SEPARATE OPINION OF JUDGE ABRAHAM

[Translation]

Agreement with the part of the Judgment dealing with the various aspects of the dispute other than sovereignty over the three islands — Disagreement as to this last aspect — Main difficulty in the case: drawing the line between those issues appertaining to the preliminary phase and those which cannot be decided until after the proceedings on the merits — Unusualness, in this regard, of the provisions of the Pact of Bogotá — Date by reference to which it should be determined whether the conditions in Article VI of the Pact have been fulfilled — Question whether an invalid treaty can be regarded as being in force for purposes of Article VI — Question of the validity of the 1928 Treaty creating difficulties which the Court was unable to address with all the necessary information at the preliminary stage — Exclusiveness of the Pact of Bogotá in respect of judicial settlement of disputes between States parties to the Pact — Impossibility of asserting, without distorting the notion of dispute, that there is no extant dispute between the Parties as to sovereignty over the three islands — Need to avoid confusing the merits and jurisdiction.

1. In this case the Applicant — Nicaragua — invoked two bases of jurisdiction, each of which sufficient, in its view, to establish the jurisdiction of the Court: Article XXXI of the Pact of Bogotá and the Parties' optional declarations under Article 36 of the Statute of the Permanent Court of International Justice. The Respondent — Colombia — disputed both bases and asked the Court to find that it lacked jurisdiction.

2. The Court considered this objection to jurisdiction first as asserted against reliance on Article XXXI of the Pact of Bogotá (this is what the Court has called, for the sake of convenience, the "first preliminary objection") and then as asserted against reliance on the optional clause declarations (which it has called the "second preliminary objection"). The Court examined each of the two objections (or prongs of a single objection) as thus defined by distinguishing, as indeed it needed to do, the various subject-matters (or "aspects", as they are called in the Judgment) of the dispute. It is obvious that, when a claim dealing simultaneously with a number of subjects is before the Court, the Court may very well have jurisdiction over only some of them. It follows that, where the Court is called upon to rule on a preliminary objection to jurisdiction in such a case, it cannot limit itself to an examination in the aggregate but must ascertain as to each subject-matter (or "aspect") of the claim whether the objection is well founded (and, correlatively, whether the Court's jurisdiction has been established).

3. This approach led the Court, rightly in my opinion, to distinguish

three "aspects" of Nicaragua's case capable of being dealt with separately in respect of the jurisdictional issue: sovereignty over the three islands named in Article I of the 1928 Treaty between the Parties (San Andrés, Providencia and Santa Catalina); sovereignty over the other disputed maritime features; and, lastly, the maritime delimitation along the median line between the coasts of the two States.

In respect of the "first objection to jurisdiction", the Court concluded that Article XXXI of the Pact of Bogotá afforded it a title of jurisdiction over the second and third aspects as thus distinguished — and that the objection had to be rejected *pro tanto*; but that the Article, in joint operation with the other relevant provisions of the Pact of Bogotá, did not provide a basis for the Court to entertain Nicaragua's claim to the "three islands" — and that the objection had to be upheld to this extent.

In respect of the "second objection to jurisdiction", the Court concluded, first, that the optional clause declarations similarly failed to provide any basis for its jurisdiction to decide the issue of sovereignty over the "three islands" and, second, that logic dictated that it need not examine this objection in respect of the other aspects of the dispute, as it had already concluded that Article XXXI of the Pact of Bogotá conferred upon it a sufficient title of jurisdiction over them.

4. I concur both in the operative clause and in the core reasoning in the Judgment in respect of those aspects of the dispute other than sovereignty over the "three islands": the Court has jurisdiction over them pursuant to the Pact of Bogotá, and there was therefore no need to consider whether it was afforded a further title of jurisdiction by the optional clause declarations.

On the other hand, I regret having to part ways with the Judgment in respect of its treatment of Nicaragua's claim to sovereignty over the "three islands". Indeed, I voted against subparagraph 1 *(a)* of the operative clause, upholding the objection to jurisdiction on this point, for I believe that the Court should have declared that, in the circumstances of the case, the objection did not possess an exclusively preliminary character — in so far as it concerned this aspect of the dispute. And, while also concluding that the Court lacks jurisdiction over that question under the optional declarations (I voted in favour of subparagraph 2 *(a)* of the operative clause), I do so for reasons completely different from those set out in the Judgment, which strike me as juridically flimsy.

5. Before going into my reasons in some detail, I wish to devote a few words to describing the main difficulty encountered by the Court in this case (at this stage in the proceedings), one which in my opinion it did not resolve very successfully. That was to draw the line between issues falling strictly within the ambit of preliminary objections, which the Court can and must decide in the preliminary stage of the proceedings, and those

involving the merits, which the Court must reserve for subsequent decision after the Parties have had the opportunity to plead their cases in full.

6. There is, of course, nothing new or unusual about this difficulty. It is a known fact that jurisdictional issues, admissibility issues and substantive issues are not hermetically separated categories and that, in answering an objection to jurisdiction or admissibility, the Court is sometimes obliged to "touch upon" the merits of the dispute, as the Permanent Court of International Justice recognized as early as 1925 (*Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6,* p. 15). The Court cannot shy away from the occasional need to take up substantive points on which its jurisdiction or the admissibility of an application may hinge, but it must at the same time be careful to avoid deciding the dispute on the merits in the judgment in which it is supposed to deal with objections to jurisdiction or admissibility, the proceedings on the merits being suspended. Indeed, this is why Article 79, paragraph 9, of the Rules of Court does not restrict the Court to the binary choice of either upholding or rejecting a respondent's objection, but also gives it the option of declaring that the objection does not possess an exclusively preliminary character, meaning that it can only be decided after the proceedings on the merits. In general, the Court had, until now, been adroit and judicious in applying these provisions.

7. It has not been so in the present case. In my view, this is ascribable primarily to the fact that the Court succumbed to the unfortunate influence of the unusual provisions it had to deal with.

I am referring to Articles VI and XXXIV of the Pact of Bogotá read in conjunction. Article VI provides that the procedures for judicial settlement, which the Pact seeks to foster, may not be applied to, among other things, "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". Article XXXIV states that, in cases described in Article VI, the International Court of Justice must declare itself "to be without jurisdiction to hear the controversy".

8. In what way are these provisions unusual? Certainly not in expressing the desire on the part of the States having negotiated the Pact to prevent the judicial procedures from being used to upset states of affairs established by treaties in force. What State would accept seeing its rights under a duly applicable treaty contested in legal proceedings? And what international court would agree to being asked to frustrate the principle *pacta sunt servanda*? To the best of our knowledge, the judicial settlement procedures are aimed at giving full effect to treaties or agreements in force between the Parties (in so far as the dispute lies within the scope of the treaties or agreements), not at impeding their implementation.

The originality of the provisions in question thus does not lie in the rejection which they articulate, and which would even be self-evident, of any challenge to treaties concluded between the States parties to the Pact — provided that those treaties are valid, a point to which I shall return. It lies precisely in the following: the fact that the provisions of a treaty in force defeat the claims made by a State before the Court is a ground, under Article XXXIV of the Pact, for the Court's *lack of jurisdiction*, whereas under the general régime this fact would justify rejecting the claims *on the merits*.

In other words, in the special system established by the Pact, what would be strictly a question *on the merits* under the general régime (for example, where the Court is seised solely on the basis of optional clause declarations), i.e., the question whether one State's claim against another accords or conflicts with treaty provisions in force in their relations, is transmuted into a question of *jurisdiction*.

9. Here, for example, the issues whether the 1928 Treaty awards Colombia sovereignty over the islands and other maritime features claimed by Nicaragua and whether the Treaty establishes the maritime delimitation, as Colombia claims, along a dividing line different from that advocated by Nicaragua would ordinarily be treated as substantive questions, certainly not as questions pertaining to the jurisdiction of the Court. But, seen through the prism of the Pact of Bogotá, they are (also) jurisdictional issues, since they involve the question whether Nicaragua's claim concerns matters which have been "settled" or are "governed" by treaties in force. Confusion between the merits and jurisdiction thus becomes inevitable to some extent.

10. The Court should not however have fallen prey to this confusion to the degree that it did. Granted, it had to apply the relevant provisions of the Pact of Bogotá in examining the Respondent's objection to jurisdiction denying the Applicant's claim that a title of jurisdiction existed under the Pact. But it was also for the Court to ensure respect for the fundamental principles governing procedure before it, as they derive from its Statute and the Rules of Court, especially since the Pact of Bogotá itself refers to the Statute of the Court (as rightly pointed out in the Judgment, para. 59). Among these principles is the distinction to be made between those matters which must be dealt with in the preliminary examination of jurisdiction and admissibility and those which cannot be decided until completion of the proceedings on the merits.

11. The Court's task was undeniably not an easy one, consisting as it did in striking the right balance, the best possible reconciliation, between the special provisions of the Pact of Bogotá and the fundamental principles governing procedure before the Court, when they seem, to say the least, not readily in harmony.

How did the Court acquit itself of its task? Unsatisfactorily, in my opinion. On a number of occasions in the Judgment, the Court needlessly decides substantive questions which would more wisely have been reserved

for the subsequent proceedings. Thus, it did not do its utmost to maintain the greatest possible separation between its examination of jurisdiction and the judgment on the merits. The confusion culminates, in my view, in the Court's response to the second preliminary objection, where, even though the Pact of Bogotá no longer forms the framework, the Court relies in declining jurisdiction on reasoning going to the merits.

I shall now take up these various points, along with a few others.

I. First Preliminary Objection

12. In its first preliminary objection (or the first prong of its single preliminary objection, but no matter), Colombia denied that the Pact of Bogotá furnished a basis for the Court's jurisdiction in the present case, arguing that the questions raised by Nicaragua in its claim had all been settled by the 1928 Treaty and the 1930 Protocol (or rather, in the exact words of Article VI of the Pact of Bogotá, that these matters were "governed" by the Treaty and Protocol, but I concur in the statement in paragraph 39 of the Judgment that there is no difference for purposes of the case between the terms "governed" and "settled").

13. As Article VI of the Pact bars the application of judicial settlement procedures only to those matters governed (or settled) by "agreements or treaties in force on the date of the conclusion of the present Treaty", the Court, in responding to this objection, needed to determine whether the 1928 Treaty was "in force" on the date referred to, i.e. 30 April 1948.

But, in doing so, the Court's obligations in respect of that part of the claim relating to the three islands named in Article I of the 1928 Treaty (San Andrés, Providencia and Santa Catalina) were different from those in respect of the other aspects of the dispute — that is to say, all the rest.

I shall begin with the "other aspects", even though they are dealt with in the Judgment after the question of the three islands. This is in no way intended as criticism; the order of treatment makes no difference.

A. Aspects of the Dispute other than Sovereignty over the Three Islands: the Rest of the San Andrés Archipelago, the Cays of Roncador, Quitasueño and Serrana, the Maritime Delimitation

14. In respect of these aspects of the dispute, I fully subscribe to the finding made in the Judgment that, contrary to Colombia's contention, none of these matters can be deemed to have been "settled" or "governed" by the 1928 Treaty.

15. One important consequence follows: in respect of these aspects of the dispute, there was no need for the Court to decide whether the 1928 Treaty was "in force" in 1948, or, *a fortiori*, whether its validity might be

affected by the circumstances under which it was concluded. In order for the Court's jurisdiction to be *excluded* pursuant to the joint operation of Articles VI and XXXIV of the Pact of Bogotá (in other words, in order for the Court to uphold an objection to jurisdiction grounded on these provisions), *two* conditions must both be met:

— the matter submitted to the Court by the Applicant State must be governed (or settled) by a treaty binding on the two Parties; and
— the treaty must have been "in force" on the date the Pact was concluded, i.e. in 1948.

If the first of these two conditions is not satisfied, and it is not in respect of any of the aspects of the dispute other than sovereignty over the three named islands, there is no need to determine whether the second condition is met. Although the "question whether the 1928 Treaty was in force in 1948" is examined in the Judgment — and answered in the affirmative — *before* consideration is given to Nicaragua's various claims (the claim in respect of sovereignty over the "three islands" as well as the others), it is patently clear that as to those other claims the answer given to the question set out above is devoid of effect, since the Judgment goes on to explain that the Treaty settles nothing in respect of them.

I therefore agree with the Court's conclusion on the "other aspects" of the dispute, even though, as explained below, it is my opinion that the Court should not have ruled at this time on the question whether the 1928 Treaty was "in force".

16. There is however one point which is not so certain.

It is addressed at the beginning of the examination of the first preliminary objection (paras. 45-52), and in reality it bears on all the issues argued under the first objection, that is to say the Court's jurisdiction over not only the matter of the "three islands" but also the "other aspects" of the dispute. The point is *whether Colombia's first objection possessed an exclusively preliminary character*, and therefore whether a definitive decision on it should have been made at this stage in the proceedings.

17. To my thinking, the answer was not self-evident, even in regard to the aspects of the dispute other than sovereignty over the "three islands" (I shall return a bit later to the question in respect of this aspect).

In finding that the 1928 Treaty did not settle any of the issues in question (the rest of the archipelago, the three cays, the maritime delimitation), the Court decides matters that not only are not extraneous to the merits of the case but that even lie, at least in part, at the heart of the arguments which the Parties are in all likelihood preparing to present to the Court in the proceedings on the merits. For example, on the subject of the maritime delimitation, Colombia's position on the merits is based to a significant degree on the 1928 Treaty and the 1930 Protocol, as the Respondent interprets them (and I concur with the Court in finding that

interpretation unpersuasive). In rejecting that interpretation, and doing so categorically (para. 120), the Court clearly does more than "touch upon" — to use the term employed in the classic jurisprudence — issues on the merits.

18. That said, I concur with the Judgment in the proposition that *the mere fact that the Court, in examining a jurisdictional objection, is required to take a position on certain questions on the merits does not* ipso facto *mean that it is prevented from ruling on the objection in the preliminary phase* or that it must "join the objection to the merits" (as the Rules of Court previously stated) or defer consideration of the objection until the decision following the proceedings on the merits by declaring that it does not possess an "exclusively preliminary" character (as now provided). The Court's case law stands in clear opposition to such a restrictive approach to "preliminary objections".

19. The fact remains that the Court was once again confronted with the issue of determining what it means for an objection "not [to] possess, in the circumstances of the case, an exclusively preliminary character", within the meaning of Article 79, paragraph 9, of the Rules of Court.

20. I subscribe by and large to the statement appearing in paragraph 51 of the Judgment and distinguishing a *principle* and *exceptions to it*.

The principle holds that "a party raising preliminary objections is entitled to have these objections answered at the preliminary stage of the proceedings". Thus, it is only in *special circumstances* that the Court must defer examining an objection to jurisdiction or admissibility until later (after the proceedings on the merits).

The Judgment then identifies two exceptions to this principle (in my view, it is ill-advised to present them as exhaustive, as the Judgment does, since the possibility of other special circumstances cannot be excluded; but these two are undoubtedly the most important). The first is where the Court does not have before it all facts necessary to decide the questions raised, in particular because it has not been sufficiently enlightened by the debate between the Parties in the preliminary phase. In such a case, sagacity calls for refraining from rashly settling issues which cannot be appreciated in their entirety until after the Parties have been able to present their full arguments on the merits. The second exception is where answering the preliminary objection would determine the dispute (or some elements of it) on the merits. In my view, this exception to the principle applies even more forcefully where the Court is inclined to *reject* the preliminary objection than where it is tempted to *uphold* it, because in the first case the Court allows the continuation of proceedings the outcome of which is in fact "prejudged" by the grounds for the preliminary judgment (even though, formally, the operative clause of the preliminary judgment confines itself to enabling the Court to proceed to consideration of the merits) and either the subsequent proceedings are devoid of practical significance — if the Court deems itself bound by the grounds for its judgment on the objection — or it runs the risk of contradicting

itself — if it does not deem itself bound. This is obviously a very undesirable situation.

21. Applying these criteria — which I believe to be correct — to the first preliminary objection in so far as it concerns aspects of the dispute other than sovereignty over the "three islands", I think that the Court was right to find that there was no special circumstance in the case justifying a refusal to answer the objection as of now by rejecting it.

While the proceedings will admittedly continue on the merits, and the Court has taken a position in its preliminary judgment on arguments with a certain significance for the showing Colombia seeks to make in proving its claims, it cannot be said that the outcome on the merits is "predetermined" to such an extent that there is virtually nothing, or very little, remaining to be genuinely debated.

For example, once it has been said that the maritime delimitation does not follow directly from the 1928 Treaty, the bases and processes for the delimitation, that is to say the real crux of the dispute on this point, remain to be determined. Nor do I believe that the situation here falls within the other exception: the Court has been sufficiently enlightened by the debates between the Parties to be able to conclude, on the basis of solid reasoning, that these aspects of the dispute are not settled by the 1928 Treaty; and the proceedings to come are unlikely to bring to light information invalidating the Court's conclusion in this respect.

22. One question remains; in my eyes, it is of major importance but the Court refrains, rightly I believe, from deciding it in the Judgment. This is the question whether and to what extent the parties, in later pleading on the merits, and the Court itself, in its final Judgment, will be bound by the positions on matters of substance which the Court has taken in its reasoning (but not in the operative clause as constructed) in the Judgment on preliminary objections.

It is a thorny issue. There can be no doubt that, when the Court takes a stance on substantive questions in a preliminary judgment, its positions cannot fail to affect the approach subsequently taken by the parties in arguing the merits. That does not however mean that the parties are necessarily barred from re-opening (or pursuing) the debate on these substantive points in the final phase of the proceedings or that the Court is precluded from changing its positions on them if it is given good reasons for doing so.

The question is a delicate one. The place for the Court to resolve it is not in its judgment on jurisdiction, because it is of no help in deciding on the preliminary objections. It is in the judgment on the merits that the Court may be required — that is, if one of the Parties argues a substantive point examined in the preliminary judgment — to rule on the authority attaching to its earlier judgment. It is for this reason that I do not wish to opine on this point right now.

B. The Part of the Dispute Concerning Sovereignty over the Three Islands: San Andrés, Providencia and Santa Catalina

23. For this part of the dispute, it is clear that the question was "settled", or is "governed", by the 1928 Treaty. Accordingly, the Court had to determine whether the Treaty was "in force on the date of the conclusion" of the Pact of Bogotá, within the meaning of Article VI of the Pact. Two preliminary questions had to be resolved before that question could be answered: first, as of what date(s) must it be determined whether or not the condition laid down in Article VI had been satisfied? Second, can a treaty be regarded under this provision as being "in force" if it was concluded subject to a defect likely to affect its validity? If the second question was answered in the negative, the Court was then required to consider whether it should take a position already in the preliminary judgment on Nicaragua's arguments as to the invalidity of the Treaty.

1. As of what date(s)?

24. Paragraph 73 of the Judgment answers this question by observing that Article VI refers to the "date of the conclusion of the Pact" and that that occurred in 1948. Paragraph 81 is even more explicit: it states that 1948 is the "date by reference to which the Court must decide on the applicability of the provisions of Article VI of the Pact of Bogotá setting out an exception to the Court's jurisdiction under Article XXXI thereof". That then allows the Court to add (para. 82 (2)):

> "the question whether the Treaty was terminated in 1969 is not relevant to the question of [the Court's] jurisdiction since what is determinative . . . is whether the 1928 Treaty was in force on the date of the conclusion of the Pact, i.e. in 1948, and not in 1969".

25. This reasoning is too hasty in my view. I believe that an absolutely *symmetrical* interpretation of Article VI of the Pact of Bogotá in respect of the relevant date is unreasonable; a distinction must be drawn between two situations.

If the Treaty invoked by the Party arguing against the jurisdiction of the Court (the Respondent) *was not in force* in 1948, then the objection should be rejected for that reason alone; it makes no difference whether the Treaty had been in force *prior to* (but not in) 1948 or was even concluded *after* 1948 — but before proceedings were instituted before the Court. While the latter situation would of course influence the resolution of the dispute on the merits, it would create no bar to the Court's jurisdiction.

If, on the other hand, the Treaty *was in force* in 1948 (and does settle the matter in dispute), my view is that the Court should declare itself to be without jurisdiction only if the Treaty *was still in force at the date the proceedings were instituted*. In this case, there is not only one operative date, but two. The opposite interpretation — that which is adopted in the Judgment and can be claimed to follow from a literal reading of Arti-

cle VI — leads to unreasonable outcomes which the drafters of the Pact of Bogotá cannot be assumed to have intended. It would mean that the Court lacks jurisdiction over a dispute bearing on a matter settled by a Treaty in force in 1948, even if the Treaty ceased to be in force (for example, because the Parties agreed to abrogate it) between 1948 and the date the Court was seised of the case. It truly strains belief to think that such an odd outcome could have been intended by the States having entered into the Pact of Bogotá with a view to fostering judicial settlement of their disputes to the greatest extent possible. Thus, in my opinion, Article VI must be read as a bar to the Court's jurisdiction where the disputed matter is governed by a Treaty which was in force in 1948 (as is written), provided that the Treaty is still in force at the date the proceedings are instituted (as is implied).

26. Thus, I do not subscribe to the reasoning set out in paragraph 82: I think that the Court, in responding to the first preliminary objection in respect of the "three islands" — which, in my opinion, it should have refrained from doing, for the reasons set out in point 3 below —, should not have confined itself to ascertaining whether the 1928 Treaty was in force in 1948, while dismissing as beside the point Nicaragua's argument that the Treaty — if assumed to have been valid — was terminated in 1969.

27. It would moreover appear that the Court itself was not really convinced by its interpretation, because in paragraph 89 it does exactly what in paragraph 82 it announced it would not do: it opines upon Nicaragua's argument to the effect that the 1928 Treaty terminated as a result of Colombia's violation of it in 1969, setting that argument aside on the ground that, even if true, it "would not affect the sovereignty of Colombia over the [three] islands" — i.e., not only in 1948, the date of the Pact of Bogotá, but even today. Yet, if it was true that 1948 was the only date by reference to which the Court's jurisdiction was to be determined and that it was necessary to ascertain which matters had been settled *at that date* by the Treaties in force, then why did the Court feel the need to add the not insignificant assertion figuring in paragraph 89? Since the explanation for this apparent contradiction cannot be a lack of consistency on the part of my colleagues, I can only suppose that the Court simply wished here to decide the merits of the dispute. In doing so, it has overstepped the role assigned to it at this stage in the proceedings.

2. Can an invalid treaty be regarded as "in force" in 1948 for purposes of Article VI of the Pact?

28. To counter Colombia's objection based on Article VI of the Pact, Nicaragua contended that the 1928 Treaty could not be regarded as "in force" in 1948, and could not have settled any

matter, because it had been concluded under conditions rendering it invalid.

29. Nicaragua's argument on this point can be effective only if it is first accepted that a treaty which is invalid cannot have been "in force" for purposes of Article VI; in other words, it is not enough for the Treaty to have been *formally* in force, i.e. for it to have come into force initially in accordance with its terms and for it not to have been the object, as of the relevant date (1948), of any process for abrogation, denunciation or suspension.

30. The issue is not dealt with expressly by the Court but is resolved implicitly in the Judgment, because, after examining Nicaragua's argument, the Court finds (para. 81) that "the 1928 Treaty was valid and in force on the date of the conclusion of the Pact of Bogotá in 1948". In other words, the Court seems indeed to accept that, for purposes of Article VI, a treaty cannot be in force at the relevant date if it was not valid at that date.

31. I agree with the Court's position on the interpretation of the meaning of "treaty in force", although I regret that it did not make itself clearer on this point.

A treaty does not enter into force until it becomes capable of producing its full legal effects vis-à-vis the parties (or, conversely, it does not produce its full legal effects until it enters into force). Now, under Article 69, paragraph 1, of the Vienna Convention on the Law of Treaties, which indisputably expresses customary law, "[t]he provisions of a void treaty have no legal force". Hence, a treaty which is invalid for one of the reasons defined in the Vienna Convention — in so far as it codifies custom — cannot be regarded as "in force", within the ordinary meaning of the expression.

32. The foregoing proposition may perhaps bear qualification in respect of the causes of invalidity described in Articles 46 to 50 of the Vienna Convention. These give rise to "relative" nullity: the treaty in question can be acknowledged to be void only where the party having an interest in invalidating it (the "injured" party) invokes the nullity in accordance with the procedure described in Article 65. It might just be possible to maintain that a treaty subject to one of these causes of invalidity remains in force at least as long as the party entitled to invoke the invalidating cause has not done so (which, moreover, it might never do). But even this proposition is not certain, for once a treaty has been determined (judicially, for example) to be void, the effects are in principle, and regardless of the cause of invalidity, retroactive *ab initio*, subject to the qualifications set out in Article 69, paragraph 2, of the Vienna Convention.

33. In any event, a treaty characterized by absolute nullity, which is what Nicaragua maintains — rightly or wrongly, but wrongly according to the Judgment — in respect of the 1928 Treaty, cannot, in my view, be considered ever to have been "in force".

This interpretation could no doubt have been rejected, or refuted, had there been serious reasons to ascribe a different meaning to the expression "treaties in force" in the specific context of Article VI of the Pact of Bogotá, but the Court found none. For that, a showing would have had to have been made that the States which drew up the Pact intended to prevent States involved in judicial dispute resolution proceedings from challenging the validity of any treaty formally in force in 1948. That intention cannot be presumed and it was not demonstrated.

34. That said, the Court, acting on the basis of its interpretation of the meaning of "treaty in force", examined Nicaragua's argument alleging the nullity (or invalidity, I see virtually no difference) of the 1928 Treaty. That led it to find, without directly ruling on the two invalidating causes invoked by the Applicant, that Nicaragua had consistently recognized the validity of the Treaty over the 50 years following its conclusion and that Nicaragua was therefore now precluded from claiming on any ground that the Treaty was void (paras. 77-80).

In thus proceeding, the Court has adopted a position on a very complex question on the merits: I think that it would have been better advised to refrain from doing so at this stage in the proceedings. This brings me to the next point.

3. Should the Court take a position on the question of the validity of the 1928 Treaty already at the stage of the decision on the preliminary objections?

35. We return to the criteria for determining whether or not an objection possesses an exclusively preliminary character.

36. In paragraph 51 of the Judgment, the Court, after describing the two situations in which it must refrain from immediately deciding the objection (i.e., where the Court does not have before it all the necessary facts or where deciding would determine the dispute on the merits), adds that it "finds itself in neither of these situations in the present case".

I believe, to the contrary, that the Court found itself in *both* of these two situations in respect of the issue of the validity of the Treaty and its effects on sovereignty over the "three islands".

37. In the first place, it is plain that, in ruling as it did, the Court settled the dispute over the "three islands" definitively and on the merits. What does the Judgment — supposed to pass only on the Court's jurisdiction — tell us? That the 1928 Treaty awarded Colombia sovereignty over the three islands named in the first Article. That, even assuming that a cause invalidating the Treaty could have been identified at the outset, Nicaragua is precluded from invoking it now by its subsequent conduct over many years. Lastly, that, even if the Treaty did terminate in 1969, as Nicaragua contends, that would have no impact on the permanence of the legal effects of its provisions granting Colombia sovereignty over the

"three islands". And, accordingly, the Court will not concern itself any further with that part of the dispute relating to the three islands.

What more would be needed to conclude that "answering the preliminary objection . . . determine[s] the dispute, or some elements of it, on the merits", in the words describing one of the two situations in which, the Court itself holds, it must refrain from ruling on the objection?

38. To justify its choice, the Court observes in paragraph 51 that the question of the validity of the Treaty "does not constitute the subject-matter of the dispute on the merits" and "is rather a preliminary question to be decided in order to ascertain whether the Court has jurisdiction": thus, there is, in its view, nothing in the grounds adopted by the Court which impinges on the merits of the dispute. This reasoning is not very convincing. Granted, I agree that the question of the validity of the Treaty is not the actual subject-matter of the dispute; on this point, I subscribe to the reasoning in the Judgment and I am in agreement with the first of the two propositions quoted above. But not with the second: it is utterly incorrect to characterize the issue of the validity of the Treaty as being strictly a question preliminary to determining the Court's jurisdiction; it is also, and principally, a question on which, in Nicaragua's view, the solution to the dispute hinges. And therefore, in deciding it, the Court by necessity does more than rule on its jurisdiction.

39. In reality, and in spite of the foregoing comments, I could have come to accept the Court's approach on this point, had the question of the validity of the 1928 Treaty called for a simple response and had the right solution been obvious.

After all, as I have already said, the confusion which is to some extent unavoidable between the merits and jurisdiction is created by the Pact of Bogotá itself. And I have also stated above that I find it less objectionable for the Court to rule on matters of substance in deciding a preliminary objection when it *upholds* the objection, because there the Judgment puts an end to the proceedings (in respect of some or all of the questions constituting the subject-matter of the dispute).

40. But what is more serious is that the Court, in deciding the question of the validity of the 1928 Treaty, had to take a position on highly complex points of law and fact not yet sufficiently argued by the Parties at this stage and in respect of which the Court consequently "d[id] not have before it all facts necessary". Thus, it also found itself in the other of the two situations in which, by its own definition, it should refrain from deciding an objection.

41. In rejecting Nicaragua's argument based on the invalidity of the 1928 Treaty, the Court begins by setting out a detailed review of Nicaragua's conduct between 1928 and 1980, when it first officially asserted that the Treaty was void (paras. 78 and 79).

42. The Court then draws a conclusion of law in paragraph 80: Nica-

ragua can therefore no longer rely on the invalidity of the 1928 Treaty to claim that it was not in force in 1948. The Court is then able to find in paragraph 81 that the Treaty "was valid and in force" in 1948.

The Court clearly intended here to apply the rule that a State may no longer invoke a ground for invalidating a treaty if, after becoming aware of the ground — and having thus been in a position to give notice of its existence —, the State must by reason of its subsequent conduct be considered as having acquiesced in the validity of the Treaty.

43. I would find nothing objectionable about this reasoning if Nicaragua had confined itself to invoking, as the ground for invalidating the 1928 Treaty, the alleged violation of its own constitutional rules at the time the Treaty was concluded. The solution would then be obvious.

44. But Nicaragua also claimed that the Treaty was invalid owing to the coercion it suffered in 1928 as a result of the occupation of part of its territory by the armed forces of the United States and alleged that this prevented it from exercising its free will.

The reasoning in the Judgment raises a major difficulty in this connection.

45. Under the Vienna Convention, which assuredly must be seen as expressing the customary law of treaties as it now stands on this point, the rule precluding a State from invoking an invalidating ground where its subsequent conduct shows its acquiescence in the validity of the treaty does not apply where the treaty is *absolutely* void for having been concluded under coercion resulting from the threat or use of force in violation of the principles of international law embodied, today, in the Charter of the United Nations. This is to be inferred from a joint reading of Articles 45 and 52 of the Vienna Convention. The solution adopted by the Court in the present case is thus inconsistent with the law of treaties as it now stands.

46. This does not however mean that this solution is necessarily wrong, because neither the Vienna Convention nor the current customary law of treaties applies in the present case, which involves determining the validity of a treaty concluded in 1928 and applied without challenge until 1980.

It may be argued that coercion resulting from the threat or use of force was not a ground for invalidating an international treaty in 1928. Even if this view is rejected, it may also be contended (more cogently, I think) that the customary law applicable at the time in question did not make that invalidity *absolute*: it could be cured by the subsequent conduct of the prejudiced State, which is no longer the case today.

47. The problem is that none of this is explained in the Judgment, largely because these points were not really debated at this stage in the proceedings. Nicaragua, which raised the argument as to the invalidity of

the Treaty, expressly reserved the right to return to and expand upon it in the proceedings on the merits. This, in my view, was neither reckless nor unjustified on the part of Nicaragua, since, as noted earlier, the point plainly bore at least as much upon the merits as upon jurisdiction.

48. Accordingly, it is my opinion that, in view of the grounds for its decision, the Court dealt rather lightly with an extremely difficult and important subject, the international law of treaties, and did so without adequately explaining the basis for the solution adopted and needlessly, since it could very easily have reserved these questions for the subsequent proceedings.

49. I thus fear that on this point the Judgment, rather than clarifying the applicable law, adds some confusion: that is not my conception of the mission of the Court and that is why I did not join in the Judgment in this respect.

* * *

II. Second Preliminary Objection

50. It was then only in regard to that part of the dispute concerning sovereignty over the "three islands" that it made sense to examine the "second preliminary objection". As the Court found jurisdiction under the Pact of Bogotá over the rest of the dispute, no useful purpose would have been served in seeking to determine whether there might exist another basis of jurisdiction — the optional declarations — which would in any case have been superfluous: that is what paragraph 132 says, in terms which I wholeheartedly approve.

51. It would have been possible under one argument to *uphold* the second objection without having to decide whether Nicaragua's and Colombia's declarations were still in effect at the date the proceedings were instituted or whether the reservation *ratione temporis* in Colombia's declaration applied in the present case: the argument based on the *exclusivity* of the Pact of Bogotá as the basis for the Court's jurisdiction to entertain disputes between the States parties to the Pact.

I find this argument convincing. The Judgment sets it aside for the reasons appearing in paragraphs 133 to 136, which strike me as especially weak.

52. Paragraph 133 is confined to observing that, in its 1988 Judgment in the case concerning *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility*, the Court did not reject the contention that optional declarations under Article 36 could form a separate, sufficient basis for jurisdiction in disputes between States parties to the Pact. That is wholly correct, which means that Colombia was mistaken in arguing to the contrary, stretching the meaning of the 1988 Judgment in doing so. But this is no argument in support of the contention which the Court in 1988 *did not reject*. Granted, it did not reject it,

but it did not uphold it either. Here then is a point of law on which the earlier decision is silent (because the matter was reserved) and it would therefore be necessary to explain why this issue should today be decided one way rather than the other.

53. The Judgment does not do this. Paragraph 134 says no more in this respect than does paragraph 133. It merely repeats the notion, in a different form, that the 1988 Judgment did not settle the issue in the way advocated by Colombia. The reasons justifying a decision *to the contrary* on the question remain unstated.

54. Are they to be found in the following paragraph (this would be the time, as this is the last paragraph before the conclusion)?

Not really: paragraph 135 does no more than quote the dictum, general in nature, from the 1939 Judgment of the Permanent Court of International Justice in the case concerning *Electricity Company of Sofia and Bulgaria*, a case in which it would be futile to seek any connection with the unusual provisions of the Pact of Bogotá. According to that dictum, multiple agreements entered into by States accepting the Court's compulsory jurisdiction must be seen as additional to each other, rather than as cancelling each other out. This is undoubtedly correct *as a general rule*, but it fails to take account of any of the distinctive characteristics of the Pact of Bogotá. The Judgment thus provides no response to Colombia's arguments, notably those set out in paragraph 126, which I find cogent.

55. In particular, the language specific to Article XXXIV of the Pact, stating that, if the Court declares itself to be without jurisdiction to hear a controversy for one of the reasons set out in Articles V, VI or VII, the controversy "shall be declared ended", seems to me clearly to preclude submission of the same dispute to the Court on the basis of a different title of jurisdiction after the Court has handed down a judgment declining jurisdiction under the Pact of Bogotá. I therefore believe that, logically, this provision also bars a State party to the Pact of Bogotá from submitting to the Court a dispute with another State party on the basis of a title of jurisdiction other than the Pact itself, or on the basis of, simultaneously, the Pact and another title of jurisdiction, as in the present case.

56. More broadly, in view of its special provisions and general structure, I see the Pact of Bogotá as having established machinery for the judicial settlement in the International Court of Justice of disputes between the States parties which is exclusive of all other mechanisms, in both its scope and its limits, thus rendering inoperative in the relations between States parties to the Pact (but only in those relations) any optional declarations those States may have made pursuant to Article 36, paragraph 2, of the Statute of the Court.

57. The Judgment takes the opposite view. The Court does however also come to the conclusion (which I share) that it lacks jurisdiction

under the optional clause declarations to entertain the question of sovereignty over the "three islands", but it does so on grounds which, I must admit, leave me utterly perplexed.

The reason, explains the Court in paragraph 138, is that there is no extant dispute between the Parties as to sovereignty over the three islands.

58. Aside from the fact that this assertion seems to me to fly in the face of the most basic common sense — admittedly, however, what is common sense to some is not necessarily so to others —, it rests on a total, and alarming, distortion of the concept itself of "dispute".

59. Here, two States claiming sovereignty over the same islands appear before the Court. One contends (legitimately, it would seem) that it has had sovereignty ever since such was recognized in a treaty concluded by the two States. The other responds (no doubt wrongly, but that is not the question here) that the Treaty has been void since the outset and, in any event, even if it was initially valid, it has in the meantime gone out of force and can therefore no longer be relied upon against that State as a title of sovereignty.

Are these not all the characteristic elements of a dispute capable of submission for judicial determination? No, responds the Court serenely: there is no longer any dispute.

60. The reason — and there is one — given in paragraph 138 is that the dispute has ceased to exist because it was settled by the 1928 Treaty, for the reasons set out in the examination of the first preliminary objection.

Is it not obvious that there is complete confusion here between the merits and jurisdiction?

61. I shall leave aside the wholly secondary issue whether the absence of a real, present dispute between the Parties causes the Court *to lack jurisdiction* or the claim *to be inadmissible*; in all honesty, that hardly makes any difference.

62. What the 1928 Treaty did settle — assuming that it did so validly — was the dispute which *then* existed between the two States. But it did not settle, and plainly could not settle, the dispute which presents itself *today* to the Court and which is not to be confused with the earlier one. Admittedly, the *subject-matter* is the same: sovereignty over the three islands. But the *cause* is not: because today's dispute came into being when one of the two States party to the Treaty began to claim — granted, rather belatedly — that its consent to be bound had been procured at the time by coercion.

63. In fact, what paragraph 138 really signifies is that it would serve no purpose for the Court to find jurisdiction to decide this aspect of the case, because the ultimate disposition the Court would favour is known in advance, in view of the grounds on which it partially upheld the first preliminary objection.

True. But that in no way shows that the dispute between the Parties has disappeared; rather, it merely reinforces the feeling that it would

have been better for the Court to refrain from ruling as it did on the first objection and to defer consideration of the disputed points until after the proceedings on the merits.

64. One final comment: had the Court examined the title of jurisdiction based on the optional clause declarations first, it definitely would not have been able to reject it on the grounds which it adopts here, entirely drawn as they are from the Court's response in relation to the Pact of Bogotá. Until now, it has been thought that the order in which titles of jurisdiction are examined was immaterial to the validity of each title. Here, such is clearly not the case: is this not because something is amiss in the reasoning of the Court?

65. It remains to be hoped that in the future certain respondent States bound by optional clause declarations will not seize upon this unfortunate decision as a pretext for using substantive arguments to raise preliminary challenges to the Court's jurisdiction, that the Court will succeed in confining the solution adopted in these proceedings to the specific facts and circumstances of the case, and that, in short, the present Judgment will not set a precedent on this point.

(Signed) Ronny ABRAHAM.