DECLARATION OF JUDGE TOMKA

Two bases of jurisdiction of the Court.

Objection to the jurisdiction under the Pact of Bogotá — Was the 1928 Treaty in force when the Pact of Bogotá was concluded? — Alleged manifest violation of the Constitution as a ground for invalidating the Treaty — Impact of the subsequent conduct of the Party on its right to invoke the alleged manifest violation of the Constitution as a ground for invalidating the Treaty.

The alleged lack of international capacity to conclude treaties during the occupation by the United States — The alleged coercion in the conclusion of the 1928 Treaty — The Court prevented from deciding on alleged coercion by a State which is not a party to the proceedings.

Sovereignty over the islands of San Andrés, Providencia and Santa Catalina not to be adjudicated at the merits stage.

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1. I have voted in favour of the Court's Judgment. Nevertheless, some aspects of the case and of the present Judgment call for a few observations.

2. Nicaragua invoked, in its Application, *two bases* of jurisdiction of the Court.

First, it relies on Article 36, paragraph 1, of the Statute which states, *inter alia*, that "[t]he jurisdiction of the Court comprises . . . all matters specially provided for . . . in treaties and conventions in force". In Nicaragua's view, the American Treaty on Pacific Settlement, officially known as the Pact of Bogotá, is such a treaty.

Second, Nicaragua further relies on Article 36, paragraph 2, of the Statute arguing that the jurisdiction of the Court also exists by virtue of the operation of the declaration of Nicaragua dated 24 September 1929 and the declaration of Colombia dated 30 October 1937 recognizing as compulsory the jurisdiction of the Court.

3. Colombia denies that the Court has jurisdiction on either of these two bases.

4. Colombia refers to Article VI of the Pact of Bogotá, which provides that the procedures of pacific settlement envisaged in the Pact, including the judicial procedure before the International Court of Justice, "may not be applied to matters already settled by arrangement between the parties . . . or which are governed by agreements or treaties in force on the date of the conclusion of the present Treaty"; i.e. in 1948 when the Pact was concluded. It argues that the Treaty concerning Territorial Questions at Issue between Colombia and Nicaragua of 24 March 1928

(hereinafter "the 1928 Treaty") has been in force since 1930 and that it governs the matters submitted by Nicaragua to the Court. Therefore, in Colombia's view, Article VI of the Pact of Bogotá prevents the application of the judicial procedure before this Court in the present case and the Court should declare itself to be without jurisdiction.

5. Nicaragua argues that the Treaty was not in force since, in its view, it was not validly concluded. Nicaragua denies the validity and the entry into force of the 1928 Treaty, despite the fact that it not only signed a Protocol of Exchange of Ratifications on 5 May 1930 but also registered the 1928 Treaty (with the Protocol of Exchange) in 1932 with the League of Nations.

6. Nicaragua invokes two grounds for the invalidity of the 1928 Treaty. *First*, it alleges that the 1928 Treaty was concluded in manifest violation of the Nicaraguan Constitution then in force[1]. *Second*, it contends that the Nicaraguan Government was deprived of its international capacity during the pertinent period since it could not freely express its consent to be bound by international treaties (Memorial of Nicaragua, p. 108, para. 2.102; Written Statement of Nicaragua, p. 15).

7. Nicaragua takes the view that the Court cannot pronounce itself, at this stage of the proceedings, whether the Treaty was validly concluded and has been in force, since those issues belong to the merits of the dispute. In Nicaragua's view, Colombia's preliminary objection to the jurisdiction of the Court on the basis of the Pact of Bogotá does not possess an exclusively preliminary character.

8. It would have been all too convenient for the Court to defer its decision on Colombia's objection to the Court's jurisdiction under the Pact of Bogotá. But in a situation where the issue of the validity of the 1928 Treaty and its entry into force has been determined by the Court as not constituting the subject-matter of the dispute (which consists of sovereignty over the disputed islands and other maritime features, and of maritime delimitation), and the Court has at its disposal sound legal grounds to rule on the objection, the proper administration of justice and procedural economy justify the Court upholding or rejecting the objection already at this stage.

9. I concur with the view of the Court that Nicaragua, for an extended period of more than 50 years, has treated the 1928 Treaty as valid and

[1] It may be noted that it is not the first time that Nicaragua has argued the alleged violation of its Constitution as a ground for invalidating an international treaty it had concluded. Thus in the arbitration with Costa Rica, Nicaragua invoked, among others, this argument in support of its claim that the 1858 Treaty of Limits with Costa Rica was invalid. The arbitrator in his Award of 22 March 1888 found that the 1858 Treaty of Limits was valid. See H. La Fontaine, *Pasicrisie internationale 1794-1900, Histoire documentaire des arbitrages internationaux*, 1902 (repr. by Martinus Nijhoff Publishers, The Hague 1997, pp. 299-301), J. B. Moore, *International Arbitrations To Which the United States Has Been a Party*, Vol. II, 1898, pp. 1964-1967.

never contended that it was not bound by it (Judgment, para. 79). Nicaragua, by its conduct over those years, must be considered as having acquiesced in the validity of the 1928 Treaty and its maintenance in force. Therefore it may no longer invoke the alleged manifest violation of its Constitution of 1911 as a ground for invalidating the 1928 Treaty.

10. The second ground for the invalidity of the 1928 Treaty invoked by Nicaragua is that its government was deprived of its international capacity during the pertinent period, since it could not freely express its consent to be bound by international treaties. Although mentioned in the Judgment, this argument receives a rather cryptic response from the Court. It seems that it has been dealt with in the same way as the argument based on the manifest violation of the Nicaraguan Constitution. In fact, there is a common response to both of these arguments in the Judgment (paras. 78, 79 and 80). While I have concurred with the view of the majority as far as the first ground of invalidity is concerned, I consider that the second ground requires a different response in view of the difference in nature between the two grounds invoked. The International Law Commission, in its commentary to what has become Article 45 of the 1969 Vienna Convention, excluded the case of coercion from the application of the principle that the State may, on account of its subsequent conduct, lose a right to invoke the invalidity of a treaty. It stated that in the case of coercion "a consent so obtained must be treated as absolutely void in order to ensure that the victim of the coercion should afterwards be in a position freely to determine its future relations *with the State which coerced it*" (*Yearbook of the International Law Commission*, 1966, Vol. II, p. 239; emphasis added).

11. The argument advanced by Nicaragua is not without difficulties. If it is to be understood broadly, generally, then it would run counter to the other basis of the Court's jurisdiction invoked by Nicaragua, i.e., the optional clause declaration under Article 36, paragraph 2, of the Statute. Nicaragua made such a declaration in *1929*, exactly in the *pertinent period* when its government, as it is now alleged, was deprived of its international capacity. When in 1984 Nicaragua instituted proceedings in the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* case, the Court treated its declaration as valid and in force (see *I.C.J. Reports 1984*, p. 442, para. 113 (1)).

In fact, in all proceedings involving Nicaragua before the Court in the past, its optional clause declaration of 1929 was relied on as a basis of the Court's jurisdiction (see, for example, *Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras* v. *Nicaragua), Judgment, I.C.J. Reports 1960*, p. 194; *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 1988,* p. 71, para. 1, p. 82, para. 25; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment,*

I.C.J. Reports 2007, p. 664, para. 1). Such a broadly construed argument cannot be accepted, since it is contradicted by the findings made by the Court in previous cases involving Nicaragua.

12. Nicaragua itself admits that it was not prevented from concluding international treaties in general (CR 2007/19, p. 11, para. 13). But then it is difficult to accept its contention that the Nicaraguan Government was deprived of its international capacity during the relevant period. Nicaragua therefore specifies that while it was under occupation by the United States, it was prevented from concluding treaties that ran against the interest of the United States and from rejecting the conclusion of treaties that the United States demanded it to conclude. The interests of a third State, even its demand to conclude a treaty, do not render such a treaty null and void *ab initio*. That could only be a consequence if a State was coerced to conclude a treaty by the threat or use of force in violation of the principles of international law. It seems that that is what Nicaragua suggests when it refers to Article 52 of the Vienna Convention on the Law of Treaties, which provides that "[a] treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations".

13. The issues raised by Nicaragua in its argument are complex. They relate both to facts and law, including the law of treaties applicable at the time of the conclusion of the 1928 Treaty. Nicaragua acknowledged that, when it observed that "the 1928 Treaty 'must be appreciated in the light of the law contemporary with it' and that Law as expressed in the 1969 [Vienna] Convention has no retroactive effect" (Memorial of Nicaragua, p. 116, para. 2.124). Perhaps these issues could have been further elucidated if the Court had decided to join the consideration of the preliminary objection to the merits stage. But one fundamental problem of Nicaragua's contention would still have remained. The Court would not have been able to reach a decision about the alleged coercion without examining the lawfulness of the United States conduct, when that State is not a party to these proceedings. A conclusion by the Court that there was coercion by the United States would be tantamount to a finding that this third State, which is not before the Court, had acted unlawfully. Principles governing the exercise of the Court's jurisdiction prevent the Court from making such a finding. Even if the Court had jurisdiction, it would not have been able to exercise it (see *East Timor (Portugal* v. *Australia)*, *Judgment*, *I.C.J. Reports 1995*, p. 105. para. 35).

14. Nicaragua also pursues another line of argument when it contends that Colombia "took advantage of the US occupation to extort from her the conclusion of the 1928 Treaty" (Memorial of Nicaragua, p. 98, para. 2.82; CR 2007/19, pp. 10-11). It is sufficient to observe that the main principles of that Treaty were already discussed by Colombia with the Nicaraguan Government which was inaugurated on 1 January 1925,

as Nicaragua admits, after "an election that had not been controlled by the United States" (Memorial of Nicaragua p. 76, para. 2.41). A draft Treaty was presented to Nicaragua's Foreign Minister by Colombia's Ambassador in Managua in March 1925. It appears from the case file that Nicaragua actively participated in the negotiation of that Treaty. It was Nicaragua which, after the signing of the 1928 Treaty, suggested an understanding about the geographical scope of the Archipelago of San Andrés (see paragraph 64 of the Judgment). That agreed understanding was recorded in the 1930 Protocol of Exchange.

15. Accordingly, I concur with the Court that the issue of sovereignty over the islands of San Andrés, Providencia and Santa Catalina is not to be adjudicated at the merits stage.

(Signed) Peter TOMKA.