

DECLARATION OF JUDGE *AD HOC* SIMMA

*1980 Treaty concerning Delimitation of Marine Areas and Maritime Co-operation between the Republic of Costa Rica and the Republic of Panama — Relevance to this case — Obligations under Article 102 of the Charter of the United Nations.*

1. I have voted in favour of each of the Judgment's operative paragraphs and agree, for the most part, with the reasoning set out therein. I wish, in this short declaration, to comment on a point which has not been addressed in the Judgment, relating to Article 102 of the Charter of the United Nations.

2. Article 102 of the Charter provides:

“1. Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.

2. No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations.”

3. In this case, both Parties made reference to the Treaty concerning Delimitation of Marine Areas and Maritime Co-operation between the Republic of Costa Rica and the Republic of Panama, which was signed on 2 February 1980 and entered into force on 11 February 1982 (the “1980 Treaty”) (see Judgment, para. 57). While the text of that Treaty is available on the website of the United Nations Division for Ocean Affairs and the Law of the Sea (and is reproduced in Annex 2 to Costa Rica's Memorial in the case concerning *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)*), it does not appear to have been registered in accordance with the requirements of Article 102, paragraph 1, of the United Nations Charter.

4. In their respective pleadings in this case, both Parties made reference to the 1980 Treaty in discussing the maritime boundaries already delimited by Costa Rica. The 1980 Treaty played a role in determining the approach of both Parties to the limits of the relevant area in the southerly part of the Caribbean Sea (see Judgment, paras. 117-119), the Court ultimately following in this respect that suggested by Costa Rica (*ibid.*, para. 164).

5. In making its arguments regarding the cut-off generated by a “three-State concavity” that it suffers in the Caribbean Sea, Costa Rica did not

point to the boundary delimited in the 1980 Treaty but to equidistance lines creating such an effect (see also Judgment, para. 150). In response, Nicaragua pointed to the terms of the 1980 Treaty, and Costa Rica acknowledged that part of its maritime boundary with Panama was indeed delimited by that treaty.

6. Nicaragua also referred to the 1980 Treaty in another respect, arguing that “[t]he terms of the 1980 Treaty are binding and inescapable and must be taken into account and given their due weight” in asserting the relevance of treaties signed by Costa Rica to the question of delimitation between the Parties in the Caribbean Sea (see also Judgment, paras. 123-129).

7. According to paragraph 2 of Article 102, “[n]o party to any such treaty or international agreement which has not been registered . . . may invoke that treaty or agreement before any organ of the United Nations”. The International Court of Justice being, according to Article 92 of the United Nations Charter, “the principal judicial organ of the United Nations”, it follows that such unregistered treaties cannot be invoked before it<sup>1</sup>. This does not, however, as the Court has observed, “have any consequence for the actual validity of the agreement, which remains no less binding upon the parties” (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994*, p. 122, para. 29).

8. The concept of “invocation” has been taken, in the context of Article 102 of the Charter, to mean that “a party relies upon a treaty as the foundation of its claim or counter-claim, or where the particular legal right that it alleges has been infringed has its basis in the terms thereof”<sup>2</sup>. In this case, it does not appear that Costa Rica has attempted to so invoke the 1980 Treaty.

9. For its part, Nicaragua did appear to rely on the 1980 Treaty to establish, at least indirectly, that Costa Rica had renounced certain maritime entitlements to its benefit (see Judgment, paras. 124-134). However, it is not necessary in the present case to determine whether Nicaragua has “invoked” the 1980 Treaty within the meaning of Article 102, paragraph 2, given that Nicaragua is not a party to that Treaty and therefore does not fall within the scope of Article 102, paragraph 2, in respect of it<sup>3</sup>.

<sup>1</sup> See, for example, the discussion in E. Martens, “Article 102” in B. Simma *et al.* (eds.), *The Charter of the United Nations: A Commentary*, Vol. II, 3rd ed., Oxford University Press, 2012, pp. 2106-2109.

<sup>2</sup> *Ibid.*, p. 2106, citing M. Brandon, “The Validity of Non-Registered Treaties” (1952), *British Yearbook of International Law*, Vol. 29, p. 198.

<sup>3</sup> See E. Martens, *supra* note 1, p. 2106. (“Only parties to an unregistered agreement can be concerned by the sanction. Third parties are at liberty to invoke it at any time, subject, of course, to the rule of *res inter alios acta*.”) See also M. Brandon, *supra* note 2, p. 192; J.-P. Jacque, “Article 102” in J.-P. Cot *et al.* (eds.), *La Charte des Nations Unies: Commentaire article par article*, Vol. II, 3rd ed., Paris: Economica, 2005, p. 2130.

10. Notwithstanding that neither Party was thus probably captured by the terms of Article 102, paragraph 2, of the Charter in this case, that provision is, as a whole, an important element in maintaining the international rule of law<sup>4</sup> and States should respect their obligations thereunder. It is therefore disappointing that the parties to the 1980 Treaty appear to have treated their obligations under Article 102 of the Charter in a somewhat cavalier fashion and that the Court did not take the opportunity to acknowledge this in its Judgment.

*(Signed)* Bruno SIMMA.

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<sup>4</sup> See, for example, United Nations General Assembly resolution 70/118, “The rule of law at the national and international levels” (14 December 2015), para. 8 (*b*).