

DECLARATION OF JUDGE SIMMA

Jurisdiction of the Court within the system of the Pact of Bogotá: difference between Nicaragua not being allowed anymore to assert the invalidity of its 1928 Treaty with Colombia due to its past behaviour and the Treaty being "valid and in force" in 1948 — The provisions of the Pact and the declarations made under the optional clause representing two distinct bases of the Court's jurisdiction which are not mutually exclusive, the fact that Nicaragua is denied access to the Court within the system of the Pact neither disposes of the legal dispute in question nor does it eliminate the invocability of an Article 36, paragraph 2, declaration.

While I consider the present Judgment generally satisfactory, I have my doubts whether the Court has applied Article VI of the Pact of Bogotá to the Treaty concluded between Nicaragua and Colombia in 1928 in a correct way. In the same context, I have considerable difficulties with the Court's reading of the relationship between, on the one hand, the notion of a matter being "governed by . . . treaties in force" at the time of the conclusion of the Pact in 1948 and that of the continued existence of a "legal dispute" as a precondition for the jurisdiction of the Court on the basis of a declaration of acceptance under the optional clause on the other.

According to the Court, the one matter which the 1928 Treaty between Nicaragua and Colombia settled finally (contrary to the issues of sovereignty over the further maritime features in the area and of maritime delimitation in general), and did so in favour of Colombia, is the question of sovereignty over the islands of San Andrés, Providencia and Santa Catalina. The Court arrives at the conclusion that the 1928 Treaty has resolved this question definitively because the Treaty was to be regarded as a "treaty in force" in 1948 — with the result that, according to Article VI of the Pact of Bogotá, matters governed by it are beyond the jurisdictional reach of the Court. Nicaragua had contended that the 1928 Treaty was to be regarded as null and void *ab initio* on the grounds, first, that it was incompatible with the constitution of the country and, second, that its conclusion was brought about under foreign, namely United States, coercion. However, in the view of the Court, since Nicaragua had not contested the validity of the 1928 Treaty for over 50 years, that is, until 1980, and in a number of instances had even positively acted as if the Treaty was valid, "[it] cannot today be heard to assert that the 1928 Treaty was not in force in 1948" (Judgment, para. 80). And the Court then continues by stating that:

“In light of all the foregoing, the Court finds that the 1928 Treaty was *valid and in force* on the date of the conclusion of the Pact of Bogotá in 1948, 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.” (Para. 81; emphasis added.)

I would submit that this conclusion is problematic. What I mean by this is not that the Court should have said more (or rather, anything) about the well-foundedness *vel non* of the two grounds of invalidity invoked by Nicaragua as such instead of focusing exclusively on the loss of the right to such invocation. To do so this would not have been possible at the present, jurisdictional, stage of the proceedings (even as it stands, the present Judgment is a borderline case with regard to the way in which it purports to limit its scope to questions of jurisdiction while at the same time undertaking frequent, though extremely cursory, visits to issues clearly belonging to the merits). Rather, what I am aiming at is the character of the Court’s above conclusions as a *non sequitur*. To say that Nicaragua, by its behaviour concerning the 1928 Treaty somehow forfeited the right to invoke its invalidity, is one thing; to go on from there to find that, for the same reasons, the Treaty was actually valid and in force on the date of the conclusion of the Pact of Bogotá in 1948, is quite another. In my view, the second conclusion does not follow from the first. I do agree with the Court’s first finding to the effect that, since Nicaragua treated the 1928 Treaty as valid for such a long period of time, it cannot suddenly change its position and claim the instrument’s invalidity *ab initio*. I am of course aware that in taking this position one will encounter several difficulties arising under the law of treaties — let me just mention that Article 45 (*b*) of the Vienna Convention of 1969¹ excludes from its scope the case of coercion of a State by the threat or use of force, or that the applicability of the Vienna Convention’s Article 46 presupposes that the violation of internal law in question be manifest and concerned a constitutional rule of fundamental importance. Awareness of these problems might be the reason for the Court somewhat coyly avoiding the terminology used by the Vienna Convention (“invoking . . . as a ground”) and instead saying that Nicaragua “cannot today to be heard to assert” invalidity. Without straying too far into the terrain

¹ Article 45 reads as follows:

“A state may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts:

- (a) it shall have expressly agreed that the treaty is valid or remains in force or continues in operations, as the case may be; or
- (b) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.”

reserved for the merits stage of the case, as concerns the chances of success of the two arguments on invalidity (or lack thereof), I think that the Court would not have had to be so cautious. The principle underlying Article 45 (*b*) of the Vienna Convention is undoubtedly applicable under the present circumstances: by its past behaviour, Nicaragua can no longer rely on the invalidity of the 1928 Treaty — under the system of the Pact of Bogotá, that is. Expressed in more precise terms: what Nicaragua is prevented from claiming now is that the Treaty of 1928 was not a treaty “in force” (within the meaning of Article VI of the Pact of Bogotá) at the date of the conclusion of the Pact. Further, Nicaragua cannot any longer contend that the matter “settled” by that Treaty, i.e., sovereignty over the islands of San Andrés, Providencia and Santa Catalina, was not to be seen as definitively resolved and could still come before the Court on the basis of the Pact of Bogotá.

According to the majority of the Court, however, what follows from Nicaragua’s behaviour vis-à-vis the Treaty is something more radical, namely that the Treaty “was valid and in force” in 1948, purely and simply. Thus, apparently the circumstances that led to the grounds of invalidity not any longer being invocable, also are held to have erased the invalidity as such. This is a result which, as a matter of theory, I find difficult to agree with. Within the framework of Colombia’s first preliminary objection it led the Court to uphold the objection, that is, to accept that access by Nicaragua to the Court on the basis of the Pact of Bogotá was barred with regard to the issue of sovereignty over the three islands mentioned. The Court could readily have reached the same result by following the line of reasoning that I pursue here: viewed within the framework of the Pact of Bogotá, Nicaragua forfeited the opportunity to bring the matter before the Court.

With this I arrive at my second — but closely related — point: what if the applicant State had at its disposal an alternative, additional, basis of jurisdiction of the Court? This could possibly be the case here, in view of the declarations made by both Parties under Article 36, paragraph 2, of the Court’s Statute; leaving aside for the moment Colombia’s second preliminary objection (relating to the reservation *ratione temporis* made to its declaration and its later revocation of the declaration altogether). Obviously, recourse to the Court on the jurisdictional basis of Article 36, paragraph 2, declarations is conditioned upon the — continued — existence of a “legal dispute”. What I take issue with in the present Judgment, however, is its finding that the Court’s upholding Colombia’s (first) preliminary objection relating to jurisdiction on the basis of the Pact of Bogotá (on which above) also disposed of Nicaragua’s reliance on jurisdiction based on the optional clause declarations of the two Parties. This finding is made in the face, as it were, of the Court’s previous conclusion

that the provisions of the Pact of Bogotá and the declarations made under the optional clause “represent two distinct bases of the Court’s jurisdiction which are not mutually exclusive” (Judgment, para. 136). In paragraph 138 of the Judgment the Court states as follows:

“The question has arisen as to whether the claim by Nicaragua of sovereignty over the islands of San Andrés, Providencia and Santa Catalina in the present case means that there thus is a continuing dispute as to this matter. The Court has upheld the first preliminary objection to jurisdiction, based on the Pact of Bogotá, raised by Colombia in so far as it concerns the Court’s jurisdiction regarding the question of sovereignty over these three islands, after satisfying itself that the matter of sovereignty over these islands had been settled by the 1928 Treaty. The Court could not have concluded that it lacked jurisdiction over that matter under the Pact of Bogotá had there still been an extant dispute with regard thereto.”

After referring to its earlier jurisprudence on the preconditions of the existence of a dispute, the Court continues:

“The Court’s acknowledgment of the fact that sovereignty over the three islands was attributed to Colombia under the 1928 Treaty was made for the purposes of ascertaining whether or not the Court had jurisdiction over the matter under the Pact of Bogotá. However, the very fact that the dispute on the question of the sovereignty over the three islands has been settled by the 1928 Treaty is equally relevant for the purposes of determining whether the Court has jurisdiction on the basis of the optional clause declarations. In this regard, the Court notes that Article 36, paragraph 2, of the Statute expressly requires that, in order for the Court to have jurisdiction on the basis of optional clause declarations, there must exist a ‘legal dispute’ between the Parties.

Given the Court’s finding that there is no extant legal dispute between the Parties on the question of sovereignty over the islands of San Andrés, Providencia and Santa Catalina, the Court cannot have jurisdiction over this question either under the Pact of Bogotá or on the basis of the optional clause declarations.”

The Court then concludes that, in light of the foregoing, no practical purpose would be served by proceeding further with the matters of the Colombian termination of its declaration and its reservation *ratione temporis* (Judgment, para. 139).

What this reasoning amounts to is that, with the question of sovereignty over the three islands “settled” by the 1928 Treaty according to the mechanisms of the Pact of Bogotá (forfeiture preventing the Nicara-

guan claim of invalidity of the 1928 Treaty; the Treaty therefore held to be “valid and in force” and the Court’s jurisdiction thus excluded), there is no “legal dispute” in regard to the islands left to decide on the basis of the optional clause declarations either. In my view and as a matter of principle, this is erroneous.

If the two bases of jurisdiction — first, the Pact of Bogotá and, second, the declarations of the two Parties on the basis of the optional clause — are to be seen as distinct and not mutually exclusive (in this sense, correctly, paragraph 136 of the Judgment), the first cannot simply eclipse the second. Any objective determination of the matter must lead us to conclude that there still persists a dispute including the appurtenance of the three islands in the sense of the Court’s case law, that is, “a disagreement on a point of law or fact, a conflict of legal views or interests between two persons” (*Mavrommatis Palestine Concessions (Greece/United Kingdom)*, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 11), the claim of one party being positively opposed by the other, etc. Thus, the Court, after having reached a negative result with regard to the first base of jurisdiction claimed by Nicaragua, ought to have continued the examination of its jurisdiction by turning to the optional clause declarations of the Parties, with a view to seeing whether these declarations could provide a jurisdictional basis for the decision of matters excluded from the Court’s purview on the basis of the Pact of Bogotá. If, subsequently, the Court had followed the arguments put forward by Colombia and granted the reservation *ratione temporis* to its Article 36, paragraph 2, declaration the desired effect, or had accepted Colombia’s termination of its subjection to the Court’s jurisdiction as admissible, the question of jurisdiction with regard to the controversy over the three islands would have been finally settled in the negative. In the alternative, this controversy would have been included in the list of issues that the Court allows to proceed to the merits stage. Thus, at that stage, Nicaragua would have had the opportunity to argue fully the two grounds of invalidity put forward with regard to the 1928 Treaty and present the reasons, if any, why it had not relied on these grounds before.

In this connection let me clarify that I have undertaken this short enquiry into the relationship between the two bases of jurisdiction claimed by Nicaragua simply because I could not be convinced of the correctness of the Court’s application of the law in this regard, and in no way out of any belief that the Nicaraguan arguments concerning the invalidity of the 1928 Treaty, as to their substance, came off too badly in the present Judgment.

(Signed) Bruno SIMMA.