DISSENTING OPINION OF JUDGE ABRAHAM

[Translation]

Disagreement with the parts of the Judgment relating to jurisdiction ratione temporis *and the "integral contiguous zone" — Question of the Court's jurisdiction over facts subsequent to 27 November 2013 not settled by the 2016 Judgment — Lack of relevance of the precedents invoked because of the novel character of the question — Difficulty in reconciling Article XXXI of the Pact of Bogotá with the idea that the Court can exercise jurisdiction over facts subsequent to the denunciation of the Pact — Precedents to which the Court refers relate to admissibility rather than jurisdiction — Relative flexibility of the jurisprudence on the admissibility of new claims filed in the course of proceedings — Rigour required in respect of jurisdiction — Situation in which the facts form an indivisible whole — Dissociable character in this instance of the facts subsequent and prior to the critical date — Too abstract an approach to the problem of the "integral contiguous zone" — Nicaragua's claim limited to alleged violations of its rights in its exclusive economic zone — Questions of the conformity with international law of the "integral contiguous zone" and of respect for the rights invoked by Nicaragua do not fully coincide — "Sovereign rights" and "jurisdiction" of the coastal State deriving from the customary rule reflected in Article 56, paragraph 1* (a) *and* (b)*, of UNCLOS should serve as reference points for the examination to be undertaken — Colombia's promulgation of Decree 1946 cannot in itself be regarded as constituting an internationally wrongful act — Possibility to interpret the Decree, at the implementation stage, in a manner consistent with Nicaragua's rights.*

1. I disagree with the present Judgment on two points: the Court's jurisdiction *ratione temporis* and Colombia's "integral contiguous zone". Because of my disagreement on these two points, I had to vote against most of the subparagraphs of the operative clause.

I. The Court's Jurisdiction *Ratione Temporis*

2. Some of the actions which Nicaragua attributes to Colombia, and which, according to the Applicant, constitute violations of its rights in the maritime areas that fall under its jurisdiction by virtue of the 2012 Judgment whereby the Court fixed the maritime boundary between the two Parties, took place after 27 November 2013. On that date, the title of jurisdiction enabling the Court to entertain the present dispute ceased to have effect, since Colombia had given notice of its denunciation of the Pact of Bogotá on 27 November 2012. The Respondent contested the Court's jurisdiction to examine and rule on the lawfulness of events that occurred after 27 November 2013, and the Court rejected that objection in its Judgment and agreed to extend its examination to all the facts alleged by Nicaragua, irrespective of whether they occurred before or

after the date on which its jurisdictional title ceased to have effect. It is on this point that I disagree.

3. I shall start by making two preliminary observations.

First, the Judgment on the preliminary objections raised by Colombia rendered in 2016 in the present case failed to resolve the question of jurisdiction *ratione temporis* either explicitly or implicitly. It did not resolve it explicitly because the question was not raised by the Respondent, which argued that the Court had no jurisdiction at all over the dispute, since, in its view, its denunciation of the Pact of Bogotá had taken effect immediately as far as the jurisdictional clause was concerned (an argument which the Court rejected). Nor did the 2016 Judgment resolve the matter implicitly. It would be going too far to maintain that in finding that it had jurisdiction over the dispute concerning Colombia's alleged violations of Nicaragua's rights in the maritime areas claimed by the Applicant (rightly, moreover) to have been adjudged to appertain to it in the 2012 Judgment, the Court had implicitly settled the question of the scope *ratione temporis* of its jurisdiction, a matter which the Parties did not discuss before the Court at all. Besides, Nicaragua made no attempt to claim that there was a *res judicata* deriving from the 2016 Judgment that would prevent the Court, at the current stage of the proceedings, from adopting a position consistent with Colombia's argument in respect of jurisdiction *ratione temporis*.

4. Secondly, none of the precedents to which the Parties may have referred directly settles the point of law submitted to the Court in the present case. This is because the Court has never, in practice, found itself in a situation where it has had to determine the effects of the lapse of its jurisdictional title on its ability to examine facts subsequent to that lapse, in the context of a case already pending before it on the date when the jurisdictional title ceased to have effect. The Court, moreover, acknowledges this in the present Judgment, in paragraph 43. It was therefore incumbent on it to establish its jurisprudence in this regard. It does so, but in a way that I find open to criticism.

5. The jurisdictional basis for the Court to entertain the part of the dispute concerning the various actions that Nicaragua attributes to Colombia, which, according to the Applicant, took place in its exclusive economic zone, and each one of which it claims to be a violation of its rights, is Article XXXI of the Pact of Bogotá. The provisions of that article that are relevant to the question before us read as follows:

> "[T]he High Contracting Parties declare that they recognize in relation to any other American State, the jurisdiction of the Court as compulsory *ipso facto*, without the necessity of any special agreement so long as the present Treaty is in force, in all disputes of a juridical nature that arise among them concerning:
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> . . . .
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> *(c)* The existence of any fact which, if established, would constitute the breach of an international obligation".

6. It is understood that those provisions, which in substance reproduce those of Article 36, paragraph 2, of the Statute of the Court, do not allow a State to institute contentious proceedings against another State after the date on which the treaty — the Pact of Bogotá — ceased to be in force between them, whether the "fact" alleged to "constitute the breach of an international obligation" itself occurred before or after that date. But that does not answer our question, since in this case Nicaragua instituted proceedings the day before the treaty ceased to be in force between itself and Colombia.

7. In my view, it is hard to reconcile the aforementioned provisions, which circumscribe the consent given by Colombia to the Court's jurisdiction, with the idea that the Court is competent to examine the facts attributed to the Respondent and to decide whether they constitute a breach of an international obligation, when those facts occurred after the date on which Colombia ceased to be a party to the Pact of Bogotá and its consent to the jurisdiction of the Court thus came to an end.

That those facts were brought to the attention of the Court and submitted for its examination as part of a case which was already pending, rather than through the institution of new proceedings by Nicaragua (which would obviously be impossible), does not appear to me to require a fundamentally different answer to the question of jurisdiction *ratione temporis*.

8. To justify the solution it adopts, the Court refers in paragraph 44 of the present Judgment to precedents which are, in my view, irrelevant.

Most of them concern the question of whether and to what extent a party can file a new claim in the course of proceedings. The Court has found such an additional claim to be possible, on condition that either it is implicit in the application instituting proceedings or it arises directly out of the question which is the subject-matter of the application (*Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, p. 657, para. 41, referring to *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*).

Yet this line of jurisprudence, which must be considered well established, is irrelevant in the present case, for several reasons.

First, it does not concern the jurisdiction of the Court, but is intended to settle what is purely a question of admissibility: that is, whether an applicant can add a claim during proceedings or whether they must file that claim in the form of a new application instituting proceedings instead. In all those precedents, the title of jurisdiction had not lapsed. That is why that jurisprudence applies irrespective of whether the new claim relates to facts which occurred before the application was made (as happened in the *Diallo* case) or afterwards. The date of the facts is immaterial, since the title of jurisdiction continues to exist.

There is no doubt, in my view, that the Court should have referred to that jurisprudence, and that it would have been entirely relevant, had

Nicaragua introduced in the course of the proceedings, after the filing of the Application or even after the lapse of the jurisdictional title, one or more new claims relating to actions carried out by Colombia before 27 November 2013. Yet that is not the question which arises in this case.

Furthermore, the relatively flexible approach adopted by the Court in the context of the jurisprudence cited above (whose flexibility is not boundless, however: in the *Diallo* case, the new claim was declared inadmissible) can easily be explained by a desire to avoid excessive formalism and concerns of procedural economy and efficiency.

Such considerations have no role to play in the present case, since the question put to the Court is of an entirely different nature: the question pertains to the Court's jurisdiction — which calls for a degree of rigour — and not to the conduct of proceedings — which would justify a degree of flexibility.

9. The Judgment also refers to the *Djibouti* v. *France* case, in which the Court explored whether it could adjudicate the claims made by the Applicant in the course of the proceedings from the standpoint of jurisdiction rather than admissibility. However, the question arose in very particular circumstances, since the Court's jurisdiction was founded on the consent given by the Respondent after the filing of the Application, under Article 38, paragraph 5, of the Rules of Court, and it was a matter of interpreting the terms and determining the scope of that consent.

Since France had given its consent "for the dispute forming the subject of the Application", the Court had to establish what that wording covered, and it is not surprising that, to do so, it referred to its jurisprudence on new claims (*Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, pp. 211-212, paras. 87-88). However, the title of jurisdiction had not lapsed, and the question that the Court had to decide was one of jurisdiction *ratione materiae*, not jurisdiction *ratione temporis*. In my opinion, no conclusion can be drawn from that Judgment that is of relevance to the question before the Court in the present case.

10. In short, I fail to see any convincing argument for extending the Court's jurisdiction to cover facts occurring after 27 November 2013. I would certainly have no difficulty in accepting that account must be taken of facts or conduct that occurred after the date on which the jurisdictional title lapsed, if there were a link between those facts and the ones occurring before that date, causing them to form an indivisible whole. In such a case, it would only be possible to assess the scope of the facts occurring before the critical date, and to judge their lawfulness, by taking into consideration certain later developments from which they were indissociable.

Yet nothing of the sort applies in the present case. The facts alleged by Nicaragua to have occurred after 27 November 2013 are entirely dissociable from the earlier facts (because to my mind it does not suffice for

them to be more or less of the same nature), and each of them requires separate examination, which is what the Judgment undertakes.

11. It is for the above reasons that I have had to vote against subparagraph 1 of the operative clause and, consequently, against subparagraphs 2, 3 and 4 as well.

12. Indeed, with regard to the incidents alleged to have occurred at sea and during which, according to Nicaragua, the Colombian Navy prevented the Applicant from exercising its rights, the only one to have occurred before 27 November 2013 is not, in my view, supported by sufficient evidence.

As for Colombia's alleged authorizations of certain fishing activities in Nicaragua's exclusive economic zone, besides the fact that I doubt their very existence, most of the evidence identified in the Judgment to uphold that complaint dates from after 27 November 2013.

II. The Question of the "Integral Contiguous Zone"

13. I also disagree with the way in which the Judgment addresses the question of the "integral contiguous zone" established by Colombia's Decree 1946 of 9 September 2013.

14. In brief, the Court carried out an abstract examination of whether the Decree at issue (or the contiguous zone as provided for by the Decree, which amounts to the same thing) complies with "international law". To that end, the Judgment begins by defining the content of the customary international law applicable to the creation of contiguous zones by States (paragraphs 147 to 155); it then examines Decree 1946 in order to identify which of its provisions are incompatible with international law (paragraphs 164 to 187), before considering whether, by its very promulgation, the Decree — several provisions of which the Court has already found to be contrary to the applicable law — could engage Colombia's international responsibility (paragraphs 188 to 194). That leads the Court towards an operative clause in which, first, it finds that the contiguous zone "is not in conformity with customary international law" (subparagraph 5 of the operative clause) and, secondly, it rules that Colombia must bring the Decree into conformity with that law (subparagraph 6).

15. To my mind, this is too abstract an approach to the issue, which does not correspond to the examination that the Court was called upon to carry out in this case. Nicaragua's complaint was that, by creating this "integral contiguous zone", Colombia had violated the rights of the Applicant in the maritime areas adjudged by the 2012 Judgment to appertain to the latter, inasmuch as that Judgment fixed the maritime boundary separating the exclusive economic zones of Nicaragua and Colombia. Rather than examining *in abstracto* whether Decree 1946 (or the contiguous zone established by it, which amounts to the same thing) was in conformity with international law, the Court should have asked whether

and to what extent the contiguous zone violated — or was capable of violating, when the Decree was implemented — the rights claimed by Nicaragua, the rights that the Applicant alleged Colombia failed to respect, in breach of the 2012 Judgment. Such an approach — the only correct one, in my view — would not have led the Court to the same conclusions.

16. As a general rule, when a State comes before the Court to invoke the international responsibility of another State, it is not acting in defence of international law but to protect its own rights which, in its view, have been violated by the respondent as a result of the latter's failure to comply with an obligation owed to the applicant. The only exception is when there are *erga omnes* or *erga omnes partes* obligations at issue: in such cases, the applicant acts to ensure protection of the collective interest which those obligations are specifically intended to guarantee.

17. It may happen, and often happens, that the question of whether a given act of the respondent is in conformity with international law and the question of whether that same act respects the applicant's rights coincide in practice, even if they remain distinct in theory. Thus, in this case, if Nicaragua's Decree of 27 August 2013 establishing a system of straight baselines to measure the breadth of the territorial sea is contrary to international law (as the Judgment finds, and I agree on this point), the result must be a violation of Colombia's rights, once it is accepted that the latter is specially affected by the consequences of this wrongful act. That is why I voted in favour of subparagraph 7 of the operative clause, without dwelling on the wording, which, in my view, is not the most felicitous.

18. The situation is different as regards the question of whether Colombia's contiguous zone is in conformity with international law and that of whether the rights invoked by Nicaragua have been respected, questions which do not fully coincide.

19. Nicaragua did not ask the Court to conduct an abstract examination of Decree 1946 in the light of international law, but to find that the Decree — and the contiguous zone defined therein —violated its rights in its exclusive economic zone. Of course, in order to answer the question thus submitted to it, the Court had to address the issue of the applicable law and examine — to some extent — whether the provisions of Decree 1946 were compatible with that law. But it should not have lost sight — which, in my opinion, it tended to do — of the fact that such an examination was only relevant in so far as it enabled the Court to decide whether Nicaragua's rights had been violated, rather than whether Colombia had complied with international law as such.

20. The rights alleged by Nicaragua to have been violated are those which the Applicant, as a coastal State, can claim in its exclusive economic zone. Those rights are not a direct result of the 2012 Judgment but are derived from it, since that Judgment fixed the limits of the exclusive

economic zone. In short, Nicaragua alleged that Colombia failed to respect the maritime boundary as drawn by the Court in 2012, by seeking to exercise, on Nicaragua's side of the boundary, powers incompatible with the rights belonging to the Applicant in its exclusive economic zone. The rights in question are the "sovereign rights" and "jurisdiction" conferred on the coastal State in its exclusive economic zone by Article 56 of the United Nations Convention on the Law of the Sea (hereinafter "UNCLOS"), which reflects customary international law; they are enumerated in Article 56, paragraph 1 *(a)* and *(b)*, of that Convention. Note that Nicaragua did not include among the rights whose violation it alleged before the Court its right of freedom of navigation, which it (together with third States) unquestionably possesses in its exclusive economic zone, but which was in no way affected, either in its scope or in its existence, by the maritime boundary fixed by the 2012 Judgment.

In my view, it is thus the provisions of Article 56, paragraph 1 *(a)* and *(b)*, of UNCLOS which should have served as a reference point for the Court's examination of Decree 1946, rather than the provisions of Article 33, paragraph 1, of the same Convention, which defines the powers that the coastal State may exercise in its contiguous zone.

21. I am therefore of the opinion that the Court should have addressed two questions. It should first have considered whether the provisions of Decree 1946 violate — or are capable of violating — the sovereign rights and jurisdiction of Nicaragua in its exclusive economic zone, as defined by Article 56, paragraph 1 *(a)* and *(b)*, of UNCLOS. If the answer to that question were in the affirmative, or partially in the affirmative, the Court should then have considered whether, by its mere existence, the Decree at issue constituted an internationally wrongful act engaging Colombia's international responsibility.

22. As regards the first question, I note that the Judgment deals at quite considerable length with a point which, under my approach, is of rather limited relevance, namely the breadth of the contiguous zone. Having found that the rule set out in Article 33, paragraph 2, of UNCLOS — which states that the breadth of the contiguous zone may not exceed 24 nautical miles — reflected customary law, the Court declares that Decree 1946 fails to comply with the applicable law because it extends the contiguous zone that it establishes beyond 24 nautical miles in some areas. That may be so, but it is hardly relevant in the present case. There are two possibilities here: either the powers conferred on the Colombian authorities by Decree 1946 are compatible with the "sovereign rights" and "jurisdiction" of Nicaragua, as defined in Article 56, paragraph 1 *(a)* and *(b)*, of UNCLOS, in which case the fact that the Colombian contiguous zone is wider than 24 nautical miles does not per se violate Nicaragua's rights in its exclusive economic zone; or, the powers in question are incompatible with Nicaragua's rights, in which case there would have been a violation of those rights even if the limits of the contiguous zone had complied with the 24-nautical-mile rule, since, in any event, part of

the contiguous zone would inevitably overlap with Nicaragua's exclusive economic zone. If there were a violation of Nicaragua's sovereign rights and jurisdiction, the fact that the Colombian contiguous zone extends beyond 24 nautical miles could, at the very most, be considered an aggravating circumstance, since that violation would produce geographically more extensive effects.

23. The crucial question, in fact, is whether the powers which Decree 1946 confers on the Colombian authorities are incompatible with the "sovereign rights" and "jurisdiction" of Nicaragua, as a coastal State, in its exclusive economic zone.

24. In this regard, the Court identifies several provisions in the Decree which it deems to go beyond the powers that international law — namely Article 33, paragraph 1, of UNCLOS, inasmuch as it reflects customary law — allows a State to exercise in its contiguous zone. This is the case for the provisions of Article 5 of the Decree which cover the prevention of infringements and control over compliance with laws and regulations regarding the "security of the State, including piracy, trafficking of drugs and psychotropic substances, as well as conduct contrary to the security in the sea". It is also the case for the provision covering "the preservation of the maritime environment".

25. As regards the first category of provisions, it is quite possible that "[t]he inclusion of security in the material scope of Colombia's powers within the 'integral contiguous zone' is . . . not in conformity with the relevant customary rule", as the Court states in paragraph 177, and that the Decree is therefore contrary to international law in this respect. But, as I explained earlier, that was not the question submitted to the Court. The question was whether the powers conferred on the Colombian authorities by the Decree violated the "sovereign rights" and "jurisdiction" of Nicaragua in its exclusive economic zone. No evidence has been provided to show that this is the case as far as the provisions of the Decree relating to security are concerned; doing so would involve identifying the provisions of Article 56, paragraph 1 *(a)* and *(b)*, which had been — or might be — violated by the provisions so criticized.

26. As for the provision in the Decree referring to "the preservation of the maritime environment", I fully accept that it raises a serious difficulty in respect of the "sovereign rights" and "jurisdiction" of Nicaragua in its exclusive economic zone. Customary law does indeed grant the State to which the exclusive economic zone belongs "jurisdiction . . . with regard to . . . the protection and preservation of the marine environment" (Article 56, paragraph 1 *(b)* (iii), reflecting customary law). That jurisdiction is exclusive as regards the adoption of laws and regulations pertaining to the conservation of biological resources and preservation of the marine environment. However, when it comes to the application of those laws and regulations, the jurisdiction of the coastal State is not exclusive: third States thus have the power to take the necessary measures to ensure that

vessels flying their flag comply with the laws and regulations enacted by the coastal State, as mentioned in the Judgment (paragraph 179, referring to an Advisory Opinion of the International Tribunal for the Law of the Sea: *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015*, p. 37, para. 120). Consequently, there would be a violation of Nicaragua's jurisdiction if that particular provision of Article 5 of Decree 1946 was applied in such a way as to empower the Colombian authorities to enact rules on the "preservation of the maritime environment" in the part of the contiguous zone overlapping with Nicaragua's exclusive economic zone, or to exercise measures of constraint against vessels flying the flag of a third State.

27. It remains to be determined whether by its mere existence — that is to say, in the absence of any specific measure implementing the provision at issue — Decree 1946, inasmuch as it gives Colombia jurisdiction in relation to the "preservation of the maritime environment", engages Colombia's responsibility vis-à-vis Nicaragua.

28. I do not think it necessary to adopt a position on the general question of whether a State engages its international responsibility simply by adopting national legislation, a question in respect of which the International Law Commission rightly stated that there was no general and unequivocal answer.

It seems to me that, at the very least, for a law or regulation, by its mere adoption or its mere promulgation, to constitute an internationally wrongful act, one condition must be met, which is necessary but may not be sufficient. The condition is that the law or regulation, by virtue of its content, is such that its application cannot fail to lead to the violation of an international obligation. If the text in question is open to a number of interpretations, one or more of which would be compatible with the State's international obligations, I find it hard to regard it as constituting a wrongful act per se, even before its practical implementation brings to light a violation of an international obligation, if such there be.

29. I am not convinced that the above condition is met in the present case. It would be possible for Decree 1946 to be interpreted by the Colombian authorities (if need be, by the judicial authorities) in a restrictive fashion, precluding the provision referring to "the preservation of the maritime environment" from being implemented in such a way as to allow Colombia to exercise legislative power in Nicaragua's exclusive economic zone. This is even more apparent in respect of the provision of the Decree referring to the protection of "national maritime interests", which, the Court notes, "through its broad wording alone, appears to encroach on the sovereign rights and jurisdiction of Nicaragua as set forth in Article 56, paragraph 1, of UNCLOS" (para. 178). It too could be interpreted in a restrictive fashion so as to render it compatible with Nicaragua's rights.

30. The important point, to my mind, is not whether such an interpretation reflects the intentions of the Decree's drafters (which is highly debatable). Nor am I unduly influenced by the presence in Article 5 of the Decree of the clause added in 2014, according to which "[t]he Application of this article will be carried out in conformity with international law". A State is always bound to apply its legislation in conformity with international law in so far as this is possible and, if it is not, to amend it. The aforementioned clause therefore adds nothing, in terms of the international obligations of the State. The decisive point is that if, in its Judgment, the Court had provided guidance on how the provisions of Decree 1946 should be applied (and the limits within which they may be applied) in order to ensure the compatibility of the contiguous zone with Nicaragua's rights, Colombia would have been obliged to comply with that guidance when implementing the Decree. That is how, in my opinion, the Court should have proceeded, rather than finding the contiguous zone contrary to international law and ordering Colombia to bring the Decree into conformity with that law, which requires it to be amended.

31. For the foregoing reasons, I have been compelled to vote against subparagraphs 5 and 6 of the operative clause. This does not mean that I consider that Colombia's "integral contiguous zone" does not give rise to serious difficulties in respect of Nicaragua's rights. But I address the question from a different perspective than that chosen by most of my colleagues, and I regret that I cannot reach the same conclusions as they do.

(Signed) Ronny Abraham.