

DECLARATION OF JUDGE BENNOUNA

[Original English Text]

1. To my regret, I had to vote against the decision of the Court, which found that it had jurisdiction *ratione temporis* to entertain facts and events alleged by Nicaragua to have occurred after 27 November 2013 (Judgment, para. 261, subpara. 1). Indeed, this is the date on which the Pact of Bogotá, the basis of the Court's jurisdiction, ceased to be in force in relations between the two Parties.

2. Under the terms of Article XXXI, subparagraph (c), of the Pact, the Parties recognize "the jurisdiction of the Court . . . in all disputes of a juridical nature that arise among them concerning . . . [t]he existence of any fact which, if established, would constitute the breach of an international obligation". Article XXXI also states that this recognition is valid only "so long as the present Treaty is in force".

3. In my view, the Court should have interpreted the Pact, and in particular the compromissory clause contained in its Article XXXI, using the means of interpretation provided for in the 1969 Vienna Convention on the Law of Treaties (hereinafter the "VCLT"), which have customary status (*Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgment, I.C.J. Reports 1991, pp. 69-70, para. 48). Thus, pursuant to Article 31, paragraph 1, of the VCLT, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". The Court has emphasized that "[i]nterpretation must be based above all upon the text of the treaty" (*Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, Judgment, I.C.J. Reports 1994, p. 22, para. 41; *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Preliminary Objections, Judgment, I.C.J. Reports 2004 (I), p. 318, para. 100).

4. Pursuant to Article LVI of the Pact,

"[t]he present Treaty shall remain in force indefinitely, but may be denounced upon one year's notice, at the end of which period it shall cease to be in force with respect to the State denouncing it, but shall continue in force for the remaining signatories. The denunciation shall be addressed to the Pan American Union, which shall transmit it to the other Contracting Parties.

The denunciation shall have no effect with respect to pending procedures initiated prior to the transmission of the particular notification."

Colombia proceeded to denounce the Pact on 27 November 2012, and that denunciation took effect from 27 November 2013.

5. Clearly, the termination of the Pact of Bogotá after the filing of the Application cannot affect the Court's jurisdiction, established by its

2016 decision, to entertain the dispute as it existed on 26 November 2013, the date on which the Application was filed by Nicaragua. In my view, however, that jurisdiction cannot extend to facts and events which occurred after the critical date of 27 November 2013.

6. In accordance with the ordinary meaning of the terms of Article XXXI, subparagraph (c), of the Pact, from that date onwards the Court was unable to entertain a dispute between the Parties concerning “[t]he existence of any fact which, if established, would constitute the breach of an international obligation”. In order to comply with this provision, the Court should thus have declared that it lacked jurisdiction to rule on all incidents alleged by the Applicant to have occurred after the critical date of 27 November 2013.

7. Instead of adopting this approach and interpreting the compromissory clause in a manner consistent with the consent given by the Parties to its jurisdiction, the Court invokes precedents (Judgment, para. 44) relating to jurisdiction *ratione materiae* and, above all, the admissibility of late claims made after the filing of the application, in cases where the jurisdictional title was still valid. It derives from that jurisprudence two criteria which apply only to late claims, and which have no bearing on determining jurisdiction *ratione temporis* when the parties’ consent to that jurisdiction has lapsed. None of the cases to which the Court refers (*ibid.*) concerns facts or events that occurred after the jurisdictional title was no longer in force between the parties. It is clear, therefore, that the present case cannot be treated in the same way as the precedents mentioned by the Court, since the situation concerned is not comparable to theirs. The Court acknowledges that “the question posed by Colombia has not previously been presented to the Court” (*ibid.*, para. 43), and this is, moreover, why this decision is so important. Unable to rely on precedent in this case, the Court was forced to break new ground, but it has failed to properly produce reasoning in support of this.

8. The Court, thus, has not provided a solution founded on the compromissory clause of the Pact of Bogotá, which instrument does not allow it to rule on the incidents alleged to have occurred after 27 November 2013, the date on which the Pact ceased to be in force and to have any effect in relations between the two Parties.

9. It should be noted that the Court places particular emphasis on the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*. In that case, however, it ruled on the basis of *forum prorogatum* in order to establish its jurisdiction *ratione materiae*. The Court assessed the scope of the consent given by France to Djibouti’s application, from which it followed that “the claims relating to the arrest warrants arise in respect of issues which are outside the scope of the Court’s jurisdiction *ratione materiae*” (Judgment, *I.C.J. Reports 2008*, p. 212, para. 88).

10. Nicaragua, aware of the inadequacy of its argument seeking to link the present case to the criteria relating to the admissibility of late claims, described the facts and events in question as “composite and continuing” (Judgment, para. 38). The Court, moreover, did not comment on this expression, which is borrowed from the law on international responsibility and is of no help in answering the question of jurisdiction *ratione temporis*.

11. The absence of a title of jurisdiction *ratione temporis* after the critical date of 27 November 2013 should, in my view, have prompted the Court to refuse to rule on the events that occurred after that date. Even if the issues raised by the incidents in question in the present case do not have profound consequences, the fact remains that by adopting such a broad interpretation of consent to its jurisdiction under the Pact of Bogotá, the Court risks undermining one of the pillars of its relationship with the States parties under the Statute.

12. In view of the foregoing, I also voted against subparagraph 2 of the operative clause relating to Colombia’s violations of Nicaragua’s sovereign rights and jurisdiction (*ibid.*, para. 261, subpara. 2).

13. I likewise voted against the third point of the operative clause relating to the granting of fishing permits by Colombia (*ibid.*, subpara. 3). First, because, here too, the Court should not have ruled on some of the alleged incidents, since they occurred after the critical date of 27 November 2013. Second, because the Court did not rely on evidence capable of demonstrating that Colombia granted fishing permits relating to Nicaragua’s exclusive economic zone. The Court refers to a number of resolutions, stating that Colombia continues to assert “the right to authorize fishing activities in parts of Nicaragua’s exclusive economic zone” (*ibid.*, para. 119). Nevertheless, this does not prove that Colombia granted permits authorizing fishing in the zone attributed to Nicaragua.

14. Finally, I voted against subparagraph 7 of the operative clause, which states that Nicaragua’s straight baselines are not in conformity with customary international law (*ibid.*, para. 261, subpara. 7). This is a counter-claim relating to alleged violations of Colombia’s sovereign rights and maritime spaces resulting from the use of straight baselines by Nicaragua. In my view, the Court would only be able to assess whether Nicaragua’s straight baselines were consistent with international law if Colombia could prove that the drawing of such baselines by Nicaragua specially affected its own rights in its exclusive economic zone.

15. Nicaragua argued before the Court that the straight baselines established by Decree No. 33-2013 did not call into question the delimitation of the maritime areas carried out in 2012 and did not shift seaward the outer limit of its exclusive economic zone.

16. Article 7 of the United Nations Convention on the Law of the Sea (hereinafter “UNCLOS”) lays down conditions for the use of straight

baselines by a coastal State. It is for each State to assess and take those conditions into account. One limitation is that “[t]he system of straight baselines may not be applied by a State in such a manner as to cut off the territorial sea of another State from the high seas or an exclusive economic zone” (UNCLOS, Art. 7, para. 6). The Court emphasizes that the straight baselines “convert into internal waters certain areas which otherwise would have been part of Nicaragua’s territorial sea or exclusive economic zone and convert into territorial sea certain areas which would have been part of Nicaragua’s exclusive economic zone” (Judgment, para. 259). It adds that “[t]he establishment of Nicaragua’s straight baselines limits the rights that Colombian vessels would have had in those areas” (*ibid.*). I am of the opinion, however, that such a limitation affects Colombia in the same way as all other States. Therefore, Colombia cannot be considered a State specially affected, that is to say an injured State, under the law of international responsibility, by Nicaragua’s use of straight baselines (Article 42 of the International Law Commission’s Articles on the Responsibility of States for Internationally Wrongful Acts). This is, in effect, the sole basis on which Colombia could have brought before the Court its allegations that its sovereign rights and maritime spaces had been violated by Nicaragua’s use of straight baselines.

17. By granting Colombia’s request, the Court is creating a precedent which may result in an increase in cases of this kind, given the existence of a number of straight baselines not wholly consistent with the criteria set out in Article 7 of UNCLOS. Under Article 16 of that instrument, charts or lists of geographical co-ordinates relating to the drawing of straight baselines are deposited with the Secretary-General of the United Nations, and they are thus sufficiently publicized to other States. It is through diplomatic means that coastal States have protested against the drawing of certain baselines.

(Signed) Mohamed BENNOUNA.
