SEPARATE OPINION OF JUDGE ABRAHAM

[Translation]

Disagreement with the reasoning, not with the operative part — Essential first to consider the 1928 Treaty in order to determine whether it settles the question of the sovereignty of the islands still in dispute — Failure to rule on the interpretation of the 1928 Treaty — No valid justification for failing to do so — Application of the traditional equidistance method at the very least inappropriate in this instance — Impossible to construct a provisional median line which takes account of all the "relevant coasts" — Inadequacy in this case of the notions of "adjustment" or "shifting" of the provisional line.

1. I voted in favour of all the points in the operative part of the Judgment. Nevertheless, I disagree with certain aspects of the Court's reasoning. This opinion does not seek to criticize the reasoning as a whole, nor even its fundamental logic, but rather two of its individual elements. They are, first, the conclusion which the Judgment draws — or rather, in my view, does not draw — from its consideration of the 1928 Treaty at the end of Part 2, subsection A (paras. 40 to 56); and second, how the Judgment deals with the issue of the construction of a "median line" as the first stage in the delimitation process (paras. 184 to 199).

The reasons why I disagree with those two points are as follows.

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I. The Consideration of the 1928 Treaty as Title to Sovereignty over the Islands in Dispute

2. In support of their opposing claims to sovereignty over the islands in dispute, the Parties put forward three main series of arguments: the first, which was essentially invoked by Colombia, was based on the bilateral 1928 Treaty and its 1930 Protocol; the second was based on the principle of *uti possidetis juris*; and the third was based on the post-colonial *effectivités*.

3. The Judgment begins by considering the issue of the 1928 Treaty. This is fully justified: not so much by the fact that Colombia relied principally on that Treaty as the source of its sovereignty and only advanced the other two series of arguments as alternatives; but above all because the conventional title, if its existence was established, would take precedence over any other consideration, and would make the examination of the other bases put forward by the Parties not only pointless but legally impossible.

4. In other words, this was not one of those situations — which do occur — in which the Court could consider the various legal bases pleaded for resolving the dispute, and choose the one which it regarded as constituting the most robust and most appropriate basis for its reasoning. It was bound to examine the issue of the Treaty first and was only entitled to move on to consider the *uti possidetis juris* and the *effectivités* if and to the extent that the Treaty did not accord sovereignty over the islands in dispute to one or other of the Parties. Indeed, if the Treaty were construed as according sovereignty to one Party, then that Party should be declared to be in possession of it at the present time, even if the examination of the *uti possidetis* and the *effectivités* were to lead to conclusions in favour of the other Party. If the 1928 Treaty did derogate from the division of sovereignty over the islands which was established by the principle of *uti possidetis juris,* then it was legitimate for it to do so; the *effectivités* subsequent to the Treaty could not, whatever their nature, take precedence over the conventional title. Only a new treaty or an agreement binding the Parties could have contradicted the 1928 Treaty on the question of sovereignty over the islands in dispute, assuming that this question was settled — in whole or in part — by that latter Treaty; but no one has alleged that such a post-1928 agreement exists.

5. It was therefore crucial to determine whether the 1928 Treaty (with its 1930 Protocol) settled the question of sovereignty over the islands currently in dispute. Moreover, it is clear that the 2007 Judgment on the Preliminary Objections raised by Colombia did not rule on that point. That Judgment merely noted that Article I of the 1928 Treaty expressly accorded sovereignty to Colombia over the three islands mentioned by name therein (San Andrés, Providencia and Santa Catalina) — which was why the Court did not have jurisdiction over that part of the dispute, since it had been settled by an agreement between the Parties — but that, on the other hand, it was not easy, prima facie, to determine the other disputed features over which sovereignty was attributed to Colombia under the Treaty, and that the Court did indeed have jurisdiction over that part of the dispute, which had to be decided on the merits in the subsequent phase of the proceedings. That was the Court's task in the present Judgment.

6. Up to this point in my reasoning I have no objections to the Judgment.

In paragraph 42, after noting that, under the terms of the 1928 Treaty, Colombia has sovereignty over "San Andrés, Providencia and Santa Catalina and over the other islands, islets and reefs forming part of the San Andrés Archipelago", the Court is right to deduce that: "in order to address the question of sovereignty over the maritime features in dispute, [it] needs first to ascertain what constitutes the San Andrés Archipelago". In the context of this paragraph, the word "first" means that the question thus formulated needed to be resolved before the Court turned — but only if that were still to be necessary after answering the first question — to the consideration of the other arguments of the Parties, based on the *uti possidetis juris* and the *effectivités*.

7. It is clear, however, that at the end of the examination which it conducts in paragraphs 52 to 55, the Court does not do what it said it would do in paragraph 42: it does not "ascertain what constitutes the San Andrés Archipelago". In fact it does not draw any conclusion and merely notes that, since it cannot reach a definitive decision on the scope of the 1928 Treaty concerning the features in dispute, it can only settle the dispute over sovereignty on the basis of the arguments of the Parties "which are not based on the composition of the Archipelago under the 1928 Treaty" — that is to say, the arguments concerning the *uti possidetis juris* and the *effectivités* (Judgment, para. 56). It then moves on to consider those other arguments.

8. In so doing, in my opinion, the Court commits a serious legal error: it fails, without valid justification, to rule on the interpretation of the 1928 Treaty, and, more specifically, on the meaning of the words "over the other islands, islets and reefs forming part of the San Andrés Archipelago", within the meaning of Article I of the Treaty.

9. The fundamental reasons for this failure are provided in paragraph 53 of the Judgment:

> "the question about the composition of the Archipelago cannot . . . be definitively answered solely on the basis of the geographical location of the maritime features in dispute or on the historical records relating to the composition of the San Andrés Archipelago referred to by the Parties, since this material does not sufficiently clarify the matter".

In essence, the Court notes that when the 1928 Treaty refers to the "San Andrés Archipelago" it does not define its composition; that the sole fact that some islands lie close to the main island of San Andrés is insufficient to conclude that they form part of the Archipelago, whereas other, more distant, islands do not — since it would be necessary to determine a cut-off point for establishing appurtenance to the Archipelago, which the Treaty does not allow; and, finally, that the examination of the documents communicated to the Court by the Parties, which were meant to shed light on the context in which the Treaty was negotiated and concluded, does not establish with any certainty what the Parties intended the reference to the "San Andrés Archipelago" to signify at the time.

10. None of the aforementioned reasons justifies the Court's failure to interpret the Treaty: they merely emphasize that the Treaty is unclear on this point, identify the difficulties encountered when seeking to define its meaning and scope, and indicate that it is impossible to draw a definitive conclusion. None of that justifies the Court's failure to interpret the Treaty, whose meaning is disputed by the Parties. All that can be deduced from the reasons given by the Court is that the interpretation is difficult in this case. True. But the difficulty of interpreting a legal text is not — is never — a valid reason for a failure to do so by the court which is responsible for applying it. A text's obscurity is a sign that it needs to be interpreted, never an obstacle to that interpretation. The court may not be certain about the meaning of the text, it may hesitate over the solution to

adopt; that is not unusual. But it is the court's duty to decide, irrespective of its doubts — doubts which it is moreover perfectly entitled to express at the very moment when it does decide.

11. Admittedly, there are cases when, faced with a relatively obscurely worded norm, the court prefers to avoid coming down in favour of one particular questionable interpretation, and decides to set the difficulty aside and settle the dispute on the basis of other legally relevant and sufficient considerations. That is the mark of healthy judicial caution. However, it still has to be legally possible, given the particular facts of the case, to rule without establishing the meaning of the norm whose scope is in doubt. That is not always the case. For example, it is not the case in this instance, for the reasons which I have set out above: the 1928 Treaty, the *uti possidetis* and the *effectivités* are not alternative legal bases, which are on an equal footing, and between which the Court could choose in order to settle the issue of sovereignty. It was necessary first to determine the effects of the 1928 Treaty on sovereignty before the rest could — if appropriate — be examined. Deciding cannot mean merely noting that the task is difficult: the Court has not done its duty.

12. Admittedly, when it writes, in paragraph 56, that, in order to resolve the dispute, it must examine the arguments of the Parties which are not based on the Treaty, whose meaning it regards as being in doubt, the Court already knows that when it considers the *effectivités* it will find sufficient robust and relatively uncontentious evidence on which to base a conclusion in favour of awarding sovereignty to one of the Parties.

However, that does not alter the problem. For the reasons which I have already stated, the Court was not at leisure to choose between the Treaty and the *effectivités* on the basis of which of the two grounds appeared to be the more robust.

Moreover, if the Parties had pleaded solely on the basis of the Treaty, the Court would certainly not have evaded its duty of interpretation, the performance of which may be difficult but is never impossible.

13. I would add, to anticipate a possible objection, that a court's duty to interpret a treaty which has been adduced by a party, when it is not legally possible to rely on a strictly alternative basis, is not limited to cases in which the provision invoked seeks to define a rule of a general and impersonal nature, a genuine norm, that is to say, one which is abstract and permanent. The duty to interpret is equally applicable in those cases, like the present one, in which the contentious clause confers a specific title on a party, notably a title to sovereignty. In such cases there is no reason to derogate from the fundamental principle that a court is not entitled to cite the obscurity of the treaty as justification for not interpreting it. I regret that the Court disregarded that principle in this case.

14. Having said that, I think that the Court's final conclusion would have been the same if it had proceeded as it ought to have done.

15. It would first have noted that, unless the last clause of the first paragraph of Article I of the 1928 Treaty were rendered ineffective, it must

inevitably be acknowledged that at least some of the features in dispute in the present phase of the proceedings belong to Colombia on the basis of the Treaty, since they form part of the "San Andrés Archipelago". That provision in fact implies that islands other than San Andrés, Providencia and Santa Catalina form part of the "San Andrés Archipelago" under the Treaty, and those other islands can be none other than those which are presently in dispute, or certain of them at least. Nicaragua's position, that "the Archipelago comprises only the islands of San Andrés, Providencia and Santa Catalina" (para. 48 of the Judgment) is incompatible with the Treaty, since it renders it meaningless. A simple glance at the map is sufficient to conclude — once you disregard all the islands to the west of the 82° W meridian, which the 1930 Protocol declares not to belong to the Archipelago under the Treaty — that the Archipelago includes at least the Alburquerque Cays and the East-Southeast Cays, which lie closest to San Andrés. Those islands therefore definitely belong to Colombia under the Treaty, and the Court ought to have noted that fact, instead of cautiously indicating that "given their geographical location" they "could be seen as forming part of the Archipelago" (*ibid.*, para. 53), before adding that this geographical criterion was not decisive.

16. In my opinion, there is sufficient evidence to consider that in 1928 the islands of Roncador, Quitasueño and Serrana were also regarded as forming part of the San Andrés Archipelago, but it is not necessary to settle that question, since the second paragraph of Article I of the Treaty expressly precludes sovereignty over those three features from being attributed to Colombia. The fact that the reason given is that their appurtenance was in dispute between Colombia and the United States of America at the time, a dispute which subsequently disappeared when the United States renounced its claim, does not alter the indisputable fact that the 1928 Treaty does not in itself confer a title of sovereignty on Colombia over the three features in question. The Court was therefore able to leave the issue unresolved of whether Roncador, Quitasueño and Serrana formed part of the San Andrés Archipelago in the sense in which the two States understood that notion in 1928.

17. Finally, it seems to me that Bajo Nuevo and Serranilla are too far away from San Andrés to be reasonably regarded, at first sight, as forming part of the Archipelago, and that this assumption must be made, unless there is sufficiently convincing evidence to the contrary in the *travaux préparatoires* of the 1928 Treaty. However, Colombia did not provide any such evidence in support of its claim.

18. I therefore conclude that the 1928 Treaty accords Colombia sovereignty not only over San Andrés, Providencia and Santa Catalina (since these three islands are no longer at issue in the present phase of the proceedings), but also over the Alburquerque Cays and the East-Southeast Cays; however, it does not accord either of the two Parties sovereignty over the other maritime features in dispute.

19. In respect of the latter — Quitasueño, Serrana, Roncador, Serranilla and Bajo Nuevo — but of them alone, the Court had to move to the

examination of the arguments based on the *uti possidetis* and the post-colonial *effectivités*. In this regard, I support the Judgment's subsequent reasoning: a title in favour of one or other of the Parties cannot be established on the basis of the principle of *uti possidetis*; the *effectivités* are in Colombia's favour.

20. Ultimately, my serious reservations about the reasoning in the Judgment did not prevent me from voting in favour of point 1 of the operative part, since my conclusion is the same as that of my colleagues.

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II. The Construction of a Provisional Median Line as the First Stage in the Method for Fixing the Maritime Boundary

21. As far as the maritime delimitation is concerned, my disagreement relates less to what the Court has done — moreover, I agree with the end result of the process, and I voted in favour of points 4 and 5 of the operative part — than to how it is presented, which appears to me to be largely fallacious. In short, my opinion is that, although the Court states that it is following the traditional method, as described in particular in its Judgment in the case between Romania and Ukraine (*Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 61), in reality it diverges very considerably from it and actually it cannot do otherwise, since it is clear that the said method is inappropriate in the present case.

22. The method in question is recalled in paragraphs 190 to 193 of the Judgment. It consists of first constructing a provisional median line, that is to say, a line which is at equal distance from the opposite coasts of the two States which generate entitlements to overlapping maritime spaces — those overlapping entitlements being the very reason why it is necessary to effect a delimitation. Where the relevant coasts are adjacent, the provisional line is termed an equidistance line, but that does not make any substantial difference and moreover is not the case here. The second stage is to adjust or shift the provisional line thus obtained in order to take account of any particular circumstances which might require the line to be adjusted or shifted in order to achieve an equitable solution. Finally, in a third stage, the Court must check that the maritime areas awarded to the Parties by virtue of the delimitation obtained at the end of the previous stage are not markedly disproportionate to their respective relevant coasts — the coasts which generate the entitlements to the overlapping spaces.

23. The Court considers the arguments by which Nicaragua sought to convince it that the said method was inappropriate in the present case on

the grounds that the particular geographical situation was one in which the Court should not begin by constructing a provisional median line. It acknowledges that the "three-stage process is not . . . to be applied in a mechanical fashion" and "that it will not be appropriate in every case to begin with a provisional equidistance/median line" (Judgment, para. 194). However, it dismisses Nicaragua's arguments and states that, although there are undoubtedly particular circumstances which justify adjusting the provisional median line, there is no reason not to begin by constructing such a line nor to use it as a starting-point for the delimitation. Consequently, the Court affirms that it will adhere to its "standard method" (*ibid.*, para. 199), and it proceeds to do so — or rather it claims to proceed to do so — in paragraphs 200 to 204 (first stage: construction of the provisional median line), in paragraphs 205 to 238 (second stage: adjustment or shifting of the provisional line), and in paragraphs 239 to 247 (third stage: disproportionality test).

24. Nevertheless, it is obvious that the construction of a provisional median line as a starting-point for the delimitation is not only highly inappropriate in this case, but that it is even virtually impossible.

25. The reason for this is very simple. The overlapping entitlements which make the delimitation necessary in this instance do not exist because two opposite (or adjacent) coasts are generating projections which overlap in an intermediate area, as is usually the case. Here, the overlapping entitlements occur because, within the exclusive economic zone measured from the Nicaraguan coast, there are islands belonging to Colombia which generate an entitlement to an exclusive economic zone for that State in all directions. In other words, the overlapping does not only occur between the Nicaraguan coast and the Colombian islands (that is to say, in the area to the west of the Colombian islands and to the east of the Nicaraguan coast); it also occurs in the areas to the north, east and south of the Colombian islands — and even between them. This is shown very clearly on sketch-map No. 7 in the Judgment (p. 687), which depicts the "relevant maritime area", that is to say, the area of overlapping entitlements within which the Court is called upon to effect the delimitation.

26. Plainly, therefore, no "median line" can take account of the geographical reality which was submitted for the Court's consideration, not because of any "relevant particular circumstance" which would justify the adjustment of a provisional line without making it impossible to construct it in the first place, but because of the essential facts of the dispute brought before the Court, which make the very notion of a "median line" meaningless in the present case.

27. It is admittedly possible to construct a line which is equidistant from the Nicaraguan coast and the west-facing coasts of the Colombian islands, and that is what the Court does, affirming that in so doing it has completed the first stage of its "standard method". But a glance at that

line, which is shown on sketch-map No. 8 (p. 701), is sufficient to realize that it is "median" in name only: it may be equidistant from the Nicaraguan coast (more precisely from the Nicaraguan islands adjacent to that State's mainland coast), on its western side, and the western coasts of the Colombian islands, on its eastern side. However, it does not take any account — indeed the manner of its construction means that it cannot take any account — of the entire area to the east of the Colombian islands, which nonetheless also forms part of the overlapping area. This is not a "particular circumstance" which would justify a subsequent adjustment or shifting of the line. It is a fundamental defect which deprives the line of its alleged "median" character. This can be explained by a specific characteristic of the case: the Court could only construct that line by taking base points, as far as Colombia is concerned, which were located exclusively on the west-facing coasts of the islands belonging to that State. It could not adopt any base points on the east-, north- and south-facing coasts of those islands since they do not face the Nicaraguan coast. However, as I recalled above, all of the coasts of Colombia's islands, not just the west-facing parts of those coasts, generate entitlements to an exclusive economic zone which overlap with those of Nicaragua.

28. In other words, in order to be able to construct a line which has at least the semblance of a "median line" — although in my view even that is debatable — the Court deliberately had to ignore the majority of Colombia's relevant coasts. However, in order to perform its designated function in the delimitation process, a median line must take into account all the "relevant coasts" of the States present, that is to say, all the coasts which generate the projections creating the overlapping entitlements which make the delimitation necessary.

29. The Judgment itself recalls that point in paragraph 191 : the median line has to be "constructed using the most appropriate base points on the coasts of the Parties". These points are admittedly chosen, but they cannot be chosen in just any way: in order for them to be "the most appropriate", they must take satisfactory account of all the "relevant coasts" and not just one part of those coasts. However, as far as the Colombian islands are concerned, the Judgment rightly points out that the relevant coasts constitute "the entire coastline of these islands, not merely the west-facing coasts" (para. 151). This suggests that a median line corresponding to the definition in the "standard method" would have to be constructed from base points on all the coasts of the Colombian islands, and not only on their west-facing parts. Clearly, however, that is not possible in this case.

30. Instead of concluding from this that the construction of a median line — albeit a provisional one — is at the very least inappropriate, if not impossible, in this case, the Court decides to construct one all the same without taking into account (simply because it cannot) the majority of the coasts of the Colombian islands. In so doing, it appears to forget in para-

graphs 200 to 204, in which it selects base points which, on the Colombian side, are located exclusively on the western sides of the islands, what it explained in paragraphs 151 and 191.

31. It is true that this enables it to construct a line (depicted on sketch-map No. 8). But that line is only "median" with respect to one part of the "relevant area" to delimit (the area shown on sketch-map No. 7); it is otherwise entirely meaningless. In my view, therefore, the line constructed cannot be regarded as a "median line", that is, as an acceptable starting-point for the delimitation, which will subsequently only be adjusted or shifted to a necessarily limited extent, in order to take account of particular circumstances.

32. Moreover, further on in its reasoning the Judgment implicitly acknowledges that fact, in two ways.

First, after adjusting the provisional line by shifting it considerably eastwards (in order, therefore, to move it closer to the Colombian islands), the Court notes that even after that adjustment the result would not be equitable if the line "extend[ed]... into the parts of the relevant area north of point 1 or south of point 5", that is to say, to the north and south of the principal Colombian islands, and that furthermore the line in question would cut off Nicaragua from the areas to the east of those islands, areas "into which the Nicaraguan coast projects" (Judgment, para. 236). That is perfectly true, but does it not constitute an acknowledgment that the provisional line is not fit for purpose, with regard to a large part of the area in which the delimitation is to be effected, that is to say, all the sectors to the north, south and east of the principal Colombian islands?

Second, and as a consequence of the foregoing, the Court is induced to construct two horizontal lines along lines of latitude passing to the north through point 1 (which is located to the north of Santa Catalina, and approximately level with Roncador) and to the south through point 9 (which is located level with East-Southeast Cays) with a view to delimiting the area to the east of the Colombian islands (*ibid.*, para. 237). However, it is difficult to regard these two horizontal lines as a mere "adjustment" or even "shifting" of the provisional line. With the exception of the starting-point of the first line, those lines are actually entirely unrelated to the provisional line. The same goes for the addition of no fewer than four maritime frontier points (points 6 to 9 on sketch-map No. 11, p. 714) in the southern part of the area to be delimited which, rather than adjusting or shifting the provisional line, are in fact supplementary to it.

33. In short, after describing as a "median line" a line which does not really merit that description, the Court terms an "adjustment" or "shift" a process which does not really merit being termed as such. Perhaps the Judgment envisaged that process (the construction of two horizontal lines and the fixing of points 6 to 9) as a separate stage after the adjustment or shifting of the line. But if so, would that not be adding another stage —

and a decisively important one in this case — to the "traditional method" (or "standard method") to which the Court nevertheless promised to adhere in paragraph 199?

34. I do not wish to say that the Court was wrong to delimit the spaces constituting the relevant area in the way that it did. On the contrary, I think that it adopted the most reasonable solution, and that each stage in its construction was intrinsically justified. However, my opinion is that it would have been clearer and more honest of the Court to acknowledge that it could not follow the so-called "standard" method in this case because the geographical framework did not at all lend itself to the application of that method. In this instance it thus found itself in the situation in which "compelling reasons . . . in the particular case" made it unfeasible to construct the provisional median line (*Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 101, para. 116) or, at the very least, in one in which the application of the equidistance method was "inappropriate" (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 741, para. 272, mentioned in paragraph 194 of the present Judgment).

35. I understand that the Court wishes to give all its observers, and first and foremost States, the impression that it does not use arbitrary methods to achieve an equitable solution, but that it implements proven and consistent techniques. And it is perfectly true that there is nothing arbitrary about the Court's approach, which is characterized merely by a scrupulous search for the best solution. However, there are cases which are presented in such specific terms that it is, on the whole, preferable to acknowledge that the Court needs to depart from its usual technique, and to explain why, rather than to sacrifice clarity and intelligibility to the semblance of an illusory continuity.

(Signed) Ronny Abraham.