SEPARATE OPINION OF JUDGE YUSUF

First disagreement with conclusion on jurisdiction ratione temporis — *Jurisdiction based on consent of the parties and subject to limits and conditions thereto — Article XXXI of the Pact of Bogotá establishes those limits — No detailed interpretation of Article XXXI of the Pact is undertaken — Such interpretation would lead to conclusion that Court lacks jurisdiction over claims predicated on facts and events having occurred after lapse of jurisdictional title — Nothing in 2016 Judgment suggests that Court's jurisdiction extends to events subsequent to termination of the Pact with respect to Colombia — An analogy with jurisprudence on admissibility of new claims subsequent to application whilst jurisdictional title still in force is inapposite — Also, alleged incidents are not of "same nature" — They are neither uniform in character nor always relate to identical facts or common legal bases — Second disagreement with subparagraph 6 of* dispositif *referring to provisions of Presidential Decree 1946 of 9 September 2013 — Inconsistency with subparagraph 5 of* dispositif*, which finds Colombia's "integral contiguous zone", rather than Presidential Decree 1946 itself, as not in conformity with customary law — Inconsistency also found in reasoning of Judgment.*

1. I voted against several subparagraphs of the *dispositif* because of my disagreement with two conclusions of the Court in this Judgment. The first one concerns the jurisdiction *ratione temporis* of the Court, while the second relates to the conformity with customary international law of the provisions of the Colombian Presidential Decree 1946 of 9 September 2013. The reasons for my disagreement are set out below.

A. Jurisdiction of the Court *Ratione Temporis*

2. I disagree with the conclusion in subparagraph 1 of the *dispositif* of the Judgment, according to which the Court's jurisdiction on the basis of Article XXXI of the Pact of Bogotá extends to the "claims based on those events referred to by the Republic of Nicaragua that occurred after 27 November 2013", the date on which the Pact of Bogotá ceased to be in force with respect to the Republic of Colombia.

3. The jurisdiction of the Court is based on the consent of the parties. Such consent may also be subject to certain conditions and/or limits which must be observed by the Court. As was stated by the Court in its Judgment on *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda)*, "[w]hen that consent is expressed in a compromissory clause in an international

agreement, any conditions to which such consent is subject must be regarded as constituting the limits thereon"[1].

4. Article XXXI of the Pact of Bogotá is such a compromissory clause. It reads as follows:

> "In conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice, the 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*: *(a)* The interpretation of a treaty; *(b)* Any question of international law; *(c) The existence of any fact which, if established, would constitute the breach of an international obligation*; *(d)* The nature or extent of the reparation to be made for the breach of an international obligation." (Emphases added.)

5. It is no longer disputed between the Parties to the instant case that the lapse of the jurisdictional title *after* the filing of the Application does not affect the jurisdiction of the Court to adjudicate their "dispute" over facts that are said to have occurred *before* the jurisdictional title came to an end[2]. What is, however, disputed between them and on which divergent arguments have been presented during the current proceedings is whether the lapse of the jurisdictional title had an effect on the Court's jurisdiction to examine claims regarding incidents that have allegedly occurred *after* the Pact of Bogotá ceased to be in force between the Parties, i.e. the incidents that are said to have occurred after 27 November 2013.

6. The Court has never been confronted with a similar situation. Therefore, neither the findings in the Court's Judgment of 2016[3] nor the Court's jurisprudence with respect to the admissibility of facts or claims that occurred after the filing of the Application, but while the title of jurisdiction still existed, can offer a solution to this divergence of views. It was therefore necessary, in my view, to proceed in the Judgment to a detailed analysis of the interpretation of Article XXXI of the Pact of Bogotá, which provides the limits and conditions of the Court's jurisdiction. It is regrettable that such an analysis is nowhere to be found in the Judgment.

7. Such an interpretation, in my view, would readily lead to the conclusion that the Court does not have jurisdiction over claims predicated on facts and events that occurred after the lapse of the jurisdictional title

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[1] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 39, para. 88.

[2] Cf. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 438, para. 80 ("[T]he removal, after an application has been filed, of an element on which the Court's jurisdiction is dependent does not and cannot have any retroactive effect").

[3] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 3.

between the Parties. By specifying that the Parties to the Pact of Bogotá recognize the jurisdiction of the Court over disputes concerning "any fact which, if established, would constitute the breach of an international obligation" only "so long as the present Treaty is in force", the text of Article XXXI makes it abundantly clear that the Court's jurisdiction *ratione temporis* is limited to facts underlying a dispute which occurred before the Pact ceased to apply. The consent expressed in Article XXXI does not and cannot extend to events or facts underlying disputes that occurred after the treaty had lapsed. In this regard, Article XXXI of the Pact sets out a clear temporal limitation to the Court's jurisdiction in so far as consent is conditioned on the continuation in force of the Pact between the concerned States.

8. This textual interpretation of Article XXXI finds support in the Court's analysis of this provision in the *Border and Transborder Armed Actions* case, where it was stated that,

> "[i]n that text, the parties 'declare that they recognize' the Court's jurisdiction 'as compulsory *ipso facto*' in the cases there enumerated.
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> . . . . . .
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> The commitment in Article XXXI applies *ratione materiae* to the disputes enumerated in that text; it relates *ratione personae* to the American States parties to the Pact; *it remains valid* ratione temporis *for as long as that instrument itself remains in force between those States*."[4]

9. Moreover, the words "so long as the present Treaty is in force" in Article XXXI must be read together with the first sentence of Article LVI of the Pact, which states that

> "[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 Pact of Bogotá ceased to be in force for Colombia on 27 November 2013, that is one year after Colombia gave its notice of denunciation. Thus, under the terms of Article XXXI, there is no basis for the Court to entertain any claims relating to events or situations that occurred after that date and that might have given rise to a dispute between the Parties or to conclude that it has jurisdiction over such claims, in view of the termination of the Pact of Bogotá between the two States.

10. The "dispute" found by the Court to exist in its 2016 Judgment was limited to the facts "at the date on which the Application was filed", i.e. before the lapse of the jurisdictional title. The Court was careful to limit

[4] *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 84, paras. 32 and 34 (emphases added).

itself to a finding of jurisdiction over the dispute concerning "the incidents at sea alleged to have taken place *before the critical date*"[5]. At no point in the 2016 Judgment did the Court define the "dispute" by reference to incidents at sea that took place *after* the filing of the Application. This is despite the fact that the Court already had before it Nicaragua's Memorial, which contained no less than 20 incidents allegedly having occurred in the period between the Application and the Memorial.

11. Accordingly, the Court concluded that,

> "[b]ased on the evidence examined above, the Court finds that, *at the date on which the Application was filed*, there existed a dispute concerning the alleged violations by Colombia of Nicaragua's rights in the maritime zones which, according to Nicaragua, the Court declared in its 2012 Judgment appertain to Nicaragua"[6].

Thus, contrary to what is mentioned in paragraph 45 of the Judgment, there is nothing in the 2016 Judgment to suggest that the Court's jurisdiction extends to facts subsequent to the Application and subsequent to the termination of the Pact of Bogotá with respect to Colombia.

12. It is also untenable to draw an analogy between the Court's jurisprudence on the admissibility of new "claims" or "facts" that occurred after the filing of an application, but while the title of jurisdiction continued to exist, and the present case, which concerns the Court's jurisdiction vis-à-vis new facts or events *after* the lapse of the jurisdictional title. The criteria enunciated in the Court's case law with respect to the admissibility of new claims, while the jurisdictional title continues to be in force, cannot apply to the determination of the Court's jurisdiction *ratione temporis*. According to such case law, the admissibility of new claims presupposes the continued existence of a valid jurisdictional title, which is not the case here. Therefore, none of the cases mentioned in paragraph 44 of the Judgment are apposite to the present circumstances, as the jurisdictional title invoked by the respective applicant continued to be in force throughout the proceedings. Moreover, it should be recalled that in all those cases, the problem was one of admissibility, not of jurisdiction *ratione temporis*.

13. It is equally important to note that the incidents that have allegedly occurred before and after 27 November 2013 are neither uniform in character nor do they always relate to identical facts or common legal bases. They cannot therefore be characterized to be of "the same nature"; nor can it be said that they concern the same legal questions. To give a simple example, no incident concerning marine scientific research occurred before 27 November 2013. The two incidents on marine scientific research

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[5] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 32, para. 71 and p. 33, paras. 74 and 78 (emphasis added).

[6] *Ibid.*, p. 33, para. 74 (emphasis added).

regarding the *Dr Jorge Carranza Fraser* allegedly occurred on 6 and 8 October 2018. In addition, the three incidents concerning the USA-flagged oceanographic vessel *Pathfinder* are said to have occurred on 7 and 25 January 2014 and 20 February 2014, respectively.

14. Are such alleged incidents regarding marine scientific research of the same nature as incidents regarding fishing or overflight that occurred before 27 November 2013? The answer is negative. Apart from the difference in character of these incidents, the legal bases of the claims relating to them are dissimilar. While the coastal State has sovereign rights in the exclusive economic zone (hereinafter the "EEZ") with respect to fisheries, it has jurisdiction with regard to marine scientific research. Thus, the legal régime governing the rights and obligations of the two States with respect to the two sets of alleged incidents in the EEZ is quite different. Consequently, the dispute between the Parties over the alleged incidents before and after 27 November 2013 does not always have the same subject-matter nor does it concern the same facts or situations or the same legal questions, but has a varied number of aspects both legally and factually.

B. Subparagraph 6 of the *Dispositif*

15. I also have to express my disagreement with subparagraph 6 of the *dispositif*, which states that

> "Colombia must, by means of its own choosing, bring into conformity with customary international law the provisions of Presidential Decree 1946 of 9 September 2013, as amended by Decree No. 1119 of 17 June 2014, in so far as they relate to maritime areas declared by the Court in its 2012 Judgment to appertain to the Republic of Nicaragua".

16. By ordering Colombia to bring the provisions of the Presidential Decree into conformity with customary international law, the Court is clearly barking up the wrong tree. It is not solely by enacting the provisions of the Presidential Decree as such, but through their implementation in establishing the "integral contiguous zone" and enforcing its powers therein that Colombia has breached the rights of Nicaragua in the latter's EEZ. After all, the Judgment itself does not say anywhere that Colombia has breached its obligations under customary international law by merely enacting the Presidential Decree or that it is the Decree, in and of itself, which is not in conformity with international law. It finds that it is the "integral contiguous zone" established by Colombia that is not in conformity with customary international law (see, for example, paragraphs 187 and 194 of the Judgment). This finding is afterwards reflected in subparagraph 5 of the *dispositif*.

17. However, instead of stating in subparagraph 6 of the *dispositif* that Colombia should bring the limits of its "integral contiguous zone" and the powers it exercises therein into conformity with customary international law, the Judgment pivots, under this subparagraph, to the necessity of bringing the provisions of the Presidential Decree into conformity with customary international law. To the extent that subparagraph 5 of the *dispositif* makes a finding concerning the incompatibility with customary law of a particular zone, rather than the legislative or administrative means underlying its implementation, the obligation to remedy that situation cannot be limited to the provisions of a particular decree or piece of legislation. Rather, it should concern the "integral contiguous zone" itself, its limits, and the police powers exercised in it by Colombia over environmental and other matters, to the detriment of the sovereign rights and jurisdiction of Nicaragua in its EEZ.

18. It is for these reasons that I voted in favour of the finding in subparagraph 5 of the *dispositif*, but against subparagraph 6 thereof. In my view, the latter clause is not consistent with the conclusions of the Court reflected in subparagraph 5 of the *dispositif*, which finds that it is the "'integral contiguous zone' established by the Republic of Colombia by Presidential Decree 1946 of 9 September 2013, as amended by Decree 1119 of 17 June 2014" — and not the Presidential Decree 1946 *itself* — which is not in conformity with customary international law.

19. This inconsistency is to be found also in the reasoning of the Judgment itself. In paragraph 196 of the Judgment, which is meant to summarize the infringements by Colombia through its "integral contiguous zone" of Nicaragua's rights in the latter's EEZ, it is stated that

> "[t]he Court has also found (see paragraphs 187 and 194 above) that the 'integral contiguous zone' established by Colombia's Presidential Decree 1946 is not in conformity with customary international law, both because its breadth exceeds 24 nautical miles from the baselines from which Colombia's territorial sea is measured and because the powers that Colombia asserts within the 'integral contiguous zone' exceed those that are permitted under customary international law. In the maritime areas where the 'integral contiguous zone' overlaps with Nicaragua's exclusive economic zone, the 'integral contiguous zone' infringes upon Nicaragua's sovereign rights and jurisdiction in the exclusive economic zone. Colombia's responsibility is thereby engaged. Colombia has the obligation, by means of its own choosing, to bring the provisions of Presidential Decree 1946 into conformity with customary international law in so far as they relate to maritime areas declared by the Court in its 2012 Judgment to appertain to Nicaragua."

20. Based on this paragraph, it is not clear whether it is the zone itself, the enforcement of its limits and the powers exercised by Colombia therein, or solely the legislative means underlying it, i.e. the Presidential Decree as such, that is found to be incompatible with customary interna-

tional law. Paragraph 175 also states that it is "[t]he geographical extent of the 'integral contiguous zone'" — rather than Article 5 of Presidential Decree 1946 — which "is not in conformity with customary international law". By contrast, paragraphs 176 to 180 specifically examine the compatibility of Article 5, paragraph 3, of Presidential Decree 1946 with customary law. All these inconsistencies lead to confusion, which is regrettably reflected in the above subparagraphs of the *dispositif*.

21. If the findings of the Judgment relate to the incompatibility of the "integral contiguous zone" itself with customary international law, as appears to be indicated in several paragraphs of the Judgment and in subparagraph 5 of the *dispositif*, then the obligation to bring the situation into conformity with customary international law should logically relate to the "integral contiguous zone", and the powers exercised therein by Colombia, rather than the provisions of the Presidential Decree as such, as currently formulated in subparagraph 6 of the *dispositif*.

(Signed) Abdulqawi A. YUSUF.