autónoma de Madrid, member of the Institut de droit international,

as Counsel and Advocates;

Mr. César Vega Masís, Deputy Minister for Foreign Affairs, Director of Juridical Affairs, Sovereignty and Territory, Ministry of Foreign Affairs,

Mr. Walner Molina Pérez, Juridical Adviser, Ministry of Foreign Affairs,

Mr. Julio César Saborio, Juridical Adviser, Ministry of Foreign Affairs,

as Counsel;

Mr. Edgardo Sobenes Obregon, Counsellor, Embassy of Nicaragua in the Kingdom of the Netherlands,
Ms Claudia Loza Obregon, First Secretary, Embassy of Nicaragua in the Kingdom of the Netherlands,
Mr. Benjamin Samson, Ph.D. Candidate, Centre de droit international de Nanterre (CEDIN), Université Paris Ouest, Nanterre-La Défense,
Ms Gimena González,

as Assistant Counsel;

Ms Sherly Noguera de Argüello, Consul General of the Republic of Nicaragua,

as Administrator,

and

the Republic of Colombia,

represented by

H.E. Ms María Angela Holguín Cuéllar, Minister for Foreign Affairs,
H.E. Mr. Francisco Echeverri Lara, Vice-Minister of Multilateral Affairs, Ministry of Foreign Affairs,

as National Authorities;

H.E. Mr. Carlos Gustavo Arrieta Padilla, former Judge of the Council of State of Colombia, former Attorney General of Colombia and former Ambassador of Colombia to the Kingdom of the Netherlands,

as Agent;

H.E. Mr. Manuel José Cepeda Espinosa, former President of the Constitutional Court of Colombia, former Permanent Delegate of Colombia to UNESCO and former Ambassador of Colombia to the Swiss Confederation,

as Co-Agent;

Mr. W. Michael Reisman, McDougal Professor of International Law at Yale Law School, member of the Institut de droit international,

Mr. Rodman R. Bundy, former *avocat à la Cour d'appel de Paris*, member of the New York Bar, Eversheds LLP, Singapore,
Sir Michael Wood, K.C.M.G., member of the Bar of England and Wales, member of the International Law Commission,
Mr. Tullio Treves, member of the Institut de droit international, Senior Public International Law Consultant, Curtis, Mallet-Prevost, Colt & Mosle LLP, Milan, Professor, University of Milan,
Mr. Eduardo Valencia-Ospina, member of the International Law Commission, President of the Latin American Society of International Law,

Mr. Matthias Herdegen, Dr. h.c., Professor of International Law, Director of the Institute of International Law at the University of Bonn,

as Counsel and Advocates;

H.E. Mr. Juan José Quintana Aranguren, Ambassador of the Republic of Colombia to the Kingdom of the Netherlands, Permanent Representative of Colombia to the Organisation for the Prohibition of Chemical Weapons, former Permanent Representative of Colombia to the United Nations in Geneva,
H.E. Mr. Andelfo García González, Ambassador of the Republic of Colombia to the Kingdom of Thailand, Professor of International Law, former Deputy Minister for Foreign Affairs,
Ms Andrea Jiménez Herrera, Counsellor, Embassy of the Republic of Colombia in the Kingdom of the Netherlands,
Ms Lucía Solano Ramírez, Second Secretary, Embassy of the Republic of Colombia in the Kingdom of the Netherlands,
Mr. Andrés Villegas Jaramillo, Co-ordinator, Group of Affairs before the ICJ, Ministry of Foreign Affairs,
Mr. Giovanny Andrés Vega Barbosa, Group of Affairs before the ICJ, Ministry of Foreign Affairs,
Ms Ana María Durán López, Group of Affairs before the ICJ, Ministry of Foreign Affairs,
Mr. Camilo Alberto Gómez Niño, Group of Affairs before the ICJ, Ministry of Foreign Affairs,
Mr. Juan David Veloza Chará, Third Secretary, Group of Affairs before the ICJ, Ministry of Foreign Affairs,

as Legal Advisers;

Rear Admiral Luís Hernán Espejo, National Navy of Colombia,
CN William Pedroza, International Affairs Bureau, National Navy of Colombia,
CF Hermann León, National Maritime Authority (DIMAR), National Navy of Colombia,
Mr. Scott Edmonds, Cartographer, International Mapping,
Mr. Thomas Frogh, Cartographer, International Mapping,

as Technical Advisers;

Ms Charis Tan, Advocate and Solicitor, Singapore, member of the New York Bar, Solicitor, England and Wales, Eversheds LLP, Singapore,

Mr. Eran Sthoeger, LL.M., New York University School of Law,
Mr. Renato Raymundo Treves, Associate, Curtis, Mallet-Prevost, Colt & Mosle LLP, Milan,
Mr. Lorenzo Palestini, Ph.D. Candidate, Graduate Institute of International and Development Studies, Geneva,

as Legal Assistants,

The Court,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 26 November 2013, the Government of the Republic of Nicaragua (hereinafter "Nicaragua") filed with the Registry of the Court an Application instituting proceedings against the Republic of Colombia (hereinafter "Colombia") concerning a dispute in relation to "the violations of Nicaragua's sovereign rights and maritime zones declared by the Court's Judgment of 19 November 2012 [in the case concerning *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*] and the threat of the use of force by Colombia in order to implement these violations".

In its Application, Nicaragua seeks to found the jurisdiction of the Court on Article XXXI of the American Treaty on Pacific Settlement signed on 30 April 1948, officially designated, according to Article LX thereof, as the "Pact of Bogotá" (hereinafter referred to as such).

Nicaragua states that, alternatively, the jurisdiction of the Court "lies in its inherent power to pronounce on the actions required by its Judgments".

2. In accordance with Article 40, paragraph 2, of the Statute of the Court, the Registrar immediately communicated the Application to the Government of Colombia; and, under paragraph 3 of that Article, all other States entitled to appear before the Court were notified of the Application.

3. Since the Court included upon the Bench no judge of the nationality of either of the Parties, each Party proceeded to exercise the right conferred upon it by Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case. Nicaragua first chose Mr. Gilbert Guillaume, who resigned on 8 September 2015, and subsequently Mr. Yves Daudet. Colombia chose Mr. David Caron.

4. By an Order of 3 February 2014, the Court fixed 3 October 2014 as the time-limit for the filing of the Memorial of Nicaragua and 3 June 2015 for the filing of the Counter-Memorial of Colombia. Nicaragua filed its Memorial within the time-limit so prescribed.

5. On 19 December 2014, within the time-limit set by Article 79, paragraph 1, of the Rules of Court, Colombia raised preliminary objections to the jurisdiction of the Court. Consequently, by an Order of 19 December 2014, the President, noting that, by virtue of Article 79, paragraph 5, of the Rules of Court, the proceedings on the merits were suspended, and taking account of Practice Direction V, fixed 20 April 2015 as the time-limit for the presentation by Nicaragua of a written statement of its observations and submissions on the preliminary objections raised by Colombia. Nicaragua filed its statement within the prescribed time-limit. The case thus became ready for hearing in respect of the preliminary objections.

6. Pursuant to the instructions of the Court under Article 43 of the Rules of Court, the Registrar addressed to States parties to the Pact of Bogotá the notifications provided for in Article 63, paragraph 1, of the Statute of the Court. In accordance with the provisions of Article 69, paragraph 3, of the Rules of Court, the Registrar moreover addressed to the Organization of American States (hereinafter the "OAS") the notification provided for in Article 34, paragraph 3, of the Statute of the Court. As provided for in Article 69, paragraph 3, of the Rules of Court, the Registrar transmitted the written pleadings to the OAS and asked that Organization whether or not it intended to furnish observations in writing within the meaning of that Article. The Registrar further stated that, in view of the fact that the current phase of the proceedings related to the question of jurisdiction, any written

observations should be limited to that question. The Secretary-General of the OAS indicated that the Organization did not intend to submit any such observations.

7. Referring to Article 53, paragraph 1, of the Rules of Court, the Government of the Republic of Chile asked to be furnished with copies of the pleadings and documents annexed in the case. Having ascertained the views of the Parties in accordance with that same provision, the President of the Court decided to grant that request. The Registrar duly communicated that decision to the Government of Chile and to the Parties.

Pursuant to the same provision of the Rules, the Government of the Republic of Panama also asked to be furnished with copies of the pleadings and documents annexed in the case. This request was communicated to the Parties in order to ascertain their views. By letter dated 22 July 2015, the Agent of Nicaragua stated that his Government had no objection to Panama being furnished with copies of the pleadings and documents annexed in the case. For its part, by letter dated 27 July 2015, the Agent of Colombia indicated that although his Government had no objection to Panama being furnished with copies of the preliminary objections filed by Colombia and Nicaragua's written statement of its observations and submissions, it did object to the Memorial of Nicaragua being made available to Panama. Taking into account the views of the Parties, the Court decided that copies of the preliminary objections filed by Colombia and Nicaragua's written statement of its observations and submissions on those objections would be made available to the Government of Panama. The Court, however, decided that it would not be appropriate to furnish Panama with copies of the Memorial of Nicaragua. The Registrar duly communicated that decision to the Government of Panama and to the Parties.

8. Pursuant to Article 53, paragraph 2, of the Rules of Court, the Court, after ascertaining the views of the Parties, decided that copies of the preliminary objections of Colombia and the written observations of Nicaragua would be made accessible to the public on the opening of the oral proceedings.

9. Public hearings on the preliminary objections raised by Colombia were held from Monday 28 September 2015 to Friday 2 October 2015, at which the Court heard the oral arguments and replies of:

For Colombia: H.E. Mr. Carlos Gustavo Arrieta Padilla,
Sir Michael Wood,
Mr. Rodman R. Bundy,
Mr. W. Michael Reisman,
Mr. Eduardo Valencia-Ospina,
Mr. Tullio Treves.

For Nicaragua: H.E. Mr. Carlos José Argüello Gómez,
Mr. Antonio Remiro Brotóns,
Mr. Vaughan Lowe,
Mr. Alain Pellet.

10. At the hearings, a Member of the Court put questions to the Parties, to which replies were given in writing, within the time-limit fixed by the President in accordance with Article 61, paragraph 4, of the Rules of Court. Pursuant to Article 72 of the Rules of Court, each of the Parties submitted comments on the written replies provided by the other.

*

11. In the Application, the following claims were presented by Nicaragua:

"On the basis of the foregoing statement of facts and law, Nicaragua, while reserving the right to supplement, amend or modify this Application, requests the Court to adjudge and declare that Colombia is in breach of:

— its obligation not to use or threaten to use force under Article 2 (4) of the UN Charter and international customary law;

— its obligation not to violate Nicaragua's maritime zones as delimited in paragraph 251 of the ICJ Judgment of 19 November 2012 as well as Nicaragua's sovereign rights and jurisdiction in these zones;

— its obligation not to violate Nicaragua's rights under customary international law as reflected in Parts V and VI of UNCLOS;

— and that, consequently, Colombia is bound to comply with the Judgment of 19 November 2012, wipe out the legal and material consequences of its internationally wrongful acts, and make full reparation for the harm caused by those acts."

12. In the written proceedings on the merits, the following submissions were presented on behalf of the Government of Nicaragua in its Memorial:

"1. For the reasons given in the present Memorial, the Republic of Nicaragua requests the Court to adjudge and declare that, by its conduct, the Republic of Colombia has breached:

(a) its obligation not to violate Nicaragua's maritime zones as delimited in paragraph 251 of the Court Judgment of 19 November 2012 as well as Nicaragua's sovereign rights and jurisdiction in these zones;

(b) its obligation not to use or threaten to use force under Article 2 (4) of the UN Charter and international customary law;

(c) and that, consequently, Colombia has the obligation to wipe out the legal and material consequences of its internationally wrongful acts, and make full reparation for the harm caused by those acts.

2. Nicaragua also requests the Court to adjudge and declare that Colombia must:

(a) cease all its continuing internationally wrongful acts that affect or are likely to affect the rights of Nicaragua.

(b) Inasmuch as possible, restore the situation to the *status quo ante*, in

(i) revoking laws and regulations enacted by Colombia, which are incompatible with the Court's Judgment of 19 November 2012 including the provisions in the Decrees 1946 of 9 September 2013 and 1119 of 17 June 2014 to maritime areas which have been recognized as being under the jurisdiction or sovereign rights of Nicaragua;

(ii) revoking permits granted to fishing vessels operating in Nicaraguan waters; and

(iii) ensuring that the decision of the Constitutional Court of Colombia of 2 May 2014 or of any other National Authority will not bar compliance with the 19 November 2012 Judgment of the Court.

(c) Compensate for all damages caused in so far as they are not made good by restitution, including loss of profits resulting from the loss of investment caused by the threatening statements of Colombia's highest authorities, including the threat or use of force by the Colombian Navy against Nicaraguan fishing boats [or ships exploring and exploiting the soil and subsoil of Nicaragua's continental shelf] and third State fishing boats licensed by Nicaragua as well as from the exploitation of Nicaraguan waters by fishing vessels unlawfully 'authorized' by Colombia, with the amount of the compensation to be determined in a subsequent phase of the case.

(d) Give appropriate guarantees of non-repetition of its internationally wrongful acts."

13. In the preliminary objections, the following submissions were presented on behalf of the Government of Colombia:

"For the reasons set forth in this Pleading, the Republic of Colombia requests the Court to adjudge and declare that it lacks jurisdiction over the proceedings brought by Nicaragua in its Application of 26 November 2013."

In the written statement of its observations and submissions on the preliminary objections raised by Colombia, the following submissions were presented on behalf of the Government of Nicaragua:

"For the above reasons, the Republic of Nicaragua requests the Court to adjudge and declare that the preliminary objections submitted by the Republic of Colombia in respect of the jurisdiction of the Court are invalid."

14. At the oral proceedings on the preliminary objections, the following submissions were presented by the Parties:

On behalf of the Government of Colombia,

at the hearing of 30 September 2015:

"For the reasons set forth in [its] written and oral pleadings on preliminary objections, the Republic of Colombia requests the Court to adjudge and declare that it lacks jurisdiction over the proceedings brought by Nicaragua in its Application of 26 November 2013 and that said Application should be dismissed."

On behalf of the Government of Nicaragua,

at the hearing of 2 October 2015:

"In view of the reasons Nicaragua has presented in its written observations and during the hearings, the Republic of Nicaragua requests the Court:

— to reject the preliminary objections of the Republic of Colombia; and

— to proceed with the examination of the merits of the case."

* * *

I. Introduction

15. It is recalled that in the present proceedings, Nicaragua seeks to found the Court's jurisdiction on Article XXXI of the Pact of Bogotá. According to this provision, the parties to the Pact recognize the Court's jurisdiction as compulsory in "all disputes of a juridical nature" (see paragraph 21 below).

16. Alternatively, Nicaragua maintains that the Court has an inherent jurisdiction to entertain disputes regarding non-compliance with its judgments and that in the present proceedings, such an inherent jurisdiction exists, given that the current dispute arises from non-compliance by Colombia with its Judgment of 19 November 2012 in the case concerning *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)* (*Judgment, I.C.J. Reports 2012 (II)*, p. 624) (hereinafter the "2012 Judgment").

17. Colombia has raised five preliminary objections to the jurisdiction of the Court. According to the first objection, the Court lacks jurisdiction *ratione temporis* under the Pact of Bogotá because the proceedings were instituted by Nicaragua on 26 November 2013, after Colombia's notice of denunciation of the Pact on 27 November 2012. In its second objection, Colombia argues that, even if the Court does not uphold the first objection, the Court still has no jurisdiction under the Pact of Bogotá because there was no dispute between the Parties as at 26 November 2013, the date when the Application was filed. Colombia contends in its third objection that, even if the Court does not uphold the first objection, the Court still has no jurisdiction under the Pact of Bogotá because, at the time of the filing of the Application, the Parties were not of the opinion that the purported controversy "[could not] be settled by direct negotiations through the usual diplomatic channels", as is required, in Colombia's view, by Article II of the Pact of Bogotá before resorting to the dispute resolution procedures of the Pact. In its fourth objection, Colombia contests Nicaragua's assertion that the Court has an "inherent jurisdiction" enabling it to pronounce itself on the alleged non-compliance with a previous judgment. Finally, according to Colombia's fifth objection, the Court has no jurisdiction with regard to compliance with a prior judgment, which is, in its opinion, the real subject-matter of Nicaragua's claims in the present proceedings.

18. In its written observations and final submissions during the oral proceedings, Nicaragua requested the Court to reject Colombia's preliminary objections in their entirety (see paragraphs 13 and 14 above).

19. The Court will now consider these objections in the order presented by Colombia.

II. First Preliminary Objection

20. Colombia's first preliminary objection is that Article XXXI of the Pact of Bogotá cannot provide a basis for the jurisdiction of the Court, because Colombia had given notification of denunciation of the Pact before Nicaragua filed its Application in the present case. According to Colombia, that notification had an immediate effect upon the jurisdiction of the Court under Article XXXI, with the result that the Court lacks jurisdiction in respect of any proceedings instituted after the notification was transmitted.

21. Article XXXI of the Pact of Bogotá provides:

> "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)* [t]he interpretation of a treaty;
> *(b)* [a]ny question of international law;
> *(c)* [t]he existence of any fact which, if established, would constitute the breach of an international obligation;
> *(d)* [t]he nature or extent of the reparation to be made for the breach of an international obligation."

22. Denunciation of the Pact of Bogotá is governed by Article LVI, which reads:

> "The present treaty shall remain in force indefinitely, but 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, but shall continue in force for the remaining signatories. The denunciation shall be addressed to the Pan-American Union, which shall transmit it to the other Contracting Parties.
> The denunciation shall have no effect with respect to pending procedures initiated prior to the transmission of the particular notification."

23. On 27 November 2012, Colombia gave notice of denunciation by means of a diplomatic Note from the Minister for Foreign Affairs to the Secretary-General of the OAS as head of the General Secretariat of the OAS (the successor to the Pan-American Union). That notice stated that Colombia's denunciation "takes effect as of today with regard to procedures that are initiated after the present notice, in conformity with [the] second paragraph of Article LVI".

24. The Application in the present case was submitted to the Court after the transmission of Colombia's notification of denunciation but before the one-year period referred to in the first paragraph of Article LVI had elapsed.

* *

25. Colombia maintains that Article LVI of the Pact of Bogotá should be interpreted in accordance with the customary international law rules on treaty interpretation enshrined in Articles 31 to 33 of the 1969 Vienna Convention on the Law of Treaties (hereinafter, the "Vienna Convention"). Colombia relies, in particular, on the general rule of interpretation in Article 31 of the Vienna Convention, which requires that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". According to Colombia, the application of the general rule of treaty interpretation must lead to the conclusion that procedures initiated after transmission of a notification of denunciation are affected by the denunciation.

26. Colombia contends that the natural implication of the express provision in the second paragraph of Article LVI of the Pact that denunciation shall have no effect on pending procedures initiated *before* the transmission of a notification is that denunciation is effective with regard to procedures initiated *after* that date. Such effect must follow, according to Colombia, from the application to the second paragraph of Article LVI of an *a contrario* interpretation of the kind applied by the Court in its Judgment of 16 April 2013 in the case concerning the *Frontier Dispute (Burkina Faso/Niger)* (*I.C.J. Reports 2013*, pp. 81-82, paras. 87-88). Moreover, to adopt a different interpretation would deny *effet utile* to the second paragraph and thus run counter to the principle that all of the words in a treaty should be given effect. Colombia refutes the suggestion that its interpretation of the second paragraph of Article LVI would deny *effet utile* to the first paragraph of that provision. Even though Colombia accepts that its interpretation would mean that none of the different procedures provided for in Chapters Two to Five of the Pact could be initiated by, or against, a State which had given notification of denunciation during the year that the treaty remained in force in accordance with the first paragraph of Article LVI, it maintains that important substantive obligations contained in the other chapters of the Pact would nevertheless remain in force during the one-year period, so that the first paragraph of Article LVI would have a clear effect.

27. Colombia argues that its interpretation of Article LVI is confirmed by the fact that if the parties to the Pact had wanted to provide that denunciation would not affect any procedures initiated during the one-year period of notice, they could easily have said so expressly, namely by adopting a wording similar to provisions in other treaties, such as Article 58, paragraph 2, of the 1950 European Convention on Human Rights, or Article 40, paragraph 2, of the 1972 European Convention on State Immunity. Colombia also observes that the function and language of Article XXXI are very similar to those of Article 36, paragraph 2, of the Statute of the Court and that States generally reserve the right to withdraw their declarations under Article 36, paragraph 2, without notice.

28. Finally, Colombia maintains that its interpretation is "also consistent with the State practice of the parties to the Pact" and the *travaux préparatoires*. With regard to the first argument, it points to the absence of any reaction, including from Nicaragua, to Colombia's notice of denunciation, notwithstanding the clear statement therein that the denunciation was to take effect as of the date of the notice "with regard to procedures . . . initiated after the present notice". It also emphasizes that there was no reaction from other parties to the Pact when El Salvador gave notice of denunciation in 1973, notwithstanding that El Salvador's notification of denunciation stated that the denunciation "will begin to take effect as of today". With regard to the *travaux préparatoires*, Colombia contends that the first paragraph of Article LVI was taken from Article 9 of the 1929 General Treaty of Inter-American Arbitration (and the parallel provision in Article 16 of the 1929 General Convention of Inter-American Conciliation). Colombia maintains that what became the second paragraph of Article LVI was added as the result of an initiative taken by the United States of America in 1938 which was accepted by the Inter-American Juridical Committee in 1947 and incorporated into the text which was signed in 1948. According to Colombia, this history shows that the parties to the Pact of Bogotá intended to incorporate a provision which limited the effect of the first paragraph of Article LVI.

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29. Nicaragua contends that the jurisdiction of the Court is determined by Article XXXI of the Pact of Bogotá, according to which Colombia and Nicaragua had each recognized the jurisdiction of the Court "so long as the present Treaty is in force". How long the treaty remains in force is determined by the first paragraph of Article LVI, which provides that the Pact remains in force for a State which has given notification of denunciation for one year from the date of that notification. Since the date on which the jurisdiction of the Court has to be established is that on which the Application is filed, and since Nicaragua's Application was filed less than one year after Colombia gave notification of its denunciation of the Pact, it follows — according to Nicaragua — that the Court has jurisdiction in the present case. Nicaragua maintains that nothing in the second paragraph of Article LVI runs counter to that conclusion and no inference should be drawn from the silence of that paragraph regarding procedures commenced between the transmission of the notification of denunciation and the date on which the treaty is terminated for the denouncing State; in any event, such inference could not prevail over the express language of Article XXXI and the first paragraph of Article LVI.

30. That conclusion is reinforced, in Nicaragua's view, by consideration of the object and purpose of the Pact. Nicaragua recalls that, according to the Court, "[i]t is . . . quite clear from the Pact that the purpose of the American States in drafting it was to reinforce their mutual commitments with regard to judicial settlement" (*Border and Transborder Armed Actions*

(Nicaragua v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 89, para. 46). Colombia's interpretation of the second paragraph of Article LVI would, Nicaragua maintains, deprive of all meaning the express provision of Article XXXI that the parties to the Pact accept the jurisdiction of the Court so long as the Pact is in force between them, as well as the express provision of Article LVI that the Pact remains in force for one year after notification of denunciation. According to Nicaragua, it would also render the purpose of the Pact — as defined by the Court — unachievable during the one-year notice period.

31. Nicaragua disputes Colombia's argument that the Colombian interpretation of the second paragraph of Article LVI would still leave important obligations in place during the one-year period of notice. According to Nicaragua, the Colombian interpretation would remove from the effect of the first paragraph of Article LVI all of the procedures for good offices and mediation (Chapter Two of the Pact), investigation and conciliation (Chapter Three), judicial settlement (Chapter Four) and arbitration (Chapter Five), which together comprise forty-one of the sixty Articles of the Pact. Of the remaining provisions, several — such as Article LII on ratification of the Pact and Article LIV on adherence to the Pact — are provisions which have entirely served their purpose and would fulfil no function during the one-year period of notice, while others — such as Articles III to VI — are inextricably linked to the procedures in Chapters Two to Five and impose no obligations independent of those procedures. Colombia's interpretation of Article LVI would thus leave only six of the Pact's sixty Articles with any function during the period of one year prescribed by the first paragraph of Article LVI. Nicaragua also notes that the title of Chapter One of the Pact is "General Obligation to Settle Disputes by Pacific Means" and contends that it would be strange to interpret Article LVI of the Pact as maintaining this Chapter in force between a State which had given notice of denunciation and the other parties to the Pact, but not the chapters containing the very means to which Chapter One refers.

32. Finally, Nicaragua denies that the practice of the parties to the Pact of Bogotá or the *travaux préparatoires* support Colombia's interpretation. So far as practice is concerned, Nicaragua maintains that nothing can be read into the absence of a response to the notices of denunciation by El Salvador and Colombia as there was no obligation on other parties to the Pact to respond. As for the *travaux préparatoires*, they suggest no reason why what became the second paragraph of Article LVI was included or what it was intended to mean. Most importantly, the *travaux préparatoires* contain nothing which suggests that the parties to the Pact intended, by the addition of what became the second paragraph, to restrict the scope of the first paragraph of Article LVI. In Nicaragua's view, the second paragraph of Article LVI, while not necessary, serves a useful purpose in making clear that denunciation does not affect pending procedures.

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33. The Court recalls that the date at which its jurisdiction has to be established is the date on which the application is filed with the Court (*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*, pp. 437-438, paras. 79-80; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 613, para. 26). One consequence of this rule is that "the removal, after an application has been filed, of an element on which the Court's jurisdiction is dependent does not and cannot have any retroactive effect" (*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. 438, para. 80). Thus, even if the treaty provision by which jurisdiction is conferred on the Court ceases to be in force between the applicant and the respondent, or either party's declaration under Article 36, paragraph 2, of the Statute of the Court expires or is withdrawn, after the application has been filed, that fact does not deprive the Court of jurisdiction. As the Court held, in the *Nottebohm* case:

> "When an Application is filed at a time when the law in force between the parties entails the compulsory jurisdiction of the Court . . . the filing of the Application is merely the condition required to enable the clause of compulsory jurisdiction to produce its effects in respect of the claim advanced in the Application. Once this condition has been satisfied, the Court must deal with the claim; it has jurisdiction to deal with all its aspects, whether they relate to jurisdiction, to admissibility or to the merits. An extrinsic fact such as the subsequent lapse of the Declaration, by reason of the expiry of the period or by denunciation, cannot deprive the Court of the jurisdiction already established." (*Nottebohm (Liechtenstein* v. *Guatemala), Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 123.)

34. By Article XXXI, the parties to the Pact of Bogotá recognize as compulsory the jurisdiction of the Court, "so long as the present Treaty is in force". The first paragraph of Article LVI provides that, following the denunciation of the Pact by a State party, the Pact shall remain in force between the denouncing State and the other parties for a period of one year following the notification of denunciation. It is not disputed that, if these provisions stood alone, they would be sufficient to confer jurisdiction in the present case. The Pact was still in force between Colombia and Nicaragua on the date that the Application was filed and, in accordance with the rule considered in paragraph 33 above, the fact that the Pact subsequently ceased to be in force between them would not affect that jurisdiction. The only question raised by Colombia's first preliminary objection, therefore, is whether the second paragraph of Article LVI so alters what would otherwise have been the effect of the first paragraph as to require the conclusion that the Court lacks jurisdiction in respect of the

proceedings, notwithstanding that those proceedings were instituted while the Pact was still in force between Nicaragua and Colombia.

35. That question has to be answered by the application to the relevant provisions of the Pact of Bogotá of the rules on treaty interpretation enshrined in Articles 31 to 33 of the Vienna Convention. Although that Convention is not in force between the Parties and is not, in any event, applicable to treaties concluded before it entered into force, such as the Pact of Bogotá, it is well established that Articles 31 to 33 of the Convention reflect rules of customary international law (*Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, p. 48, para. 83; *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 502, para. 101; *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 812, para. 23; *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 21, para. 41; *Arbitral Award of 31 July 1989 (Guinea-Bissau* v. *Senegal), Judgment, I.C.J. Reports 1991*, p. 70, para. 48). The Parties agree that these rules are applicable. Article 31, which states the general rule of interpretation, requires that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

36. Colombia's argument regarding the interpretation of the second paragraph of Article LVI is based not upon the ordinary meaning of the terms used in that provision but upon an inference which might be drawn from what that paragraph does not say. That paragraph is silent with regard to procedures initiated after the transmission of the notification of denunciation but before the expiration of the one-year period referred to in the first paragraph of Article LVI. Colombia asks the Court to draw from that silence the inference that the Court lacks jurisdiction in respect of proceedings initiated after notification of denunciation has been given. According to Colombia, that inference should be drawn even though the Pact remains in force for the State making that denunciation, because the one-year period of notice stipulated by the first paragraph of Article LVI has not yet elapsed. That inference is said to follow from an *a contrario* reading of the provision.

37. An *a contrario* reading of a treaty provision — by which the fact that the provision expressly provides for one category of situations is said to justify the inference that other comparable categories are excluded — has been employed by both the present Court (see, e.g., *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Application by Honduras for Permission to Intervene, Judgment, I.C.J. Reports 2011 (II)*, p. 432, para. 29) and the Permanent Court of International Justice (*S.S. "Wimbledon", Judgment, 1923, P.C.I.J., Series A, No. 1*, pp. 23-24). Such an interpretation is only warranted, however, when it is appropriate in light of the text of all the provisions concerned, their context and the object and purpose of the treaty. Moreover, even where an *a contrario* interpretation is justified, it is important to determine precisely what inference its application requires in any given case.

38. The second paragraph of Article LVI states that "[t]he denunciation shall have no effect with respect to pending procedures initiated prior to the transmission of the particular notification". However, it is not the denunciation *per se* that is capable of having an effect upon the jurisdiction of the Court under Article XXXI of the Pact, but the termination of the treaty (as between the denouncing State and the other parties) which results from the denunciation. That follows both from the terms of Article XXXI, which provides that the parties to the Pact recognize the jurisdiction of the Court as compulsory *inter se* "so long as the present Treaty is in force", and from the ordinary meaning of the words used in Article LVI. The first paragraph of Article LVI provides that the treaty may be terminated by denunciation, but that termination will occur only after a period of one year from the notification of denunciation. It is, therefore, this first paragraph which determines the effects of denunciation. The second paragraph of Article LVI confirms that procedures instituted before the transmission of the notification of denunciation can continue irrespective of the denunciation and thus that their continuation is ensured irrespective of the provisions of the first paragraph on the effects of denunciation as a whole.

39. Colombia's argument is that if one applies an *a contrario* interpretation to the second paragraph of Article LVI, then it follows from the statement that "denunciation shall have no effect with respect to pending procedures initiated prior to the transmission of the particular notification [of denunciation]" that denunciation does have an effect upon procedures instituted after the transmission of that notification. Colombia maintains that the effect is that any procedures instituted after that date fall altogether outside the treaty. In the case of proceedings at the Court commenced after that date, Colombia maintains that they would, therefore, fall outside the jurisdiction conferred by Article XXXI. However, such an interpretation runs counter to the language of Article XXXI, which provides that the parties to the Pact recognize the jurisdiction of the Court as compulsory "so long as the present Treaty is in force".

The second paragraph of Article LVI is open to a different interpretation, which is compatible with the language of Article XXXI. According to this interpretation, whereas proceedings instituted before transmission of notification of denunciation can continue in any event and are thus not subject to the first paragraph of Article LVI, the effect of denunciation on proceedings instituted after that date is governed by the first paragraph. Since the first paragraph provides that denunciation terminates the treaty for the denouncing State only after a period of one year has elapsed, proceedings instituted during that year are instituted while the Pact is still in force. They are thus within the scope of the jurisdiction conferred by Article XXXI.

40. Moreover, in accordance with the rule of interpretation enshrined in Article 31, paragraph 1, of the Vienna Convention, the text of the second paragraph of Article LVI has to be examined in its context. Colombia admits (see paragraph 26 above) that its reading of the second

paragraph has the effect that, during the one-year period which the first paragraph of Article LVI establishes between the notification of denunciation and the termination of the treaty for the denouncing State, none of the procedures for settlement of disputes established by Chapters Two to Five of the Pact could be invoked as between a denouncing State and any other party to the Pact. According to Colombia, only the provisions of the other chapters of the Pact would remain in force between a denouncing State and the other parties, during the one-year period of notice. However, Chapters Two to Five contain all of the provisions of the Pact dealing with the different procedures for the peaceful settlement of disputes and, as the Court will explain, play a central role within the structure of obligations laid down by the Pact. The result of Colombia's proposed interpretation of the second paragraph of Article LVI would be that, during the year following notification of denunciation, most of the Articles of the Pact, containing its most important provisions, would not apply between the denouncing State and the other parties. Such a result is difficult to reconcile with the express terms of the first paragraph of Article LVI, which provides that "the present Treaty" shall remain in force during the one-year period without distinguishing between different parts of the Pact as Colombia seeks to do.

41. It is also necessary to consider whether Colombia's interpretation is consistent with the object and purpose of the Pact of Bogotá. That object and purpose are suggested by the full title of the Pact, namely the American Treaty on Pacific Settlement. The preamble indicates that the Pact was adopted in fulfilment of Article XXIII of the Charter of the OAS. Article XXIII (now Article XXVII) provides that:

> "A special treaty will establish adequate means for the settlement of disputes and will determine pertinent procedures for each peaceful means such that no dispute between American States may remain without definitive settlement within a reasonable period of time."

That emphasis on establishing means for the peaceful settlement of disputes as the object and purpose of the Pact is reinforced by the provisions of Chapter One of the Pact, which is entitled "General Obligation to Settle Disputes by Pacific Means". Article I provides:

> "The High Contracting Parties, solemnly reaffirming their commitments made in earlier international conventions and declarations, as well as in the Charter of the United Nations, agree to refrain from the threat or the use of force, or from any other means of coercion for the settlement of their controversies, and to have recourse at all times to pacific procedures."

Article II provides:

> "The High Contracting Parties recognize the obligation to settle international controversies by regional pacific procedures before referring them to the Security Council of the United Nations.

> Consequently, in the event that a controversy arises between two or more signatory States which, in the opinion of the parties, cannot be settled by direct negotiations through the usual diplomatic channels, the parties bind themselves to use the procedures established in the present Treaty, in the manner and under the conditions provided for in the following articles, or, alternatively, such special procedures as, in their opinion, will permit them to arrive at a solution."

Finally, the Court recalls that, in its 1988 Judgment in the *Armed Actions* case, quoted at paragraph 30 above, it held that "the purpose of the American States in drafting [the Pact] was to reinforce their mutual commitments with regard to judicial settlement" (*Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 89, para. 46).

42. These factors make clear that the object and purpose of the Pact is to further the peaceful settlement of disputes through the procedures provided for in the Pact. Although Colombia argues that the reference to "regional . . . procedures" in the first paragraph of Article II is not confined to the procedures set out in the Pact, Article II has to be interpreted as a whole. It is clear from the use of the word "consequently" at the beginning of the second paragraph of Article II that the obligation to resort to regional procedures, which the parties "recognize" in the first paragraph, is to be given effect by employing the procedures laid down in Chapters Two to Five of the Pact. Colombia maintains that its interpretation of the second paragraph of Article LVI would leave Article II — which contains one of the core obligations in the Pact — in effect during the one-year period. The Court observes, however, that Colombia's interpretation would deprive both the denouncing State and, to the extent that they have a controversy with the denouncing State, all other parties of access to the very procedures designed to give effect to that obligation to resort to regional procedures. As the Court has already explained (see paragraph 36 above), that interpretation is said to follow not from the express terms of the second paragraph of Article LVI but from an inference which, according to Colombia, must be drawn from the silence of that paragraph regarding proceedings instituted during the one-year period. The Court sees no basis on which to draw from that silence an inference that would not be consistent with the object and purpose of the Pact of Bogotá.

43. An essential part of Colombia's argument is that its interpretation is necessary to give *effet utile* to the second paragraph of Article LVI. Colombia maintains that if the effect of the second paragraph is confined to ensuring that procedures commenced before the date of transmission of the notification of denunciation can continue after that date, then the provision is superfluous. The rule that events occurring after the date on which an application is filed do not deprive the Court of jurisdiction which existed on that date (see paragraph 33 above) would ensure, in any

event, that denunciation of the Pact would not affect procedures already instituted prior to denunciation.

The Court has recognized that, in general, the interpretation of a treaty should seek to give effect to every term in that treaty and that no provision should be interpreted in a way that renders it devoid of purport or effect (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, pp. 125-126, para. 133; *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgments, I.C.J. Reports 1949*, p. 24). There are occasions, however, when the parties to a treaty adopt a provision for the avoidance of doubt even if such a provision is not strictly necessary. For example, Article LVIII of the Pact of Bogotá provides that certain earlier Inter-American treaties shall cease to have effect with respect to parties to the Pact as soon as the Pact comes into force. Article LIX then provides that the provisions of Article LVIII "shall not apply to procedures already initiated or agreed upon" in accordance with any of those earlier treaties. While neither Party made reference to these provisions, if one applies to them the approach suggested by Colombia with regard to Article LVI, then Article LIX must be considered unnecessary. It appears that the parties to the Pact of Bogotá considered that it was desirable to include Article LIX out of an abundance of caution. The fact that the parties to the Pact considered that including Article LIX served a useful purpose even though it was not strictly necessary undermines Colombia's argument that the similar provision in the second paragraph of Article LVI could not have been included for that reason.

44. The Court also considers that, in seeking to determine the meaning of the second paragraph of Article LVI, it should not adopt an interpretation which renders the first paragraph of that Article devoid of purport or effect. The first paragraph provides that the Pact shall remain in force for a period of one year following notification of denunciation. Colombia's interpretation would, however, confine the effect of that provision to Chapters One, Six, Seven, and Eight. Chapter Eight contains the formal provisions on such matters as ratification, entry into force and registration and imposes no obligations during the period following a notification of denunciation. Chapter Seven (entitled "Advisory Opinions") contains only one article and is purely permissive. Chapter Six also contains one provision, which requires only that before a party resorts to the Security Council regarding the failure of another party to comply with a judgment of the Court or an arbitration award, it shall first propose a Meeting of Consultation of Ministers of Foreign Affairs of the parties.

Chapter One ("General Obligation to Settle Disputes by Pacific Means") contains eight Articles which impose important obligations upon the parties but, as has already been shown (see paragraph 42 above), Article II is concerned with the obligation to use the procedures in the Pact (none of which would be available during the one-year period if Colombia's interpretation were accepted), while Articles III to VI have no

effect independent of the procedures in Chapters Two to Five. That leaves only three provisions. Article I provides that the parties,

> "solemnly reaffirming their commitments made in earlier international conventions and declarations, as well as in the Charter of the United Nations, agree to refrain from the threat of the use of force, or from any other means of coercion for the settlement of their controversies, and to have recourse at all times to pacific procedures".

Article VII binds the parties not to exercise diplomatic protection in respect of their nationals when those nationals have had available the means to place their cases before competent domestic courts. Article VIII provides that recourse to pacific means shall not preclude recourse to self-defence in the case of an armed attack.

Colombia's interpretation of the second paragraph of Article LVI would thus confine application of the first paragraph of Article LVI to these few provisions.

45. Colombia, basing itself on the language employed in other treaties, argues that, had the parties to the Pact of Bogotá wished to provide that proceedings instituted at any time before the expiry of the one-year period stipulated by the first paragraph of Article LVI would be unaffected, they could easily have made express provision to that effect. Conversely, however, had the parties to the Pact intended the result for which Colombia contends, they could easily have made express provision to that effect — but they chose not to do so. The comparison with those other treaties is not, therefore, a persuasive argument in favour of Colombia's interpretation of the second paragraph of Article LVI. Nor is the fact that many declarations made under Article 36, paragraph 2, of the Statute of the Court are terminable without notice. Article 36, paragraph 2, of the Statute and Article XXXI of the Pact of Bogotá both provide for the compulsory jurisdiction of the Court. However, Article 36, paragraph 2, of the Statute confers jurisdiction only between States which have made a declaration recognizing that jurisdiction. In its declaration under Article 36, paragraph 2, a State is free to provide that that declaration may be withdrawn with immediate effect. By contrast, Article XXXI of the Pact of Bogotá is a treaty commitment, not dependent upon unilateral declarations for its implementation (*Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 84, para. 32). The conditions under which a State party to the Pact may withdraw from that commitment are determined by the relevant provisions of the Pact. The fact that many States choose to frame their declarations under Article 36, paragraph 2, in such a way that they may terminate their acceptance of the jurisdiction of the Court with immediate effect thus sheds no light on the interpretation of the provisions of the Pact.

46. The Court has noted Colombia's argument (see paragraph 28 above) regarding State practice in the form of the denunciation of the Pact by El Salvador in 1973 and Colombia itself in 2012, together with what Colombia describes as the absence of any reaction to the notification of those denunciations.

The two notifications of denunciation are not in the same terms. While El Salvador's notification stated that its denunciation "will begin to take effect as of today", there is no indication of what effect was to follow immediately upon the denunciation. Since the first paragraph of Article LVI requires one year's notice in order to terminate the treaty, any notification of denunciation begins to take effect immediately in the sense that the transmission of that notification causes the one-year period to begin. Accordingly, neither El Salvador's notification, nor the absence of any comment thereon by the other parties to the Pact, sheds any light on the question currently before the Court.

Colombia's own notification of denunciation specified that "[t]he denunciation [of the Pact] takes effect as of today with regard to procedures that are initiated after the present notice, in conformity with the second paragraph of Article LVI". Nevertheless, the Court is unable to read into the absence of any objection on the part of the other parties to the Pact with respect to that notification an agreement, within the meaning of Article 31 (3) *(b)* of the Vienna Convention, regarding Colombia's interpretation of Article LVI. Nor does the Court consider that the absence of any comment by Nicaragua amounted to acquiescence. The fact that Nicaragua commenced proceedings in the case concerning *Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia)* and in the present case within one year of the transmission of Colombia's notification of denunciation reinforces this conclusion.

47. Turning to Colombia's argument regarding the *travaux préparatoires*, the Court considers that the *travaux préparatoires* of the Pact demonstrate that what became the first paragraph of Article LVI was taken over from Article 9 of the 1929 General Treaty of Inter-American Arbitration and Article 16 of the 1929 General Convention of Inter-American Conciliation. The second paragraph of Article LVI originated with a proposal from the United States in 1938 which had no counterpart in the 1929 Treaties. However, the *travaux préparatoires* give no indication as to the precise purpose behind the addition of what became the second paragraph of Article LVI. The Court also notes that, if Colombia's view as to the significance of the second paragraph were correct, then the insertion of the new paragraph would have operated to restrict the effect of the provision which, even before the United States made its proposal, the parties were contemplating carrying over from the 1929 Treaties. Yet there is no indication anywhere in the *travaux préparatoires* that anyone considered that incorporating this new paragraph would bring about such an important change.

48. For all of the foregoing reasons the Court considers that Colombia's interpretation of Article LVI cannot be accepted. Taking Article LVI

as a whole, and in light of its context and the object and purpose of the Pact, the Court concludes that Article XXXI conferring jurisdiction upon the Court remained in force between the Parties on the date that the Application in the present case was filed. The subsequent termination of the Pact as between Nicaragua and Colombia does not affect the jurisdiction which existed on the date that the proceedings were instituted. Colombia's first preliminary objection must therefore be rejected.

III. Second Preliminary Objection

49. In its second preliminary objection to the jurisdiction of the Court, Colombia contends that prior to the filing of Nicaragua's Application on 26 November 2013, there was no dispute between the Parties with respect to the claims advanced in the Application that could trigger the dispute resolution provisions of the Pact of Bogotá, in particular, those concerning the Court's jurisdiction.

50. Under Article 38 of the Statute, the function of the Court is to decide in accordance with international law disputes that States submit to it. By virtue of Article XXXI of the Pact of Bogotá, the States parties agreed to accept the compulsory jurisdiction of the Court, in conformity with Article 36, paragraph 2, of the Statute, for "all disputes of a juridical nature that arise among them". The existence of a dispute between the parties is a condition of the Court's jurisdiction. Such a dispute, according to the established case law of the Court, is "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons" (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11; see also *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 84, para. 30). "It must be shown that the claim of one party is positively opposed by the other." (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328.) It does not matter which one of them advances a claim and which one opposes it. What matters is that "the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain" international obligations (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74).

The Court recalls that "[w]hether there exists an international dispute is a matter for objective determination" by the Court (*ibid.*; see also *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 442, para. 46; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections,*

Judgment, I.C.J. Reports 2011 (I), p. 84, para. 30; *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 271, para. 55; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 476, para. 58). "The Court's determination must turn on an examination of the facts. The matter is one of substance, not of form." (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 84, para. 30.)

51. According to Article 40, paragraph 1, of the Statute and Article 38, paragraph 2, of the Rules of Court, the Applicant is required to indicate the "subject of the dispute" in the Application, specifying the "precise nature of the claim" (see also *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015 (II)*, p. 602, para. 25; *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 448, para. 29). However,

> "[i]t is for the Court itself . . . to determine on an objective basis the subject-matter of the dispute between the parties, that is, to 'isolate the real issue in the case and to identify the object of the claim' (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 262, para. 29; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 466, para. 30)" (*Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015 (II)*, p. 602, para. 26).

52. In principle, the critical date for determining the existence of a dispute is the date on which the application is submitted to the Court (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 85, para. 30; *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. 25-26, paras. 43-45; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 130-131, paras. 42-44).

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53. In its Application, Nicaragua indicates that the subject of the dispute it submits to the Court is as follows: "The dispute concerns the violations of Nicaragua's sovereign rights and maritime zones declared by the Court's Judgment of 19 November 2012 and the threat of the use of force by Colombia in order to implement these violations."

In the submissions set out in the Memorial (see paragraph 12 above), Nicaragua requests the Court to determine two principal claims; one

relates to Colombia's alleged violations of Nicaragua's maritime zones as delimited by the Court in its 2012 Judgment "as well as Nicaragua's sovereign rights and jurisdiction in these zones", and the other concerns Colombia's alleged breach of its obligation not to use or threaten to use force under Article 2, paragraph 4, of the Charter of the United Nations and customary international law.

54. Nicaragua claims that, in the period between the delivery of the 2012 Judgment and the date of the filing of the Application on 26 November 2013, Colombia first asserted that the 2012 Judgment was not applicable. On 9 September 2013, it enacted Presidential Decree 1946 on the establishment of an "Integral Contiguous Zone" (hereinafter "Decree 1946") that partially overlapped with the maritime zones that the Court declared appertain to Nicaragua. Moreover, according to Nicaragua, Colombia started a programme of military and surveillance operations in those maritime areas. Nicaragua also states that Colombia took steps using military vessels and aircraft to intimidate Nicaraguan vessels and that it continued to issue licenses authorizing fishing in the waters concerned.

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55. In supporting its second preliminary objection, Colombia contends that at no time up to the critical date of 26 November 2013, the date on which Nicaragua filed its Application, did Nicaragua ever indicate to Colombia, by any modality, that Colombia was violating Nicaragua's sovereign rights and maritime zones declared by the 2012 Judgment or that it was threatening to use force. It argues that Nicaragua had not raised any complaints with Colombia, either in writing or orally until almost ten months after it filed the Application and three weeks before it submitted its Memorial, namely, until it sent a diplomatic Note to Colombia on 13 September 2014. Colombia alleges that this Note "is a transparent effort to manufacture a case where none exists".

56. Colombia claims that Nicaragua's Application came as a "complete surprise", given the peaceful situation at sea and the Parties' repeated statements that they were intent on negotiating a treaty to implement the 2012 Judgment. It contends that, prior to the filing of the Application, and even for a significant period afterwards, there was no dispute over any allegations of violation by Colombia of Nicaragua's maritime spaces, or threat of the use of force, that could have formed the basis of negotiations.

57. With regard to Nicaragua's allegation that Colombia had repudiated the 2012 Judgment, Colombia states that

> "Colombia accepts that the Judgment [of 2012] is binding upon it in international law. The Colombian Constitutional Court took the

> same position in its decision of 2 May 2014. The question that has arisen in Colombia is how to implement the 2012 Judgment domestically, having regard to the relevant constitutional provisions and the nature of Colombia's legal system with respect to boundaries."

Colombia maintains that, under Article 101 of its Constitution, a change to its boundaries can only be effected by the conclusion of a treaty and that Nicaragua had expressed its willingness to enter into negotiations with Colombia regarding the possibility of concluding such a treaty.

58. With regard to Presidential Decree 1946 on an "Integral Contiguous Zone" enacted on 9 September 2013 and subsequently amended by Decree 1119 of 17 June 2014, Colombia argues that although its own entitlement to a contiguous zone around its islands was fully addressed by the Parties in the case concluded with the 2012 Judgment, the delimitation of that zone was not an issue addressed or decided by the Court. Colombia claims that, like all other States, it is entitled to such a maritime zone, which is governed by customary international law. It states that its

> "Integral Contiguous Zone (i) is necessary for the orderly management, policing and maintenance of public order in the maritime spaces in the Archipelago of San Andrés, Providencia and Santa Catalina, (ii) is to be applied in conformity with international law having due regard to the rights of other States, (iii) is in conformity with customary international law, and (iv) consequently, cannot be said to be contrary to the Court's Judgment of 19 November 2012".

59. Moreover, Colombia maintains that, under Decree 1946, its right to sanction infringements of laws and regulations concerning the matters mentioned in the Decree would only be exercised in relation to acts committed in its insular territories or in their territorial sea, which, according to Colombia, "corresponds to customary international law".

60. Finally, Colombia denies that there existed, at the date of the filing of the Application, any dispute between the Parties concerning a threat of use of force at sea, let alone any violation of Article 2, paragraph 4, of the Charter of the United Nations. It maintains that it had given instructions to its naval forces to avoid any risk of confrontation with Nicaragua at sea. It claims that, as confirmed by members of Nicaragua's Executive and Military, "the situation in the south-western Caribbean was calm, and that no problems existed".

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61. Nicaragua, for its part, first points to the declarations and statements of Colombia's senior officials, including its Head of State, its Foreign Minister and the Chief of its Navy, which, it claims, indicate that Colombia would not accept the delimitation of the maritime zones as

determined by the Court in the 2012 Judgment. It particularly refers to the declaration made on 9 September 2013 by the President of Colombia on the "integral strategy of Colombia on the Judgment of the International Court of Justice", in which the President announced, *inter alia*, that the 2012 Judgment would not be applicable until a treaty had been concluded with Nicaragua. Nicaragua contends that, with the "integral strategy" and the subsequent actions taken in line with the instructions of the President, Colombia hardened its position in defiance of the 2012 Judgment. Nicaragua claims that Colombia could not fail to see that there was a dispute between the Parties.

62. Nicaragua states that Decree 1946 draws a contiguous zone joining together the contiguous zones of all the islands and cays of Colombia in the Western Caribbean Sea. It argues that neither the size of the contiguous zone, nor the nature of the rights and jurisdiction that Colombia claims within it, are consistent with the definition of the contiguous zone recognized by international law. Moreover, according to Nicaragua, Decree 1946 purports to attribute to Colombia maritime areas that the Court determined in its 2012 Judgment appertain to Nicaragua. By issuing that Decree, Nicaragua alleges, "Colombia transformed into national law its rejection and defiance of the . . . 2012 Judgment" of the Court.

63. Nicaragua also alleges that a series of incidents involving vessels or aircraft of Colombia occurred at sea. According to Nicaragua, a number of such incidents took place between the date of the 2012 Judgment and the date of the filing of the Application in the waters declared by the 2012 Judgment to be Nicaraguan. It claims that the conversations between the commanders of the Colombian navy frigates and the agents of Nicaragua's Coast Guard during these alleged incidents demonstrate that the Parties held conflicting claims of maritime entitlements to the areas concerned.

64. Nicaragua points out that since the maritime boundary between the Parties out to 200 nautical miles from the Nicaraguan coast was fixed by the Court, both Nicaragua and Colombia have known for almost three years the geographical extent of each other's maritime rights. According to Nicaragua, after the 2012 Judgment was rendered, however, Colombia has continued to assert its "sovereignty" and maritime entitlements in Nicaragua's waters and to issue fishing permits to its nationals to exploit the resources in Nicaragua's maritime area. Nicaragua explains that its purpose in referring to facts having occurred after the date of the filing of its Application is to demonstrate that the problem is a continuing one.

65. In relation to its allegations of Colombia's threat of use of force, Nicaragua contends that in furtherance of its assertion of "sovereignty", Colombia has regularly "harassed" Nicaraguan fishing vessels in Nicaraguan waters, particularly in the rich fishing ground known as "Luna Verde", located around the intersection of meridian 82° with parallel 15° in waters the Court declared to belong to Nicaragua. It asserts that Colombia has done so by directing Colombian navy frigates to chase away Nicaraguan fishing boats and fishing vessels licensed by Nicaragua,

as well as by commanding its military aircraft to "harass" Nicaraguan fishing vessels by air.

66. Nicaragua claims that it "has consistently met Colombia's refusal to comply with the . . . 2012 Judgment and its provocative conduct within Nicaragua's waters with patience and restraint". Nicaraguan naval forces have been ordered to avoid any engagement with Colombia's navy and, in fact, have kept their distance from the Colombian navy as far as possible. Nicaragua emphasizes, however, that its "conciliatory, non-escalatory position . . . has in no way reduced the disagreement or made the dispute go away".

* *

67. The Court recalls (see paragraph 53 above) that Nicaragua makes two distinct claims — one that Colombia has violated Nicaragua's sovereign rights and maritime zones, and the other that Colombia has breached its obligation not to use or threaten to use force. The Court will examine these two claims separately in order to determine, with respect to each of them, whether there existed a dispute within the meaning set out in paragraphs 50 to 52 above at the date of filing of the Application.

68. The Court notes that, in support of their respective positions on the existence of a dispute with regard to Nicaragua's first claim, the Parties primarily refer to declarations and statements made by the highest representatives of the Parties, to Colombia's enactment of Decree 1946, and to the alleged incidents at sea.

69. Considering, first, the declarations and statements of the senior officials of the two States, the Court observes that, following the delivery of the 2012 Judgment, the President of Colombia proposed to Nicaragua to negotiate a treaty concerning the effects of that Judgment, while the Nicaraguan President, on a number of occasions, expressed a willingness to enter into negotiations for the conclusion of a treaty to give effect to the Judgment, by addressing Colombia's concerns in relation to fishing, environmental protection and drug trafficking. The Court considers that the fact that the Parties remained open to a dialogue does not by itself prove that, at the date of the filing of the Application, there existed no dispute between them concerning the subject-matter of Nicaragua's first claim.

The Court notes that Colombia took the view that its rights were "infringed" as a result of the maritime delimitation by the 2012 Judgment. After his meeting with the President of Nicaragua on 1 December 2012, President Juan Manuel Santos of Colombia stated that "we will continue — and we said this clearly to President Ortega — looking for the reestablishment of the rights that this Judgment breached in a grave matter for the Colombians".

Nicaragua, for its part, insisted that the maritime zones declared by the Court in the 2012 Judgment must be respected. On 10 September 2013, following Colombia's issuance of Decree 1946, when President Santos

reiterated Colombia's position on the implementation of the 2012 Judgment, President Daniel Ortega of Nicaragua reportedly stated that:

> "We understand the position taken by President Santos, but we cannot say that we agree with the position of President Santos . . . We do agree that it is necessary to dialogue, we do agree that it is necessary to look for some kind of agreement, treaty, whatever we want to call it, to put into practice in a harmonious way . . . the Judgment of the International Court of Justice . . ."

It is apparent from these statements that the Parties held opposing views on the question of their respective rights in the maritime areas covered by the 2012 Judgment.

70. With regard to Colombia's proclamation of an "Integral Contiguous Zone", the Court notes that the Parties took different positions on the legal implications of such action in international law. While Colombia maintained that it was entitled to such a contiguous zone as defined by Decree 1946 under customary international law, Nicaragua contended that Decree 1946 violated its "sovereign rights and maritime zones" as adjudged by the Court in the 2012 Judgment.

71. Regarding the incidents at sea alleged to have taken place before the critical date, the Court considers that, although Colombia rejects Nicaragua's characterization of what happened at sea as "incidents", it does not rebut Nicaragua's allegation that it continued exercising jurisdiction in the maritime spaces that Nicaragua claimed as its own on the basis of the 2012 Judgment.

72. Concerning Colombia's argument that Nicaragua did not lodge a complaint of alleged violations with Colombia through diplomatic channels until long after it filed the Application, the Court is of the view that although a formal diplomatic protest may be an important step to bring a claim of one party to the attention of the other, such a formal protest is not a necessary condition. As the Court held in the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)*, in determining whether a dispute exists or not, "[t]he matter is one of substance, not of form" (*Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 84, para. 30).

73. The Court notes that, although Nicaragua did not send its formal diplomatic Note to Colombia in protest at the latter's alleged violations of its maritime rights at sea until 13 September 2014, almost ten months after the filing of the Application, in the specific circumstances of the present case, the evidence clearly indicates that, at the time when the Application was filed, Colombia was aware that its enactment of Decree 1946 and its conduct in the maritime areas declared by the 2012 Judgment to belong to Nicaragua were positively opposed by Nicaragua. Given the public statements made by the highest representatives of

the Parties, such as those referred to in paragraph 69, Colombia could not have misunderstood the position of Nicaragua over such differences.

74. Based on the evidence examined above, the Court finds that, at the date on which the Application was filed, there existed a dispute concerning the alleged violations by Colombia of Nicaragua's rights in the maritime zones which, according to Nicaragua, the Court declared in its 2012 Judgment appertain to Nicaragua.

75. The Court now turns to the question of the existence of a dispute with regard to Nicaragua's second claim, namely that Colombia, by its conduct, has breached its obligation not to use or threaten to use force under Article 2, paragraph 4, of the Charter of the United Nations and customary international law.

76. Although Nicaragua refers to a number of incidents which allegedly occurred at sea, the Court observes that, with regard to those which allegedly occurred before the critical date, nothing in the evidence suggests that Nicaragua had indicated that Colombia had violated its obligations under Article 2, paragraph 4, of the Charter of the United Nations or under customary international law regarding the threat or use of force. On the contrary, members of Nicaragua's executive and military authorities confirmed that the situation at sea was calm and stable. On 14 August 2013, on the occasion of the 33rd anniversary of Nicaragua's naval forces, the President of Nicaragua stated that:

> "[W]e must recognize that in the middle of all this media turbulence, the Naval Force of Colombia, which is very powerful, that certainly has a very large military power, has been careful, has been respectful and there has not been any kind of confrontation between the Colombian and Nicaraguan Navy . . ."

On 18 November 2013, the Chief of the Nicaraguan Naval Force stated that "in one year of being there we have not had any problems with the Colombian Naval Forces", that the forces of the two countries "maintain[ed] a continuous communication" and that "we have not had any conflicts in those waters".

77. Furthermore, the Court observes that the alleged incidents that were said to have occurred before Nicaragua filed its Application relate to Nicaragua's first claim rather than a claim concerning a threat of use of force under Article 2, paragraph 4, of the Charter of the United Nations and customary international law.

78. Given these facts, the Court considers that, at the date on which the Application was filed, the dispute that existed between Colombia and Nicaragua did not concern Colombia's possible violations of Article 2, paragraph 4, of the Charter of the United Nations and customary international law prohibiting the use or threat of use of force.

79. In light of the foregoing considerations, the Court concludes that, at the time Nicaragua filed its Application, there existed a dispute concerning the alleged violations by Colombia of Nicaragua's rights in the maritime zones which, according to Nicaragua, the Court declared in its 2012 Judgment appertain to Nicaragua. Consequently, Colombia's second preliminary objection must be rejected with regard to Nicaragua's first claim and upheld with regard to its second claim.

IV. Third Preliminary Objection

80. In its third preliminary objection, Colombia argues that the Court lacks jurisdiction because Article II of the Pact of Bogotá imposes a precondition on the recourse by the States parties to judicial settlement, which was not met at the date of Nicaragua's filing of its Application.

81. Article II of the Pact of Bogotá, which has already been quoted in paragraph 41, reads as follows:

> "The High Contracting Parties recognize the obligation to settle international controversies by regional pacific procedures before referring them to the Security Council of the United Nations.
>
> Consequently, in the event that a controversy arises between two or more signatory States which, in the opinion of the parties, cannot be settled by direct negotiations through the usual diplomatic channels, the parties bind themselves to use the procedures established in the present Treaty, in the manner and under the conditions provided for in the following articles, or, alternatively, such special procedures as, in their opinion, will permit them to arrive at a solution."

82. Referring to the 1988 Judgment in the *Border and Transborder Armed Actions (Nicaragua* v. *Honduras)* case (hereinafter the "1988 Judgment"), Colombia claims that recourse to the pacific procedures of the Pact would be in conformity with Article II only if an attempt at negotiating a settlement had been made in good faith, and it is clear, after reasonable efforts, that a deadlock had been reached and that there was no likelihood of resolving the dispute by such means. Colombia asserts that, contrary to what Nicaragua claims, the term "in the opinion of the parties" in Article II should refer to the opinion of both parties, as stated in the English, Portuguese and Spanish versions of the Pact, rather than the opinion of one of the parties. Colombia contends that, based on the conduct of both itself and Nicaragua, it could not be concluded that the alleged controversy, in the opinion of the Parties, could not be settled by direct negotiations through the usual diplomatic channels at the time of Nicaragua's filing of the Application.

83. Colombia claims that the fact that the Parties had been engaged in dialogue on the possibility of negotiating a treaty with a view to implementing the 2012 Judgment indicates that the two sides remained willing

to settle their differences through direct negotiations. To demonstrate such intention on the part of Nicaragua, Colombia in its written pleadings refers to a number of statements and declarations made by the Nicaraguan President to that effect.

84. Colombia contends that even after the filing of its Application, it was reported that the Nicaraguan President on several occasions still talked about signing agreements with Colombia and proposed to set up a bi-national commission to co-ordinate the fishing operations, antidrug patrolling and the joint administration for the Seaflower Biosphere Marine Reserve in the Caribbean Sea, on the basis of the delimitation established by the Court.

85. Colombia asserts that the Chief of the Nicaraguan Naval Force and the Chief of Nicaragua's army held the same view about peace and stability in the waters concerned. This fact confirms, according to Colombia, that up to the filing of the Application, Nicaragua was of the opinion that the two maritime neighbours maintained good relations, there had been no naval "incidents", and they could resolve their differences by way of negotiations. Colombia argues that Nicaragua's filing of its Application "was completely at odds with reality".

86. Colombia maintains that it also held the opinion that any maritime issues between the two Parties arising as a result of the Court's 2012 Judgment could be settled by way of direct negotiations. It claims that Nicaragua incorrectly inferred from the Colombian President's declaration of 19 November 2012 that Colombia rejected the Court's 2012 Judgment. Colombia points out that, upon instruction from its President, its Foreign Minister had already commenced discussions with her Nicaraguan counterpart on 20 November 2012. It further refers to the statement by its Foreign Minister on 14 September 2013, where she reiterated that "Colombia is open to dialogue with Nicaragua to sign a treaty that establishes the boundaries and a legal regime that contributes to the security and stability in the region".

87. Colombia explains that the protection of the historic fishing rights of the people of the Archipelago of San Andrés, Providencia and Santa Catalina is of paramount importance for the country. It underscores that the declarations made by Colombia's highest authorities in the wake of the 2012 Judgment must be understood in that context and, contrary to what Nicaragua seeks to portray, they in no way imply any disregard for the Judgment of the Court. Colombia contends that the timing of Nicaragua's Application was due not to allegedly futile negotiations, but to the fact that the Pact of Bogotá would soon cease to be in force between the Parties.

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88. For its part, Nicaragua rejects the interpretation of Article II advanced by Colombia, maintaining that Colombia misreads the Court's

1988 Judgment. It contends that the Court, in that Judgment, explicitly declined to apply the jurisprudence relating to compromissory clauses in other treaties but referred to the opinion of the parties regarding the possibility of a negotiated settlement as provided for by Article II. Relying on the French version of the Pact, Nicaragua argues that Article II of the Pact requires the Court to determine whether, from an objective standpoint, one of the parties was of the opinion that the dispute could not be settled by direct negotiations.

89. Nicaragua contends that the present dispute arose from Colombia's actions subsequent to the delivery of the 2012 Judgment, with Colombia first rejecting the 2012 Judgment, then asserting new claims to the waters adjudged by the Court to appertain to Nicaragua and exercising purported sovereign rights and jurisdiction in those waters. According to Nicaragua, the events which occurred in the two and a half months leading up to the Application demonstrate that the Parties were of the opinion that their dispute concerning Colombia's violation of Nicaragua's sovereign rights and maritime zones could not be settled by direct negotiations. It points out that three days after the issuance of Decree 1946, President Juan Manuel Santos asked the Colombian Constitutional Court to declare Articles XXXI and L of the Pact of Bogotá unconstitutional, for, in his view, the Colombian Constitution only permits national boundaries to be modified by means of duly ratified treaties.

Nicaragua alleges that the President of Colombia also stated that, without a treaty with Nicaragua, Colombia would continue to "exercise sovereignty right up to the 82nd Meridian" which it had historically claimed as a maritime frontier, notwithstanding the Court's 2012 Judgment.

90. With regard to Colombia's reference to the declaration of its Foreign Minister that her country was open to dialogue (see paragraph 86 above), Nicaragua points out that following those remarks the Minister also added that the Government of Colombia "awaits the decision of the Constitutional Court before initiating any action". Nicaragua claims that, based on these declarations and statements, it was apparent to Nicaragua that Colombia was of the opinion that no negotiation was possible between the Parties to settle the dispute relating to Colombia's violations of Nicaragua's sovereign rights and maritime zones at the time of its filing of the Application.

91. Nicaragua, while reiterating its willingness to negotiate a treaty with Colombia for the implementation of the 2012 Judgment, emphasizes that the subject-matter for negotiations between the Parties is entirely unrelated to the subject-matter of the dispute in the present case. It claims that Colombia in its preliminary objections has "carefully chosen to elide the critical differences" between the two subject-matters. Nicaragua maintains that it is — and has always been — open to discussion with Colombia on the arrangements for fishing, environmental protection of the Seaflower Biosphere Marine Reserve and the fight against drug-trafficking

in the Caribbean Sea, but it "is absolutely not prepared to give up the maritime boundaries that the Court has drawn" between the Parties.

* *

92. The Court recalls that in the 1988 Judgment, it decided that, for the purpose of determining the application of Article II of the Pact, it was not "bound by the mere assertion of the one [p]arty or the other that its opinion [was] to a particular effect". The Court emphasized that "it must, in the exercise of its judicial function, be free to make its own determination of that question on the basis of such evidence as is available to it" (*Border and Transborder Armed Actions, (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 95, para. 65).

93. The Court made clear that the parties are expected to provide substantive evidence to demonstrate that they considered in good faith that their dispute could or could not be settled by direct negotiations through the usual diplomatic channels. The critical date at which "the opinion of the parties" has to be ascertained for the application of Article II of the Pact is the date on which proceedings are instituted.

94. Moreover, in its 1988 Judgment, the Court took note of the discrepancy between the French text and the other three official texts (English, Portuguese and Spanish) of Article II; the former refers to the opinion of one of the parties *("de l'avis de l'une des parties")*, while the latter three refer to the opinion of both parties. The Court, however, did not consider it necessary to resolve the problem posed by that textual discrepancy before proceeding to the consideration of the application of Article II of the Pact in that case. It proceeded on the basis that it would consider whether the "opinion" of both parties was that it was not possible to settle the dispute by negotiation, subject to demonstration of evidence by the parties.

95. In the present case, as in the 1988 Judgment, it will not be necessary for the Court to rehearse the arguments put forward by the Parties with regard to the interpretation of the term "in the opinion of the parties" *("de l'avis de l'une des parties")* in Article II of the Pact. The Court will begin by determining whether the evidence provided demonstrates that, at the date of Nicaragua's filing of the Application, neither of the Parties could plausibly maintain that the dispute between them could be settled by direct negotiations through the usual diplomatic channels (see, in this regard, *ibid.*, p. 99, para. 75).

96. The Court recalls that statements and declarations referred to by the Parties in their written and oral pleadings are all made by the highest representatives of the two States. As the Court stated in the *Georgia* v. *Russian Federation* case,

> "in general, in international law and practice, it is the Executive of the State that represents the State in its international relations and speaks for it at the international level (*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. 27, paras. 46-47). Accordingly, primary attention will be given to statements made or endorsed by the Executives of the two Parties." (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 87, para. 37.)

The Court therefore considers that, in determining the Parties' positions with regard to the possibility of a negotiated settlement, it may rely on such statements and declarations to draw its findings.

97. The Court observes that, through various communications between the Heads of State of the two countries since the delivery of the 2012 Judgment, each Party had indicated that it was open to dialogue to address some issues raised by Colombia as a result of the Judgment.

The Nicaraguan President expressed Nicaragua's willingness to negotiate a treaty or agreement with Colombia so as to accommodate the latter's domestic requirement under national law for the implementation of the Judgment. The issues that the Parties identified for possible dialogue include fishing activities of the inhabitants of San Andrés, Providencia and Santa Catalina in waters that have been recognized as appertaining to Nicaragua by the Court, the protection of the Seaflower Biosphere Marine Reserve, and the fight against drug trafficking in the Caribbean Sea.

98. The Court notes, however, that the above-mentioned subject-matter for negotiation is different from the subject-matter of the dispute between the Parties. According to Nicaragua, negotiations between the Parties should have been conducted on the basis that the prospective treaty would not affect the maritime zones as declared by the 2012 Judgment. In other words, for Nicaragua, such negotiations had to be restricted to the modalities or mechanisms for the implementation of the said Judgment.

Colombia did not define the subject-matter of the negotiations in the same way. In the words of its Foreign Minister, it intended to "sign *a treaty that establishes the boundaries* and a legal regime that contributes to the security and stability in the region" (emphasis added).

99. The Court considers that Colombia's argument that the Parties remained open to dialogue, at least on the date of the filing of the Application, is not a decisive factor, because what is essential for the Court to decide is whether, on that date, given the positions and conduct of the Parties in respect of Colombia's alleged violations of Nicaragua's sovereign rights and maritime zones delimited by the Court in 2012, the Parties considered in good faith a certain possibility of a negotiated settlement to exist or not to exist.

100. The Court notes that the Parties do not dispute that the situation at sea was "calm" and "stable" throughout the relevant period. That fact, nevertheless, is not necessarily indicative that, in the opinion of the Parties, the dispute in the present case could be settled by negotiations. From the inception of the events following the delivery of the 2012 Judgment, Nicaragua was firmly opposed to Colombia's conduct in the areas that

the 2012 Judgment declared appertain to Nicaragua. Colombia's position on the negotiation of a treaty was equally firm during the entire course of its communications with Nicaragua. No evidence submitted to the Court indicates that, on the date of Nicaragua's filing of the Application, the Parties had contemplated, or were in a position, to hold negotiations to settle the dispute concerning the alleged violations by Colombia of Nicaragua's rights in the maritime zones which, according to Nicaragua, the Court declared in its 2012 Judgment appertain to Nicaragua.

101. Given the above considerations, the Court concludes that at the date on which Nicaragua filed its Application, the condition set out in Article II was met. Therefore, Colombia's third preliminary objection must be rejected.

V. Fourth Preliminary Objection

102. Nicaragua claims two bases for the jurisdiction of the Court. It states that, should the Court find that it has no jurisdiction under Article XXXI of the Pact of Bogotá, its jurisdiction could be founded on "its inherent power to pronounce on the actions required by its Judgment[]". In its fourth preliminary objection, Colombia contends that the Court has no "inherent jurisdiction" upon which Nicaragua can rely.

103. Colombia maintains that Nicaragua's claim of "inherent jurisdiction" can find no support either in the Statute of the Court or in its case law. It argues that, if Nicaragua's position is to be taken seriously, it would strike at the foundation of consensual jurisdiction under Article 36 of the Statute of the Court, for Nicaragua's theory of "inherent jurisdiction" ignores any conditions which States may have attached to their consent to jurisdiction. It argues that, instead of applying the law and practice of this Court, Nicaragua referred to the law and practice of the European Court of Human Rights and the Inter-American Court of Human Rights; even by doing so, Nicaragua ignores the explicit statutory authority afforded to those courts for monitoring the implementation of their decisions.

* *

104. The Court notes that "inherent jurisdiction" claimed by Nicaragua is an alternative ground that it invokes for the establishment of the Court's jurisdiction in the present case. Nicaragua's argument, could, in any event, apply only to the dispute that existed at the time of filing of the Application. Since the Court has founded its jurisdiction with regard to that dispute on the basis of Article XXXI of the Pact of Bogotá, it considers that there is no need to deal with Nicaragua's claim of "inherent jurisdiction", and therefore will not take any position on it. Consequently, there is no ground for the Court to rule upon Colombia's fourth preliminary objection.

VI. Fifth Preliminary Objection

105. Colombia's fifth preliminary objection is that the present Application is an attempt to enforce the 2012 Judgment even though the Court has no post-adjudication enforcement jurisdiction. Colombia maintains that the Charter of the United Nations and the Statute of the Court are based upon a division of functions according to which the Court is entrusted with the task of adjudication, while post-adjudication enforcement is reserved for the Security Council in accordance with paragraph 2 of Article 94 of the Charter, which provides:

> "If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment."

According to Colombia, the same division of functions is recognized in the Pact of Bogotá, Article L of which provides:

> "If one of the High Contracting Parties should fail to carry out the obligations imposed upon it by a decision of the International Court of Justice or by an arbitral award, the other party or parties concerned shall, before resorting to the Security Council of the United Nations, propose a Meeting of Consultation of Ministers of Foreign Affairs to agree upon appropriate measures to ensure the fulfilment of the judicial decision or arbitral award."

Colombia's position is that the heart of Nicaragua's case is an allegation that Colombia is in breach of the 2012 Judgment and that Nicaragua is entitled to obtain further relief from the Court to enforce compliance with that Judgment.

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106. Nicaragua denies that its Application in the present proceedings represents an attempt to obtain post-adjudicative enforcement measures. It maintains that the subject-matter of its Application is the violation by Colombia of Nicaragua's sovereign rights in maritime spaces adjudged by the Court in 2012 to belong to Nicaragua. Nicaragua also rejects Colombia's analysis of Article 94, paragraph 2, of the Charter of the United Nations and Article L of the Pact of Bogotá. According to Nicaragua, neither provision operates in such a way as to preclude either the inherent jurisdiction of the Court (see paragraphs 102 to 104 above) or jurisdiction conferred by Article XXXI of the Pact of Bogotá.

* *

107. Colombia's fifth preliminary objection is directed first at Nicaragua's alternative argument that the Court has an inherent jurisdiction in relation to the present case. Colombia submits that, even if the Court were to find — contrary to Colombia's fourth preliminary objection — that it possesses an inherent jurisdiction, such "inherent jurisdiction" does not extend to a post-adjudicative enforcement jurisdiction.

The Court has already held that it does not need to determine whether it possesses an inherent jurisdiction, because of its finding that its jurisdiction is founded upon Article XXXI of the Pact of Bogotá (see paragraph 104 above). Accordingly, it is unnecessary to rule on Colombia's fifth preliminary objection in so far as it relates to inherent jurisdiction.

108. Nevertheless, Colombia indicated in its pleadings that its fifth preliminary objection was also raised as an objection to the jurisdiction of the Court under Article XXXI of the Pact of Bogotá. Colombia argues that

> "[e]ven assuming . . . that the Court still has jurisdiction in the instant case under Article XXXI of the Pact of Bogotá, such jurisdiction . . . would not extend to Nicaragua's claims for enforcement by the Court premised on Colombia's alleged non-compliance with the Judgment of 2012".

Since the Court has concluded that it has jurisdiction under Article XXXI, the fifth preliminary objection must be addressed in so far as it relates to jurisdiction under the Pact of Bogotá.

109. Colombia's fifth preliminary objection rests on the premise that the Court is being asked to enforce its 2012 Judgment. The Court agrees with Colombia that it is for the Court, not Nicaragua, to decide the real character of the dispute before it (see paragraph 51 above). Nevertheless, as the Court has held (see paragraph 79 above), the dispute before it in the present proceedings concerns the alleged violations by Colombia of Nicaragua's rights in the maritime zones which, according to Nicaragua, the Court declared in its 2012 Judgment appertain to Nicaragua. As between Nicaragua and Colombia, those rights are derived from customary international law. The 2012 Judgment of the Court is undoubtedly relevant to that dispute in that it determines the maritime boundary between the Parties and, consequently, which of the Parties possesses sovereign rights under customary international law in the maritime areas with which the present case is concerned. In the present case, however, Nicaragua asks the Court to adjudge and declare that Colombia has breached "its obligation not to violate Nicaragua's maritime zones as delimited in paragraph 251 of the Court['s] Judgment of 19 November 2012 as well as Nicaragua's sovereign rights and jurisdiction in these zones" and "that, consequently, Colombia has the obligation to wipe out the legal and material consequences of its internationally wrongful acts, and make full reparation for the harm caused by those acts" (see para-

graph 12 above). Nicaragua does not seek to enforce the 2012 Judgment as such. The Court is not, therefore, called upon to consider the respective roles accorded to the Meeting of Consultation of Ministers of Foreign Affairs (by Article L of the Pact of Bogotá), the Security Council (by Article 94, paragraph 2, of the Charter) and the Court.

110. Colombia's fifth preliminary objection must therefore be rejected.

* * *

111. For these reasons,

The Court,

(1) *(a)* Unanimously,

Rejects the first preliminary objection raised by the Republic of Colombia;

(b) By fifteen votes to one,

Rejects the second preliminary objection raised by the Republic of Colombia in so far as it concerns the existence of a dispute regarding the alleged violations by Colombia of Nicaragua's rights in the maritime zones which, according to Nicaragua, the Court declared in its 2012 Judgment appertain to Nicaragua;

in favour: *President* Abraham; *Vice-President* Yusuf; *Judges* Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Gevorgian; *Judge* ad hoc Daudet;

against: *Judge* ad hoc Caron;

(c) Unanimously,

Upholds the second preliminary objection raised by the Republic of Colombia in so far as it concerns the existence of a dispute regarding alleged violations by Colombia of its obligation not to use force or threaten to use force;

(d) By fifteen votes to one,

Rejects the third preliminary objection raised by the Republic of Colombia;

in favour: *President* Abraham; *Vice-President* Yusuf; *Judges* Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Gevorgian; *Judge* ad hoc Daudet;

against: *Judge* ad hoc Caron;

(e) Unanimously,

Finds that there is no ground to rule upon the fourth preliminary objection raised by the Republic of Colombia;

(f) By fifteen votes to one,

Rejects the fifth preliminary objection raised by the Republic of Colombia;

IN FAVOUR: *President* Abraham; *Vice-President* Yusuf; *Judges* Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Robinson, Gevorgian; *Judges* ad hoc Daudet, Caron;

AGAINST: *Judge* Bhandari;

(2) By fourteen votes to two,

Finds that it has jurisdiction, on the basis of Article XXXI of the Pact of Bogotá, to adjudicate upon the dispute between the Republic of Nicaragua and the Republic of Colombia referred to in subparagraph 1 *(b)* above.

IN FAVOUR: *President* Abraham; *Vice-President* Yusuf; *Judges* Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Robinson, Gevorgian; *Judge* ad hoc Daudet;

AGAINST: *Judge* Bhandari; *Judge* ad hoc Caron.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this seventeenth day of March, two thousand and sixteen, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Nicaragua and the Government of the Republic of Colombia, respectively.

(Signed) Ronny ABRAHAM,
President.

(Signed) Philippe COUVREUR,
Registrar.

Judge CANÇADO TRINDADE appends a separate opinion to the Judgment of the Court; Judge BHANDARI appends a declaration to the Judgment of the Court; Judge *ad hoc* CARON appends a dissenting opinion to the Judgment of the Court.

(Initialled) R.A.
(Initialled) Ph.C.

SEPARATE OPINION OF JUDGE CANÇADO TRINDADE

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*

I. *Prolegomena*

1. Once again before this Court, the question of inherent powers of international tribunals has been the object of particular attention in the course of the proceedings in the present case of *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)*. The two Contending Parties have aptly presented their distinct outlooks of the issue of inherent powers or *facultés*: in their submissions before the Court, they have seen it fit to refer to the relevant case law of contemporary international tribunals (in particular international human rights tribunals) in respect, in particular, of the issue of their inherent powers or *facultés*. The issue pertains directly to the fourth preliminary objection raised by Colombia.

2. In the present Judgment, the International Court of Justice (ICJ), having found that it has jurisdiction under the Pact of Bogotá, dismissing Colombia's first preliminary objection, could and should have shed some light on the points made by the Contending Parties — Nicaragua's claim of "inherent jurisdiction" and Colombia's fourth preliminary objection — even if for dismissing this latter as well, rather than, in a minimalist posture, elliptically saying that "there is no ground" for it to deal with the issue (Judgment, para. 104).

3. Given the importance that I attach to this particular issue, recurrent in the practice of international tribunals, and given the fact that it was brought to the attention of the ICJ in the *cas d'espèce*, not only in the written phase of the proceedings, but also in the course of the hearings before it, I feel obliged to leave on the records, first, the positions of the Parties and the treatment dispensed to it, and, secondly, the foundations of my own personal position on it, in its interrelated aspects.

4. It is, after all, an issue of relevance to the operation of contemporary international tribunals, in their common mission of the realization of justice. In my perception, this is an issue which cannot simply be eluded. The aspects which I deem it fit to cover, in the present separate opinion, refer to the following successive points: *(a)* inherent powers beyond State consent; *(b)* the teleological interpretation *(ut res magis valeat quam pereat)* beyond State consent; *(c) compétence de la compétence*/*Kompetenz Kompetenz* beyond State consent; *(d) recta ratio* above *voluntas*, human conscience above the "will"; *(e)* inherent powers overcoming *lacunae*, and the relevance of general principles; *(f)* inherent powers and *juris dictio*, beyond transactional justice; and *(g)* inherent powers and supervision of compliance with judgments. I shall at last come to my brief epilogue.

II. Submissions of the Parties and Questions from the Bench

5. In the course of the proceedings (written and oral phases) in the present case of *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*, both Contending Parties, in their submissions, when addressing the issue of inherent powers or *facultés*, referred to the relevant case law of the Inter-American Court of Human Rights (IACtHR) and of the European Court of Human Rights (ECHR). In the written phase of the proceedings in the *cas d'espèce*, both Nicaragua and Colombia referred to the IACtHR's judgment (of 28 November 2003) in the case of *Baena-Ricardo and Others* v. *Panama*, as well as the ECHR's (Grand Chamber) judgment (of 7 February 2003) in the case of *Fabris* v. *France*[1]. Nicaragua further referred to the ECHR's (Grand Chamber) judgments (of 30 June 2009 and 5 February 2015, respectively) in the cases of *Verein gegen Tierfabriken Schweiz (VgT)* v. *Switzerland*, and of *Bochan* v. *Ukraine*[2].

6. Subsequently, towards the end of the oral phase of the proceedings in the *cas d'espèce*, in the public sitting of 2 October 2015 before the Court, I deemed it fit to put the three following questions to the two Contending Parties, Nicaragua and Colombia:

> "In the course of the proceedings along this week, both Contending Parties referred to the relevant case law of contemporary international tribunals, in particular in respect of the question of their inherent powers or *facultés*. Having listened attentively to their oral arguments, I have three questions to address to both Parties, so as to obtain further precisions, at conceptual level, from both of them, in the context of the *cas d'espèce*.
>
> First: Do the inherent powers or *facultés* of contemporary international tribunals ensue from the exercise itself, by each of them, of their international judicial function?
>
> Second: Do the distinct bases of jurisdiction of contemporary international tribunals have an incidence on the extent of their *compétence de la compétence*?
>
> Third: Do the distinct bases of jurisdiction of contemporary international tribunals condition the operation of the corresponding mechanisms of supervision of compliance with their respective judgments and decisions?"[3]

[1] Memorial of the Republic of Nicaragua [hereinafter "Memorial", para. 1.27; and Preliminary Objections of the Republic of Colombia, paras. 5.22-5.23.

[2] Written Statement of the Republic of Nicaragua to the Preliminary Objections of the Republic of Colombia, of 20 April 2015, para. 5.35.

[3] Cf. CR 2015/25, of 2 October 2015, p. 47.

III. Responses from the Contending Parties

1. Response from Nicaragua

7. One week later, on 9 October 2015, both Parties provided the Court with their written answers to the questions I had put to them at the end of the Court's hearings in the *cas d'espèce*. In its written reply, Nicaragua stated, in response to my *first question*, that, in its view, the inherent powers of international tribunals ensue, "more widely than from the *exercise* of their judicial function", from "their very *existence* and nature as judicial organs"[4].

8. As to my *second question*, Nicaragua contended that "in all cases", the basis for jurisdiction (statute) of an international tribunal "includes the power or *faculté* to decide on the existence and scope of an inherent power"[5]. The *compétence de la compétence (Kompetenz Kompetenz)*, even if leading to distinct conclusions according to the various Statutes, "can be said to be inherent", it is "a well-established legal principle of general application"[6]. This is so, in its view, irrespective of "whether or not it is expressly granted" by the Statute of the international tribunal concerned[7].

9. And as to my *third question*, Nicaragua was of the view that "all tribunals have the same right to determine the scope of their own (. . . inherent) powers", it being "indispensable" for them "to exercise some kind of jurisdiction on the implementation of their own judgments"[8]. Even if it may vary from one tribunal to another, international tribunals have here an "inherent power" as well, in respect of the implementation of their own judgments (whether they can count or not on the assistance of another organ with supervisory powers)[9].

2. Response from Colombia

10. For its part, Colombia, in its written reply, stated, in response to my *first question*, that the ICJ "has such 'inherent powers' as are necessary in the interests of the good administration of justice for the proper conduct of cases over which it has jurisdiction"[10]. It then added that, yet, there is "no such thing as an 'inherent jurisdiction' enabling the

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[4] Written Reply of Nicaragua to the Questions Put by Judge Cançado Trindade at the Public Sitting Held on the Morning of 2 October 2015, doc. NICOLC 2015/32, p. 2.

[5] *Ibid.*, p. 3.

[6] *Ibid.*, p. 2.

[7] *Ibid.*

[8] *Ibid.*, p. 3.

[9] Cf. *ibid.*, pp. 3-4.

[10] Written Reply of Colombia to the Questions Put by Judge Cançado Trindade at the Public Sitting Held on the Morning of 2 October 2015, doc. NICOLC 2015/33, of 9 October 2015, p. 2, para. 3.

Court to take jurisdiction over new cases, as urged upon the Court by Nicaragua"[11].

11. As to my *second question*, Colombia asserted, as to *compétence de la compétence*, that the Court's deciding as to jurisdiction amounts to "an express power, and in and of itself in no way gives rise to an inherent power or jurisdiction"[12]. Colombia added, in this connection, that no such considerations can give rise to "an inherent power or jurisdiction over *the merits* of a case" that an international tribunal "does not otherwise have"[13].

12. And as to my *third question*, Colombia was of the view that a mechanism of supervision of compliance with judgments "must be found in the instrument which created" the international tribunal and "established its jurisdiction"[14] (statutory provisions). In the case of the ICJ, such a mechanism is provided not by its Statute, but by the UN Charter ("of which the Statute is an integral part"), which "assigns such competence to the Security Council"; and, in its view, the "Pact of Bogotá (in particular, Article L), reflects the States parties' understanding that the Court is not the venue for matters of supervision of compliance"[15].

3. *General Assessment*

13. As just seen, Nicaragua sustains a broader scope of inherent powers: irrespective from what is provided distinctly in statutes of international tribunals, they ensue from their very existence, and they are all endowed with the *compétence de la compétence*; inherent powers, in its view, are indispensable also for them "to exercise some kind of jurisdiction" on the implementation of their own judgments, whether assisted or not by other supervisory organs.

14. For its part, Colombia, rather distinctly, takes the view that inherent powers are exercised when necessary in the interests of the sound administration of justice; it ascribes a stricter scope to them, sustaining that they do not amount to *compétence de la compétence*, that there is no "inherent jurisdiction", and that supervision of compliance with judgments is not expressly provided in the Statute or constitutive Charter (of the UN, in the case of the ICJ).

[11] Written Reply of Colombia to the Questions Put by Judge Cançado Trindade at the Public Sitting Held on the Morning of 2 October 2015, doc. NICOLC 2015/33, of 9 October 2015, p. 2, para. 4.

[12] *Ibid.*, p. 3, para. 6.

[13] *Ibid.*, p. 4, para. 6.

[14] *Ibid.*, para. 7.

[15] *Ibid.*

15. It is not surprising to see these two distinct conceptions of the scope of inherent powers or *facultés* of international tribunals. I see no reason for the Court not having pronounced upon this issue. Having abstained from doing so, reflects a rather minimalist outlook, which I do not share, of the exercise of the international judicial function. After all, in matters of both admissibility and jurisdiction, as well as of substance, judgments are expected to contain reason and persuasion. In dwelling upon this issue, I propose to address, in the following paragraphs, the interrelated points that I have identified (*supra*, para. 4).

IV. Inherent Powers beyond State Consent

16. The issue of inherent powers or *facultés* has, in effect, been raised time and time again before international tribunals. For some years, I have been dealing with it, in distinct jurisdictions[16]; within the ICJ, I have recently addressed it, *inter alia*, e.g., in my separate opinions in other Latin American cases, namely, those of *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)* (*Joinder of Proceedings, Orders of 17 April 2013, I.C.J. Reports 2013*, pp. 166 and 184), as well as that of *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015 (II)*, p. 592).

17. It is not my intention to reiterate here all that I have already stated in those separate opinions, but rather only to summarize it, and then focus briefly on other and related aspects of the matter, of relevance to the present Judgment of the ICJ. In my previous separate opinions in the two aforementioned joined cases of *Certain Activities* and *Construction of a Road* (Orders of 2013), I revisited the conceptualization of "implied" and "inherent powers", and pointed out that

> "While the doctrinal construction of 'implied powers' was intended to set up limits to powers transcending the letter of constitutive charters — limits found in the purposes and functions of the international organization at issue — the doctrinal construction of 'inherent powers', quite distinctly, was intended to assert the powers of the juridical person at issue for the accomplishment of its goals, as provided for in its constitutive charter. The point I wish here to make is that the same expression — 'inherent powers' — has at times been invoked in

[16] For example, almost two decades ago, I addressed it in the IACtHR, in my dissenting opinion in the case of *Genie Lacayo* v. *Nicaragua* (Appeal of Revision of Judgment, resolution of 13 September 1997), paras. 1-28, esp. para. 7.

respect of the operation of international judicial entities; yet, though the expression is the same, its rationale and connotation are different, when it comes to be employed by reference to international tribunals. Another precision is here called for, for a proper understanding of the operation of these latter. Understanding and operation go hand in hand: *ad intelligendum et ad agendum*" (*I.C.J. Reports 2013*, pp. 174 and 191, para. 6)[17].

18. I then sought to demonstrate the relevance of *Kompetenz Kompetenz (compétence de la compétence)* to the exercise of the international judicial function (*ibid.*, pp. 174-175 and 191-192, paras. 7-9), and how inherent powers contribute to the sound administration of justice *(la bonne administration de la justice)* (*ibid.*, pp. 175-182 and 192-198, paras. 10-27). Thus, for example, both the PCIJ and the ICJ have "effected joinders *avant la lettre*, even in the absence (before 1978) of a provision to that effect in their *interna corporis*" (*ibid.*, pp. 181 and 198, para. 25).

19. In effect, most international tribunals have an express power[18] to adopt their own rules of procedure. It may so happen that at times a given situation may not be sufficiently covered by the rules. The application of their rules, and the resolution of issues not sufficiently addressed by them, with recourse to their inherent powers, are likewise beyond the "will" or consent of States. Even in the absence of an express provision thereon, international tribunals are entitled to exercise their inherent powers in order to secure the sound administration of justice.

20. In my subsequent separate opinion, in the very recent Judgment (as to the merits, of 16 December 2015) in the same two joined cases of *Certain Activities* and *Construction of a Road*, I have retaken my consideration of the matter, expressing my understanding that, if any unforeseeable circumstance should arise, the ICJ is "endowed with inherent powers or *facultés* to take the decision that ensures compliance with the provisional measures it has ordered, and thus the safeguard of the rights at stake" (*I.C.J. Reports 2015 (II)*, p. 773, para. 45). And I added:

> "In such circumstances, an international tribunal cannot abstain from exercising its inherent power or *faculté* of supervision of compliance with its own Orders, in the interests of the sound administration of justice *(la bonne administration de la justice)*. Non-compliance with provisional measures of protection amounts to a breach of international obligations deriving from such measures.
>
> . . . .

[17] For a study of the conceptualization of "implied powers" of international organizations (distinctly from "inherent powers" of international tribunals), cf. A. A. Cançado Trindade, *Direito das Organizações Internacionais*, 6th ed., Belo Horizonte/Brazil, Edit. Del Rey, 2014, pp. 7-135 and 645-646.

[18] Like the ICJ, in Article 30 of its Statute.

The Court is fully entitled to order *motu proprio* provisional measures which are totally or partially different from those requested by the contending parties. (. . .) The Court is fully entitled to order further provisional measures *motu proprio*; it does not need to wait for a request by a party to do so. (. . .) The Court has inherent powers or *facultés* to supervise *ex officio* compliance with provisional measures of protection and thus to enhance their preventive dimension" (*I.C.J. Reports 2015 (II)*, pp. 779-780, paras. 63 and 70).

21. In another recent separate opinion, in the aforementioned case concerning the *Obligation to Negotiate Access to the Pacific Ocean*, opposing Bolivia to Chile, I deemed it fit to stress that

> "the principle of the sound administration of justice *(la bonne administration de la justice)* permeates the considerations of all the (. . .) incidental proceedings before the Court, namely, preliminary objections, provisional measures of protection, counter-claims and intervention. As expected, general principles mark their presence, and guide, all Court proceedings" (*Judgment, I.C.J. Reports 2015 (II)*, p. 627, para. 30).

The principle of the sound administration of justice *(la bonne administration de la justice)* is always to be kept in mind by an international tribunal (cf. *ibid.*, p. 642, para. 67).

V. The Teleological Interpretation *(Ut Res Magis Valeat Quam Pereat)* beyond State Consent

22. This brings me to the question of the teleological interpretation, pursuant to the principle of *effet utile*, or *ut res magis valeat quam pereat*. In my understanding, the teleological interpretation, which I support, covers not only material or substantive law (e.g., the rights vindicated and to be protected) but also jurisdictional issues and procedural law as well. May I briefly recall a couple of points I made, in this respect, in my dissenting opinion in the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)*, Judgment on preliminary objections of 1 April 2011, I pondered therein that, by virtue of the principle of *effet utile*,

> "widely supported by case law, States parties to human rights treaties ought to secure to the conventional provisions *the appropriate effects* at the level of their respective domestic legal orders. Such principle (. . .) applies not only in relation to *substantive* norms of human rights treaties (that is, those which provide for the protected rights), but also in relation to *procedural* norms, in particular those relating to the right of individual petition and to the acceptance of the compulsory jurisdiction in contentious matters of the international judicial organs of protection. Such conventional norms, essential to the efficacy of

the system of international protection, ought to be interpreted and applied in such a way as to render their safeguards truly practical and effective (. . .). Such has been, as I have already indicated (. . .), the approach pursued in practice by the ECHR and the IACtHR." (*I.C.J. Reports 2011 (I)*, pp. 276-277, para. 79.)

23. I then recalled a couple of relevant examples from the case law of both international tribunals. For example, I singled out that in the case of *Loizidou* v. *Turkey* (judgment on preliminary objections of 23 March 1995), the ECHR warned that

> "in the light of the letter and the spirit of the European Convention [of Human Rights] the possibility cannot be inferred of restrictions to the optional clause relating to the recognition of the contentious jurisdiction of the ECHR[19]. In the domain of the international protection of human rights, there are no 'implicit' limitations to the exercise of the protected rights; and the limitations set forth in the treaties of protection ought to be restrictively interpreted. The optional clause of compulsory jurisdiction of the international tribunals of human rights does not admit limitations other than those expressly contained in the human rights treaties at issue." (*Ibid.*, p. 277, para. 80.)

24. I further recalled that, in the case of *Castillo Petruzzi and Others* v. *Peru* (judgment on preliminary objections of 4 September 1998), the IACtHR also stated that it could not be at the mercy of limitations not foreseen in the American Convention on Human Rights and invoked by the States parties for reasons or vicissitudes of domestic order *(ibid.)*[20]. And I added, in the same dissenting opinion in the aforementioned case concerning the *Application of the CERD Convention* (2011):

> "The clause pertaining to the compulsory jurisdiction of international human rights tribunals constitutes, in my view, a fundamental clause *(cláusula pétrea)* of the international protection of the human being, which does not admit any restrictions other than those expressly provided for in the human rights treaties at issue. This has been so established by the IACtHR in its judgments on competence in the cases of the *Constitutional Tribunal* and *Ivcher Bronstein* v. *Peru* (of 24 September 1999)[21]. The permissiveness of the insertion of lim-

[19] Cf. ECHR, *Loizidou* v. *Turkey* (preliminary objections), Strasbourg, C.E., judgment of 23 March 1995, p. 25, para. 82, and cf. p. 22, para. 68. On the prevalence of the conventional obligations of the States parties, cf. also the Court's *obiter dicta* in its previous decision, in the *Belilos* v. *Switzerland* case (1988).

[20] As also upheld in the concurring opinion of Judge Cançado Trindade (paras. 36 and 38) appended thereto.

[21] IACtHR, case of the *Constitutional Tribunal* (competence), judgment of 24 September 1999, p. 44, para. 35; IACtHR, case of *Ivcher Bronstein* (competence), judgment of 24 September 1999, p. 39, para. 36.

itations, not foreseen in the human rights treaties, in an instrument of acceptance of an optional clause of compulsory jurisdiction, represents a regrettable historical distortion of the original conception of such clause, in my view unacceptable in the field of the international protection of the rights of the human person.

Any understanding to the contrary would fail to ensure that the human rights treaty at issue has the appropiate effects *(effet utile)* in the domestic law of each State party. The IACtHR's decision in the case of *Hilaire* v. *Trinidad and Tobago* (preliminary objections, judgment of 1 September 2001) was clear: the modalities of acceptance, by a State party to the American Convention on Human Rights, of the contentious jurisdiction of the IACtHR, are expressly stipulated in Article 62 (1) and (2), and are not simply illustrative, but quite *precise*, not authorizing States parties to interpose any other conditions or restrictions *(numerus clausus)*.

In my concurring opinion in the (. . .) *Hilaire* v. *Trinidad and Tobago* case, I saw it fit to ponder that:

> '(. . .) we cannot abide by an international practice which has been subservient to State voluntarism, which has betrayed the spirit and purpose of the optional clause of compulsory jurisdiction, to the point of entirely denaturalizing it, and which has led to the perpetuation of a world fragmented into State units which regard themselves as final arbiters of the extent of the contracted international obligations, at the same time that they do not seem truly to believe in what they have accepted: the international justice.'" (*I.C.J. Reports 2011 (I)*, pp. 277-279, paras. 81-83.)

25. In concluding my dissenting opinion in the case concerning the *Application of the CERD Convention*, I warned that

> "This Court cannot keep on privileging State consent above everything, time and time again, even after such consent has already been given by States at the time of ratification of those treaties.
>
> The Court cannot keep on embarking on a literal or grammatical and static interpretation of the terms of compromissory clauses enshrined in those treaties, drawing 'preconditions' therefrom for the exercise of its jurisdiction, in an attitude remindful of traditional international arbitral practice." (*Ibid.*, p. 320, paras. 205-206.)

26. I further warned that the goal of the realization of justice "can hardly be attained from a strict State-centred voluntarist perspective, and a recurring search for State consent. This Court cannot, in my view, keep

on paying lip service to what it assumes as representing the State's 'intentions' or 'will'" (*I.C.J. Reports 2011 (I)*, p. 321, para. 209). And I finally stated that:

> "The position and the thesis I sustain in the present dissenting opinion is that, when the ICJ is called upon to settle an inter-State dispute on the basis of a human rights treaty, (. . .) [t]he proper interpretation of human rights treaties (in the light of the canons of treaty interpretation of Articles 31-33 of the two Vienna Conventions on the Law of Treaties, of 1969 and 1986) covers, in my understanding, their *substantive as well as procedural provisions*, thus including a provision of the kind of the compromissory clause set forth in Article 22 of the CERD Convention. This is to the ultimate benefit of human beings, for whose protection human rights treaties have been celebrated, and adopted, by States. The *raison d'humanité* prevails over the old *raison d'Etat*.
>
> In the present Judgment, the Court entirely missed this point: it rather embarked on the usual exaltation of State consent, labelled, in paragraph 110, as 'the fundamental principle of consent'. I do not at all subscribe to its view, as, in my understanding, consent is not 'fundamental', it is not even a 'principle'. What is 'fundamental', i.e., what lays in the *foundations* of this Court, since its creation, is the imperative of the *realization of justice*, by means of compulsory jurisdiction. State consent is but a rule to be observed (. . .). It is a means, not an end, it is a procedural requirement, not an element of treaty interpretation; it surely does not belong to the domain of the *prima principia*. This is what I have been endeavouring to demonstrate in the present dissenting opinion." (*Ibid.*, pp. 321-322, paras. 210-211.)

27. May I here again stress that, in my understanding, unlike what the ICJ has usually assumed, State consent is not at all a "fundamental principle", it is not even a "principle"; it is at most a rule (embodying a prerogative or concession to States) to be observed as the *initial* act of undertaking an international obligation. It is surely not an element of treaty interpretation. Once that initial act is performed, it does not condition the exercise of a tribunal's compulsory jurisdiction, which preexisted it and continues to operate unaffected by it.

VI. *Recta Ratio* above *Voluntas*, Human Conscience above the "Will"

28. *Recta ratio* surely stands above *voluntas*, human conscience above the "will". May I here further recall, in historical perspective, that the new *jus gentium*, as conceived by the "founding fathers" of the law of

nations (as from the sixteenth-century lessons of Francisco de Vitoria), was based on a *lex praeceptiva*, apprehended by human reason, and thus could not possibly derive from the "will" of subjects of law themselves (States and others). The way was thus paved for the apprehension of a true *jus necessarium*, transcending the limitations of the *jus voluntarium*. The lessons of the "founding fathers" of our discipline are perennial, are endowed with an impressive topicality.

29. Contrariwise, the voluntarist conception, obsessed with State consent or "will", has proven flawed, not only in the domain of law, but also in the realms of other branches of human knowledge. The attachment to power, oblivious of values, leads nowhere. As to international law, if, as voluntarist positivists argue, it is by the "will" of States that obligations are created, it is also by their "will" that they are violated, and one ends up revolving in vicious circles which are unable to explain the nature of international obligations. As to social sciences, so-called relativists cannot explain anything which does not fit into their *petitio principii*. And as to international relations and political science, so-called realists focus on the present (here and now), and cannot explain — nor forecast anything that suddenly changes in the international scenario; they thus have to readjust their minds to the new "reality". Definitively, it is inescapable that conscience stands above the "will".

30. Turning for a while to international legal doctrine, there were jurists who, throughout the last century, supported the primacy of human conscience over the "will" in the foundations of the law of nations, in the line of jusnaturalist thinking (going back to the lessons of Francisco de Vitoria, Francisco Suárez and Hugo Grotius, in the sixteenth-seventeenth centuries). Thus, for example, in his posthumous book *La morale internationale* (1944), Nicolas Politis sustained that legality cannot prescind from justice, they both go together, so as to foster the progressive development of international law[22].

31. Earlier on, in the same line of thinking, in his course delivered at the *Institut des Hautes Etudes Internationales* in Paris (1932-1933), Albert de La Pradelle (who had been a member of the Advisory Committee of Jurists which drafted the original Statute of the Permanent Court of International Justice [PCIJ] in 1920), warned that the strictly inter-State dimension is dangerous to the progressive development of international law; one ought to keep in mind also the human person, the peoples and humankind[23].

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[22] Nicolas Politis, *La morale internationale*, N.Y., Brentano's, 1944, pp. 157-158, 161 and 165. In invoking the ancient Greeks, in particular Euripides, he pondered that whoever commits an injustice, "est plus malheureux que ne l'est sa victime" [is more unhappy than the victim]; *ibid.*, p. 102.

[23] Albert de La Pradelle, *Droit international public* [Cours sténographié], Paris, Institut des hautes études internationales, 1932-1933, pp. 25, 33, 37 and 40-41.

32. In Albert de La Pradelle's outlook, the *droit des gens* transcends the inter-State dimension, it is a *"droit de la communauté humaine"*, a true *"droit de l'humanité"*[24]. Hence the utmost importance of the general principles of law, which ultimately guide the progressive development of international law[25]. The learned jurist added that there is "surely a natural law", which, nowadays,

> "must be regarded as a rational law which expresses the dictates of the juridical conscience of the times. However, the juridical conscience of humankind is becoming increasingly complex and precise, it is increasingly nuanced, its requirements becoming increasingly demanding with time. This is an effect of general culture, civilization and the progress of ideas; natural or rational law must not therefore be regarded as an immutable law that is fixed from the outset and does not change. It does change, but those changes are not capricious, they constitute a development, one that goes hand in hand with the development of humankind."[26]

33. In the same perspective, Max Huber (a former judge of the PCIJ), in his book *La pensée et l'action de la Croix Rouge* (1954), wrote that international law is also turned to basic human values, which it ought to protect: this is the true *jus gentium*, from a jusnaturalist, rather than positivist, conception[27]. It thus represents the *"droit de l'humanité"*[28]. This outlook goes well beyond inter-State interests, beholding humankind as a whole.

34. The idea of *civitas maxima gentium*, as conceived by the classic international legal philosophers, Huber proceeded, is projected into the UN Charter itself, which is, on ethical grounds, attentive to peoples and the human person (proper of the *droit des gens*). The international juridical conscience, to his mind, has acknowledged the need to pursue the "humanization" of international law[29], a historical process which is, in my own perception, gradually advancing in our times[30].

35. Likewise, Alejandro Alvarez (a former judge of the ICJ), in his book *El Nuevo Derecho Internacional en Sus Relaciones con la Vida Actual*

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[24] Cf. note 23 *supra*, pp. 49, 149 and 264.

[25] *Ibid.*, pp. 222 and 413.

[26] *Ibid.*, p. 412. *[Translation by the Registry.]*

[27] M. Huber, *La pensée et l'action de la Croix-Rouge*, Geneva, CICR, 1954, pp. 26 and 247.

[28] *Ibid.*, p. 270.

[29] *Ibid.*, pp. 286, 291-293 and 304.

[30] Cf. A. A. Cançado Trindade, *A Humanização do Direito Internacional*, 2nd ed., Belo Horizonte/Brazil, Edit. Del Rey, 2015, pp. 3-789; A. A. Cançado Trindade, *La Humanización del Derecho Internacional Contemporáneo*, Mexico, Edit. Porrúa, 2014, pp. 1-324; A. A. Cançado Trindade, *Los Tribunales Internacionales Contemporáneos y la Humanización del Derecho Internacional*, Buenos Aires, Ed. Ad-Hoc, 2013, pp. 7-185.

de los Pueblos (1962), also wrote that "the universal juridical conscience" plays a very important role in the evolution of international law[31]; it is therefrom that international norms and precepts emanate[32]. In his view, general principles of law much contribute to the formation of a universal international law[33].

36. Earlier on, in his dissenting opinion in the *Anglo-Iranian Oil Co. (United Kingdom* v. *Iran)* case (preliminary objections, Judgment of 22 July 1952), Judge Alvarez expressed his opposition to a restrictive interpretation of Article 36 of the Statute of the ICJ (*I.C.J. Reports 1952*, pp. 131 and 134) and to the voluntarist conception of international law (*ibid.*, pp. 127 and 133). To him, rights under international law "do not result from the will of States", but from human conscience (*ibid.*, p. 130).

37. Still in the same line of thinking, in his course delivered at the Hague Academy of International Law in 1960, Stefan Glaser likewise sustained that the norms of the law of nations emanate from human conscience *(recta ratio)*, conforming natural justice, independently of the "will" of States. There is an assimilation of moral duties to legal duties, and general principles of law *(pacta sunt servanda, bona fides)* are endowed with the utmost importance; the foundation of international law is essentially ethical[34]. In effect, may I here add, *pacta sunt servanda* and *bona fides* are precepts which ensue from natural reason, and are deeply-rooted in natural law thinking.

38. For my part, the present Judgment in the case of *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* is not the first time when, within the ICJ, I express my concerns as to its undue reliance on State voluntarism. I have likewise done so on earlier occasions as well. Thus, in my extensive dissenting opinion in the case of the *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)* (Judgment of 3 February 2012), I cared to rescue some forgotten doctrinal trends nowadays, which, in the mid-twentieth century, focused on *fundamental human values*, so as to make the *droit des gens* evolve well beyond the strict inter-State dimension, into a *droit de l'humanité* (*I.C.J. Reports 2012 (I)*, pp. 191-194, paras. 32-40). *Recta ratio* stands above *voluntas*, human conscience stands above the "will".

39. In the same line of thinking, in my lengthy dissenting opinion in the aforementioned case concerning the *Application of the CERD Convention* (Judgment of 1 April 2011), I examined the historical development of the professed ideal of compulsory jurisdiction, which originally inspired the optional clause (of Article 36 (2) of the ICJ Statute), and the follow-

[31] Alejandro Alvarez, *El Nuevo Derecho Internacional en Sus Relaciones con la Vida Actual de los Pueblos [The New International Law in Its Relations with the Life of the Peoples]*, Santiago de Chile, Editorial Jurídica de Chile, 1962, pp. 49, 57 and 77.

[32] *Ibid.*, pp. 155-156 and 356-357.

[33] *Ibid.*, pp. 163 and 292.

[34] S. Glaser, "Culpabilité en droit international pénal", 99 *Recueil des cours de l'Académie de droit international de La Haye* (1960), pp. 561-563, 566-567, 582-583 and 585.

ing distorted State practice of inserting, in declarations of its acceptance, restrictions of all kinds, militating against its *rationale*, and, in a display of sheer voluntarism, denaturalizing that clause and depriving it of all efficacy (*I.C.J. Reports 2011 (I)*, pp. 254-265, paras. 37-43 and 45-63).

40. Before moving into compromissory clauses (*ibid.*, paras. 64ss.), I then added that, with this distorted practice, and the opportunity missed in the elaboration of the Statute of the new ICJ in 1945 to put an end to it and thus to enhance compulsory jurisdiction,

> "One abandoned the very basis of the compulsory jurisdiction of the ICJ to an outdated voluntarist conception of international law, which had prevailed at the beginning of the last century, despite the warnings of lucid jurists of succeeding generations as to its harmful consequences to the conduction of international relations. Yet, a considerable part of the legal profession continued to stress the overall importance of individual State *consent*, regrettably putting it well above the imperatives of the realization of justice at international level." (*Ibid.*, p. 257, para. 44.)

41. It seems most regrettable that, still in our days, the obsession with reliance on State consent remains present in legal practice and international adjudication, apparently by force of mental inertia. In my perception, it is hard to avoid the impression that, if one still keeps on giving pride of place to State voluntarism, we will not move beyond the prehistory of judicial settlement of disputes between States, in which we still live. May I here reiterate that *recta ratio* stands above *voluntas*, human conscience stands above the "will".

VII. *Compétence de la Compétence/Kompetenz Kompetenz* beyond State Consent

42. In the same line of thinking (beholding conscience above the "will"), in my address delivered on 1 November 2000 at the Rome Conference on the Cinquentenary of the European Convention of Human Rights, in recalling the aforementioned decisions of the ECHR in the case of *Loizidou* v. *Turkey* (1995), and of the IACtHR in the cases of the *Constitutional Tribunal* and of *Ivcher Bronstein* (1999), I pondered that:

> "Both the European and Inter-American courts have rightly set limits to State voluntarism, have safeguarded the integrity of the respective human rights conventions and the primacy of considera-

tions of *ordre public* over the will of individual States, have set higher standards of State behaviour and established some degree of control over the interposition of undue restrictions by States, and have reassuringly enhanced the position of individuals as subjects of the international law of human rights, with full procedural capacity."[35]

43. International tribunals have the power to determine their own jurisdiction[36]. And international human rights tribunals (like the IACtHR and the ECHR), in particular — the case law of which has been invoked by the Contending Parties in the course of the proceedings before the ICJ in the present case of *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (cf. *supra*) — have succeeded in liberating themselves from the chains of State consent, and have thereby succeeded in preserving the integrity of their respective jurisdictions. They have consistently pursued a teleological interpretation, have asserted their *compétence de la compétence*, and have exercised their inherent powers.

44. Had they not taken the decisions they took, in the aforementioned cases of *Loizidou* v. *Turkey*, of the *Constitutional Tribunal* and of *Ivcher Bronstein*, the consequences would have been disastrous for their respective jurisdictions, and they would have deprived the respective conventions of their *effet utile*. They rightly understood that their *compétence de la compétence*, and their inherent powers, are not constrained by State consent; otherwise, they would simply not be able to impart justice. In the *Loizidou* v. *Turkey* case, the ECHR discarded the possibility of inferring restrictions to its jurisdiction. In the *Constitutional Tribunal* and *Ivcher Bronstein* cases[37], the IACtHR exercised its inherent power to uphold its own jurisdiction, and discarded the respondent State's attempt to "withdraw" unilaterally from it.

45. Those two international tribunals opposed the voluntarist posture, and insisted on their *compétence de la compétence*, as guardians and masters of their respective jurisdictions. The ECHR and the IACtHR contributed to the primacy of considerations of *ordre public* over the subjective voluntarism of States. They did not hesitate to exercise their inherent powers, and thereby decidedly preserved the integrity of the bases of their respective jurisdictions.

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[35] A. A. Cançado Trindade, "The Contribution of the Work of the International Human Rights Tribunals to the Development of Public International Law", Council of Europe, *The European Convention of Human Rights at 50* (50 *Human Rights Information Bulletin* (2000), pp. 8-9).

[36] For a general study, cf., e.g., I. F. I. Shihata, *The Power of the International Court to Determine Its Own Jurisdiction — Compétence de la Compétence*, The Hague, Nijhoff, 1965, pp. 1-304.

[37] And also in the *Hilaire, Benjamin and Constantine* case (preliminary objections, 2001).

In sum, for taking such position of principle, the IACtHR and the ECHR rightly found that conscience stands above the will.

46. As to international criminal tribunals, it may be recalled that, in the *Tadić* case, the *ad hoc* International Criminal Tribunal for the former Yugoslavia (ICTY — Appeals Chamber) held (decision of 2 October 1995) that jurisdiction

> "is basically — as is visible from the Latin origin of the word itself, *jurisdiction* — a legal power, hence necessarily a legitimate power, 'to state the law' *(dire le droit)* within this ambit, in an authoritative and final manner. This is the meaning which it carries in all legal systems" (para. 10).

47. The ICTY (Appeals Chamber) added that in international law a narrow concept of jurisdiction is unwarranted; it warned that limitations to an international tribunal cannot be presumed and, "in any case, they cannot be deduced from the concept of jurisdiction itself" (para. 11). In upholding its jurisdiction in a broad sense, it understood that the ICTY's jurisdiction was not limited to those powers the Security Council intended to entrust it with, but it also encompassed the Tribunal's own inherent powers (cf. paras. 14-15). The ICTY relied on its own *compétence de la compétence* in order to assert its power even to review the validity of its own establishment by the Security Council (cf. paras. 18-22).

VIII. Inherent Powers overcoming *Lacunae*, and the Relevance of General Principles

48. International tribunals have made use of their inherent powers or *facultés* in distinct situations. An example, of almost two decades ago, can be found in the decision of the IACtHR in the case of *Genie Lacayo* v. *Nicaragua* (resolution of 13 September 1997), in respect of an appeal for revision of a judgment. In my dissenting opinion appended thereto, I pondered that

> "The present appeal before the Inter-American Court [IACtHR] is unprecedented in its history: (. . .) in the present *Genie Lacayo* case the Court is for the first time called upon to pronounce on an appeal of *revision of a judgment*, (. . .) for which there is no provision either in the American Convention [on Human Rights — ACHR], or in its Statute or Regulations. The silence of these instruments on the question is not to be interpreted as amounting to *vacatio legis*, with the consequence of the inadmissibility of that appeal. (. . .) The fact that no provision is made for it in the ACHR or in its Statute or Regulations does not prevent the IACtHR from declaring *admissible* an appeal of revision of a judgment: the apparent *vacatio legis* ought in this particular [case] to give way to an imperative of natural justice." (Paras. 2 and 6.)

49. Drawing attention to the importance of general principles of law also in the present context, I then added that

> "The Court ought thus to decide (. . .) on the basis — in application of the principle *jura novit curia* — of general principles of procedural law, and making use of the *powers inherent* to its judicial function. Human beings, and the institutions they integrate, are not infallible, and there is no jurisdiction worthy of this name which does not admit the possibility — albeit exceptional — of revision of a judgment, be it at international law level, or at domestic law level." (Para. 7.)

50. The IACtHR itself acknowledged, in its aforementioned decision in the *Genie Lacayo* case, that its inherent power to consider, in special cases, an appeal for revision of a judgment, is in line with "the general principles of procedural law, both domestic and international" (para. 9). This is just one of the possible situations of recourse to inherent powers; there are several others, pertaining, e.g., *inter alia*, to the due process of law, or else to the award of reparations. The relevant case law of international criminal tribunals provides illustrations of it.

51. As to the due process of law, the *ad hoc* International Criminal Tribunal for Rwanda (ICTR — Trial Chamber III), for example, in the *Rwamakuba* case, upheld (decision of 31 January 2007) the Tribunal's

> "inherent power to provide an accused or former accused with an effective remedy for violations of his or her human rights while being prosecuted or tried before this Tribunal. Such power (. . .) is essential both for the carrying out of its judicial functions and for complying with its obligation to respect generally accepted international human rights norms." (Para. 49.)

In the same *Rwamakuba* case, the ICTR (Appeals Chamber) added (decision of 13 September 2007) that its inherent power extends, in appropriate circumstances, to ordering compensation, "proportional to the gravity of the harm" suffered (para. 27).

52. For its part, the International Criminal Court (ICC Trial Chamber V-A), in the case of *The Prosecutor* v. *William Samoei Ruto and Joshua Arap Sang* (*Situation in the Republic of Kenya*, decision of 17 April 2014), observed that it may use such power[38] so as "to preserve its judicial integrity" (para. 80); that power is "essential for the exercise of its primary jurisdiction or the performance of its essential duties and functions" (para. 81). The ICC (Trial Chamber) added that it can make use of that power, e.g., to order the attendance of witnesses[39].

[38] Meaning "inherent" power, though using the term "implied" power.

[39] Cf. paras. 87-89, 91, 100, 104 and 110-111.

53. On its turn, in the *Bobetko* case, the ICTY (Appeals Chamber) held (decision of 29 November 2002) that the ICTY "has an inherent power to stay proceedings which are an abuse of process", so as to fulfil the Tribunal's need "to exercise effectively the jurisdiction which it has to dispose of the proceedings" (para. 15). Subsequently, the ICTY (Appeals Chamber) further stated, in its decision (of 1 September 2005) in the *Stanković* case, that the Tribunal's inherent powers encompass the rendering of orders "reasonably related" to the task before it, deriving from the exercise itself of the judicial function (para. 51).

54. More recently, in the *Hartmann* case, a specially appointed Chamber of the ICTY recalled (judgment of 14 September 2009) that the ICTY has the "inherent power" to "hold in contempt those who knowingly and wilfully interfere with its administration of justice" (para. 19). Such inherent power, it added, is firmly established in the *jurisprudence constante* of the ICTY, so as to ensure that a "conduct which obstructs, prejudices or abuses the administration of justice" is punished (para. 18).

55. For its part, the Special Tribunal for Lebanon (STL Appeals Chamber), likewise, in its decision (of 10 November 2010) in the matter of *El-Sayed*, extensively dwelt upon the exercise of inherent powers[40], so as to secure the fairness of proceedings (paras. 15, 48 and 52), the equality of arms (para. 17), and, in sum, the due process of law (paras. 49 and 52). As it can be seen, such pronouncements of distinct international criminal tribunals all point to the same direction, in so far as inherent powers are concerned.

56. The relevant international case law on the matter has lately drawn the attention, also of expert writing, to the use of inherent powers by international tribunals in order to fill *lacunae* of their *interna corporis*[41]. There seems, in effect, to be general acknowledgment nowadays of the multiplicity of possible situations of the use of inherent powers by international tribunals, keeping in mind in particular the distinct functions proper to each international tribunal.

57. Although the International Tribunal for the Law of the Sea (ITLOS), for its part, has not explicitly addressed to date the issue of its inherent powers, it goes without saying that, as an international tribunal, it is vested with them, for the exercise of its judicial function pertaining to the UN Convention on the Law of the Sea. In effect, some of its judges have expressly referred to the inherent powers of ITLOS, in their separate opinions appended to its judgments in two successive cases (namely, the cases of *M/V "SAIGA" (No. 2) (Saint Vincent and Grenadines* v. *Guinea)*,

[40] Cf. paras. 2, 15, 17, 43, 45-49, 52, 54 and 56.

[41] Cf., *inter alia*, e.g., P. Gaeta, "Inherent Powers of International Courts and Tribunals", *Man's Inhumanity to Man — Essays on International Law in Honour of Antonio Cassese* (eds. L. C. Vohrah, F. Pocar *et al.*), The Hague, Kluwer, 2003, pp. 359 and 364-367; C. Brown, "The Inherent Powers of International Courts and Tribunals", 76 *British Yearbook of International Law* (2005), pp. 203, 215, 221, 224 and 244.

judgment of 1 July 1999; and of *M/V "Louisa" (Saint Vincent and Grenadines* v. *Kingdom of Spain)*, judgment of 28 May 2013).

58. In short, contemporary international tribunals have resorted to the inherent powers which appear to them necessary to the proper exercise of their respective judicial functions. They have shown their preparedness to make use of their inherent powers (in deciding on matters of jurisdiction, or handling of evidence, or else merits and reparations), and have not seldom made use of them, in distinct situations, in order to secure a proper and sound administration of justice.

IX. Inherent Powers and *Juris Dictio*, beyond Transactional Justice

59. Ultimately, the concern of international tribunals is to endow their own respective judicial functions with the inherent powers needed to ensure the proper and sound administration of justice. Thus, in the case of *Mucić, Delić and Landžo*, the ICTY (Appeals Chamber, judgment of 8 April 2003) stated that, besides its express powers, it has also inherent powers, "deriving from its judicial function", so as "to control its proceedings in such a way as to ensure that justice is done" (para. 16). They include the inherent power to reconsider any of its own decisions, so as "to prevent an injustice" (para. 49). In its administration of justice, it has an inherent power "to ensure that its proceedings do not lead to injustice" (para. 50)[42].

60. In the same line of thinking, in the case of *Sam Hinga Norman, Moinina Fofana and Allieu Kondewa*, the Special Court for Sierra Leone (SCSL — Appeals Chamber) explained (decision of 17 January 2005) that, although the inherent power of a court cannot be exercised against the express provisions of its Rules, it can be so when the Rules are silent (para. 41). A tribunal — as acknowledged in the jurisprudence of the ICTY — can have recourse to its inherent power "to reconsider *its own decision* to avoid injustice or miscarriage of justice" (para. 40)[43].

61. As it can be seen from the preceding paragraphs (Sections VII-VIII), contemporary international tribunals have made statements in support of their exercise of inherent powers for the proper performance of their international judicial function. This becomes even clearer in the understanding that their task goes beyond peaceful settlement of disputes, as they also *say what the law is (juris dictio)*. Contemporary international human rights tribunals as well as international criminal tribunals have espoused this outlook in the exercise of their respective judicial functions.

[42] And cf. also paras. 52-53.

[43] And cf. also para. 34.

62. In this connection, on the occasion of the commemoration by the ICJ of the centenary of the Peace Palace at The Hague (2013), I had the occasion, in my address, to point out that, parallel to the traditional conception (still prevailing in some circles at the Peace Palace) whereby an international tribunal is "to limit itself to settle the dispute at issue and to handle its resolution of it to the Contending Parties (a form of transactional justice), addressing only what the parties had put before it", there is another conception,

> "a larger one — the one I sustain — whereby the tribunal has to go beyond that, and say what the law is *(juris dictio)*, thus contributing to the settlement of other like situations as well, and to the progressive development of international law. In the interpretation itself — or even in the search — of the applicable law, there is space for judicial creativity; each international tribunal is free to find the applicable law, independently of the arguments of the Contending Parties *(juria novit curia)*."[44]

63. There is support for this larger conception in the relevant case law of international human rights tribunals and international criminal tribunals. Already in its judgment of 18 January 1978, in the landmark case of *Ireland* v. *United Kingdom*, the plenary of the ECHR stated that its functions were not only to decide or settle the cases lodged with it, but more generally also to apply, "elucidate" and "develop" the norms of the European Convention, thus contributing to the observance by States parties of the engagements undertaken by them (para. 154).

64. Two and a half decades later the ECHR (First Section) made the same point in its judgment of 24 July 2003, in the case of *Karner* v. *Austria*, adding that it could elucidate and develop the *corpus juris* of the European Convention, as its mission, besides settling individual cases, also comprised raising human rights standards of human rights protection and extending its own jurisprudence throughout the community of States parties to the Convention (para. 26).

65. The IACtHR, likewise going beyond dispute settlement only, has taken the same wide outlook of its *juris dictio*, in its *jurisprudence constante*. This is significant, considering that there have been circumstances wherein the judgments of international tribunals (particularly the ECHR and the IACtHR) have had repercussions beyond the States parties to a case, in other States parties to the respective Conventions[45].

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[44] A. A. Cançado Trindade, "A Century of International Justice and Prospects for the Future", *A Century of International Justice and Prospects for the Future* (eds. A. A. Cançado Trindade and D. Spielmann), Oisterwijk, Wolf Publs., 2013, p. 16, para. 40.

[45] *Ibid.*, p. 16, para. 41.

66. This is, furthermore, implicit in the notion of "pilot judgments/ *arrêts pilotes*" in the work of the ECHR[46]. This outlook (such as the one pursued by both the IACtHR and the ECHR) gives greater importance to the reasoning of the tribunals and the exercise of their inherent powers, well beyond the stricter traditional conception of transactional justice. In settling disputes and saying what the law is, international tribunals have exercised their inherent powers and endeavoured to secure the proper administration of justice, in facing new challenges. International tribunals have thus enabled themselves to contribute to the progressive development of international law[47].

X. Inherent Powers and Supervision of Compliance with Judgments

67. May I now turn to another point raised in the course of the proceedings of the present case of *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*, namely, that of inherent powers in relation to compliance with judgments of the ICJ. The point was raised by the two Contending Parties, on distinct grounds[48], in relation of Colombia's fifth preliminary objection. The fact that an international tribunal can count on the assistance of another supervisory organ for seeking compliance with its own judgments and decisions, in my view does not mean that, once it renders its judgment or decision, it can remain indifferent as to its compliance. Not at all.

68. The fact, for example, that Article 94 (2) of the UN Charter entrusts the Security Council with the enforcement of ICJ judgments and decisions, does not mean that compliance with them ceases to be a concern of the Court. Not at all. Moreover, the Security Council has, in prac-

[46] As from the rendering of its judgment of 22 June 2004 in the case of *Broniowski* v. *Poland*.

[47] Cf., in this respect, the books by: H. Lauterpacht, *The Development of International Law by the International Court*, London, Stevens, 1958, pp. 3-400; A. A. Cançado Trindade, *Os Tribunais Internacionais e a Realização da Justiça*, Rio de Janeiro, Edit. Renovar, 2015, pp. 1-507; J. G. Merrills, *The Development of International Law by the European Court of Human Rights*, 2nd ed., Manchester University Press, 1993, pp. 1-255; A. A. Cançado Trindade, *El Ejercicio de la Función Judicial Internacional — Memorias de la Corte Interamericana de Derechos Humanos*, 3rd ed., Belo Horizonte/Brazil, Edit. Del Rey, 2013, pp. 1-409; L. J. van den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law*, Leiden, Nijhoff, 2005, pp. 1-284; [Various Authors,] *The Development of International Law by the International Court of Justice* (eds. C. J. Tams and J. Sloan), Oxford University Press, 2013, pp. 3-396; and cf. M. Lachs, "The Development and General Trends of International Law in Our Time", 169 *Recueil des cours de l'Académie de droit international de La Haye* (1980), pp. 245-246, 248-249 and 251.

[48] Cf. submissions in CR 2015/22, of 28 September 2015, pp. 60-62, paras. 1, 3 and 8 (Colombia); CR 2015/23, of 29 September 2015, pp. 46-50 and 54, paras. 4-5, 9, 12, 14-15 and 23 (Nicaragua); CR 2015/24, of 30 September 2015, p. 37, para. 23 (Colombia); CR 2015/25, of 2 October 2015, pp. 37-43, paras. 12-19 and 22 (Nicaragua).

tice, very seldom done anything at all in that respect, except in the *Nicaragua* v. *United States* case (1986)[49]. Pursuant to Article 94 (1) of the UN Charter, non-compliance amounts to an additional breach; hence the importance of avoiding that, and of securing compliance. In my view, compliance with their judgments and decisions remains a concern of the ICJ as well as of all other international tribunals.

69. In the case of the ICJ in particular, it has been mistakenly assumed that it is not the Court's business to secure compliance with its own judgments and decisions. Even if one invokes the silence of the Statute in this respect, or else Article 94 (2) of the UN Charter, this latter does *not* confer an *exclusive* authority to the Security Council to secure that compliance. On the contrary, a closer look at some provisions of the Statute[50] shows that the Court is entitled to occupy itself with compliance with its own judgments and decisions[51].

70. What is thus to be criticized, in my view, is not judicial law-making (as is often said without reflection), but rather judicial inactivism or absenteeism — in particular in respect of ensuring compliance with judgments and decisions. In this connection, before considering whether recourse could be made to domestic courts to seek such compliance, further attention should be devoted conceptually to the role of the ICJ itself, and of other international tribunals, in securing compliance with their own judgments and decisions.

71. The practice of the ECHR (which counts on the assistance of the Committee of Ministers) and of the IACtHR (which has resorted to post-adjudicative hearings, ever since its landmark judgment, of 28 November 2003, in the case of *Baena-Ricardo and Others* v. *Panama*) provides useful elements to this effect. In the course of the proceedings before the ICJ in the present case of *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*, the IACtHR's decision in the case of *Blake* v. *Guatemala* (Order of 27 November 2003) was invoked, when it asserted the Court's inherent powers "to monitor compliance with its decisions" (para. 1)[52].

72. The powers of the Committee of Ministers to supervise the execution of the ECHR's judgments, in any case, are not exclusive; the Court itself can be concerned with it, as the ECHR (Grand Chamber) acknowledged in its judgments, e.g., in the cases of *Verein gegen Tierfabriken Schweiz (VgT)* v. *Switzerland* (of 30 June 2009), and of *Bochan* v. *Ukraine* (of 5 February 2015). In sum, in my understanding, no international tribunal can remain indifferent to non-compliance with its own judgments. The

[49] Cf. C. Schulte, *Compliance with Decisions of the International Court of Justice*, Oxford University Press, 2004, pp. 38-40, 42 and 63, and cf. p. 68 (as to the General Assembly), p. 70 (as to the Secretary-General), and pp. 77 and 79 (as to domestic courts).

[50] Articles 41, 57, 60 and 61 (3).

[51] Cf. M. Al-Qahtani, "The Role of the International Court of Justice in the Enforcement of Its Judicial Decisions", 15 *Leiden Journal of International Law* (2002), pp. 781-783, 786, 792, 796 and 803.

[52] CR 2015/23, of 29 September 2015, p. 54, para. 23 (Pellet).

inherent powers of international tribunals extend to this domain as well, so as to ensure that their judgments and decisions are duly complied with.

73. In doing so, international tribunals are preserving the integrity of their own respective jurisdictions. Surprisingly, international legal doctrine has not yet dedicated sufficient attention to this particular issue. This is regrettable, as compliance with judgments and decisions of international tribunals is a key factor to foster the rule of law in the international community[53]. And, from 2006 onwards, the topic of *"the rule of law at the national and international levels"* has remained present in the agenda of the UN General Assembly[54], and has been attracting increasing attention of Member States, year after year.

74. It appears, thus, paradoxical, that a greater general awareness has not yet awakened as to the relevance of compliance with judgments and decisions of international tribunals. The present case, before the ICJ, of *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*, has, in my perception, brought to the fore the need to dispense much greater attention to the issue of such compliance, as related to the inherent powers of international tribunals. Those jurists who are genuinely concerned with, and engaged in, the realization of justice (they are not so many), can contribute to it; the legal profession, distinctly, remains more interested in strategies of litigation and "winning cases" only.

75. The path to justice is a long one, and not much has been achieved to date as to the proper conceptualization of the supervision of compliance with judgments and decisions of international tribunals. Instead, the force of mental inertia has persisted throughout decades. It is time to overcome this absenteeism and passiveness. Supervision of such compliance is, after all, a jurisdictional issue. An international tribunal cannot at all remain indifferent as to compliance with its own judgments and decisions.

XI. Epilogue

76. Having addressed this point of inherent powers in relation to compliance with judgments of the ICJ, brought before the Court (on distinct grounds) by Nicaragua and Colombia, I come now to my last words in the present separate opinion. As pointed out in the preceding pages, the Court's handling of the question raised by the fourth preliminary objec-

[53] Cf., recently, e.g., A. A. Cançado Trindade, "Prologue: An Overview of the Contribution of International Tribunals to the Rule of Law", *The Contribution of International and Supranational Courts to the Rule of Law* (eds. G. De Baere and J. Wouters), Cheltenham/Northhampton, E. Elgar, 2015, pp. 3-18.

[54] Cf. General Assembly resolutions A/RES/61/39, of 4 December 2006; A/RES/62/70, of 6 December 2007; A/RES/63/128, of 11 December 2008; A/RES/64/116, of 16 December 2009; A/RES/65/32, of 6 December 2010; A/RES/66/102, of 9 December 2011; A/RES/67/97, of 14 December 2012; 68/116, of 16 December 2013; A/RES/69/123, of 10 December 2014; and A/RES/70/118, of 14 December 2015.

tion of Colombia does not reflect the richness of the proceedings in the *cas d'espèce*, and of the arguments presented before the ICJ (in the written and oral phases) by both Nicaragua and Colombia.

77. Their submissions should, in my view, have been fully taken into account expressly in the present Judgment, even if likewise to dismiss the fourth preliminary objection at the end. After all, the Parties' submissions in the present case of *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*, raise an important question, recurrently put before the Court, which continues to require our reflection so as to endeavour to enhance the realization of justice at international level.

78. The fact that the Court has found, in the present Judgment, that it has jurisdiction under the Pact of Bogotá (dismissing Colombia's first preliminary objection) did not preclude it from having considered the arguments of the two Contending Parties on such an important issue as its inherent powers or *facultés* (to pronounce on the alleged non-compliance with its 2012 Judgment)[55]. I have felt obliged to do so, even if considering that the fourth preliminary objection is unsustainable and was thus to be likewise dismissed, rather than having simply said in an elusive way that "there is no ground" to pronounce upon it[56].

79. Contemporary international tribunals exercise inherent powers beyond State consent, thus contributing to the sound administration of justice *(la bonne administration de la justice)*. There are examples (cf. *supra*) of assertion of their *Kompetenz Kompetenz (compétence de la compétence)*; this latter has proven of relevance to the exercise of the international judicial function. There are illustrations of their pursuance of the teleological interpretation beyond State consent. The use of inherent powers by contemporary international tribunals beyond State consent, has also aimed at filling *lacunae* in their *interna corporis*, drawing attention to the relevance of general principles.

80. In upholding the exercise of inherent powers for the proper performance of their international judicial function, contemporary international tribunals have given support to the conception of their work — which I sustain — of going beyond dispute-settlement (transactional justice), further *to say what the law is (juris dictio)*. Moreover, the attention of contemporary international tribunals extends to the monitoring of compliance with their decisions, which is a jurisdictional issue.

81. The inherent powers of international tribunals extend to this particular domain as well, to the supervision of execution of their judgments. In doing so, they are preserving the integrity of their own respective jurisdictions; after all, as I have pointed out, no international tribunal can remain indifferent to non-compliance with its own judgments. This is

[55] Cf. paragraphs 16 and 101 of the present Judgment.
[56] Cf. paragraph 104 and resolutory point 1 *(e)* of the *dispositif* of the present Judgment.

essential, so as to foster the *rule of law* in the international community, — a topic which has remained present, with growing attention on the part of UN Member States, in the agenda of the UN General Assembly throughout the last decade.

82. Last but not least, the consideration, in the present separate opinion, of the exercise, in its distinct aspects, by contemporary international tribunals, of their inherent powers or *facultés*, has prompted me to bring to the fore my understanding that *recta ratio* stands above *voluntas*. There is need to overcome the voluntarist conception of international law. There is need of a greater awareness of the primacy of conscience above the "will", and of a constant attention to fundamental human values, so as to secure the progressive development of international law, and, ultimately, to foster the realization of justice at international level.

(Signed) Antônio Augusto Cançado Trindade.

DECLARATION OF JUDGE BHANDARI

1. In the present case, I have voted with the majority in respect of the first, second, third and fourth preliminary objections raised by Colombia[1]. However, with the greatest of respect to my learned colleagues, I cannot join them in rejecting Colombia's fifth preliminary objection[2], which contends that the present case brought by Nicaragua is, in effect, an improper attempt by Nicaragua to have this Court enforce one of its prior judgments. Thus, for the reasons that I shall briefly outline hereunder, I would declare Nicaragua's present claim inadmissible and thus would not allow this case to proceed to the merits phase of these proceedings.

2. As the majority correctly and succinctly observes, "Colombia's fifth preliminary objection rests on the premise that the Court is being asked to enforce its 2012 Judgment"[3]. If true, Nicaragua's claim would run afoul of Article 94, paragraph 2, of the Charter of the United Nations, which reads as follows:

> "If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the [International] Court [of Justice], *the other party may have recourse to the Security Council*, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment." (Emphasis added.)

3. Moreover, Article L of the Pact of Bogotá (a treaty which, I will recall, I have joined the majority in concluding grants jurisdiction in the present case[4]) provides as follows:

> "If one of the High Contracting Parties should fail to carry out the obligations imposed upon it by a decision of the International Court of Justice . . . the other party or parties concerned shall, *before resorting to the Security Council of the United Nations*, propose a Meeting of Consultation of Ministers of Foreign Affairs to agree upon appropriate measures to ensure the fulfilment of the judicial decision . . ." (emphasis added).

[1] Judgment, para. 111 (1) *(a)*–*(e)*.
[2] *Ibid.*, para. 111 (1) *(f)*.
[3] *Ibid.*, para. 109.
[4] See my vote rejecting Colombia's first preliminary objection at *ibid.*, para. 111 (1) *(a)*.

4. When these two authorities are read in concert it is clear that if Nicaragua, as both a Member of the United Nations and a party to the Pact of Bogotá, seeks to enforce the 2012 Judgment of this Court in the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)* case ("2012 Judgment"), its ultimate avenue of recourse is the Security Council. This obligation, posited by the plain wording of these two texts, is further reinforced by a supplementary *a contrario* interpretation, in that both the United Nations Charter and the Pact of Bogotá are conspicuously silent on the ability of an aggrieved former litigant to re-approach the ICJ to seek enforcement of one of its prior judgments.

5. While the majority does not deny that Nicaragua has framed its case as a request to enforce the 2012 Judgment, it recalls that ultimately "it is for the Court, not Nicaragua, to decide the real character of the dispute before it"[5]. While this statement is true as a matter of law, I simply disagree with the majority that, based on the facts as averred at this preliminary stage of the proceedings, the Court ought to arrive at the independent conclusion that Nicaragua's present claim is anything other than a rather obvious attempt to circumvent the Security Council by asking the Court to enforce its prior Judgment.

6. While an exhaustive analysis of Nicaragua's written and oral pleadings would greatly exceed the scope of the present declaration, I draw upon several points that illustrate why I respectfully cannot accept the majority's position that Nicaragua is not presently seeking to enforce the 2012 Judgment through its present claim.

7. *First*, in its Application, Nicaragua

> "requests the Court to adjudge and declare that Colombia is in breach of . . . *its obligation not to violate Nicaragua's maritime zones as delimited in paragraph 251 of the ICJ Judgment of 19 November 2012* as well as Nicaragua's sovereign rights and jurisdiction in these zones"[6].

8. *Second*, this plea is reiterated virtually verbatim in the prayer for relief contained in Nicaragua's Memorial[7].

9. *Third*, the pleadings reveal many instances of alleged conduct that, if true, strongly suggest that Colombia failed to heed the boundaries delimited by the 2012 Judgment, including but not limited to: the enactment on 9 September 2013 of Decree 1946, which purported to create an "Integral Contiguous Zone" asserting sovereign rights over maritime areas the Court had explicitly determined to be Nicaraguan; the encroach-

[5] Judgment, para. 109.
[6] *Ibid.*, para. 11; emphasis added.
[7] *Ibid.*, para. 12.

ment of Colombian naval vessels into waters explicitly declared to be under the sovereign jurisdiction of Nicaragua in the 2012 Judgment; the issuance of fishing licenses by the Colombian authorities for waters adjudged to belong to Nicaragua by the 2012 Judgment; and Colombia's contention that it was precluded from executing the 2012 Judgment by virtue of a domestic law impediment necessitating that any changes to its boundaries can only be effected by the conclusion of a treaty[8].

10. While not contesting these points, the rationale underpinning the majority's determination that Nicaragua is *not* asking the Court to enforce the 2012 Judgment in the face of such a compelling body of evidence to the contrary is to be found in the latter portion of paragraph 109, which, for ease of reference, I reproduce hereunder:

> "[A]s the Court has held (see paragraph 79 above), the dispute before it in the present proceedings concerns the alleged violations by Colombia of Nicaragua's rights in the maritime zones which, according to Nicaragua, the Court declared in its 2012 Judgment appertain to Nicaragua. As between Nicaragua and Colombia, those rights are derived from customary international law. The 2012 Judgment of the Court is undoubtedly relevant to that dispute in that it determines the maritime boundary between the Parties and, consequently, which of the Parties possesses sovereign rights under customary international law in the maritime areas with which the present case is concerned. In the present case, however, Nicaragua asks the Court to adjudge and declare that Colombia has breached 'its obligation not to violate Nicaragua's maritime zones as delimited in paragraph 251 of the Court['s] Judgment of 19 November 2012 as well as Nicaragua's sovereign rights and jurisdiction in these zones'. . . Nicaragua [therefore] does not seek to enforce the 2012 Judgment as such."

11. I respectfully take issue with this conclusion and the analysis upon which it rests. First, the cited paragraph 79 is a rather inapposite reference, since that paragraph draws a conclusion on a separate point of law, which is based upon a different set of factual considerations. It is to be recalled that the analysis preceding paragraph 79 dealt with Colombia's *second* preliminary objection, i.e., whether there was in fact a "dispute" between the Parties at the time the Application was filed, in accordance with the requirement stipulated under Article 38 of the Statute of the Court.

12. As one might expect, the thrust of the analysis preceding paragraph 79 of the Judgment does not focus on the character of Nicaragua's claim, but rather on the critical issue of whether there existed a bona fide

[8] Judgment, paras. 54-57.

dispute between the Parties at the time Nicaragua filed its Application. To this end, the analysis was not focused on the source of Nicaragua's legal claim but rather the actions of the Parties prior to the filing of Nicaragua's Application, in order to determine whether such conduct could properly be deemed a "dispute" for the purpose of Article 38 of the Statute of the Court. After conducting such an examination, the majority determined — correctly, in my view, as my vote on this issue evinces[9] — that there was indeed a "dispute" between the Parties as contemplated by Article 38, and thus the second preliminary objection of Colombia ought to be rejected.

13. Since the analysis leading up to the conclusion at paragraph 79 of the Judgment on Colombia's second preliminary objection dealt with a separate and distinct legal issue and focused on the conduct of the Parties in the interval between the issuance of the 2012 Judgment and the filing of Nicaragua's Memorial, the majority's reliance on paragraph 79 to buttress its conclusion on the fifth preliminary objection is, to my mind, tenuous at best. Indeed, to the extent that portion of the Judgment touches upon the *legal source* of the dispute — i.e., enforcement of Nicaragua's maritime rights under customary international law *versus* enforcement of the 2012 Judgment per se — at all, this was done obliquely and often by way of examples that are either inconsistent with, or at least unhelpful to, the majority's conclusion as to the true character of Nicaragua's complaint.

14. Second, in my respectful view, the majority's analysis regarding Colombia's fifth preliminary objection simply ignores the clear, unequivocal, and repetitive assertions by both Parties — explicitly and implicitly — that the crux of the matter under consideration is, quite plainly, Colombia's alleged non-compliance with the 2012 Judgment. Such assertions are abundantly supported by the factual record available to this Court at this preliminary stage of proceedings.

15. For these reasons, I would uphold Colombia's fifth preliminary objection and consequently refuse to allow Nicaragua's claim to advance to the merits phase of this case.

(Signed) Dalveer BHANDARI.

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[9] Judgment, para. 111 (1) *(b)*.

DISSENTING OPINION OF JUDGE *AD HOC* CARON

Disagreement with dismissal by the Court of Colombia's second preliminary objection — Requirement that there be a "dispute" as a general limitation to the contentious jurisdiction of the Court — Specific requirement for a "dispute" under the Pact of Bogotá — Meaning of "dispute" — Unprecedented character of the present case — Contention by Colombia that there is no dispute between the Parties resting on the allegation that no "claim" was made by Nicaragua that was capable of being "positively opposed" by Colombia — No capacity for Court to infer the existence of a "claim" giving rise to a dispute — To have jurisdiction, Court must find that Nicaragua made a "claim" on those points of law or fact to which the present proceedings relate — Evidence as to the existence of a "dispute" — No basis for a finding that there was a dispute between the Parties as to the subject-matter now before the Court prior to the filing of the Application.

Disagreement with dismissal by the Court of Colombia's third preliminary objection — Negotiation as a condition precedent to recourse to Court — Court's characterization of circumstances in which negotiation may be dispensed with — Disagreement that those circumstances pertain in the present case — Evidentiary record does not support conclusion that settlement not possible or contemplated by the Parties — Interrelationship between second and third preliminary objection — Importance of negotiations to defining the subject-matter of the dispute ultimately brought for judicial settlement.

I. Introduction

1. I respectfully dissent in respect of the Court's finding on Colombia's second and third preliminary objections inasmuch as the Court's reasoning departs from its own jurisprudence and is not supported by the evidence before it. Beyond the particulars of this case, it is of great concern that in finding that it possesses jurisdiction, the Court's reasoning undermines in my opinion broader concepts underlying the peaceful settlement of disputes.

2. The Court's Judgment addresses its jurisdiction over the claims of Nicaragua that base the Court's competence first and foremost on Article XXXI of the Pact of Bogotá. It is important to recall that the full title of that Treaty is the "American Treaty on Pacific Settlement". The Treaty promotes the pacific settlement of disputes by setting forth various means of doing so. The means set forth in the treaty begins with the "general obligation to settle disputes by pacific means" (Chapter One, Articles I to VIII), proceeds to "procedures of good offices and mediation" (Chap-

ter Two, Articles IX to XIV), sets forth a "procedure of investigation and conciliation" (Chapter Three, Articles XV to XXX), and lastly reaches in Chapter Four Article XXXI a "judicial procedure" of reference to this Court, assuming that the parties have not provided instead for arbitration (Chapter Five, Articles XXXVIII to XLIX). The Treaty is careful to point out that the "order of the pacific procedures . . . does not signify the parties may not have recourse to the procedure which they consider most appropriate . . . or that any of them have preference over others except as expressly provided" (Article III). But the phrase "except as expressly provided" is important. The exceptions expressly provided in each means of settlement are important and are the bedrock of my dissent to the Court's Judgment in respect of the second and third preliminary objections.

3. There may not be a regimented staircase of procedures in the Pact of Bogotá, but peaceful settlement within the scheme of the Pact carefully climbs from dialogue in which each State's concerns are voiced to each other, upwards to the various means by which settlement may be negotiated and finally to the power of the Court or a tribunal to decide "disputes of a juridical nature". A disagreement is more than a pattern of conduct that might imply a difference in views. As the Pact recognizes, communication is essential because a disagreement cannot be settled unless there is a dialogue that defines what is in dispute. Indeed, unless a dispute in this sense "exists", then it is difficult to envision what is to be negotiated.

4. I dissent from the Court's Judgment because it fundamentally weakens this scheme, reducing the complexity of the scheme for the settlement of disputes set out in the American Treaty on Pacific Settlement into essentially a simple acceptance of the Court's jurisdiction. The Judgment in profoundly shifting the requirement that there be a dispute holds that the Applicant to the Court need not have engaged in dialogue, and need not have expressed its concerns to the other State. Without such dialogue, the Parties will not have had the opportunity to define the dispute, refine the dispute, and — one can hope — narrow or even settle the dispute. As critically, if the Applicant need not have engaged in dialogue with the other Party, then any duty to negotiate as a practical matter is substantially weakened. International disputes are complex and boundary disputes are amongst the most difficult to resolve. The law gives answers, but not necessarily the most nuanced answers, in such complex situations. It is essential that the Court or a tribunal possess the jurisdiction to give the answer to a dispute when necessary or when called upon by both parties. But it is only necessary when the dispute between two States "cannot be settled by direct negotiations" — language in the Pact of Bogotá that the Court's jurisprudence holds to be a precondition to jurisdiction under the Pact. It is regrettable that the present Judgment in its holdings regarding the second and third preliminary objections formally reaffirms, yet sub-

stantively negates, the requirement that a dispute exists and the obligation to pursue negotiations.

II. The Second Preliminary Objection as to the Existence of a Dispute

1. The Requirement that a Dispute Exist

5. The Court reaffirms in its Judgment that the existence of a dispute is a precondition to the Court's exercise of jurisdiction over this, and indeed any, case. The Court, however, simultaneously also departs from its own jurisprudence on this requirement. That jurisprudence indicates the importance of initiating an assessment of the existence of a "dispute" with identification of both a "claim" and "positive opposition" to that claim by the States party to the Court's proceedings. Applying the Court's previous jurisprudence as to the meaning and existence of a dispute, I am unable to see how a "dispute" as to the subject-matter invoked by Nicaragua in its Application existed at the requisite date. In these circumstances, I am unable to agree with the Court's claim to jurisdiction over the present proceedings.

6. The requirement of a dispute between the parties is a general limitation to the contentious jurisdiction of the Court. In the *Nuclear Tests* cases, where partway through the proceedings the basis of the dispute was found to have become moot, the Court stated: "the existence of a dispute is the primary condition for the Court to exercise its judicial function" (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, pp. 270-271, para. 55; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 476, para. 58). Mootness involves the situation where a dispute no longer exists. Ripeness asks whether a dispute exists, that is, whether it has come into being. It is this latter situation that is at issue in the second objection.

7. In addition to the requirement that a dispute exist as a general limitation on the contentious jurisdiction of the Court, this limitation may also arise from the particular instrument asserted to be the basis of the Court's jurisdiction. Thus, in this case, the Court's Judgment refers also to Article XXXI of the Pact of Bogotá, where the parties to the Pact accept the Court's jurisdiction in respect of "disputes of a juridical nature . . ." (Judgment, paras. 15 and 50). The particular instrument may place additional limitations on the jurisdiction of the Court, but these further requirements are best viewed as additional requirements rather

than a change in the meaning of the term "dispute" itself. Such reasoning is implicit in the *Mavrommatis* case where the Permanent Court of International Justice (PCIJ) wrote:

> "Before considering whether the case of the Mavrommatis concessions relates to the *interpretation of application* of the Mandate and whether consequently its nature and subject are such as to bring it within the jurisdiction of the Court as defined in the article quoted above, it is essential to ascertain whether the case fulfils all the other conditions laid down in this clause. Does the matter before the Court constitute a dispute between the Mandatory and another Member of the League of Nations? Is it a dispute which cannot be settled by negotiation?" (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11; emphasis in the original.)

See also *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 84, para. 29 (holding that "consistency of usage suggests that there is no reason to depart from the generally understood meaning of 'dispute' in the compromissory clause contained in Article 22 of CERD").

8. The meaning of the term "dispute" is set forth reasonably fully in the Court's jurisprudence. In its Judgment in 1924 in the *Mavrommatis* case, the PCIJ held that: "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons." (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11.) This Court's later jurisprudence concerning the elements of a dispute adds detail and precision to the view of the PCIJ. The Court in the *South West Africa* cases held:

> "[I]t is not sufficient for one party to a contentious case to assert that a dispute exists with the other party. A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its non-existence. *Nor is it adequate to show that the interests of the two parties to such a case are in conflict*." (*I.C.J. Reports 1962*, p. 328; emphasis added.)

If a mere conflict of interest as suggested in *Mavrommatis* is not "adequate", the Court refined the intensity element required of the dispute by holding repeatedly that the claim of one State must be "positively opposed" by another (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328; *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. 40, para. 90; *Application of the International Convention on the Elimination of All Forms of*

Racial Discrimination (Georgia v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, pp. 84-85, para. 30).

9. Publicists examining the Court's jurisprudence have elaborated upon what in practice it means to require that the claim of one State is "positively opposed" by another. Professor J. G. Merrills writes that: "A dispute may be defined as a specific disagreement concerning a matter of fact, law or policy in which a claim or assertion of one party is met with *refusal, counter-claim or denial* by another." (J. G. Merrills, *International Dispute Settlement*, 2nd ed., 1993, p. 1; emphasis added.) The idea that "positive opposition" entails a rejection or denial by the opposing party is implicit in the meaning of the word "opposed". Likewise, in a leading Commentary on the Statute of the ICJ, Professor Christian Tomuschat writes that a dispute presupposes opposing views: "the Court has consistently proceeded from the assumption that an applicant must advance a legal claim" (Christian Tomuschat, "Article 36", Andreas Zimmermann, Christian Tomuschat, Karin Oellers-Frahm and Christian J. Tams (eds.), *The Statute of the International Court of Justice. A Commentary*, 2nd ed., 2012, p. 642). Thus, the claim of legal violation by one party must be positively opposed by the other party through that party's rejection or denial of the claim of legal violation.

10. In a minority of cases, the applicant's claim of legal violation was not met with "refusal", but rather with silence. In such instances, the Court has been practical rather than formalistic and indicated flexibility as to how positive opposition is to be established. In 1927, for example, the PCIJ observed that:

> "In so far as concerns the word 'dispute', [. . .] according to the tenor of Article 60 of the Statute, the manifestation of the existence of the dispute in a specific manner, as for instance by diplomatic negotiations, is not required." (*Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, p. 10.)

11. Similarly, the Court more recently in *Georgia* v. *Russian Federation* summarizing its jurisprudence on the requirement stated:

> "As the Court has recognized (for example, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 315, para. 89), the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for." (*Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 84, para. 30.)

12. The practice of the Court in inferring opposition from "the failure of a State to respond to a claim where a response is called for" reinforces

the conclusion that "positive opposition" generally requires a rejection or denial by the other party. If this were not necessary, then the inference made in the several cases of silence would not have been needed. In the *Hostages* case, for example, the claim of legal violation by the Applicant, the United States, was met with silence from the Respondent, Iran. The Court in evaluating whether a dispute existed did not merely indicate that the two Parties possessed different views or a conflict of interests. Rather, the Court sifted through the statements of the United States so as to justify the necessary inference that Iran, despite its silence, positively opposed the claim of the United States (*United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, I.C.J. Reports 1980*, p. 25, para. 47).

13. The requirement that a dispute exist may thus be met where: (1) there is a claim of legal violation by a State and such a claim is positively opposed, that is, rejected, by another State; or (2) there is a claim of legal violation by a State where positive opposition may be inferred from the failure of another State to reply to the first State's claim of legal violation where such a response is called for.

2. The Unprecedented Character of the Present Case

14. To the best of my knowledge, the way in which the requirement as to the existence of a dispute arises in this case is unprecedented in the Court's history. In all of the cases cited in the Court's Judgment and in this opinion, the case involved a situation where the applicant State has stated clearly its claim of legal violation to the respondent State prior to the date of its Application. The issue in those cases was primarily whether the respondent State positively opposed, that is, rejected, the claim of legal violation by the applicant State.

15. For example: the claims of Greece, and as a secondary matter its national, were formal and unequivocal in the *Mavrommatis* case. Similarly, in the *Hostages* case, the claim of legal violation by the United States was abundantly clear through its despatch of a special emissary, the views expressed by its chargé d'affaires in Tehran, and its representations before the United Nations Security Council (*ibid.*, p. 25, para. 47).

16. In *Georgia* v. *Russian Federation*, the Court was confronted with the question of whether the particular requirement for the existence of a dispute under Article 22 of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination ("CERD") was met ("[A]ny dispute between two or more States parties with respect to the interpretation or application of this Convention"). The issue in that case was not whether Georgia had made a claim of legal violation at all but

precisely when in a long series of statements or letters it could be said that such a claim was made to the Russian Federation "with respect to the interpretation or application" of CERD. The Court had no difficulty in ultimately finding that statements by the Georgian President in a Press Conference held on 9 August 2008, the statement of the Georgian Representative to the United Nations Security Council on 10 August 2008, a published statement of the Georgian Foreign Minister on 11 August 2008, and a televised interview with the Georgian President on 11 August 2008 "expressly referred to alleged ethnic cleansing by Russian Forces". On that basis, the Court concluded that those actions constituted "claims [that] were made against the Russian Federation" (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 120, para. 113).

17. In the present proceeding, Colombia's second preliminary objection does not reach the point of arguing that it did not positively oppose a claim of Nicaragua. Colombia's second preliminary objection argues a more fundamental point, namely, that Nicaragua never made a claim which Colombia could oppose.

18. This difference is significant. However, it is a difference not addressed by the Judgment. It is appropriate for the Court to infer positive opposition to a claim. It is not in my view appropriate to infer the assertion of the claim. First, such an inference eviscerates the requirement that there be a dispute. Second, what does it mean for the requirement that the respondent positively oppose a claim when the claim is not clear, not to mention not explicit? An inferred claim is not a claim. It is not asking much of the applicant that they have formulated and communicated in some fashion a claim. Third, to infer the claim itself leaves both vague and unclear what the dispute is about. I agree that it is for the Court to objectively determine what is in dispute and that it may thus itself add clarity. For such an objective determination to be based upon an assessment of the protests made, letters exchanged and later pleadings is one thing. It is quite another matter for a court, however, to objectively determine the existence of the dispute not from the articulation of a claim by the applicant and response by (including unjustified silence of) the respondent, but rather to infer it from the overall context in which the parties co-exist. Such an attempt at objective determination is, in my opinion, fraught with potential pitfalls for the parties and the Court and could easily shade into an abuse of discretion. The dangers are evident in the Court's Judgment in this case.

19. The Court's Judgment does not address the unprecedented character of the present case. The Court reiterates at paragraph 50 of its Judgment that it "must be shown that the claim of one party is positively

opposed by the other", citing the *South West Africa* cases. The Court's Judgment, however, immediately adds a statement to the above quoted text, that for the circumstances of this case, profoundly changes the applicable law and masks the significant departure from its jurisprudence that follows. The Court states that it "does not matter which one of them [i.e., the parties] advances a claim and which one opposes it". Whether this statement is correct depends upon the situation presented. It is starkly incorrect for the situation presented in this case.

20. The overwhelming majority of contentious cases have involved disputes where there has been a significant exchange of diplomatic protests and letters between the parties concerning the subject of the dispute before the Court. Even within those cases where a preliminary objection is raised as to whether a dispute exists, that preliminary objection can nevertheless be assessed against a factual background comprised of such statements and protests. To the extent that the assertion in paragraph 50 refers to the situations just described, then I agree that it does not matter in determining whether a dispute came into existence whether it is the party who ultimately is applicant or respondent that initiated the exchange of diplomatic protests and letters. All that matters is that the factual record evidences that one party positively opposed the claim of the other. But — critically — that is far from the situation presented in this case.

21. In particular, where one side has not positively opposed the claims of the other but rather remained silent, it is the applicant who bears the onus of demonstrating that that silence should nevertheless be taken as an opposition to those claims. In cases involving such silence, it is always, then, the applicant which will have made the requisite "claim" capable of giving rise to a "dispute". That is the situation presented by this case.

22. Before reviewing the outcome of the assessments by the Court of the existence of the disputes that are the basis of Nicaragua's claims, I emphasize that Nicaragua does not dispute directly Colombia's assertion that there was no claim of legal violation as such by Nicaragua, not to mention a formal claim by Nicaragua, prior to Nicaragua filing its Application. Rather, Nicaragua argues that it is "obvious" that there is a dispute. Nicaragua argues in its written statement at paragraph 3.5 that "[i]t is perfectly obvious that Colombia and Nicaragua are in disagreement on various points of law, and have a conflict of legal views and interests". Nicaragua, however, does not refer to evidence of a claim of legal violation by it in any form. Rather, Nicaragua at paragraph 3.15 of its written statement to the preliminary objections of the Republic of Colombia writes: "one might ask why Colombia considers that the onus was on Nicaragua . . .". But this is a different way of stating precisely what is unprecedented about this case. The issue in this case is not that presented to the Court by other cases. If this case were like the others, the issue would be whether the Respondent — Colombia — positively opposed or rejected the claim of Nicaragua. This case does not reach that question.

The question in this case is whether the Applicant, having been bound by Article 40 (1) of the Statute and Article 38 (2) of the Rules of Court to state the "subject of the dispute" in its Application, ever communicated the related claim of legal violation *in any form* so that it might be positively opposed by the Respondent, thus establishing the existence of a dispute.

23. In light of the above, it is my view that a dispute cannot be taken to have arisen between the Parties unless Nicaragua made a "claim" capable of rejection by Colombia and communicated it to Colombia in some way. That is, Nicaragua must have — prior to filing its Application — asserted against Colombia its views on those points of law or fact forming the subject of the claims now before the Court.

3. What the Court Holds

24. The Judgment of the Court begins correctly by asking what are the disputes that Nicaragua asserts are the subject of the proceeding; recognizing that it is for the Court to objectively assess and specifically articulate the subject-matter of the dispute. Looking to the Application and Memorial of Nicaragua, the Court identifies two claims, each of which rests on a distinct dispute. In the Application, the "Subject of the Dispute" is described as first, "violations of Nicaragua's sovereign rights and maritime zones declared by the Court's Judgment of 19 November 2012" and second, "the threat of the use of force by Colombia in order to implement these violations" (Application of Nicaragua, p. 2, para. 2). The submissions in the Memorial of Nicaragua confirm that these two claims are the subject of this proceeding. Having identified two claims, the Judgment of the Court proceeds to assess whether a dispute existed with respect to either or both of them at the time of the Application.

25. As to whether a dispute existed as to the sovereign rights and maritime zones of Nicaragua, the Court at paragraphs 69 to 74 concludes that a dispute as to Nicaragua's rights in the relevant maritime zones existed at the time of the Application. In reaching this conclusion, the Court's Judgment refers to two specific items of evidence. What is striking and deserving of emphasis at this point is the contrast with *Georgia* v. *Russian Federation* where the Court — in seeking to identify at what point in time it could be said that a claim had been made by Georgia which the Russian Federation could have positively opposed — the Court reviewed over 50 specific items of evidence, comprising letters, statements, decrees and filings by the Applicant, Georgia.

26. As to whether a dispute existed as to the threat of the use of force, the Court at paragraphs 75 to 78 concludes that a dispute did not exist.

The Court does not state that a dispute did not exist because Nicaragua failed to claim, protest or object to a threat of the use of force by Colombia. It could have done so because there is no such claim, protest or threat in the record. But it does not. Rather, the Judgment refers to two pieces of evidence in which representatives of the Nicaraguan Government described the situation at sea as calm.

27. The above holdings that one dispute existed while the other did not are both flawed. Before laying out this critique, this dissent first must do what the Court does not do; that is, engage fully with the evidence.

4. Assessing the Evidentiary Record

28. In assessing the evidence in this case, it is important at the outset to point out what is not included. There is no diplomatic letter of protest prior to the lodgment of Nicaragua's Application. Although both sides acknowledge there were meetings of the two Heads of State, there are no minutes of those meetings nor are there any witness statements as to what transpired at those meetings. Given that the requirement that a dispute exists necessarily examines the claim of the applicant and the rejection or denial of the respondent, it is particularly curious and telling that the evidentiary record contains only a very limited number of statements from Nicaraguan officials. In fact, there are only a handful of such statements cited by the Parties. Moreover, the bulk of those derive from contemporaneous press reporting. The Court therefore is not presented here with the possibility it had in *Georgia* v. *Russian Federation* of limiting its search for a "claim" by the Applicant to statements made by that State in "official documents and statements" (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russia Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 86, para. 33). Indeed, only a small number of documents in the present proceedings have been proffered as a possible source of any such "claim".

29. In addition, it is important to observe that, temporally, the statements made by Nicaraguan officials prior to the filing of the Application fall into two sets: a first set covers the three months immediately following the issuance of the Court's November 2012 Judgment; and a second set commences six months later and spans less than two months in the period leading up to the filing of Nicaragua's Application in these proceedings. In the following paragraphs, I assess whether any of the statements disclose a "claim" which Colombia could "positively oppose" such as to give rise to a "dispute" between the Parties. I furthermore assess

whether any such "claim" related to the subject of the claims now before the Court.

30. On 21 November 2012, press reporting disclosed that President Ortega had welcomed the 2012 Judgment as a "national victory", the reporting further indicating that President Ortega had "urged the South American nation to respect the high court's decision" (Memorial of Nicaragua, Annex 26, "International court gives Nicaragua more waters, outlying keys to Colombia", *Dialogo*, 21 November 2012, pp. 355-356). I am unable to see in these statements any "claim" against Colombia of a breach of its obligations, let alone a "claim" with respect to a breach of those rights now invoked by Nicaragua in these proceedings.

31. On 26 November 2012, President Ortega made an address to "the people of Nicaragua" (Memorial of Nicaragua, Annex 27, "Message from President Daniel [Ortega] to the people of Nicaragua", *El 19 Digital*, 26 November 2012, pp. 359-362). In that address, the President referred again to the 2012 Judgment to note "our concerns for the manner in which [the President of Colombia] was reacting by rejecting the ruling of the Court", further noting that

> "[d]uring the days following the ruling, President Santos toughened his position by adding to his words, the mandate to the naval forces of the Colombian armada to multiply their surveillance activities in territories awarded by the International Court of Justice as maritime territories to Nicaragua" (*ibid.*, p. 359).

In that address, President Ortega went on to note that in response to these words and acts "the Government of Nicaragua reacted very calmly" and was "waiting and expect[s] the Government of Colombia to decide, once and for all, to comply with the ruling of the Court". He went on to refer to Nicaragua's desire to establish "new Conventions with Colombia to combat drug trafficking and organized crime" and on "matters of fisheries".

32. Again, there is no claim in these statements concerning any threat of the use of force by Colombia. There is, furthermore, no claim in respect of a breach by Colombia of Nicaragua's sovereign rights and maritime spaces. At most, the statements made by President Ortega in this address could constitute a claim in respect of Colombia's implementation of the 2012 Judgment. As Nicaragua itself attests, however, the dispute it invokes before the Court in the present proceedings "is not 'a difference of opinion or views between the parties as to the meaning or scope of a judgment rendered by the Court'" (Memorial of Nicaragua, p. 17, para. 1.33).

33. On 29 November 2012, President Ortega reportedly indicated — in the lead-up to a meeting between the two Presidents in Mexico — that he wished to "shake hands with President Santos and say that I and the peo-

ple of Nicaragua want to fix this situation as fraternally as brothers" (Memorial of Nicaragua, Annex 31, "Santos and Ortega will meet this Saturday in Mexico City", *La República*, 29 November 2012). There is no official record of the exchanges between the Presidents at the meeting on 1 December 2012. Colombia cites a press statement of President Santos that discloses some of what was discussed at that meeting, indicating that President Santos had stated that:

> "We — the Minister of Foreign Affairs and I — gathered with President Ortega. We explained in the clearest way our position: we want the Colombian rights, those of the *raizales*, not only with respect to the rights of the artisanal fishermen but other rights, to be re-established and guaranteed. He [President Ortega] understood.
>
> . . . .
>
> We will keep looking for the mechanism that both the International Court of The Hague and the international diplomacy have at their disposal to re-establish the rights infringed by the Judgment. That does not exclude these channels of communication with Nicaragua. I believe that those channels of communication are an important complement.
>
> In this sense we will continue — and we said this clearly to President Ortega — looking for the re-establishment of the rights that this Judgment breached in a grave matter for the Colombians." (Preliminary Objections of the Republic of Colombia, Annex 9, "Declaration of the President of the Republic of Colombia", 1 December 2012, pp. 109-110.)

34. A separate press report dated 3 December 2012 reports that President Santos, after the meeting:

> "announced that as a result of this meeting with the Nicaraguan President, the two Governments will manage the matter of the ruling by the Court in The Hague with forethought and discretion. 'We are going to manage this with prudence, with discretion, no insults by the news media. If there is a problem, we will call each other', he stated." (Written Statement of the Republic of Nicaragua to the Preliminary Objections of the Republic of Colombia, Annex 5, "Government of Colombia will not implement ICJ judgment until the rights of Colombians have been restored", *El Salvador Noticias.net*, 3 December 2012, p. 103.)

35. Nicaragua observes that by this meeting it sought to "engage in a constructive dialogue over implementation of the 19 November Judgment" (Memorial of Nicaragua, para. 2.7). It further surmises that the discussions between the Presidents at the meeting indicated that "President Santos's position was that his country would not abide by the Judgment until 'we see that Colombians' rights, that have been violated, are

re-established and guaranteed in the future'" (CR 2015/23, p. 12, para. 9 (Arguëllo); Memorial of Nicaragua, para. 2.7). Nicaragua does not, however, tender any evidence as to the position taken by the Nicaraguan President in the meeting, beyond asserting that:

> "President Ortega stated Nicaragua's position that, while the Judgment of the Court had to be respected by both States, there was room for discussion in regard to the manner of its implementation, and at all events the matter had to be resolved peacefully and without confrontation." (Memorial of Nicaragua, para. 2.7, citing a press report written before the meeting: "Santos and Ortega will meet this Saturday in Mexico City", *La República*, 29 November 2012; *ibid.*, Annex 31, p. 379.)

36. In such a circumstance, it is impossible to infer that Nicaragua made at that meeting any "claim" capable of giving rise to a "dispute" between the Parties. Moreover, the contemporaneous public statements by the Presidents focus upon Colombia's compliance with the 2012 Judgment. Any "claim" arising out of these statements, therefore, would pertain to a subject-matter different to the alleged breach of Nicaragua's sovereign rights and maritime zones and of Colombia's obligations in respect to the use of force that Nicaragua invokes in these proceedings.

37. On 5 December 2012, the Chief of Nicaragua's army, General Avilés, confirmed that Nicaragua was in communication with the Colombian authorities, and that "there has been no boarding to fishing vessels" (CR 2015/22, p. 33, para. 10 (Bundy)). On the same date, President Ortega held further discussions with President Santos. Press reporting of that meeting indicated that:

> "President Ortega also said that the Nicaraguan Navy has been instructed to not detain any Colombian fishermen during what he calls 'the period of transition in the zone'.
>
> 'We have to do this gradually until there is full compliance with the Court's sentence, without affecting the reserve and without affecting the fishermen and businesses on San Andres Island', Ortega said." (Memorial of Nicaragua, Annex 33, "Nicaragua: no oil concessions in Seaflower", *Nicaragua Dispatch*, 6 December 2012, p. 387.)

Again, there is no indication in any of these statements of Nicaragua claiming a breach by Colombia of its legal obligations, let alone a breach of its obligations in respect of the use of force or of Nicaragua's sovereign rights and maritime zones.

38. The two Presidents met again in February 2013. Contemporaneous press reporting indicates that:

> "Ortega said that it is necessary to find mechanisms for consensus through dialogue that will enable closer relations between the two nations instead of confronting them. 'I propose to the Government of Colombia, to President (Juan Manuel) Santos, that the sooner the better, we should organize these commissions to work so that they can demarcate all of this in regard to the area where the Raizal peoples can fish according to their historical rights'. . . Ortega said that the issue has been manipulated in Colombia for 'electoral' purposes and that 'there are powerful interests' in having an armed confrontation between Nicaragua and Colombia, in the waters granted to his country by The Hague. [']I am certain that President Santos and the People of Colombia know that the solution to the ruling by the International Court of Justice is not the use of force; it is not the deployment of warships in the area, but rather to follow the path to organize the ruling of the Court, organize it in terms of its implementation, how to organize it, how to apply it', he stated. Ortega said that both in Mexico, during the takeover by President Enrique Peña Nieto, and in the recent Summit of Latin American States in Chile, he had the opportunity to discuss the issue with the Colombian President and that they have always spoken of taking joint measures. He said that his country has no interest in a confrontation with anyone, and that the only thing its coast guard boats do is 'to enforce the ruling by The Hague 'very firmly and with serenity'', always watching 'so that the dialogue comes first''." (Memorial of Nicaragua, Annex 35, "Nicaragua asks Bogotá to form The Hague Commissions", *La Opinion*, 22 February 2013, pp. 395-396.)

This is the first statement on the record addressing the possibility of an armed confrontation between the States. Two observations are, however, in order. First, it is not the President who refers to such a possibility, but the reporter. The President appears on the contrary to recognize that "the People of Colombia know that the solution to the ruling by the International Court of Justice is not the use of force". Second, the President makes no specific allegation against Colombia of a breach of Nicaragua's sovereign rights or maritime zones or of Colombia's obligations in respect of the use of force. The statements simply cannot be read as a legal "claim" against Colombia on these matters.

39. These statements make up the first set of evidence (November 2012 to February 2013). The second group of statements occur some five months subsequent to the first group, in the lead-up to the filing of Nicaragua's Application in these proceedings (August 2013 to November 2013).

40. A number of these statements indicate Nicaragua's continued view that the situation at sea was calm, disclosing no "claim" that Colombia was violating Nicaragua's sovereign rights and maritime zones or threat-

ening the use of force against Nicaragua. On 14 August 2013, for example, President Ortega stated that:

> "[W]e must recognize that . . . the Naval Force of Colombia, which is very powerful, that certainly has a very large military power, has been careful, has been respectful and there has not been any kind of confrontation between the Colombian and Nicaraguan Navy" (Preliminary Objections of Colombia, Annex 11, "Declaration of the President of the Republic of Nicaragua", 14 August 2013, p. 118).

On 18 November 2013, the Chief of Nicaragua's naval forces, Admiral Corrales Rodríguez, further stated that "[t]here have not been any conflicts and that is why I want to highlight that in one year of being there we have not had any problems with the Colombian Navy" (*ibid.*, Annex 43, "Patrolling the recovered sea", *El Nuevo Diario*, 18 November 2013, p. 355).

41. Other statements in this period pertain to the implementation of the 2012 Judgment. On 23 August 2013, for example, press reporting indicated that:

> "Nicaragua . . . say[s] that the ruling is already being implemented and that a decision by the Colombian Government not to abide by it makes no sense. 'The judgment of the ICJ has been in effect since 19 November 2012. What has happened is that Colombia has hired a number of law firms to analyse the resources in the territory', said Mauricio Herdocia, the lawyer representing Nicaragua in this case. 'In the end all questions will be resolved by the ICJ, and according to the Rules of the Court, when a State is preparing an appeal the judgment must be respected', added Herdocia." (Memorial of Nicaragua, Annex 38, "World Court ruling on maritime borders unenforceable in Colombia: Vice-President", *Colombia Reports*, 23 August 2013, pp. 407-408.)

42. This is not a statement stemming from the Nicaraguan Executive, but in any case does not comprise any particular "claim" about Colombia's conduct capable of rejection by that State.

43. On 10 September 2013, President Ortega reportedly stated that:

> "'The call that I make to President Santos, to the Government of Colombia, to some Central American Governors that are throwing out declarations talking about expansionism, is that these are times in which law, and not force, must prevail . . . Going for force would mean to go back to the Stone Age. If we take the lawful route that would mean the strengthening of peace, if we go for force it would mean to feed more wars in the world, if we go for law it would make wars go away and to promote the peace in the world', he assured. In that sense he reaffirmed that Nicaragua is committed to peace, just like the countries of Latin America and the Caribbean." (Memorial of Nicaragua,

Annex 39, "Daniel: 40 years from the martyrdom of Allende, peace must prevail", *El 19 Digital*, 11 September 2013, p. 411.)

44. In response to Colombia's insistence on the negotiation between the two States of a treaty to implement the 2012 Judgment, President Ortega further stated that:

> "We understand the position taken by President Santos, but we cannot say that we agree with the position of President Santos . . . We do agree that it is necessary to dialogue, we do agree that it is necessary to look for some kind of agreement, treaty, whatever we want to call it, to put into practice in a harmonious way, like brother peoples, the Judgment of the International Court of Justice . . ." (Memorial of Nicaragua, Annex 39.)

He also stated:

> "The Court's decisions are obligatory . . . They are not subject to discussion. It's disrespectful to the Court. It is as if we decided not to abide by the ruling because we didn't receive 100 percent of what we asked, which in this case was the San Andrés archipelago.
>
> . . . .
>
> Nicaragua wants peace . . . We have no expansionist aims . . . we only want what the Court at The Hague granted us in its ruling." (Written Statement of the Republic of Nicaragua to the Preliminary Objections of the Republic of Colombia, Annex 7, "Colombia will Challenge Maritime Border with Nicaragua", *ABC News*, 10 September 2013, p. 115.)

45. Three points are striking about these 10 September remarks. First, President Ortega, in discussing the preference of Nicaragua for "peace" does not make any allegation against Colombia that Colombia is threatening that "peace" nor any claim that Nicaragua's legal rights were being infringed by Colombia. Second, the statements were made a day after Colombia passed Decree No. 1946, yet that Decree is not referred to by President Ortega even though it now forms a core part of the "dispute" said to have arisen before the two Parties at this time (Memorial of Nicaragua, pp. 26-33). Third, to the extent that these statements disclose any "claim" by Nicaragua or disagreement between the Parties, it would appear only to relate to the actions necessary for the Parties to give effect to the 2012 Judgment and specifically, as Nicaragua notes, the "legal requirement for a treaty in order to make the November 2012 Judgment effective or binding on the Parties" (*ibid.*, para. 2.59). They do not, however, disclose any "claim" in respect of an alleged violation by Colombia of Nicaragua's sovereign rights or maritime zones nor any threat of the use of force.

46. On 12 September 2013, the National Assembly of Nicaragua declared "its full endorsement of the position of the Government of Nicaragua for a peaceful solution through a treaty implementing the Judgment" (Memorial of Nicaragua, para. 2.59 and Annex 40, "Assembly of Nicaragua supports dialogue with Colombia", *El Universal*, 12 September 2013). It furthermore "urge[d] Colombia to comply with international law and to abide by the ruling of the International Court of Justice, which is final and of unavoidable compliance". This declaration, at most, could imply a claim that Colombia had yet to comply with the 2012 Judgment, but does not indicate any "claim" that Colombia was breaching Nicaragua's sovereign rights or maritime zones nor threatening the use of force as a result of any such alleged non-compliance.

47. On 13 September 2013, President Ortega reiterated his call for the creation of a commission to oversee implementation of the 2012 Judgment, stating:

> "We are ready, we are willing to create the corresponding commission to meet with a commission from our brother country Colombia, from the Colombian Government, and that together we can work to make possible the implementation of the Court's Judgment, and this will be supported, ratified; because the Judgment has been delivered already, it is just about laying it down, so that it will be laid down in what will be a treaty between Colombia and Nicaragua . . . In that treaty, Colombia and Nicaragua will be proceeding with the Judgment's compliance, with the ICJ's Judgment. This is the Peace path, the Unity path, the Fraternity path." (Preliminary Objections of Colombia, Annex 41, "Ortega says that Nicaragua is ready to create a Commission to ratify the Judgment of the ICJ", *La Jornada*, 13 September 2013, p. 345.)

48. This is the last statement of President Ortega cited by the Parties prior to the filing of Nicaragua's Application on 26 November 2013.

49. None of the above statements is — either alone or collectively — capable of being read to constitute a "claim" capable of rejection by Colombia. What is telling is the silence in these statements, and the statements which have not been adduced. Two points bear emphasizing.

50. First, there is no evidence that Nicaragua ever framed claims against Colombia's acts by reference to the legal rights now before the Court. In fact, the statements made by Nicaraguan officials were generally vague and unspecific. To the extent that they *were* specific, they referred not to the subject-matter of the claims now before the Court but rather to the steps necessary to ensure compliance with the 2012 Judgment.

51. Second, a number of the statements tend to indicate the opposite

conclusion: that the Parties did not consider that their claims were "positively opposed", rather indicating their constructive attempts to implement the 2012 Judgment.

52. While it might be appropriate, as I stated earlier, to infer that a respondent's conduct impliedly rejected claims raised by an applicant, the converse cannot be true. It is not possible for Colombia to reject — either expressly or impliedly — claims that were never raised. In the circumstances of this case, it is difficult to see how any of the above statements constituted a "claim" capable of being "positively opposed" by Colombia, or capable of resulting in a "disagreement on a point of law or fact" between the Parties in relation to the rights now in dispute.

53. I conclude from my review of the factual record that, prior to filing its Application, Nicaragua made no claim that Colombia had breached its sovereign rights or maritime spaces or had unlawfully threatened the use of force. In such a circumstance, there could be no "dispute" between the Parties with respect to these matters at the requisite date. To the extent that any dispute *did* arise, that dispute could only be characterized as relating to the Parties' interpretation of, or compliance with, the 2012 Judgment. That is not a matter brought by Nicaragua before the Court for determination in these proceedings.

5. The Court's Analysis Is Contradicted by the Evidentiary Record

54. Having assessed the evidentiary record before the Court, I return to the Court's holdings, summarized above, that one dispute existed while the other did not.

55. The Court begins its analysis of whether a dispute existed as to Nicaragua's sovereign rights and maritime spaces in paragraph 69 by observing that:

> "following the delivery of the 2012 Judgment, the President of Colombia proposed to Nicaragua to negotiate a treaty concerning the effects of that Judgment, while the Nicaraguan President, on a number of occasions, expressed a willingness to enter into negotiations for the conclusion of a treaty to give effect to the Judgment, by addressing Colombia's concerns in relation to fishing, environmental protection and drug trafficking".

A logical conclusion of this circumstance in my opinion would be that following the delivery of the 2012 Judgment there was no dispute between the Parties as regards Nicaragua's sovereign rights and maritime spaces. Oddly, in my view, the Court, anticipating its conclusion, concludes in paragraph 69 that "the fact that the Parties remained open to a dialogue does not by itself prove that, at the date of the filing of the Application, there existed no dispute between them".

56. As stated at paragraph 25 (above), the Court proceeds in paragraph 69 to refer to two pieces of evidence. One is a 1 December 2012 statement of President Santos of Colombia and the other is a 10 September 2013 statement of President Ortega of Nicaragua. These are the only pieces of evidence the Court references to support its conclusion that "[i]t is apparent from these statements that the Parties held opposing views on the question of their respective rights in the maritime areas covered by the 2012 Judgment" and therefore that a dispute existed. In particular, it reaches the conclusion that "the Parties held opposing views" by juxtaposing the December 2012 statement of President Santos of Colombia with the September 2013 reported statement of President Daniel Ortega of Nicaragua. Three deficiencies in the Court's reasoning need to be emphasized:

— First, jurisprudentially, the question is whether Nicaragua ever stated a claim which Colombia could have positively opposed. In this sense, only one of the two pieces of evidence is relevant. The question is not whether statements by two States separated by almost a year should be read to suggest a conflict of interests.

— Second, the statements cited at most suggest a conflict of interests as to compliance with the 2012 Judgment. But non-compliance with the 2012 Judgment is a matter that both Nicaragua and the Court repeatedly state is not the dispute before the Court. The statements of President Ortega (there are two on 10 September 2013), as quoted fully and discussed at paragraphs 43 to 45 above, in discussing the preference of Nicaragua for "peace" does not make any allegation against Colombia that Colombia is threatening that "peace" nor make any claim that Nicaragua's legal rights were being infringed by Colombia. In addition, the statements were made a day after Colombia passed Decree No. 1946, yet that Decree is not referred to by President Ortega even though it now forms a core part of the "dispute" said to have arisen before the two Parties at this time (Memorial of Nicaragua, pp. 26-33). The 10 September 2013 statements do not communicate any "claim" in respect of an alleged violation by Colombia of Nicaragua's sovereign rights or maritime zones nor any threat of the use of force.

— Third, it is striking that the Court chooses to juxtapose two statements made almost a year apart. Arguably more relevant than the 1 December 2012 statement of President Santos (made only days after the delivery of the Judgment) is the interview that took place with the Colombian Minister for Foreign Affairs on 15 September 2013 shortly after President Ortega's statement of 10 September 2013. Minister María A. Holguín's views are reported as follows:

> "*María A. Holguín speaks about the four pillars for the defence of National sovereignty in the Caribbean.*
>
> The Minister of Foreign Affairs María Angela Holguín explained to *El Tiempo* the scope of the 'integral strategy' to defend the Colombian sovereignty in the Caribbean Sea. She stated that the Government does not disregard the Court of The Hague's Judgment — in which this Tribunal recognized greater rights to Nicaragua over those waters, but that the country 'is facing a legal obstacle' to apply it.
>
> . . . .
>
> *How and when would you dialogue with Nicaragua to sign a border treaty?*
>
> Colombia is open to a dialogue with Nicaragua to sign a treaty that establishes the boundaries and a legal regime that contributes to the security and stability in the region. The Government has said that it awaits the decision of the Constitutional Court before initiating any action." (Preliminary Objections of Colombia, Annex 42, "The Minister of Foreign Affairs explains in detail the strategy vis-à-vis Nicaragua", *El Tiempo*, 15 September 2013, p. 349.)

The Court fails to engage with these contemporaneous statements by Minister Holguín. The above statements contextualize the earlier statements of President Santos, and indicate that Colombia was not "opposing" the implementation of the 2012 Judgment, nor contesting its binding character, but rather questioning the legal steps necessary to apply it.

57. In paragraph 70 of the Judgment, referring to "Colombia's proclamation of an 'Integral Contiguous Zone'", the Court writes that "the Parties took different positions on the legal implications of such action in international law". In so asserting, however, the Court does not cite any evidence indicating in what form or by which means those "different positions" were expressed. And nor could it: such evidence is simply not in the record before the Court.

58. The Court in paragraph 72 observes that a "formal diplomatic protest" is not a prerequisite. I agree. However, the problem in the instant case is that there also is not an informal protest or any statement that is a claim by Nicaragua of violation of a legal right. The Judgment does not address Colombia's objection that there was no such claim or complaint in any form. Instead, the Judgment — again without reference to the record — states that:

> "in the specific circumstances of the present case, the evidence clearly indicates that . . . Colombia was aware that its enactment of Decree 1946 and its conduct in the maritime areas declared by the

> 2012 Judgment to belong to Nicaragua were positively opposed by Nicaragua" (Judgment, para. 73).

This statement by the Court turns completely on its head its jurisprudence as to the requirement that a dispute exist at the time an Application is filed. In this case, the Court does not ask whether the Applicant — Nicaragua — made in any form a claim of legal violation prior to the lodgment of the Application. Rather, it infers that the Respondent must have been "aware" that the Applicant positively opposed actions that the Respondent had taken. With all due respect, this reasoning misapprehends the Court's jurisprudence regarding the requirement that a dispute exist. This reasoning through its silence does not accurately represent the record. This holding in practice signals the end of the application of a reasoned requirement that a dispute exist.

59. Turning to the assessment by the Court of whether a dispute existed as to the threat of the use of force, the Court does not state that a dispute does not exist because Nicaragua failed to claim, protest or object to a threat of the use of force by Colombia. It could have done so because there is no such claim, protest or threat in the record. But it does not. Rather, the Judgment refers to evidence in which representatives of the Nicaraguan Government described the situation at sea as calm. A statement of the President of Nicaragua on 14 August 2013 that "there has not been any kind of confrontation" between the naval forces of the two States. A statement by the Chief of the Nicaraguan Naval Force on 18 November 2013 that there were neither problems nor conflicts with the Colombian navy. Surprisingly, the Judgment does not discuss whether there was a claim of legal violation in the first instance. The Judgment confuses the identification of a claim of legal violation by the Applicant with the perhaps necessary inference of a positive opposition to such a claim by the Respondent. Putting aside why statements that the situation is calm or that there are no conflicts are relevant to an asserted dispute as to the *threat* of force, the fact is that there is no claim, in any form, by Nicaragua prior to the lodgment of the Application objecting to a threat of the use of force by Colombia.

60. If the Judgment had found that there was no dispute as to the threat of the use of force because there was no claim of legal violation in that regard by Nicaragua, then the same reasoning should lead to the same conclusion that there was no dispute in regard to Nicaragua's rights in the relevant maritime zones.

III. The Third Preliminary Objection as to the Possibility of Negotiations

61. Article II of the Pact of Bogotá provides in part that "in the event that a controversy arises between two or more signatory States which, in the opinion of the parties, cannot be settled by direct negotiations through the usual diplomatic channels, the parties bind themselves to use the procedures established in the present Treaty . . .". The Court in its Judgment proceeds from the basis of its 1988 holding that the reference to direct negotiation in Article II of the Pact "constitutes . . . a condition precedent to recourse to the pacific procedures of the Pact in all cases" (*Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 94, para. 62). In so proceeding, the Court in paragraph 95 holds that the test for determining whether settlement is not possible is "whether the evidence provided demonstrates that, at the date of Nicaragua's filing of the Application, neither of the Parties could plausibly maintain that the dispute between them could be settled by direct negotiations through the usual diplomatic channels" (Judgment, para. 95).

62. The Court finds that "[n]o evidence submitted to the Court indicates that, on the date of Nicaragua's filing of the Application, the Parties had contemplated, or were in a position, to hold negotiations to settle the dispute concerning the alleged violations by Colombia of Nicaragua's rights in the maritime zones" and on that basis rejects Colombia's third preliminary objection (*ibid.*, paras. 100-101).

63. I agree with the Court that an obligation to negotiate is satisfied if there is no prospect of settlement. The PCIJ in *Mavrommatis* articulated such an exception to the negotiations requirement present in that case as follows:

> "Negotiations do not of necessity always presuppose a more or less lengthy series of notes and despatches; it may suffice that a discussion should have been commenced, and this discussion may have been very short; this will be the case if a dead lock is reached, or if finally a point is reached at which one of the Parties definitely declares himself unable, or refuses, to give way, and there can therefore be no doubt that *the dispute cannot be settled by diplomatic negotiation*." (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 13.)

64. The Court's conclusion in paragraph 100, however, that "[n]o evidence" indicates that "the Parties had contemplated, or were in a position, to hold negotiations to the settle the dispute" (Judgment, para. 100) is not only not supported by the evidence, it is *contradicted* by the evidence.

65. The Court at the outset of its reasoning observes that "through

various communications between the Heads of State of the two countries since the delivery of the 2012 Judgment, each Party had indicated that it was open to dialogue to address some issues raised by Colombia as a result of the Judgment" (Judgment, para. 97). This statement is a correct reflection of the evidence.

66. The Court also observes that

> "[t]he issues that the Parties identified for possible dialogue include [1] fishing activities of the inhabitants of San Andrés, Providencia and Santa Catalina in waters that have been recognized as appertaining to Nicaragua by the Court, [2] the protection of the Seaflower Biosphere Marine Reserve, and [3] the fight against drug trafficking in the Caribbean Sea" *(ibid.)*.

This statement is also a correct reflection of the evidence.

67. As an initial matter therefore, the Court's statement that there is "[n]o evidence" to indicate that the Parties contemplated negotiation is inconsistent with the record.

68. The Court's holding, however, is more subtly worded, focusing as it does on there being no evidence that the Parties contemplated negotiations *"to settle the dispute"* (*ibid.*, para. 100; emphasis added).

69. Examined more closely, the Court's reasoning relies upon its view that, although the Parties expressed a willingness to discuss substantive issues, they had each imposed certain preconditions to any such negotiations that were so diametrically opposed that the Parties did not contemplate, or were not in a position to negotiate, a settlement. The Court constructs these preconditions in paragraph 98 of the Judgment.

70. Regarding Nicaragua's asserted preconditions, the Court in paragraph 98 appears to refer to its own characterization of what it has held to be Nicaragua's dispute. The Court writes "for Nicaragua, such negotiations had to be restricted to the modalities or mechanisms for the implementation of the [2012] Judgment". It does not rely on any statement of Nicaragua. Indeed, it offers no citation to any piece of evidence.

71. Regarding Colombia's asserted preconditions, the Court in paragraph 98 states that Colombia did not "define" the subject-matter of the negotiations in the same way. In doing so, it quotes the interview with the Colombian Minister for Foreign Affairs María A. Holguín on 15 September 2013 that is reproduced in full at paragraph 56 above. The Court at paragraph 98 uses the Minister's statement that Colombia is open to a dialogue with Nicaragua to "sign *a treaty that establishes the boundaries*" to make its point that while the two nations may have been open to dialogue they held quite different views about the content of such dialogue that made the prospects for settlement extremely unlikely.

72. The Court's juxtaposition of negotiating objectives is unfounded both in the record and in law.

— First, the Court repeatedly, and with good reason, in the Judgment elsewhere refers to the importance of examining substance and not

form. Yet in this holding its reasoning rests on formalities of negotiation rather than their substance. As described above, the Parties repeatedly indicated they were open to discuss many areas of substance with fishing rights being a particularly significant one. Settlement of any of the substantive areas may have resolved matters. Settlement of any of the substantive areas certainly would have narrowed matters. Preconditions (if there were any) themselves may be simply a part of a negotiating stance and for this reason need to be appraised carefully.

— Second, perhaps a juxtaposition of negotiating preconditions could indicate that the chances of a negotiated settlement were remote if there were clear statements indicating that a party was open to dialogue *only if* the particular issue of concern was resolved first. But that is not the case here. There are no such statements in the record by Colombia (or Nicaragua) in the relevant months leading up to the filing of the Application of Nicaragua.

— Third, and most strikingly, the record directly contradicts the Court's holding. It is true that the Colombian Foreign Minister's statement did "define" in some sense an aim of the negotiations from Colombia's perspective. But it did not do so in a way different from that of Nicaragua and certainly did not do so in the way the Court suggests. The Court quotes this statement to support the idea that Colombia sought a treaty that would re-establish the boundaries it had prior to the 2012 Judgment. It is that assertion which would be incompatible with the Court's unsupported construction of Nicaragua's negotiating position in the same paragraph. But that assertion also is flatly contradicted by the record. The Foreign Minister's statement clearly does not seek to re-establish the boundaries that existed before the Judgment but rather to establish the boundaries of the Judgment through an implementing treaty that will satisfy the internal legal requirements of Colombian constitutional law. She states:

> "[T]he Government does not disregard the Court of The Hague's Judgment — in which this Tribunal recognized greater rights to Nicaragua over those waters —, but that the country 'is facing a legal obstacle' to apply it.
>
> . . . .
>
> Colombia is open to a dialogue with Nicaragua to sign a treaty that establishes the boundaries and a legal regime that contributes to the security and stability in the region. The Government has said that it awaits the decision of the Constitutional Court before initiating any action." (Preliminary Objections of Colombia, Annex 42, "The Minister of Foreign Affairs Explains in Detail the Strategy vis-à-vis Nicaragua", *El Tiempo*, 15 September 2013, p. 349.)

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73. Having reaffirmed the obligation to pursue negotiations under Article II of the Pact of Bogotá, the Court finds contrary to the statements of the Parties that there was no prospect of settlement. I dissent. This conclusion is not supported by the evidence, and is more broadly of concern, for the Court in so doing undermines the centrality of a duty to negotiate both as a part of the peaceful settlement of disputes and specifically as a part of the scheme set out by the Pact of Bogotá. It is important to recall the insights of the PCIJ in this respect:

> "The Court realizes to the full the importance of the rule laying down that only disputes which cannot be settled by negotiation should be brought before it. It recognizes, in fact, that before a dispute can be made the subject of an action at law, its subject-matter should have been clearly defined by means of diplomatic negotiations." (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 15.)

IV. Concluding Observation

74. The Court in objectively determining the subject-matter of the disputes before it can be called upon to make fine distinctions. In the present case, it has distinguished very finely between a claim for non-compliance with a judgment of the Court and a claim for violation of the rights granted by such judgment. This dissent makes clear that the Court is not nearly as adept at distinguishing whether a certain piece of evidence bears on non-compliance with the 2012 Judgment or on a violation of sovereign rights and maritime spaces defined in the 2012 Judgment. The ease with which these two claims overlap and the difficulty the Court has in assessing the evidence will likely complicate the Court's task at the merits phase of this case.

(Signed) David D. Caron.