215. ALLEGED VIOLATIONS OF SOVEREIGN RIGHTS AND MARITIME SPACES IN THE CARIBBEAN SEA (NICARAGUA v. COLOMBIA)

Judgment of 17 March 2016

On 17 March 2016, the International Court of Justice delivered its Judgment in the case concerning the *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia).*

The Court was composed as follows: 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.

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The operative paragraph of the Judgment (para. 111) reads as follows:

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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.

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Judge Cançado Trindade appended a separate opinion to the Judgment of the Court; Judge Bhandari appended a declaration to the Judgment of the Court; Judge *ad hoc* Caron appended a dissenting opinion to the Judgment of the Court.

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1. INTRODUCTION

The Court recalls 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". 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) (I.C.J. Reports 2012 (II)*, p. 624) (hereinafter the "2012 Judgment").

The Court notes that Colombia has raised five preliminary objections to its jurisdiction. In its written observations and final submissions during the oral proceedings, Nicaragua requested the Court to reject Colombia's preliminary objections in their entirety.

II. FIRST PRELIMINARY OBJECTION

In its first preliminary objection, Colombia argues that 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.

The Court recalls that, in Colombia's denunciation of the Pact of Bogotá, it is stated that the 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", which stipulates that the denunciation shall have no effect with respect to pending procedures initiated prior to the transmission of the particular notification. The Court notes that Nicaragua's Application was submitted to it 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. According to that provision, at the end of the notice period in question, the Pact shall cease to be in force with respect to the State denouncing it, but shall continue in force for the remaining signatories.

Colombia contends that the natural implication of the express provision in the second paragraph of Article LVI of the Pact is that denunciation is effective with regard to procedures initiated after the transmission of a notification. It 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. 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. Finally, it maintains that its interpretation is "also consistent with the State practice of the parties to the Pact" and the *travaux préparatoires*.

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 adds that 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 are provisions which have entirely served their purpose and would fulfil no function during the one-year period of notice, while others are inextricably linked to the procedures in Chapters Two to Five and impose no obligations independent of those procedures. Finally, Nicaragua denies that the practice of the parties to the Pact of Bogotá or the *travaux préparatoires* support Colombia's interpretation.

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. By Article XXXI of the Pact of Bogotá, the Parties 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. The Court is of the opinion that 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 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, which stipulates that "[t]he denunciation shall have no effect with respect to pending procedures initiated prior to the transmission of the particular notification", may be subject to an *a contrario* reading, countering 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. 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, which reflect rules of customary international law.

The Court observes that it is not the denunciation *per se* that is capable of having an effect upon the jurisdiction of the Court under Article XXXI, 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 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 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.

The Court considers that Colombia's interpretation of the second paragraph of Article LVI runs counter to the language of Article XXXI. It is of the view that the second paragraph of Article LVI is open to another interpretation – one which is compatible with Article XXXI – according to which, 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. The Court adds that 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. The Court further observes that Colombia's interpretation is not compatible with the object and purpose of the Pact of Bogotá, which 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.

The Court remains unconvinced by Colombia's argument 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. Colombia's argument 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, does not shed any light on the question currently before the Court. As for *the travaux préparatoires*, they give no indication as to the precise purpose behind the addition of what became the second paragraph of Article LVI.

For all of these 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

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.

The Court notes that 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". 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. The Court further recalls that "[w]hether there exists an international dispute is a matter for objective determination" by the Court. "The Court's determination must turn on an examination of the

facts. The matter is one of substance, not of form." In principle, the critical date for determining the existence of a dispute is the date on which the application is submitted to the Court.

The Court recalls that Nicaragua makes two distinct claims – one that Colombia has violated Nicaragua's sovereign rights in its maritime zones, and the other that Colombia has breached its obligation not to use or threaten to use force. It examines these two claims separately in order to determine, with respect to each of them, whether there existed a dispute at the date of filing of the Application.

With regard to Nicaragua's first claim, the Court pays particular attention to the views expressed by the two States in the declarations and statements made by their senior officials on the question of their respective rights in the maritime areas covered by the 2012 Judgment; the incidents at sea involving Colombian vessels or aircraft alleged to have taken place in those areas; and the Parties' positions on the implications, in terms of the extent of their maritime spaces, of Colombia's Decree on the establishment of an "Integral Contiguous Zone".

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 allegation. The Court notes that Colombia took the view that its rights were "infringed" as a result of the maritime delimitation by the 2012 Judgment. Nicaragua, for its part, insisted that the maritime zones declared by the Court in the 2012 Judgment must be respected. The Court holds that 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.

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.

Regarding the incidents at sea involving vessels or aircraft of Colombia 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.

Finally, 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, Colombia could not have misunderstood the position of Nicaragua over such differences.

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.

The Court then turns to the question of the existence of a dispute with regard to Nicaragua's second allegation, 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.

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. 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. 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.

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

Colombia contends in its third objection that the Court does not have 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.

Referring to the 1988 Judgment in the *Border and Transborder Armed Actions (Nicaragua* v. *Honduras)* case, 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.

For its part, Nicaragua rejects the interpretation of Article II advanced by Colombia, maintaining that Colombia misreads the Court's 1988 Judgment. 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.

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". 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. Moreover, 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. Consequently, in the present proceedings, 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.

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 Court notes, however, that the 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".

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.

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

The Court recalls that 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 and that Nicaragua's claim can find no support either in the Statute of the Court or in its case law.

The Court notes that the "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

According to Colombia's fifth objection, the Court has no jurisdiction with regard to compliance with a prior judgment.

The Court notes that 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. Accordingly, it is unnecessary to rule on Colombia's fifth preliminary objection in so far as it relates to inherent jurisdiction. 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.

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. Nevertheless, as the Court has held, 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". 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.

Colombia's fifth preliminary objection must therefore be rejected.

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Separate opinion of Judge Cançado Trindade

1. In his Separate Opinion, composed of eleven parts, Judge Cançado Trindade presents the foundations of his personal position on one issue raised by the contending parties, Nicaragua and Colombia, before the International Court of Justice (ICJ), 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*. The issue, concerning the fourth preliminary objection raised by Colombia, concerns the inherent powers or *facultés* of contemporary international tribunals, the case-law of which was invoked by both contending parties before the ICJ.

2. Judge Cançado Trindade begins by observing (part I) that, in the present Judgment, the 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 at issue 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 (para. 104 of the Judgment).

3. Given the importance that he attaches 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*, he felt obliged to leave on the records, first, the positions of the parties and the treatment dispensed to it (parts II-III), and, in sequence, the foundations of his own personal position on it, in its interrelated aspects (parts IV-X), namely: 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.

4. Judge Cançado Trindade contends that this is a matter which cannot simply be eluded, being "of relevance to the operation of contemporary international tribunals, in their common mission of the realization of justice" (para. 4). After recalling the written submissions of both parties, as well as the responses given by Nicaragua and Colombia to the three questions he put to both of them in the public sitting of the Court of 02 October 2015 (paras. 5-12), he points out the broader scope of inherent powers sustained by Nicaragua (para. 13). The ICJ, in his view, should have pronounced upon the issue (the distinct outlooks to it), rather than having "abstained from doing so" in a "rather minimalist outlook", – which he does not share, – of the exercise of the international judicial function (para. 15).

5. Judge Cançado Trindade stresses that the issue of inherent powers or *facultés* has, in effect, been raised time and time again before international tribunals (para. 16). He refers to his own previous Separate and Dissenting Opinions dealing with it (paras. 16-18, 20-22, and 24-26) – both in the ICJ and, earlier on, in the Inter-American Court of Human Rights (IACtHR) – in its distinct aspects, and remarks that inherent powers and beyond State consent: "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" (para. 19).

6. This brings him to the question of the teleological interpretation, pursuant to the principle of *effet utile*, or *ut res magis valeat quam pereat*. In his understanding, the teleological interpretation, which he supports, "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" (para. 22), as shown by the relevant case-law of both the European Court of Human Rights (ECtHR) and the IACtHR (paras. 23-26).

7. After disclosing the pitfalls of State voluntarism in judicial settlement of international disputes, he stressed that, in his 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" (para. 27).

8. Moving to another aspect, at epistemological level, Judge Cançado Trindade then states that the understanding, which he sustains, that *recta ratio* stands above *voluntas*, human conscience above the "will", is in line with jusnaturalist thinking, going back to the lessons of the "founding fathers" of the law of nations (as from the Sixteenth-century lessons of Francisco de Vitoria), based on a *lex praeceptiva*, apprehended by human reason, and certainly not derived from the "will" of subjects of law (States and others) themselves. And he adds that

> "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. (...)
>
> 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" (paras. 28-29).

9. Judge Cançado Trindade then reviews the international legal doctrine in this line of thinking (paras. 30-37), – which is his own, – as well as his Separate and Dissenting Opinions within the ICJ to this effect (paras. 38-40), and then adds:

> "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 pre-history 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'" (para. 41).

10. Moving to the issue of the *compétence de la compétence* (*Kompetenz Kompetenz*) beyond State consent, Judge Cançado Trindade pointed out that international human rights tribunals (like the IACtHR and the ECtHR), 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*, – 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.
>
> (...) 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.
>
> 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 ECtHR and the IACtHR contributed to the primacy of considerations of *ordre public* over the subjective voluntarism of States. (...) In sum, for taking such position of principle, the IACtHR and the ECtHR rightly found that conscience stands above the will" (paras. 43-45).

11. As to international criminal tribunals, – he proceeds, – the *ad hoc* International Criminal Tribunal for the Former Yugoslavia (ICTY) has likewise relied on its own *compétence de la compétence* (paras. 46-47). Moreover, international tribunals have made use of their inherent powers or *facultés* in distinct situations (paras. 48-55), such as in filling *lacunae* of their *interna corporis* (para. 56). 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. In sum,

> "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" (para. 58).

12. In Judge Cançado Trindade's perception, 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" (paras. 59-60). It is their understanding that "their task goes beyond peaceful settlement of disputes, as they also *say what the Law is* (*juris dictio*)" (paras. 61-62). They have gone beyond traditional transactional justice. There is support for their larger conception of saying what the Law is (*juris dictio*), – thus contributing also to the progressive development of international law, – e.g., in the relevant case-law of international human rights tribunals and international criminal tribunals (para. 63). It is also implicit in the notion of "pilot judgments/*arrêts pilotes*" in the work specifically of the ECtHR (para. 66).

13. As to the remaining aspect of inherent powers and supervision of compliance with Judgments (a point raised by the two contending parties, on distinct grounds, before the ICJ), Judge Cançado Trindade ponders that 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 his view does not at all mean that, once it renders its judgment or decision, it can remain indifferent as to its compliance (para. 67).

14. The fact, for example, that Article 94 (2) of the U.N. Charter entrusts the Security Council with the enforcement of ICJ judgments and decisions, in his view, "does not mean that compliance with them ceases to be a concern of the Court. Not at all. Moreover, the Security Council has, in practice, very seldom done anything at all in that respect." It is important to avoid the additional breach of non-compliance; this "remains a concern of the ICJ as well as of all other international tribunals" (para. 68).

15. 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. Article 94 (2) of the U.N. Charter does *not* confer an *exclusive* authority to the Security Council to secure that compliance, and a closer look at some provisions of the Statute[1] shows that "the Court is entitled to occupy itself with compliance with its own judgments and decisions" (para. 69). Judge Cançado Trindade considers that what is thus to be criticized "is not judicial law-making (as often said without reflection), but rather judicial inactivism or absenteeism, – in particular in respect of ensuring compliance with judgments and decisions" (para. 70).

16. He then observes that, for their part, ECtHR counts on the assistance of the Committee of Ministers, and the IACtHR has resorted to post-adjudicative hearings (para. 71). The powers of the Committee of Ministers to supervise the execution of the ECtHR's judgments are not exclusive either; the Court can be concerned with it, as the ECtHR itself has expressly acknowledged. In sum, in his understanding, "no international tribunal can remain indifferent to non-compliance with its own judgments. The inherent powers of

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

international tribunals extend to this domain as well, so as to ensure that their judgments and decisions are duly complied with" (para. 72). And he adds:

> "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. 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 U.N. General Assembly[2], and has been attracting increasing attention of member States, year after year.
>
> (...) 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" (paras. 73 and 75).

17. Last but not least, coming to his brief epilogue, Judge Cançado Trindade notes that, the handling by the Court, in the present case, of "the question raised by the fourth preliminary objection 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 (para. 76).

18. Their submissions should, in his 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" (para. 77).

19. 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), in Judge Cançado Trindade's view "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)[3]" (para. 78). He feels 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 – as the Court has done, "in an elusive way", – that "there is no ground" to pronounce upon it[4].

20. The consideration of the use of inherent powers or *facultés* by contemporary international tribunals beyond State consent, has prompted Judge Cançado Trindade, in the present Separate Opinion, to bring to the fore his understanding that

[2] Cf. General Assembly resolutions 61/39, of 18 December 2006; 62/70, of 06 December 2007; 63/128, of 11 December 2008; 64/116, of 16 December 2009; 65/32, of 06 December 2010; 66/102, of 09 December 2011; 67/97, of 14 December 2012; 68/116, of 16 December 2013; 69/123, of 10 December 2014; and 70/118, of 14 December 2015.

[3] Cf. paras. 17 and 102 of the present Judgment.

[4] Cf. para. 104 and resolutory point 1 (e) of the *dispositif* of the present Judgment.

"*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" (para. 82).

Declaration of Judge Bhandari

In his declaration Judge Bhandari recalls that he has joined the majority with respect to the first four preliminary objections raised by Colombia. However, he differs from the majority in that he would uphold Colombia's fifth preliminary objection and thus refuse to allow the present case to proceed to the merits phase. Judge Bhandari recalls that according to the fifth preliminary objection, Nicaragua's claim constitutes an improper attempt to have the Court enforce one of its prior judgments. According to Article 94 (2) of the United Nations Charter and Article L of the Pact of Bogotá, it is clear that the appropriate avenue for an aggrieved party to seek enforcement of an ICJ judgment is the United Nations Security Council. Though both Nicaragua and Colombia have clearly framed this case as a request to enforce the 2012 Judgment, the Court has nevertheless declared in the present Judgment that the real character of the dispute involves alleged violations of customary international law by Colombia. Though it is correct, as a matter of law, that it is for the Court – not the Parties – to ultimately determine the true essence of the dispute, Judge Bhandari disagrees with the majority's factual conclusion that Nicaragua's present claim does not seek to enforce the 2012 Judgment. The majority cites paragraph 79 of the present Judgment in support of its conclusion that the dispute does not arise directly out of the 2012 Judgment. However, paragraph 79 and the analysis preceding it deal with the Court's analysis of a completely separate issue underpinning an altogether different preliminary objection raised by Colombia – namely, whether there existed a dispute between the Parties when Nicaragua filed its Application – which has no bearing on the present inquiry. Moreover, there is abundant evidence on record, which the majority has not sufficiently accounted for, clearly demonstrating that Nicaragua's present claim is an obvious attempt to enforce the 2012 Judgment.

Dissenting opinion of Judge *ad hoc* Caron

Judge Caron dissents 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 to Judge Caron that in finding that it possesses jurisdiction, the Court's reasoning undermines in his opinion broader concepts underlying the peaceful settlement of disputes.

Judge Caron recalls that the full title of the Pact of Bogotá is the "American Treaty on Pacific Settlement" and observes that although there may not be a regimented staircase of procedures in the Pact of Bogotá, 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.

Judge Caron dissents 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 Pact of Bogotá into essentially a simple acceptance of the Court's jurisdiction. The Judgment, in profoundly shifting the requirement that there be a dispute, holds that an 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, pursuant to the Pact of Bogotá, when the dispute between two States "cannot be settled by direct negotiations" – language in Article II of the Pact that the Court's jurisprudence holds to be a precondition to jurisdiction under the Pact. It is regrettable, in Judge Caron's opinion, that the present Judgment in its holdings regarding the second and third preliminary objections formally reaffirms, yet substantively negates, the requirement that a dispute exists and the obligation to pursue negotiations.

More specifically as to the second preliminary objection, Judge Caron, applying the Court's previous jurisprudence as to the meaning and existence of a dispute, is unable to see how a "dispute" as to the subject-matter invoked by Nicaragua in its Application existed at the requisite date. In the present proceedings, 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. This significant difference is not addressed by the Judgment. It can be appropriate for the Court to infer positive opposition to a claim. It is not, in Judge Caron's view, appropriate to infer the assertion of the claim.

Judge Caron concludes from a full 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 its analysis, the Court turns 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. According to Judge Caron, this reasoning misapprehends the Court's jurisprudence regarding the requirement that a dispute exist. This holding in practice signals the end of the application of a reasoned requirement that a dispute exist.

More specifically as to the third preliminary objection, Judge Caron observes that the Court in its Judgment proceeds from the basis of its 1988 holding that the reference to direct negotiations 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 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".

Judge Caron dissents from the Court finding that "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" and on that basis rejecting Colombia's third preliminary objection. In Judge Caron's opinion, the Court's conclusion is not only not supported by the evidence, it is *contradicted* by the specific evidence cited by the Court.

Judge Caron's concluding observation is that 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, Judge Caron notes that the Court 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. The Judgment, however, in Judge Caron's opinion 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 as 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.