

DECLARATION OF JUDGE *AD HOC* GAJA

While I fully agree with the operative part of the Judgment, I do not share the view that there is no “extant dispute” between the Parties on the question of sovereignty over the islands of San Andrés, Providencia and Santa Catalina and that therefore the Court does not have jurisdiction on the basis of the declarations made by the Parties according to Article 36, paragraph 2, of the Statute. It seems to me that the existence of a dispute can hardly be denied in view of the claim to sovereignty over the three islands made by Nicaragua in its submissions included in the Memorial.

My reason for concluding that the Court has no jurisdiction with regard to the question of sovereignty over the three islands rests on the reservation in the Colombian declaration to the effect that this declaration “applies only to disputes arising out of facts subsequent to 6 January 1932”. If one considers the “facts which are the source of the dispute”, as the Court stated in its Judgment on the *Right of Passage over Indian Territory (Portugal v. India)* (*Merits, I.C.J. Reports 1960*, p. 35), all the facts relating to the content and validity of the 1928 Treaty predate 1932 since they concern the conclusion of that treaty. Thus, the part of the dispute concerning the islands that were attributed to Colombia by the 1928 Treaty lies outside the scope of the Court’s jurisdiction also in so far as it is based on the Parties’ declarations under the optional clause.

Nicaragua’s contention that the 1928 Treaty was terminated as a consequence of a breach committed by Colombia refers to facts that occurred after 1932. However, the adoption by Colombia of a wide interpretation of the scope of the 1928 Treaty as including maritime delimitation, even if incorrect, cannot conceivably constitute a material breach.

(Signed) Giorgio GAJA.

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