**INTERNATIONAL COURT OF JUSTICE**

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**ALLEGED VIOLATIONS OF SOVEREIGN RIGHTS AND MARITIME SPACES IN THE CARIBBEAN SEA**

**(NICARAGUA *v.* COLOMBIA)**

# WRITTEN OBSERVATIONS OF THE REPUBLIC OF COLOMBIA ON THE ADMISSIBILITY OF ITS COUNTER-CLAIMS

**28 June 2017**

# TABLE OF CONTENTS

# Chapter 1

# INTRODUCTION

1.1. Pursuant to the Court's decision, communicated to the Parties in a letter dated 20 January 2017, Colombia respectfully submits its Observations in reply to Nicaragua's Written Observations on the admissibility of Colombia's counter-claims. Contrary to what Nicaragua advances in its Written Observations, there is no doubt that Colombia's counter-claims are admissible under Article 80 of the Rules of Court.

1.2. Nicaragua's Written Observations conclude by accusing Colombia of presenting "meritless counter-claims", which are not "genuine efforts to bring serious international disputes before the Court", and state that Colombia's counter-claims are a "tactical device", an "act of extraordinary *chutzpah*", and "a transparent attempt to distract the Court" [1]. In so alleging, Nicaragua challenges the admissibility of Colombia's counter-claims and invites the Court to refrain from entertaining them.

1.3. These ill-tempered and inflammatory accusations illustrate Nicaragua's one-sided view of the dispute with Colombia: a dispute where only Nicaragua has rights – and no

[1] Written Observations of Nicaragua on the Admissibility of Colombia's Counter-Claims (Written Observations of Nicaragua), paras. 4.2. and 4.3.

responsibilities – and only it can be heard. They highlight that Nicaragua places little premium on the requirements for the admissibility of counter-claims or the principle of equality in proceedings before the Court, which has been rightly described as "the real motor of judicial proceedings."[2]

1.4. Colombia's counter-claims show that it is Nicaragua, not Colombia, the State that is not complying with its international obligations, to the detriment of the sovereign rights of Colombia and other riparian States within the Caribbean Sea and of the basic rights of Colombian vulnerable communities in the Archipelago of San Andrés, Providencia and Santa Catalina.

1.5. Furthermore, Nicaragua's call for the Court to exercise "discretion" reveals that it is conscious of the weakness of its objections to the admissibility of Colombia's counter-claims and thus tries to importune the Court to decide on other grounds.

1.6. At any rate, such a call for the Court to use its discretion *vis-à-vis* Colombia's counter-claims is irrelevant *in casu*. The good administration of international justice should lead the Court to declare admissible any counter-claim that meets the requirements of Article 80 of the Rules of Court, regardless of considerations of discretion.

1.7. Colombia will demonstrate that its *four* counter-claims

[2] R. Kolb, *The International Court of Justice*, 2013, p. 668. Available at the Peace Palace Library.

meet both requirements under Article 80 of the Rules of Court. They all come within the jurisdiction of the Court (**Chapter 2**), and are all directly connected with the subject-matter of Nicaragua's main claim (**Chapter 3**). At the closing of these Observations, some conclusions are presented **(Chapter 4)**.

# Chapter 2

# COLOMBIA'S COUNTER-CLAIMS COME WITHIN THE JURISDICTION OF THE COURT

## A. Introduction

2.1. Nicaragua's Written Observations contend that Colombia's counter-claims do not "come within the jurisdiction of the Court". This contention defies the fundamental principles governing the Court's jurisdiction as laid out in the Statute and the Rules of Court. They also misconstrue and misread the case-law on the determination of jurisdiction in counter-claims proceedings.

2.2. As Colombia will show, the Court has jurisdiction to deal with Colombia's counter-claims under the Pact of Bogotá, notwithstanding that the latter has ceased to be in force between Nicaragua and Colombia after Nicaragua instituted these proceedings (**B**). This is enough for the Court to entertain Colombia's counter-claims under Article 80 of the Rules of Court. The two other conditions that Nicaragua tries to introduce – namely, the existence of a dispute and the prior recourse to negotiations – are not, and were never, contemplated under Article 80 of the Rules of Court. Nonetheless, for the sake of completeness, Colombia will demonstrate that these two conditions are irrelevant for the purposes of deciding the admissibility of Colombia's counter-claims (**C** and **D**).

## B. Under the Pact of Bogotá, the Court has Jurisdiction to entertain Colombia's Counter-Claims

2.3. Nicaragua reads the autonomous character of counter-claims as depriving the Court from jurisdiction to entertain Colombia's counter-claims under the Pact of Bogotá. This misconstrues the relationship between counter-claims and principal claims in a way that is not supported by the *rationale* of Article 80 of the Rules of Court.

2.4. Both Article 80 of the Rules of Court (**1**) and the 2016 Judgment (**2**) confirm that the Pact of Bogotá can serve as a basis of jurisdiction for the Court to entertain Colombia's counter-claims.

### (1) Under Article 80 of the Rules of Court, the Pact of Bogotá constitutes a basis for the Court's Jurisdiction to entertain Colombia's Counter-claims

2.5. The Court held in its Judgment on the Preliminary Objections raised in the present case that consent to its jurisdiction to adjudicate upon the dispute between Nicaragua and Colombia derives from Article XXXI of the Pact of Bogotá. The jurisdictional standards provided thereunder are satisfied. In particular jurisdiction over the counter-claims exists, (i) *ratione materiae*, as Colombia's counter-claims indisputably concern a dispute of juridical nature, as required by Article XXXI of the Pact of Bogotá; (ii) *ratione personae*, as Colombia's counter-claims refer to actions and omissions committed by Nicaragua; and, (iii) *ratione temporis*, since Article XXXI of the Pact of

Bogotá established that the Court has jurisdiction over all disputes that arise among the Parties so long as the Treaty is in force. As noted by Colombia, all of its counter-claims relate to events that "occurred before 27 November 2013, i.e., at a time when the Pact of Bogotá was still in force between Nicaragua and Colombia".[3]

2.6. Nicaragua mainly takes issue with the jurisdiction *ratione temporis*.

2.7. Nicaragua argues that Colombia's counter-claims do not come within the jurisdiction of the Court because they were submitted nearly three years after the Pact of Bogotá ceased to be in force between the Parties.[4] Nicaragua misinterprets Article XXXI of the Pact of Bogotá since that provision does not preclude submitting counter-claims related to events that occurred "so long as the […] Treaty is in force" between the Parties.

2.8. To the contrary, what the Pact of Bogotá prohibits is to present claims related to facts that occurred after its effects have ceased between the Parties. This is exactly what Nicaragua does in its Memorial when submitting no less than 23 incidents that occurred after Colombia ceased to be bound by the provisions of the Pact.

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[3] Counter-Memorial of the Republic of Colombia (Counter-Memorial of Colombia), para. 7.13.

[4] Written Observations of Nicaragua, para. 1.6

2.9. To distract from the plain meaning and application of Article XXXI of the Pact of Bogotá, Nicaragua's Written Observations insist that the date to determine the Court's jurisdiction to deal with Colombia's counter-claims should be the date upon which they were filed. No authority is offered in support of this argument, and none could be offered, aside from a shaky and convoluted reasoning.

2.10. Nicaragua first asserts that "[t]he critical date for determining jurisdiction over a counter-claim must be the date on which it is *presented* to the Court".[5] Then, it proceeds to affirm that "the critical date for determining jurisdiction over [the Respondent's] counter-claims is the date on which those claims were *submitted*, not the date of Nicaragua's Application".[6] Finally, it remarks that "the conclusion is therefore unavoidable: jurisdiction over a counter-claim must be assessed by reference to the date on which it was *filed*, not the date of the Application".[7]

2.11. As these excerpts suggest, counter-claims would be either "presented", or "submitted", or "filed". These semantic hesitations betray the lack of proper reliance by Nicaragua on the wording of Article 80 of the Rules of Court to interpret the

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5 Written Observations of Nicaragua, para. 1.6.

6 *Ibid.*, para. 2.2. (Emphasis added).

7 *Ibid.*, para. 2.15.

meaning of "jurisdiction" under that provision.

2.12. Article 80, paragraph 2 of the Rules of Court provides that counter-claims "*shall be made in the Counter-memorial*". They are not simply "presented", or "submitted" or "filed" at any moment of a pending case before the Court. The use of the verb "*shall*" shows that a Respondent does not have any other choice than to make its counter-claims in its Counter-Memorial. Moreover, this has been acknowledged by other international courts and tribunals. For instance, recently, an arbitral tribunal constituted under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID) has confirmed that when a procedural rule requires from a respondent to file its counter-claim in its Counter-Memorial, such a filing cannot be used against the respondent or to object to the jurisdiction of an international tribunal to entertain the said counter-claim.[8]

2.13. It would make no sense to compel a State to make its

[8] ICSID, *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa* v. *The Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016, para. 1150: "The Tribunal therefore finds that the BIT accepts a possibility for Respondent to raise a counterclaim in the instant case. It understands Claimants' surprise that such claim was raised many years after they had given notice of a dispute and that Respondent did not reveal even a hypothesis of such initiative when the Parties agreed upon a set of procedural rules governing this proceeding in preparation of the Tribunal's first session. Nonetheless, such surprise and disappointment has no legal effect given the provision of Arbitration Rule 40(2) permitting submission of a counterclaim no later than in the counter-memorial. The Parties had not agreed on any waiver of this procedural right nor did they agree on another time factor. The Tribunal accepts therefore that Respondent's Counterclaim was filed on time in compliance with Arbitration Rule 40(2)."

counter-claims concurrently with its Counter-Memorial and then to posit that these counter-claims were made too late. Further, Nicaragua's approach would allow an Applicant State to remove its acceptance of the Court's jurisdiction immediately after the Court has found jurisdiction, to prevent the Respondent State from making counter-claims by simply claiming that the title of jurisdiction has elapsed.

2.14. Applied to the Pact of Bogotá, this might go as far as meaning that after the Court has found jurisdiction under the Pact of Bogotá, it would be easy for the Applicant State to denounce it and then prevent a Respondent from making counter-claims two or three years later in its Counter-Memorial, because the critical date to establish jurisdiction with regard to the counter-claims would not be the date of the institution of proceedings, but the date of the filing of the Counter-Memorial. Such situation would put Respondent States in proceedings before the Court in an unequal position. This goes against the object and purpose of the Statute of the Court to ensure equality of the parties and it would be detrimental to the good administration of international justice.

2.15. There is solid ground for the application of the *forum perpetuum* principle, so that, as put by Professor Robert Kolb, "the title invoked for the principal claim continues to work its effects on all incidental matters, until the case comes to an

end…". [9] This is in line with the fundamental principle of equality of arms. As Professor Kolb notes in this respect:

> "As to equality between the parties, one needs to consider the effects of allowing a principal claimant to formulate its claim on the basis of an available title of jurisdiction, and to continue to benefit therefrom as regards all incidental matters other than counter-claims (which by definition are not in its interests), and at the same time refusing to allow the respondent to counterclaim, in the same proceedings, in relation to connected matters (which will often be the only aspect in which the respondent, for its part, has any interest). This amounts to perpetuating, for formalistic reasons that are in no way compelling, an apparent inequality between the parties. A better solution is to take one's inspiration from the fundamental principle of the equality of parties..."[10]

2.16. The only way to guarantee equality of the parties under Article 80 of the Rules of Court is to consider that the date to establish the jurisdiction of the Court to entertain Colombia's counter-claims as part and parcel of the main proceedings is the date on which those proceedings were instituted, i.e. 26 November 2013, the date of the filing of the Application, and not the date of the filing of the Counter-Memorial.

2.17. Nicaragua also asserts that the Court would not have jurisdiction over Colombia's counter-claims if they had been the

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[9] R. Kolb, *The International Court of Justice*, 2013, p. 667.

[10] R. Kolb, *The International Court of Justice*, 2013, p. 668

subject of an ordinary Application because they were presented nearly three years after the Pact of Bogotá ceased to be in force.[11] This is mere speculation and clearly has nothing to do with the current situation. Colombia is, indeed, submitting counter-claims that come within the jurisdiction of the Court insofar as they are a part of an existing case, in respect of which the Court has held that it has jurisdiction, and within the procedural framework of the Statute and Rules of Court.

2.18. Additionally, if Nicaragua's thesis were to be followed, Colombia would have had to present its counter-claims before 27 November 2013 – that is only a few hours before the lapse of the title of jurisdiction. Yet, Colombia was fully entitled to examine the claims raised by Nicaragua and to respond to these claims, including raising counter-claims, in its Counter-Memorial.

2.19. Under Article 80 of the Rules of Court, Nicaragua is mistaken in affirming that "jurisdiction over a counter-claim must be assessed by reference to the date on which it was filed, *not* the date of the Application".[12]

2.20. The reference to the "jurisdiction of the Court" under Article 80, paragraph 1 of the Rules of Court is clear. Jurisdiction means jurisdiction. Recourse to the history of the

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[11] Written Observations of Nicaragua, para. 2.9 and 2.22

[12] *Ibid*., para. 2.15.

Rules of Court[13] is irrelevant when the ordinary language of a provision in the Court's Rules is clear such as the one in Article 80. In particular, such recourse is even more irrelevant when it does not relate to Article 80 as it was amended in 2001, but to provisions that have been drafted long before the 1978 Rules of Court.

2.21. It cannot be inferred from the clear language of Article 80 of the Rules of Court that this article creates different layers of jurisdiction or two different critical dates as contended by Nicaragua. It has always been accepted that the jurisdiction of the Court has to be assessed at the critical date of the filing of an Application instituting proceedings. As long as the Court finds that it has jurisdiction over the claims contained in an Application, and as long as counter-claims refer to facts that occurred before the date of the filing of the Application, and have a direct connection with the subject-matter of the claims, as Colombia's counter-claims do, there is no impediment for the Court to entertain those counter-claims. The lapse of the title of jurisdiction between the parties to an already pending dispute has no bearing upon the jurisdiction of the Court in this context.

2.22. The footnote to Article 80 of the Rules of Court states "Article 80 of the Rules of Court as adopted on 14 April 1978 has continued to apply to *all cases submitted* to the Court prior to 1 February 2001". The expression "all cases submitted"

[13] Written Observations of Nicaragua, para. 2.8 and paras. 2.26-2.27.

confirms that only the date of the filing of the Application matters in order to determine the jurisdiction of the Court under Article 80 of the Rules of Court.

2.23. The present case satisfies all the conditions to entertain Colombia's counter-claims. Colombia's counter-claim have been filed with respect to facts that occurred before the critical date (i.e. 26 November 2013) of the filing of Nicaragua's Application that the Court has already found that it has jurisdiction to entertain under the Pact of Bogotá, despite that it ceased to bind Nicaragua and Colombia after the Application was filed.

2.24. The practice of the Court confirms Colombia's interpretation of Article 80 of the Rules of Court.

2.25. For instance, with respect to the critical date to identify the applicable law – Article 80 of the Rules having been amended in 2001 –, the Court has found that the date of the filing of the Application is the critical date to determine which version of Article 80 of the Rules applies.

2.26. The Court stressed in the 2015 Judgment in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)* that, since the main proceedings were instituted prior to the amendment of the Rules of Court that entered into force on 1 February 2001, Article 80(1) of the Rules of Court, as adopted

on 14 April 1978, was applicable with regard to Serbia's counter-claim.[14] In other words, the critical date was the date of the filing of Croatia's Application instituting proceedings, not the date of the filing of the Counter-Memorial of Serbia in the aftermath of the amendment. The same situation obtained in the *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)* case.[15]

2.27. These examples show that there is no reason to presume that the critical date to be taken into account for purposes of Article 80 of the Rules of Court is any date other than that of the filing of an Application in a given a case.

2.28. Despite this clear practice, Nicaragua wrongly interprets the *Jurisdictional Immunities* case and the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)*[16] as supporting its proposition that the critical date is the date of the filing of the Counter-Memorial and not the date of the filing of the original Application.

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[14] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment of 3 February 2015*, para. 120.

[15] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Order of 29 November 2001, I.C.J. Reports 2001*, p. 676, para. 27; See G. Distefano, "La demande reconventionnelle au fil des textes régissant le fonctionnement de la Cour de La Haye et de sa jurisprudence", *Revue suisse de droit international et européen*, 2008, pp. 45-67, at pp. 64-65.

[16] Written Observations of Nicaragua, paras. 2.10-2.15.

2.29. The excerpts invoked by Nicaragua, however, when put in the correct perspective, do anything but confirm that the Court's jurisdiction to entertain counter-claims should be based on the date of the filing of the Counter-Memorial.

2.30. For example, in the *Jurisdictional Immunities* case the Court did not state that its jurisdiction to entertain Italy's counter-claim should be determined on the date of the filing of the Counter-Memorial. The decisive factor that led the Court to declare Italy's counter-claim inadmissible for lack of jurisdiction was that it related to "facts and situations "[that fell] outside the temporal scope of this Convention".[17] Colombia's counter-claims do not "fall outside the temporal scope" of the Pact of Bogotá inasmuch as they relate to facts and situations existing at the time when the Pact of Bogotá was still in force between Nicaragua and Colombia.

2.31. This also follows from the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)*, which, contrary to the arguments of Nicaragua,[18] demonstrates that the critical date for ascertaining whether the counter-claims come within the jurisdiction of the Court is the date of the filing of the Application.

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[17] *Jurisdictional Immunities of the State (Germany* v. *Italy), Counter-Claim, Order of 6 July 2010, I.C.J. Reports 2010*, pp. 320-321, para. 30.

[18] Written Observations of Nicaragua, paras. 2.13-2.14

2.32. As the Court stated clearly, "according to its established jurisprudence, if a title of jurisdiction is shown to have existed at the date of the institution of proceedings, any subsequent lapse or withdrawal of the jurisdictional instrument is without effect on the jurisdiction of the Court".[19] The Court then stressed that the Federal Republic of Yugoslavia continued to be bound by Article IX of the Convention on Genocide until at least its notification of accession to the Convention, which included a reservation to Article IX – the jurisdictional clause – on 6 March 2001.[20]

2.33. The fact that the title of jurisdiction had expired at the time of the filing of the Counter-Memorial of Serbia on 1 December 2009 was not considered as a bar to the admissibility of the Respondent's counter-claim. Actually, contrary to Nicaragua, Croatia did not contest that Serbia's counter-claim fell within the jurisdiction of the Court under Article IX of the Genocide Convention.[21]

2.34. Furthermore, in its 2015 Judgment on the merits, the Court acted upon the premise that Article IX could still serve as a basis for its jurisdiction to entertain Serbia's counter-claim

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[19] *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. 445, para. 95.

[20] *Ibid.*, pp. 445-446, para. 96.

[21] *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*, para. 121.

under Article 80, paragraph 1 of the Rules of Court.[22] In fact, what was decisive in the Court's reasoning was that all the facts that gave rise to the allegations in Serbia's counter-claim – those related to Operation "Storm"– had taken place at a time when the title of jurisdiction provided for in the Genocide Convention was fully in force between the Parties.[23]

2.35. Thus, in both the *Jurisdictional Immunities* and the *Genocide Convention (Croatia* v. *Serbia)* cases, the relevant factor for the Court to assert that the jurisdictional requirement in Article 80 of the Court's Rules was fulfilled was that the facts giving rise or relating to the counter-claims took place at a point in time when the title of jurisdiction was in force between the Parties. In the circumstances of the present case, that date was 26 November 2013, the date in which proceedings were instituted by Nicaragua.

2.36. This interpretation is consistent with the case-law of the Court. Thus, the Pact of Bogotá serves as a basis of jurisdiction for the Court to entertain Colombia's counter-claims under Article 80 of the Rules of Court.

2.37. The Court's jurisdiction to entertain Colombia's counter-

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[22] *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*, para. 123.

[23] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment of 3 February 2015*, para. 121.

claims under the Pact of Bogotá is also confirmed by the 2016 Judgment of the Court regarding the preliminary objections in the present case.

### (2) UNDER THE 2016 JUDGMENT, THE PACT OF BOGOTÁ CONSTITUTES THE BASIS OF THE COURT'S JURISDICTION TO ENTERTAIN COLOMBIA'S COUNTER-CLAIMS

2.38. The 2016 Judgment has already given the Court the occasion to decide with *res judicata* effect that Article XXXI of the Pact of Bogotá is the sole basis of jurisdiction in the present case. Therefore, there is no reason to reopen an issue that has already been litigated by both Nicaragua and Colombia at the preliminary objections phase, and in accordance with Article 79 of the Rules of Court. Nicaragua does not refer at all to the 2016 Judgment when it comes to the issue of jurisdiction, and brings it back only to justify its assertions on the lack of a dispute and the absence of negotiations between Nicaragua and Colombia.

2.39. In its 2016 Judgment, and consistent with its settled jurisprudence, the Court "recall[ed] that the date at which its jurisdiction has to be established is the date on which the application is filed with the Court".[24] This finding confirms that

[24] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment*, 17 March 2016 (Judgment on the Preliminary Objections), para. 33. *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*, pp. 437-438, paras. 79-80; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and*

the critical date to establish jurisdiction is the date of the filing of an Application, and not any other date.

2.40. It also shows that the Court never stated, or even suggested, that the critical date to establish jurisdiction would need to be established anew for the different stages of proceedings before the Court.

2.41. Once the Court has established jurisdiction as between two States on the basis of a specific title, this title can serve as the basis of jurisdiction during all stages of the proceedings in a given case. This holds true regardless of whether the title of jurisdiction has elapsed at a certain time before the proceedings come to an end. Thus, jurisdiction to entertain any further claims of the Applicant, or claims that the Respondent may see fit to raise as counter-claims, will have to be assessed under the specific title of jurisdiction upon which the Court has established jurisdiction at the date of the filing of an Application in a case.

2.42. As the Court stated in the 2016 Judgment, "[…] even if the treaty provision by which jurisdiction is conferred on the Court ceases to be in force between the applicant and the respondent, or either party's declaration under Article 36, paragraph 2, of the Statute of the Court expires or is withdrawn,

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*Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II),* p. 613, para. 26

after the application has been filed, that fact does not deprive the Court of jurisdiction".[25] In saying this, the Court has simply relied on and followed its established case-law, as reflected in particular in the *Nottebohm* case.

2.43. In the latter case, the Court stated that: "When an Application is filed at a time when the law in force between the parties entails the compulsory jurisdiction of the Court, the filing of the Application is merely the condition required to enable the clause of compulsory jurisdiction to produce its effects in respect of the claim advanced in the Application […]. An extrinsic fact such as the subsequent lapse of the Declaration, by reason of the expiry of the period or by denunciation, cannot deprive the Court of the jurisdiction already established."[26]

2.44. The same reasoning applies to the Court's jurisdiction to entertain Colombia's counter-claims on the basis of the Pact of Bogotá. The fact that the Pact of Bogotá ceased to bind Nicaragua and Colombia does not deprive the Court of "the jurisdiction already established", i.e., its jurisdiction under the Pact of Bogotá.

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[25] Judgment on the Preliminary Objections, para. 33.

[26] *Nottebohm (Liechtenstein* v. *Guatemala), Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 123. See also, *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.

2.45. Once jurisdiction has been established – as it is the case in the present dispute– the Court "must deal with the claim"[27] and "it has jurisdiction to deal with all *its aspects* […]".[28]

2.46. A counter-claim is by definition an "aspect" of the original claim, despite the fact that it is made by the Respondent State and not by the Applicant State. Indeed, as clearly stated several times in the Court's jurisprudence, counter-claims, in the sense of Article 80 of the Rules of Court, are "linked to the principal claims, [and] react to them"[29]. Nicaragua did not contest in its Written Observations the fact that Colombia's counter-claims are genuine counter-claims within the meaning of Article 80 of the Rules of Court. Therefore, there is no hurdle for the Court to consider the Pact of Bogotá as the basis of jurisdiction to deal both with Nicaragua's claims and Colombia's counter-claims.

2.47. This aspect – the link between claims and counter-claims – is ignored by Nicaragua's Written Observations and has led Nicaragua to make two fundamental errors of law.

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[27] Judgment on the Preliminary Objections, para. 33; *Nottebohm (Liechtenstein* v. *Guatemala), Preliminary Objections, Judgment, I.C.J. Reports 1953*, p. 123.

[28] *Ibid.*

[29] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Counter-claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 256, para. 27; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Counter-Claims, Order of 18 April 2013, I.C.J. Reports 2013*, pp. 207-208, para. 19.

2.48. *First*, Nicaragua overlooks the fact that the basis of jurisdiction as established by the Court in its 2016 Judgment and "as recognized by the Parties"[30] can be the same for both the claims and the counter-claims if the latter refer to issues that are within the jurisdiction of the Court as established at the date of the filing of the Application and regardless of whether the title of jurisdiction has elapsed subsequently. Hence, as long as the issues raised in Colombia's counter-claims relate to situations that arose between Nicaragua and Colombia before the critical date of 26 November 2013 – when the Pact of Bogotá was still in effect – the Court has jurisdiction to entertain those counter-claims under the Pact of Bogotá.

2.49. Nicaragua ignores this state of the law applicable to jurisdiction in counter-claims proceedings, as confirmed by the wording of the 2016 Judgment, because it considers that "if the existence of jurisdiction over the principal claim meant *ipso facto* that there was also jurisdiction over the counter-claim, the jurisdictional requirement in Article 80, paragraph 1, would be rendered meaningless".[31]

2.50. Jurisdiction as such is matter of title. If there is a title – such as the Pact of Bogotá– that confers jurisdiction to the Court

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[30] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Counter-claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 257, para. 31.

[31] Written Observations of Nicaragua, para. 2.7.

at the date of the filing of the Application in a case, then there is no obstacle in law for the Court to entertain a counter-claim on the basis of the said title of jurisdiction, even if the title no longer exists when the counter-claim is made. This is exactly the case for Colombia's counter-claims: the Court has jurisdiction to deal with them under the same title of jurisdiction that it has for Nicaragua's claims, namely the Pact of Bogotá. In that respect, and contrary to what Nicaragua contends, Colombia's counter-claims do not at all "exceed the limits of [the Court's] jurisdiction as recognized by the parties."[32] They are allowed under the Pact of Bogotá.

2.51. It follows that recognizing jurisdiction under the Pact of Bogotá over Colombia's counter-claims would not deprive the jurisdictional requirement under Article 80 of the Rules of Court of its *effet utile*.

2.52. *Secondly*, Nicaragua gives the impression that counter-claims proceedings are entirely separate from the main proceedings. However, counter-claims are incidental proceedings according to Section D, subsection 3 of the Rules of Court. Insofar as they respect the conditions of Article 80 of the Rules of Court, they come "within the jurisdiction" established in the main proceedings, according to the maxim *accessorium sequitur principale*. They are "set out […] within the context of

[32] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Counter-claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 257, para. 31.

a case which is already in progress".[33] Nicaragua nowhere justifies why the Court's jurisdiction in counter-claims proceedings cannot be governed by the *forum perpetuum* principle – i.e., on the same title of jurisdiction operating for the main proceedings in a case – in exactly the same manner in which it applies to other incidental proceedings (e.g., provisional measures, preliminary objections, third-party intervention) under the Statute and the Rules of Court.

2.53. Nicaragua limits itself to suggesting that other incidental proceedings "constitute subsidiary procedures bearing on the main claim".[34] Under this assumption, counter-claims would not be different from other incidental proceedings. Indeed, because they are made necessarily in the Counter-Memorial, in accordance with Article 80 of the Rules of Court, counter-claims do constitute "subsidiary procedures".[35] Because they "react to"[36] and are linked to, the main claims in a case as recognized by the Court itself, undeniably counter-claims also have a "bearing on the main claim"[37]. So there is no reason why the Pact of Bogotá could not serve in the present proceedings as a basis of jurisdiction for Colombia's counter-claims. The 2016

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[33] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Counter-claims, Orders of 17 December 1997, I.C.J. Reports 1997*, p. 243, at p. 257, para. 30.

[34] Written Observations of Nicaragua, para. 2.24.

[35] Written Observations of Nicaragua, para. 2.24.

[36] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Counter-claims, Order of 18 April 2013, I.C.J. Reports 2013*, pp. 207-208, para. 19.

[37] Written Observations of Nicaragua, para. 2.24.

Judgment does not give any indication to the contrary.

2.54. In the same vein, the 2016 Judgment does not establish, and cannot be interpreted as establishing, a requirement on Colombia in the sense that the existence of a dispute or recourse to prior negotiations should be considered as a condition for the Court to have jurisdiction to entertain Colombia's counter-claims. Those conditions are actually irrelevant *in casu* to determine the Court's jurisdiction under Article 80 of the Rules of Court. While they do not constitute a bar to the jurisdiction of the Court to deal with Colombia's counter-claims, for the sake of completeness Colombia will address each of them in the following subsection.

### (3) COLOMBIA DOES NOT HAVE TO ESTABLISH THE EXISTENCE OF A DISPUTE WITH NICARAGUA ON THE SUBJECT-MATTER OF ITS COUNTER-CLAIMS

2.55. Nicaragua's Written Observations assert that Colombia attempts "to bring before the Court […] new disputes in respect of which the Parties no longer recognize the jurisdiction of the Court".[38] This is one more deformation of reality. Colombia does not bring a new dispute or new disputes before the Court.

2.56. Colombia is making use of its right under Article 80 of the Rules of Court to make counter-claims. Article 80 of the Rules of Court does not require the Respondent State that is

[38] Written Observations of Nicaragua, para. 2.32.

making counter-claims to prove that it has a dispute with the Applicant State.

2.57. Counter-claims, as Nicaragua itself has recognized[39], have as an object "to submit new claim[s] to the Court".[40] In this sense, "the thrust of a counter-claim is thus to widen the original subject-matter of the dispute by pursuing objectives other than the mere dismissal of the claim of the Applicant in the main proceeding".[41] Differently put, a counter-claim is intimately linked, and indeed arises out of, the contentious case at issue. As it has been noted, the "regime of counter-claims allows the Court to consider both sides of the dispute in a single, integrated proceeding, thereby creating the opportunity for the Court to address the dispute in a more holistic fashion."[42]

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[39] Written Observations of Nicaragua, para. 2.20.

[40] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Counter-claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 256, para. 27; *Jurisdictional Immunities of the State (Germany* v. *Italy), Counter-Claims, Order of 6 July 2010, I.C.J. Reports 2010*, p. 315, para. 13; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Counter-claims, Order of 18 April 2013, I.C.J. Reports 2013*, pp. 207-208, para. 19.

[41] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Counter-claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 256, para. 27.

[42] S.D. Murphy, "Counter-Claims at the International Court of Justice", in Karin Oellers et al., eds, *The Statute of the International Court of Justice: A Commentary*, 2012, p. 1025. See also *Jurisdictional Immunities of the State (Germany* v. *Italy), Counter-claim, Order of 6 July 2010, Dissenting Opinion of Judge Cançado Trindade, I.C.J. Reports 2010*, p. 335, par. 15: "The counter-claim in a way enlarged the object of the contentious case at issue, lodged with the Court by the original claim. It thus widened the overview of the Court, as to both claims (the original and the counter-claim), enabling it to decide them more consistently. The counter-claim came thus to

2.58. Nicaragua confuses *new disputes* with *new claims*. Article 80 of the Rules of Court allows a Respondent State to make such new claims in the form of counter-claims as long as they are directly connected with the principal claims. As such, they cannot be considered as a vehicle for bringing new disputes before the Court – and it is certainly not the intention of Colombia to do so.

2.59. If the Court follows Nicaragua's misguided interpretation according to which making new claims in the form of counter-claims is tantamount to introducing a new dispute each and every time, then Article 80 of the Rules of Court would not have any *raison d'être* and would be "devoid[ed] of purport or effect".[43] Indeed, a Respondent State would simply find itself in a position in which its counter-claims – i.e., new claims – would most of the time be qualified as entailing new disputes and, thus, declared inadmissible.

2.60. Article 80 of the Rules of Court presupposes the existence of a dispute over which the Court has already accepted jurisdiction. It is for this reason that Article 80 provides for a

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be regarded as a means of achieving more consistency in the Court's decision."

[43] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, pp. 125-126, para. 133; *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgments, I.C.J. Reports 1949*, p. 24.

test of direct connection, according to which the Respondent State shall prove that its claims fall within the subject-matter of the original dispute. In the context of counterclaims, the question of admissibility is one about the relationship between the new claims and the subject-matter of a dispute, rather than about the existence of a difference of legal views between the Parties.

2.61. There is, thus, no need to discuss whether there is a *new dispute* – as opposed to new claims simply intended to widen the original subject-matter of the dispute – between Colombia and Nicaragua when dealing with the jurisdictional requirement under Article 80 of the Rules of Court.

2.62. As long as Colombia's counter-claims "react" to the main claims of Nicaragua and thus are in close relation with the subject-matter of the dispute that has been brought before the Court by Nicaragua, and for which the Court has already established jurisdiction in its 2016 Judgment, Colombia's counter-claims fall *ipso jure* within the jurisdiction of the Court under the Pact of Bogotá.

2.63. In its 2016 Judgment, the Court has already determined the scope of the dispute between Nicaragua and Colombia. The scope of the dispute as delineated by the Court shows that Colombia's counter-claims, by reacting to Nicaragua's main claims, and being related to similar conduct of the Parties in the relevant maritime areas, are in close relation with the subject-

matter of the dispute in the present case.

2.64. Firstly, the Court noted that, "in its Application, Nicaragua indicates that the subject of the dispute it submits to the Court is as follows: 'The dispute concerns the violations of Nicaragua's sovereign rights and maritime zones declared by the Court's Judgment of 19 November 2012 […]'".[44]

2.65. Secondly, the 2016 Judgment also indicated that, "in the submissions set out in the Memorial, Nicaragua requests the Court to determine two principal claims; one relates to Colombia's alleged violations of Nicaragua's maritime zones as delimited by the Court in its 2012 Judgment […]".[45]

2.66. Thirdly, the Court emphasized that Nicaragua's dispute with Colombia was linked to "a series of incidents involving vessels or aircraft of Colombia [that] occurred at sea".[46] The Court added that: "According to Nicaragua, a number of such incidents took place between the date of the 2012 Judgment and the date of the filing of the Application in the waters declared by the 2012 Judgment to be Nicaraguan […]".[47]

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44 Judgment on the Preliminary Objections, para. 53.

45 On the subject of the second claim, concerning "Colombia's alleged breach of its obligation not to use or threaten to use force under Article 2, paragraph 4, of the Charter of the United Nations and customary international law" the Court found that there was no dispute between Nicaragua and Colombia and thus upheld Colombia's preliminary objection. See: Judgment on the Preliminary Objections, paras. 78-79 and 111, 1, c.

46 *Ibid.*, para. 63.

47 *Ibid.*

2.67. By contrast to what Nicaragua affirms, *all* of Colombia's counter-claims "react"[48], and are related, to those claims by Nicaragua that form the subject-matter of the dispute for which the Court has already established jurisdiction in its 2016 Judgment.

2.68. In particular, Colombia's counter-claims *react* to Nicaragua's claim as set out in its Application and in its Memorial, according to which alleged "violations of Nicaragua's sovereign rights and maritime zones declared by the Court's Judgment of 19 November 2012" have occurred. The counter-claims raised by Colombia aim to establish the real picture of what is happening in the Southwestern Caribbean Sea. As Colombia showed in its Counter-Memorial, and as it reiterates in Chapter 3 of the present Written Observations, Nicaragua is violating Colombia's sovereign rights in the Southwestern Caribbean Sea. Nicaragua, and not Colombia, is therefore responsible for internationally wrongful acts.

2.69. Colombia's counter-claims relate to what Nicaragua called "a series of incidents involving vessels or aircraft of Colombia [that] occurred at sea".[49] They show that the so-called

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[48] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Counter-claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 256, para. 27; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Counter-claims, Order of 18 April 2013, I.C.J. Reports 2013*, pp. 207-208, para. 19.

[49] Judgment on the Preliminary Objections, para. 63.

incidents are due to and inextricably linked to Nicaragua's failures to comply with its international obligations. Furthermore, Colombia's counter-claims related to "a number of […] incidents [that] took place between the date of the 2012 Judgment and the date of the filing of the Application […]".[50]

2.70. Colombia's counter-claims are admissible under the same basis of jurisdiction upon which the Court entertains Nicaragua's claims, that is, the Pact of Bogotá. This is because Colombia's counter-claims are inextricably linked to the subject-matter of the dispute as delineated by the Court in its 2016 Judgment.

2.71. In any case, Colombia submitted sufficient and substantial evidence[51] that the Parties were "aware or could not have been unaware"[52] of their divergent views as to the facts relied upon by Colombia in *all* its counter-claims.

2.72. As the Court itself noted in its 2016 Judgment, "declarations and statements of the senior officials of the two States"[53] addressed "Colombia's concerns in relation to fishing,

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[50] Judgment on the Preliminary Objections, para. 63.

[51] Colombia submitted evidence on this in Volume II of its Counter-Memorial, specifically, Annexes 1, 22, 73, 74, 75 and 78.

[52] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections*, para. 41.

[53] Judgment on the Preliminary Objections, para. 69.

environmental protection and drug trafficking".[54] At the same time, the Court also stated that "the fact that the Parties remained open to a dialogue does not by itself prove that, at the date of the filing of the Application, there existed no dispute between them […] It is apparent from these statements that *the Parties held opposing views on the question of their respective rights* in the maritime areas covered by the 2012 Judgment".[55] Insofar as they touch on these aspects, Colombia's counter-claims reflect the scope of the contention between the Parties. This, in turn, reflects how the subject matter of the original dispute has evolved over time up to the critical date of 27 November 2013.

2.73. More specifically, with regard to the third counter-claim, which relates to Nicaragua's infringements of the artisanal fishing rights to access and exploit the traditional banks, there is evidence that President Ortega was well aware of Colombia's position on the need to guarantee the rights of the inhabitants of the Archipelago in the aftermath of the 2012 Judgment,[56] and consequently, stated that Nicaragua would not affect the fishermen and their fishing rights.[57] As evidenced by Colombia, however, those words never materialized because the Nicaraguan Naval Force has intimidated and harassed the fishermen of the Archipelago. Moreover, the simple fact that

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54 Judgment on the Preliminary Objections, para. 69.

55 *Ibid.*

56 Counter-Memorial of Colombia, paras. 9.1 and 9.2, and Annex 73.

57 *Ibid.*, Annexes 73, 74, 75 and 78.

Nicaragua filed a claim concerning the alleged violation of its sovereign rights proves the positive opposition of Nicaragua to Colombia on this matter.

2.74. Similarly, *vis-à-vis* the first and second counter-claims, which deal with Nicaragua's lack of due diligence with respect to the marine environment of the Southwestern Caribbean Sea and the habitat of the raizales, there is evidence that the Lady Dee incident led to diplomatic exchanges between the Parties prior to the institution of the main proceedings.[58]

2.75. The protection and preservation of the marine environment was also known to Nicaragua. Indeed, this issue has always been part of the bilateral agenda and also, in his speech to the graduates of the Annual Course of Defence and Security, President Ortega asserted that one of the concerns expressed by President Santos in Mexico was the preservation of the Seaflower Marine Reserve.[59]

2.76. Hence, Nicaragua could not have been unaware of the existence of a dispute concerning the first, second and third counter-claims. This is so considering that some of the incidents alleged by Nicaragua in its Application and Memorial cover instances in which the Navy of Colombia has criticised the predatory practices of the Nicaraguan vessels and expressly

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[58] Counter-Memorial of Colombia, Annexes 22, 23 and 24.

[59] *Ibid*., Volume II, Annex 75.

referred to Colombia's historic fishing rights.[60] Nicaragua cannot be oblivious of this aspect of the dispute.

2.77. As the Court's jurisprudence confirms, what matters is that "the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain" international obligations.[61] It is evident that Nicaragua and Colombia have opposite views regarding the rights, obligations and duties of the coastal State (Nicaragua) and the rights and duties of other States (in this case, Colombia) in the exclusive economic zone, as well as, opposite views regarding how their counter-party is performing or failing to perform its obligations and duties or guaranteeing the rights of the other.

2.78. As for Colombia's fourth counter-claim, which concerns Nicaragua's straight baselines decree, Colombia notes that Nicaragua does not deny in its Written Observations that a dispute does exist between Nicaragua and Colombia with respect to the subject-matter of Colombia's fourth counter-claim.[62]

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[60] Memorial of Nicaragua, Annex 23B. See also Counter-Memorial of Colombia, Volume II, Annexes 42, 43 and 54.

[61] Judgment on the Preliminary Objections, para. 69. *See also*: *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74

[62] Written Observations of Nicaragua, para. 2.37, footnote 34.

### (4) COLOMBIA DOES NOT HAVE TO PROVIDE EVIDENCE THAT THE MATTERS PRESENTED IN ITS COUNTER-CLAIMS COULD NOT BE SETTLED BY NEGOTIATIONS

2.79. Nicaragua's Written Observations wrongly consider that under Article II of the Pact of Bogotá the matters presented in Colombia's counter-claims should have been subject of prior negotiations.

2.80. Once again, such affirmation ignores the proper *timing* for counter-claims under Article 80 of the Rules of Court. Requiring that a Respondent State negotiate with the Applicant State before making its counter-claims would be at odds with the fact that counter-claims are made in the Counter-Memorial of the Respondent State.

2.81. A Counter-Memorial responds to the Applicant's Memorial in the context of a dispute that has already crystallized and been brought to adjudication. Therefore, counter-claims are made with respect to a dispute for which the Applicant State itself has shown its intention to opt for adjudication rather than pursuing diplomatic channels of dispute resolution. Nicaragua, incidentally, shows a clear lack of good faith in its Written Observations insofar as it reverts the plea for diplomatic means that Colombia invoked at the stage of its Preliminary Objections and that Nicaragua then rejected altogether.

2.82. Furthermore, under Article II of the Pact of Bogotá, it is "*controversies*" that have to be subject to negotiations before

they can be brought to the Court. Counter-claims are not "controversies" or disputes *per se* – they are claims within the framework of an already existing dispute.

2.83. As the Court stressed in the *Fisheries Jurisdiction (Spain* v. *Canada)* case, the Court "will distinguish between the dispute itself and [the Parties'] *respective submissions on the dispute*".[63] Counter-claims, as provided for under Article 80, paragraph 2 of the Rules of Court, "shall appear as part of the *submissions* contained [in the Counter-memorial]". It is then crystal-clear that the counter-claims of Colombia are part of its submissions on the broader dispute with Nicaragua, rather than raising controversies that would have to be subject of negotiations of their own under Article II of the Pact of Bogotá.

2.84. Article II of the Pact of Bogotá does not apply to counter-claims filed under Article 80 of the Rules of Court and the pre-condition for negotiations present in that provision is inapposite in the context of the admissibility of counter-claims. The situation here is that a dispute has already crystallized, adjudication is the mean chosen to resolve it and the Colombian counter-claims are reactions to the Nicaraguan claims that could not be settled by negotiations.

2.85. Consequently, under the Pact of Bogotá, Colombia's

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[63] *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998,* p. 449, para. 32 (emphasis added).

counter-claims do not have to meet any jurisdictional precondition.

2.86. The rare time that Nicaragua's Written Observations refer to the 2016 Judgment is for the wrong reason[64]. The 2016 Judgment did not require – and could not have required, since it was only dealing with preliminary objections – Colombia to engage in prior negotiations with respect to its counter-claims. Counter-claims could not have been contemplated by the Court itself at that phase of the proceedings between Nicaragua and Colombia.

2.87. The 2016 Judgment simply took note of the fact that "[t]he issues that the Parties identified for possible dialogue include fishing activities of the inhabitants of San Andrés, Providencia and Santa Catalina in waters that have been recognized as appertaining to Nicaragua by the Court, the protection of the Seaflower Biosphere Marine Reserve, and the fight against drug trafficking in the Caribbean Sea."[65]

2.88. The wording of the 2016 Judgment is plain. The Court limited itself to take note of a "*possible* dialogue" between Colombia and Nicaragua with respect to issues that the Court has addressed in terms broad enough to cover almost all the issues dealt with in Colombia's counter-claims. This fact, as the Court noted, does not mean that "the Parties considered in good

64 Written Observations of Nicaragua, para. 2.35.

65 Judgment on the Preliminary Objections, para. 97.

faith a certain possibility of a negotiated settlement to exist or not to exist". [66]

2.89. Colombia's counter-claims are restricted to certain specific issues that have direct connection with the facts and legal aims of Nicaragua's principal claims – as required by Article 80 of the Rules of Court. They do not cover all the complexities involved in the protection of the environment and the fight against drug trafficking nor any other aspect of the bilateral agenda on which there might be disagreements between the Parties.

2.90. Furthermore, nowhere in the 2016 Judgment is it stated that Colombia was required under Article II of the Pact of Bogotá to try to settle those issues by diplomatic channels.

2.91. Most importantly, the 2016 Judgment acknowledged that there were "*issues*" between Nicaragua and Colombia with respect to "fishing activities of the inhabitants of San Andrés, Providencia and Santa Catalina" and with respect to "the protection of the Seaflower Biosphere Marine Reserve". [67] All that the quoted passage does is to show that at the time of the filing of the Application, certain facts – those that happen to constitute the basis of Colombia's counter-claims – were already known by Nicaragua and the Court.

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[66] Judgment on the Preliminary Objections, para. 99.

[67] *Ibid*., para. 97

2.92. Colombia maintained that it believed any maritime issues between the two Parties arising as a result of the Court's 2012 Judgment could be settled by way of direct negotiations.[68] However, Nicaragua was of the opinion that it "is absolutely not prepared to give up the maritime boundaries that the Court has drawn" between the Parties.[69] Based on a rejection of Colombia's proposal to negotiate a treaty with a view to implementing the 2012 Judgment,[70] Nicaragua closed the door to any possible negotiation. Nicaragua's conduct of not responding to invitations to negotiate through concrete acts and, on the contrary, submitting an Application against Colombia was the clearest evidence that, in good faith, in the opinion of the Parties the possibility of a negotiated settlement did not exist any longer.

2.93. Moreover, Nicaragua has not presented any evidence that these issues between the Parties could be settled by direct negotiations through the usual diplomatic channels. The very submission of counter-claims by Colombia attests to this situation.

2.94. The Court should, thus, dismiss Nicaragua's submission according to which Colombia's counter-claims do not come within the jurisdiction of the Court in the present case.

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68 Judgment on the Preliminary Objections, para. 86

69 *Ibid.*, para. 91

70 *Ibid.*, para. 83

# Chapter 3

# THE DIRECT CONNECTION BETWEEN COLOMBIA'S COUNTER-CLAIMS AND THE SUBJECT-MATTER OF NICARAGUA'S CLAIMS

## A. Introduction

3.1. In its Written Observations of 20 April 2017, Nicaragua argued that none of the four counter-claims made in Colombia's Counter-Memorial is directly connected with the subject-matter of its claims as required by Article 80, paragraph 1 of the Rules of Court. However, the direct connection requirement, which for self-serving reasons is deemed by Nicaragua to be "a stringent one",[71] is developed throughout that pleading in a manner that is clearly at variance with the jurisprudence of the Court concerning the admissibility of counter-claims.

3.2. Nicaragua's assessment of the threshold to be met has been pushed to such a point that one might wonder whether "stringent" or "strict" are in fact the right terms to label its erroneous rendition of the connectivity test.[72] Indeed, its Written Observations cannot conceal the obvious implication that, were the Court to follow Nicaragua's exceedingly narrow approach, this incidental proceeding would be deprived of any *effet utile*

[71] Written Observations of Nicaragua, para. 3.3.
[72] *Ibid.*, paras 3.3 and 3.13.

since it would become impossible for a Party to demonstrate that the direct connection requirement is met.

3.3. Colombia will address the factual and legal connections in terms of both an overview of the relevant jurisprudence **(1)** and with specific reference to each of the three sets of counter-claims submitted, namely the first and second together and the third and fourth treated independently **(2)**.

3.4. By proceeding accordingly, Colombia will demonstrate in the first subsection that the jurisprudence, far from supporting Nicaragua's erroneous reading of Article 80, paragraph 1 of the Rules of Court, shows a reasonable interpretation of the relevant threshold which, in particular, does not require identity of facts and legal principles in the sense that counter-claims should be mirror images of the principal claims.

3.5. In the second subsection, Colombia will go further into the specificities of the present case since, while it is true that the Court's precedents bear the highest relevance, Nicaragua cannot import lock-stock-and-barrel arguments made elsewhere that are not apposite to the particular situation in this case. Nicaragua's insistence on the cases concerning *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica*)[73] betrays its disingenuous

[73] Written Observations of Nicaragua, paras 3.5-3.3.9, 3.15-3.16 and 3.28.

stratagem according to which since the Court has found that certain of its own counter-claims were inadmissible in those cases, it must do the same *vis-à-vis* Colombia's counter-claims in the instant proceedings. Such an oversimplification fails to take cognizance of the specificities of the present case and of the obvious direct connection between Colombia's counter-claims and the subject-matter of Nicaragua's claims.

### B. The Direct Connection Requirement in the Jurisprudence of the Court

3.6. According to the Court, whether there is the necessary "direct connection" between the subject-matter of the claims and the counter-claims is a matter to be assessed "both in fact and in law".[74] Colombia will therefore examine, in turn, the relevant jurisprudence of the Court relating to the factual **(a)** and legal **(b)** connections. In undertaking this analysis, it is useful to bear in mind that in its attempt to reject Colombia's counter-claims, the main focus of Nicaragua is to provide:

- An overly narrow definition of the "same geographical area" that encompasses merely the

[74] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment of 3 February 2015*, para. 123; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Order of 29 November 2001, I.C.J. Reports 2001*, p. 660, at p. 678, para. 36; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Counter-claims, Orders of 17 December 1997, I.C.J. Reports 1997*, p. 243, p. 258, para. 33; *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Counter-claim, Order of 10 March 1998, I.C.J. Reports 1998*, p. 190, at pp. 204-205, para. 37.

maritime areas adjudged to appertain to Nicaragua in the 2012 Judgment in the *Territorial and Maritime Dispute* case[75] and, at times, only its exclusive economic zone so as to exclude, in addition to the Colombian maritime areas, also the Nicaraguan territorial sea and internal waters;[76]

- A restrictive, and often confusing, notion of whether the facts underlying both the claims and counter-claims are of the "same nature" in that they allege "similar types of conduct".[77] In this respect, Nicaragua innovates by introducing a major point of distinction between conduct that requires "active assertions" and conduct based on "inactivity",[78] that is to say, omissions;

- A formalistic assessment of the legal connection requirement that seeks to create an artificial division between sovereign rights and sovereign duties of the coastal State, as well as between various rules of customary international law, different parts of the United Nations Conventions

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[75] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012*, p. 624.

[76] Written Observations of Nicaragua, paras 1.7, 3.8-3.9, 3.24, 3.48-3.50.

[77] *Ibid.*, paras 1.7, 3.4-3.7, 3.25-3.30, 3.39-3.40.

[78] *Ibid.*, para. 3.30.

on the Law of the Sea (UNCLOS) and other instruments that, however, are part of the same body of law, the international law of the sea.[79]

### (1) FACTUAL CONNECTION: THE "SAME FACTUAL COMPLEX/BACKGROUND"

3.7. In relation to the factual connection, the Court has to consider "whether the facts relied upon by each party relate to the same geographical area or to the same time period" **(a)**, and then to examine whether they are of "the same nature, in that they allege similar types of conduct" **(b)**.[80] Both of these tests are met here.

3.8. According to the jurisprudence of the Court, which is well settled since the 1997, 1998 and 2001 Orders in, respectively, the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Oil Platforms* and *Armed Activities on the Territory of the Congo (DRC* v. *Uganda)* cases, the question is whether the subject-matter of the claims and counter-claims relate to the "same factual complex" or, in other words, to the same factual

[79] Written Observations of Nicaragua, paras 1.7, 3.13-3.16, 3.31-3.35, 3.41-3.44, 3.53-3.57.

[80] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Riva* v. *Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Counter-claims, Order of 18 April 2013, I.C.J. Reports 2013*, p. 200, at p. 212, para. 32; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Order of 29 November 2001, I.C.J. Reports 2001*, p. 660, at pp. 678-679, para. 38.

background.[81] This implies an examination of whether the relevant facts occurred during the same period of time or in the same geographical setting. What is not required, and Nicaragua does not contest it, is a complete identity in time and space between the facts underlying the claims and the facts underlying the counter-claims. Indeed "[a] 'connection' in the sense of a relationship or link may exist only between things which exist separately".[82]

*(a) The "Same Time Period" or "Same Geographical Area"*

3.9. By replacing the conjunction "or" with the conjunction "and",[83] Nicaragua seeks to convey the wrong impression that, in order to demonstrate that the claims and counter-claims concern events that took place in the "same factual complex", both the geographical and temporal settings need to be fulfilled. Yet, these are alternative requirements, not cumulative ones, as the terminology used in the jurisprudence clearly indicates: the

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[81] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Riva* v. *Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Counter-Claims, Order of 18 April 2013, I.C.J. Reports 2013*, p. 200, at p. 213, para. 34; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Order of 29 November 2001, I.C.J. Reports 2001*, p. 660, at pp. 678-680, paras 35-43; *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Counter-Claim, Order of 10 March 1998, I.C.J. Reports 1998*, p. 190, at 205, para. 38; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Counter-claims, Orders of 17 December 1997, I.C.J. Reports 1997*, p. 243, at 258, para. 34.

[82] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Counter-claims, Orders of 17 December 1997, Declaration of Judge Kreća, I.C.J. Reports 1997,* p. 262, at p. 268.

[83] Written Observations of Nicaragua, paras 3.10 and 3.12.

Court examines "whether the facts relied upon by each party relate to the same geographical area **or** to the same time period". While in the instant case both geography and time attest to the fulfilment of the direct connection requirement, Nicaragua's subterfuge can easily be explained by the fact that it was unable to find any argument suggesting that the facts supporting the claims and counter-claims occurred during a different time period.

3.10. Since Nicaragua's silence on the time element speaks volumes, the "same time period" requirement may be examined in a concise manner. Colombia must stress that, in the present proceedings, this aspect is intertwined with the question of jurisdiction *ratione temporis* due to the termination of the Pact of Bogotá between the Parties.

3.11. Both Nicaragua's claims and Colombia's counter-claims relate to events that occurred in the aftermath of the 2012 Judgment. However, while Nicaragua's claims relate to events that occurred both before *and* after the coming into effect of Colombia's denunciation of the Pact of Bogotá, the counter-claims are restricted to facts that took place *before* the lapse of the title of jurisdiction. In others words, Colombia's counter-claims are based on facts that occurred during the "same time period" as those underlying the claims raised by Nicaragua which come within the jurisdiction of the Court. For admissibility purposes, the relevant time period runs from 19

November 2012, the date of the Judgment, to 26 November 2013, the date of Nicaragua's Application.

3.12. In any event, in previous cases counter-claims were found to be admissible notwithstanding the fact that they were based on events that were, temporally speaking, far removed from those upon which rested the principal claims. Thus, in the 2015 Judgment in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)* case, the Court had no difficulty in finding that the counter-claim of Serbia, which concerned an operation launched in the summer of 1995, was directly connected with the Croatian claims based on the hostilities that took place in its territory in 1991 and 1992, that is to say more than two years before.[84] Similarly, in the *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)* case, the Court considered that Uganda's first counter-claim, which concerned alleged acts of aggression by the DRC (at the time Zaire), was admissible despite being grounded on events that started in 1994, that is to say approximately four years before the incursions adduced by the Applicant.[85]

3.13. As to the "same geographical area" requirement, the counter-claims and the claims in the pending proceedings relate

[84] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment of 3 February 2015*, paras 122-123.

[85] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Order of 29 November 2001, I.C.J. Reports 2001*, p. 660, at p. 668, para. 12 and pp. 678-679, paras 38-39.

to areas of the sea under the jurisdiction of either Party which are all located in the "same geographical area", that is to say to the maritime spaces that comprised part of the relevant area in the Southwestern Caribbean Sea in the original case.

3.14. If anything, the "geographical area" requirement is more obvious in the instant proceedings than it was in previous cases. Thus, in the *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)* case, the Court found that Uganda's second counter-claim concerning the attacks on Ugandan diplomatic premises and personnel in Kinshasa was admissible despite the fact that that counter-claim related to an area of the DRC that had nothing to do with the region concerned with the incursions.[86] The diplomatic premises were "thousands of miles away from the areas identified by the Congo as the theatre of Uganda's alleged violations of the law".[87]

3.15. Similarly, in the *Oil Platforms (Islamic Republic of Iran* v. *United States of America)* case, the Court considered that the

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[86] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Order of 29 November 2001, I.C.J. Reports 2001,* p. 660, at p. 679, para. 40; Murphy, S., "Counter-Claims Article 80 of the Rules", in A. Zimmermann, K. Oellers-Frahm, C. Tomuschat, C. Tams., *The Statute of the International Court of Justice. A Commentary*. Second edition, Oxford University Press, 2012, p. 1000, at p. 1014, para. 50.

[87] C. Antonopoulos, *Counterclaims before the International Court of Justice*, 2011, p. 93; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Riva* v. *Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Counter-Claims, Order of 18 April 2013, I.C.J. Reports 2013*, Declaration of Judge *ad hoc* Guillaume, p. 217, at p. 219, para. 8.

counter-claim was admissible since it occurred "in the Gulf during the same period". [88] In fact, the United States of America's counter-claim concerned attacks on ships that "spanned from Kuwait to Fujayrah", [89] that is to say within locations of the Persian/Arabian Gulf, and even the Strait of Hormuz and the Gulf of Oman, that are situated far away from the maritime areas in which the Rostam, the Sassan and Sirri oil platforms that were subject to American attacks were established.

3.16. In the *Diversion of Water from the Meuse* case, Belgium's counter-claim relating to the Juliana Canal and the Borgharen barrage was considered admissible regardless of the fact that it did not directly refer to the Albert Canal, the subject-matter of the Netherlands' claim.[90]

3.17. Likewise, the Court noted in the two aforementioned *Genocide* cases that the claims and counter-claims related to the "same factual complex" since they occurred on the territory of, respectively, Bosnia and Herzegovina and Croatia, during the same time.[91] The "same geographical area" was broadly defined

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[88] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Counter-Claim, Order of 10 March 1998, I.C.J. Reports 1998*, p. 190, at p. 205, para. 38.

[89] *Views on Iran's "Request for hearing in relation to the United States' counter-claim pursuant to Article 80(3) of the Rules of Court" submitted by the United States of America, December 18, 1997*, p. 13, para. 23.

[90] *The Diversion of Water from the Meuse, Series A./B., n° 70*, pp. 28-32.

[91] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Counter-claims, Orders of 17 December 1997, I.C.J.*

as encompassing the whole of the territory of the two Applicants regardless of whether the allegations of the Applicant and the Respondent in each case related to the same regions.

3.18. Obviously, it should not be inferred from these precedents that claims and counter-claims must relate to events that took place within the same national jurisdiction, whether territorial or maritime. This would be contrary to the holdings in, for example, the *Oil Platforms (Islamic Republic of Iran* v. *United States of America)* and the *Diversion of Water from the Meuse* cases. Moreover, in the *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)* case, the first counter-claim, which was also declared admissible, related to purported acts of aggression that occurred within Ugandan territory and not the territory of the DRC.[92] Although most of the counter-claims raised by Colombia relate to lack of performance of Nicaragua's international obligations within its own maritime areas, some of them concern incidents, such as predatory fishing activities, that took place in Colombia's maritime areas, which are adjacent to the maritime zones adjudicated to Nicaragua. These counter-claims also fulfil the "same geographical area" requirement since they occurred, to cite yet another precedent, "along the frontier between the

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*Reports 1997*, p. 243, à p. 258, para. 34; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment of 3 February 2015*, paras 122-123.

[92] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Order of 29 November 2001, I.C.J. Reports 2001*, p. 660, at pp. 678-679, paras 38-39.

two States",[93] that is to say on the maritime spaces adjudicated to the Parties by the Court in the Southwestern Caribbean Sea.

3.19. Nicaragua places emphasis on the Court's Order of 2013 in the *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica*) cases.[94] This is the only authority invoked by Nicaragua in order to support its thesis according to which the "same geographical area" must be "narrowly defined".[95] But Nicaragua, which disregards the remainder of the jurisprudence cited above,[96] reads too much into that case.

3.20. First of all, by means of its first counter-claim in that case, Nicaragua requested the Court to declare that "Costa Rica bears responsibility to Nicaragua" for "the impairment and possible destruction of navigation on the San Juan River caused by the construction of a road next to its right bank" by Costa Rica in violation of its obligations stemming from the 1858 Treaty of Limits and various treaty or customary rules relating to the protection of the environment and good neighbourliness.[97]

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93 *Land and Maritime Boundary between Cameroon and Nigeria, Order of 30 June 1999, I.C.J. Reports 1999*, p. 983, at p. 985.

94 Written Observations of Nicaragua, paras 3.7-3.9.

95 *Ibid.*, para. 3.9.

96 Cf. *supra* paras 3.13-18.

97 *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Riva* v. *Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Counter-claims, Order of 18 April 2013, I.C.J. Reports 2013*, para. 22, at p. 208.

3.21. While it is true that the construction of the Costa Rican road neither took place in Isla Portillos, nor in the eastern sector of the San Juan River which was of particular concern to Costa Rica, the Court did not rule on its admissibility since Nicaragua had also instituted main proceedings covering that same claim.[98] In fact, on the previous day, the Court had decided to join the proceedings in those two cases, also because "they relate[d] to an area where the common border between them [Nicaragua and Costa Rica] ru[n] along the right bank of the San Juan River", because the relevant facts concerned works "carried out in, along, or in close proximity to the San Juan River".[99]

3.22. Contrary to what Nicaragua suggests, the Court considered that "there [was], in a general sense, a geographical link between its third counter-claim and Costa Rica's claims relating to Nicaragua's dredging activities in that these claims relate[d] to a common river system".[100] The fact that the Court immediately stressed in the following sentence that a "temporal connection c[ould] **also** be made"[101] confirms that, regardless of

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[98] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Riva* v. *Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Counter-claims, Order of 18 April 2013, I.C.J. Reports 2013*, p. 200, at p. 209, para. 24.

[99] *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Joinder of Proceedings, Order of 17 April 2013, I.C.J. Reports 2013*, p. 184, at p. 187, paras 13-14.

[100] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Riva* v. *Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Counter-claims, Order of 18 April 2013, I.C.J. Reports 2013*, p. 200, at p. 214, para. 36.

[101] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Riva* v. *Nicaragua); Construction of a Road in Costa Rica along the*

the fact that the events occurred in different locations, namely the San Juan and the Colorado rivers, the "same geographical area" requirement was met.

3.23. With regard to the second counter-claim, which concerned the physical changes to the Bay of San Juan del Norte, it must follow from the assessment of the third counter-claim that the mere fact that it concerned a different location could not suffice to justify a finding of inadmissibility. The relevant paragraphs of the Court's Order show that Nicaragua's second counter-claim failed in every aspect of the direct connection requirement.[102]

*(b) The "Same Nature"/"Similar Types of Conduct"*

3.24. Whether the facts relied upon by two Parties are of "the same nature, in that they allege similar types of conduct" is a requirement that usually does not raise problems in the Court's jurisprudence. Here, Nicaragua's conduct that forms the basis of the counter-claims is of a similar nature to the conduct of Colombia to which Nicaragua's claims are directed. It is the presence of *both* Parties in the relevant maritime areas that is at issue.

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*San Juan River (Nicaragua* v. *Costa Rica), Counter-claims, Order of 18 April 2013, I.C.J. Reports 2013*, p. 200, at p. 214, para. 36 (emphasis added).

[102] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Riva* v. *Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Counter-claims, Order of 18 April 2013, I.C.J. Reports 2013*, p. 200, at p. 213, paras 34-35.

3.25. However, Nicaragua relies on Uganda's third counter-claim in the *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)* case in order to stress that questions relating to "methods for solving [a] conflict" involve different types of conduct than questions concerning acts which occurred "during [a] conflict".[103] While the Court has indeed made this distinction in that case,[104] suffice it to say that both Nicaragua's claims and Colombia's counter-claims concern events that occurred in the Southwestern Caribbean Sea which are susceptible of engaging international responsibility. None of the counter-claims of Colombia resembles Uganda's third counter-claim in the sense that what would be at stake are methods of settling an on-going dispute as opposed to the legality of the Parties' conduct throughout that dispute. The behaviour of Nicaragua and Colombia, as well as the legality of their decrees seeking to establish or modify their maritime areas constitute similar types of conduct relating to the maritime zones of the Parties that underlie both the claims and the counter-claims.

### (2) LEGAL CONNECTION: THE "SAME LEGAL AIM"

3.26. In relation to the legal connection, "[t]he Court has further examined whether there is a direct connection between the counter-claim and the principal claims of the other party

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[103] Written Observations of Nicaragua, paras 3.10-3.11.

[104] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Order of 29 November 2001, I.C.J. Reports 2001,* p. 660, at p. 680, para. 42.

based on the legal principles or instruments relied upon, or where the Applicant and the Respondent were considered as pursuing the same legal aim by their respective claims".[105]

3.27. The Court has generally found that the "same legal aim" test is met when both Parties seek "the establishment of legal responsibility and the determination of the reparation due on this account".[106] In this respect, Nicaragua again distorts the relevant test by suggesting that if the "respective claims are not based on the same legal principles and instruments", it follows that they cannot "pursue the same legal aim".[107] Again disregarding the conjunction "or", Nicaragua wrongly suggests that a causal conjunction exists between, on the one hand, the "legal principles and instruments relied upon" test and, on the other hand, the "same legal aim" test. By muddying the legal connection requirement, Nicaragua in effect forfeits its prerogative to dispute that the "same legal aim" test is met. In addition, Nicaragua erroneously submits that the adjective "same" also attaches to the "legal principles and instruments relied upon" test.[108]

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105 *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Riva* v. *Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Counter-Claims, Order of 18 April 2013, I.C.J. Reports 2013*, p. 200, at p. 212, para. 32.

106 *Land and Maritime Boundary between Cameroon and Nigeria, Order of 30 June 1999, I.C.J. Reports 1999*, p. 983.

107 Written Observations of Nicaragua, paras 3.31 and 3.44.

108 *Ibid.*, paras 3.31 and 3.44.

3.28. In other words, Nicaragua argues that Colombia's counter-claims do not fulfil the legal connection requirement since they concern the purported violation of different material rules under customary and treaty law.[109] Thus, Nicaragua alleges that Colombia's counter-claims are inadmissible because they do not mirror the claims that it has brought in the principal proceedings. Nicaragua's rendition of the connectivity test ultimately allows a Party that has filed an Application instituting proceedings to cherry-pick the material rules and instruments so as to limit the scope of the possible counter-claims.

3.29. Yet, the Court has never stated that a counter-claim should be based on the breach of the very same legal principle or instrument as the claim.[110] On the contrary, in the 2005 Judgment in the *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)* case, the Court stated that, "[a]s the jurisprudence […] reflects, counter-claims do not have to rely on identical instruments to meet the

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[109] Written Observations of Nicaragua, paras 3.31-3.35, 3.41-3.44 and 3.53-3.57.

[110] Y. Kerbrat, "De quelques aspects des procédures incidentes devant la Cour internationale de Justice : les ordonnances des 29 novembre 2001 et 10 juillet 2002 dans les affaires des activités armées sur le territoire du Congo", XLVIII *A.F.D.I.* (2002), pp. 343-361, at p. 349: "Certes, elle [la Cour] n'avait jamais exigé, dans ses précédentes décisions, qu'il existât entre la demande reconventionnelle et la demande principale une identité des règles invoquées ; elle avait indiqué qu'il était seulement nécessaire que les deux demandes poursuivent 'le même but juridique'. Mais elle n'avait pas eu l'occasion d'illustrer cette différence, car, tant dans l'affaire de l'Application de la Convention pour la prévention et la répression du crime de génocide, que dans celle des Plates-formes pétrolières, les mêmes règles étaient invoquées de part et d'autre. C'est désormais chose faite avec l'analyse effectuée par la Cour de la deuxième demande ougandaise."

'connection' test of Article 80".[111] Nicaragua is well aware of this because it relies on that case.[112]

3.30. Uganda's second counter-claim related to breaches of articles 22, 24, 29 and 30 of the Vienna Convention on Diplomatic Relations, a treaty which was never invoked by the DRC in its principal claims. In its 2001 Order, the Court had already stressed, in broad terms, that each Party sought "to establish the responsibility of the other by invoking, in connection with the alleged illegal use of force, certain rules of conventional and customary international law relating to the *protection of persons and property*".[113] So also in this case does the conduct that underlies the claims and counter-claims involve similar conduct – activities and omissions in the relevant maritime areas based on interrelated principles of the Law of the Sea.

3.31. In fact, the Permanent Court of International Justice had also previously found in the *Case concerning the Factory at Chorzow* that the counter-claim of Poland was admissible notwithstanding the fact that it was based on Article 256 of the Versailles Peace Treaty instead of the Geneva Convention on

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111 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 168, at p. 275, para. 326.

112 Written Observations of Nicaragua, para. 3.4.

113 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Order of 29 November 2001, I.C.J. Reports 2001*, p. 660, at p. 679, para. 40 (emphasis added).

Upper Silesia which constituted the basis of the principal claim of Germany and of the Court's jurisdiction.[114]

3.32. More recently, in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)* case, the Court's 2015 Judgment suggests that, if other bases for jurisdiction had been available in addition to Article IX of the Genocide Convention, Serbia might have advanced counter-claims based on the breach of different rules.[115]

### C. Nicaragua's Distorted Conception of the Direct Connection Requirement

#### (1) First and Second Counter-Claims

3.33. Colombia's first and second counter-claims concern Nicaragua's violation of its duty of due diligence to protect and preserve the marine environment of the Southwestern Caribbean Sea, as well as Nicaragua's violation of its duty of due diligence to protect the rights of the inhabitants of the San Andrés Archipelago, in particular the Raizales, to benefit from a healthy, sound and sustainable environment. The direct connection requirement is met both from the factual **(a)** and legal **(b)** points of view.

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[114] *Case Concerning the Factory at Chorzow (Claim for indemnity) (merits), Series A, n° 13*; Antonopoulos, C., *Counterclaims before the International Court of Justice*, 2011, p. 89 and 120.

[115] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment of 3 February 2015*, para. 123.

*(a) Factual Connection*

3.34. With regard to the factual connection, Nicaragua does not, and indeed cannot, dispute that the first and second counter-claims relate to events that occurred during the "same time period" as the facts underlying its own claims. Colombia has put forward seventeen instances of predatory fishing practices[116] and one instance of pollution of the sea[117] spanning from 12 December 2012 to 26 November 2013. These incidents, which involved fourteen different Nicaraguan fishing vessels, occurred during the same time period as the thirteen "incidents"[118] invoked by Nicaragua with respect to its claims that allegedly took place prior to the termination of the Pact between the Parties, that is to say within the *ratione temporis* scope of the Court's jurisdiction.

3.35. However, Nicaragua does maintain that "some of the alleged facts upon which it [Colombia] relies do *not* relate to the same geographic area as Nicaragua's claims", before referring specifically to the incidents that occurred "in the territorial sea around Colombia's Serrana Cay or in the Colombia-Jamaica Joint Regime Area".[119] Nicaragua's attempt to constrict the "same geographical area" alternative requirement to its exclusive economic zone fails in view of the *jurisprudence*

116 Counter-Memorial of Colombia, volume I, paras 8.13-8.21.
117 *Ibid*., para. 8.44.
118 *Ibid*., para. 4.22.
119 Written Observations of Nicaragua, para. 3.24.

*constante* mentioned above,[120] which demonstrates that the Court does not limit its examination to events that occurred within a specific jurisdiction. All of the incidents forming the basis of these counter-claims took place in the same waters that were relevant in the *Territorial and Maritime Dispute* case on which Nicaragua's claims are based.

3.36. Thus, the three incidents referred to in the first and second counter-claims that relate to events that occurred in the territorial sea of Serranilla and the Joint Regime Area with Jamaica[121] fulfil the "same geographical area", as well as the "same time period", alternative requirements. Similarly the incident of the Lady Dee I, which ran aground the island of Serrana on 16 December 2012, also fulfils these requirements.[122] They all occurred on the maritime spaces adjudicated to the Parties by the Court in the Southwestern Caribbean Sea.

3.37. In any event, Nicaragua itself recognizes that only "some" of the alleged facts have occurred outside its exclusive economic zone. Indeed, fourteen of the eighteen instances of predatory fishing practices and pollution of the sea have taken place in the Northwestern corner of the Seaflower Marine Protected Area, that is to say in that same "rich fishing area known as *Luna Verde*" of the Nicaraguan exclusive economic zone, as adjudicated in the 2012 Judgment, in which Nicaragua

120 Cf. *supra* paras 3.13-3.23.

121 Counter-Memorial of Colombia, volume I, paras 8.13-8.16.

122 *Ibid*., para. 8.44.

says "most of the incidents have occurred".[123] Accordingly, even if one were to follow Nicaragua's unreasonably narrow approach to the "same geographical area" requirement, suffice it to say that the incidents which, by Nicaragua's own admission fulfil that requirement, represent more than 75% of the relevant facts upon which Colombia's first and second counter-claims rest.

3.38. Having failed to refute that "the facts relied upon by each party relate to the same geographical area or to the same time period", the bulk of Nicaragua's argumentation directed at attacking the factual connection is based on the allegation that "Colombia's first and second counter-claims involve different types of conduct than the facts supporting Nicaragua's claims".[124] Thus, Nicaragua asserts that "Colombia's interference with and violations of Nicaragua's exclusive *sovereign rights and jurisdiction* in maritime areas adjudged by the Court to appertain to Nicaragua" has nothing to do with its own "failure to observe its *sovereign duties*" in those same maritime areas.[125]

3.39. In reality, it is Nicaragua's attempt to disconnect sovereign *rights* from sovereign *duties* that is unavailing. Having failed to live up to its due diligence obligation, Nicaragua persists in disregarding the fact that these duties limit

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123 Memorial of Nicaragua, para. 2.23.

124 Written Observations of Nicaragua, para. 3.25.

125 Written Observations of Nicaragua, para. 3.26 (Italics in the original).

and condition the exercise of its sovereign rights, which are not unlimited. The rights and obligations in question cannot be separated in such a casual manner. The fact that the first and second counter-claims rest mainly, but not exclusively, on breaches of Nicaragua's obligations under the Law of the Sea is a logical consequence of the fact that those counter-claims are based on the breach of due diligence obligations.

3.40. As far as the subject-matter of the claims and counter-claims is concerned, there is a direct connection between the infringement of sovereign rights and of their corollary sovereign duties. Indeed, Nicaragua itself in Chapter III of its Memorial included a section – "C. Colombia's duties arising under the international law of the sea" – whose title encompasses the relevant body of law without drawing emphasis on specific material rules or set of rules. In essence, Nicaragua's claims also rest on the allegation that Colombia failed to fulfil its duty to respect Nicaragua's maritime zones. Again in its Memorial, Nicaragua chose to cite Article 56 of UNCLOS in its totality, including its second paragraph, which stresses that "in exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention".[126]

[126] Memorial of Nicaragua, para. 3.4.

3.41. Likewise, Nicaragua contends that the "'other side of the same coin argument' is unavailing",[127] and that "Colombia's *active* assertion of rights and jurisdiction" is of a "fundamentally different character" when compared to the "*inactivity*" of Nicaragua in the face of environmentally destructive practices of Nicaragua's own citizens.[128]

3.42. This difference is meaningless considering it is trite law that a State can be responsible for both actions and omissions of its authorities.

3.43. In the *Corfu Channel* case, the Court declared the international responsibility of Albania because it considered that this State knew, or must have known, of the presence of the mines in its territorial waters and did nothing to warn third States of their presence.[129]

3.44. Likewise, in the *Tehran Hostages* case, the Court declared the international responsibility of the Islamic Republic of Iran due to the "inaction" of its authorities which "failed to take appropriate steps", in circumstances where such steps were evidently called for.[130] Therefore, the conduct of a State can

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127 Written Observations of Nicaragua, para. 3.28.

128 *Ibid*., para. 3.30. (Italics in the original).

129 *Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, pp. 22 – 23.

130 *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, pp. 31–32, paras. 63 and 67.

comprise acts or omissions of a State for the purposes of international responsibility.[131]

3.45. Colombia is thus invoking the international responsibility of Nicaragua because of the latter's failure to exercise its due diligence obligations. This is caused by Nicaragua's repeated pattern of omissions, inactivity or failure to take appropriate steps under basic Law of the Sea rules. As can be seen, therefore, Nicaragua's claims and Colombia's counter-claims refer to a series of conduct which is mutually considered to be breaches of international law entailing the international responsibility of the other State.

3.46. Moreover, the events relied upon by Colombia are of the same nature of conduct as those relied upon by Nicaragua. The best example of this is the event introduced by Nicaragua in its Memorial regarding the Nicaraguan fishing flagged vessel, Miss Sofia.

3.47. Nicaragua alleges that on 17 November 2013 the Colombian frigate A.R.C. "Almirante Padilla" ordered the Nicaraguan fishing flagged vessel Miss Sofia to withdraw from the area and sent a speedboat to chase it away.[132] Yet, in its Counter-Memorial, Colombia submitted evidence to demonstrate that this was not the case, and that on that occasion

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131 Draft articles on Responsibility of States for Internationally Wrongful Acts, Yearbook of the International Law Commission, 2001, Vol. II, Part Two. United Nations, 2008.

132 Memorial of Nicaragua, para. 2.30, 2.31 and Annex 23-A.

the Colombian Navy was actually rescuing two crew members which the Miss Sofia had left behind with the complacency of the Nicaraguan Navy.[133] This is just one example of the "other side of the coin" that Nicaragua refuses to acknowledge.

### *(b) Legal Connection*

3.48. In relation to the legal connection, Nicaragua argues that Colombia's first and second counter-claims do not fulfil this requirement because "the rules of customary international law relating to the preservation and protection of environment, and the exercise of due diligence, as well as the provisions of various international instruments, including the CITES Convention, the Cartagena Convention and the FAO Code of Conduct on Sustainable Fishing" are not relevant to Nicaragua's claims. In Nicaragua's view, the latter rely instead on "the Court's 2012 Judgment and the rules of customary international law as reflected in Parts V and VI of UNCLOS, which recognize the exclusive sovereign rights and jurisdiction of a coastal State within its maritime areas".[134]

3.49. Contrary to what Nicaragua would have the Court believe, Colombia has not argued that the legal connection is met merely because the law applicable to both the claims and counter-claims is customary international law, although that is

[133] Counter-Memorial of Colombia, Volume I, paras. 4.38 – 4.41, volume II, Annexes 53 and 112.
[134] Written Observations of Nicaragua, paras 3.33-3.34.

the case here. Rather, the first and second counter-claims, like the subject-matter of the Nicaraguan claims, are based on legal principles pertaining to the same *corpus* of international law, the customary international Law of the Sea. The truth of the matter is that the Law of the Sea addresses the sovereign rights of coastal States in close connection with those States' international obligations, as well as with the rights and duties of other non-coastal States, encompassing environmental rules.

3.50. To analyse UNCLOS and customary law as entirely different and autonomous bodies of law is unpersuasive. Nicaragua's similarly formalistic effort to reason purely in terms of branches of law, divorcing the Law of the Sea from International Environmental Law, is equally unconvincing. Principles of International Environmental Law infuse a number of principles of the Law of the Sea. For example, the body of law that is relevant to Nicaragua's claims deals extensively with coastal States' and non-coastal States' sovereign duties relating to the preservation and protection of the marine environment.

3.51. Nicaragua's insistence on the fact that some of the conventions mentioned in Colombia's counter-claims were not invoked in its Memorial is similarly in vain. Those instruments follow the spirit of the Law of the Sea rules relating to the protection of the marine environment. If the Vienna Convention on Diplomatic Relations constitutes a convention "relating to the protection of persons and property" sufficiently connected to the

rules of *jus ad bellum* and *jus in bello*,[135] instruments such as the Cartagena Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region are also treaties that are clearly connected to disputes over sovereign rights and duties of States in maritime areas. In any event, even ignoring these conventions, the conduct of Nicaragua still constitutes a breach of its obligations under the customary Law of the Sea.

### (2) THIRD COUNTER-CLAIM

3.52. Colombia's third counter-claim concerns Nicaragua's infringements of the artisanal fishing right of the local inhabitants to access and exploit the traditional banks of the inhabitants of the Archipelago of San Andrés. The direct connection requirement is met both from the factual **(a)** and legal **(b)** points of view.

#### *(a) Factual Connection*

3.53. Nicaragua rightly conceded in its Written Observations that "[t]he facts underlying Colombia's third counter-claim do generally relate to the same geographical area and the same time period as the facts stated in Nicaragua's claim".[136]

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[135] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Order of 29 November 2001, I.C.J. Reports 2001*, p. 660, at p. 679, para. 40.

[136] Written Observations of Nicaragua, para. 3.37.

3.54. Indeed the facts underlying the third counter-claim relate to events that have been taking place since the delivery of the 2012 Judgment. Already on 18 February 2013, the President of Colombia had stressed that he was aware of incidents between the Nicaraguan authorities and the artisanal fishermen of the Archipelago. [137] These events, which have to do with Nicaragua's coast guard harassing the artisanal fishermen of the Archipelago, occur in the exclusive economic zone of Nicaragua and, in particular, in the shallow waters of the area of Cape Bank known as Luna Verde, or the deep-sea banks situated between the Northern Colombian islands of Quitasueño and Serrana.

3.55. Notwithstanding this, Nicaragua adds that "[t]he facts Colombia alleges are not of the same nature" because "the harassment that Nicaragua complains about took place in its own maritime zones and was committed by another State that has no sovereign rights of [sic] jurisdiction in those areas". It also states that "[t]he harassment Colombia alleges, on the other hand, took place outside Colombia's maritime zones in areas that are subject to excusive [sic] sovereign rights and jurisdiction of Nicaragua". [138]

3.56. Contrary to what Nicaragua asserts, it can be readily seen that the nature of the conduct is the same. Whether the facts underlying the claims and counter-claims are of the "same

137 Counter-Memorial of Colombia, para. 9.1 and Annex10.
138 Written Observations of Nicaragua, para. 3.40.

nature" in that they allege "similar types of conduct", has nothing to do with the identity of the coastal State in a given area or the fact that they purportedly "took place in very difference [sic] legal zones".[139] In fact, they took place in the same zones. The Nicaraguan argument touches upon a question that clearly belongs to the merits of the case and as such is beside the point in the current discussion concerning the admissibility of the counter-claims. Nicaragua has complained because of the conduct of the Colombian Navy *vis-à-vis* Nicaraguan fishermen.[140] Colombia has complained because of the conduct of the Nicaraguan Navy *vis-à-vis* Colombian fishermen in the same area.[141] It follows that the Parties allege similar types of conduct and, therefore, the "same nature" requirement is met.

### *(b) Legal Connection*

3.57. Nicaragua states that "Colombia is equally wrong in suggesting that the legal principles and instruments that underlie its third counter-claim are the same as those that underlie Nicaragua's principal claims".[142] Colombia has never suggested that the legal principles underlying the third counter-claim and the subject-matter of Nicaragua's claims are exactly the same. Where Nicaragua errs, however, is to suggest, once more, that counter-claims and principal claims must necessarily be based

139 Written Observations of Nicaragua, para. 3.40.
140 Memorial of Nicaragua, paras 1.9, 2.22, 2.28 and 3.34.
141 Counter-Memorial of Colombia, paras 9.4-9.5, 9.17-9.21 and 9.25.
142 Written Observations of Nicaragua, para. 3.41.

on the breach of the same instrument or an identical legal principle.

3.58. Instead of divorcing sovereign rights and duties, Nicaragua this time distinguishes between "exclusive sovereign rights" and "non-exclusive private rights […] to continue traditional fishing activities in Nicaragua's EEZ despite the 2012 Judgment"; in other words, between "rights and jurisdiction *qua* sovereign" and "acting as *parens patriae* on behalf of its people to assert putative private rights".[143]

3.59. Nicaragua has wrongly assumed that the right asserted by Colombia is a private right, instead of a local customary norm binding Colombia and Nicaragua as advanced in the Counter-Memorial.[144] But this is also a question for the merits. In any event, what matters is that both Parties are seeking to establish the international responsibility of the other by invoking violations of customary law rules relating to the access to fishing resources in the "same geographical area".

3.60. Additionally, Nicaragua thought it convenient to stress that Colombia has "acknowledge[d] the importance of the legal distinction between traditional fishing rights, on the one hand, and drawing of maritime boundaries, with the attendant allocation of sovereign rights and jurisdiction, on the other".[145] This issue is also relevant for the merits. Nonetheless, it is worth

143 Written Observations of Nicaragua, para. 3.41.
144 Counter-Memorial of Colombia, paras 3.87 and ss.
145 Written Observations of Nicaragua, para. 3.43.

stressing that Nicaragua recognizes that the drawing of the 2012 delimitation did not, and could not, extinguish the rights in question, as developed in the Counter-Memorial. [146] But Colombia's third counter-claim is not an incidental proceeding grafted to the *Territorial and Maritime Dispute* case. Colombia does not have to establish a direct connection between Nicaragua's infringement of the traditional fishing rights and Nicaragua's territorial and maritime claims in the case that was decided on the merits in 2012. The direct connection has to be established between the infringement of the artisanal fishing right to access, move freely around and exploit the traditional banks and the purported breach of Nicaragua's sovereign rights to exploit its exclusive economic zone.

3.61. Nicaragua has itself emphasised in its Memorial that, "contrary to interpretation proceedings under Article 60 of the Statute, the Court's role in the present case is *not* 'to clarify the meaning and scope of what the Court decided in the judgment which it is requested to interpret', but to decide *new* legal questions and to examine 'facts other than those which it has considered in the judgment [of 19 November 2012], and consequently all facts subsequent to that judgment'." [147] And Nicaragua added that "[t]he present case takes place downstream: it originates in Colombia's actions subsequent to the *Judgment*", "[t]his is not a new delimitation case". [148]

146 Counter-Memorial of Colombia, paras 3.98-3.111.
147 Memorial of Nicaragua, para. 1.33.
148 *Ibid.*, para. 1.35

Likewise, Colombia's third counter-claim, which is directly connected to the subject-matter of Nicaragua's claims in the main proceedings, does not require an interpretation of the 2012 Judgment. Moreover, just as Nicaragua's claims are based on alleged violations that post-date the 2012 Judgment, so too do Colombia's counter-claims.

### (3) FOURTH COUNTER-CLAIM

3.62. The fourth counter-claim concerns Nicaragua's straight baselines decree which extended its internal waters, territorial sea, contiguous zone, EEZ and continental shelf, in violation of international law and of Colombia's sovereign rights and jurisdiction. The direct connection requirement is met both from the factual **(a)** and legal **(b)** points of view.

#### *(a) Factual connection*

3.63. Nicaragua does not contest that the decree addressed in the fourth counter-claim was adopted during the "same time period" in which the facts underlying Nicaragua's claims occurred. In fact Nicaragua's Decree No. 33-2013 was adopted on 19 August 2013, that is to say less than a month before the adoption of Colombia's Decree 1946 of 9 September 2013 relating to the Integral Contiguous Zone of which Nicaragua complains.[149]

[149] Written Observations of Nicaragua, paras 10.6 and 10. 9.

3.64. Nicaragua contends that its straight baselines decree and Colombia's Integral Contiguous Zone decree do not meet "the same nature" requirement by referring to geography and the merits of this counter-claim.

3.65. However, Colombia's fourth counter-claim fulfils the "same nature" requirement because there is a clear parallel with regard to Nicaragua's assertion that Colombia's Decree No. 1946 violates international law: (i) both are domestic acts that relate to the delineation of coastal States' maritime areas; and, (ii) both allegedly extend the Parties' maritime areas beyond what is allowed under international law.

3.66. Further, Nicaragua adopts a different approach for assessing whether the facts underlying the fourth counter-claim and its own claims occurred in the "same geographical area". Embarking on an examination of the merits, Nicaragua considers it crucial to demonstrate that "[t]here is no question of Nicaragua impinging on any of Colombia's maritime zones either to the west or the east of San Andrés and Providencia".[150] In other words, and contrary to what it argued in relation to the first, the second and the third counter-claims, Nicaragua now suggests that in order to be admissible the fourth counter-claim should affect the maritime areas of Colombia and not be restricted to violations that occurred in those of Nicaragua. According to Nicaragua's disingenuous argumentation, it does not matter that such decree modifies the extent of Nicaragua's

[150] Written Observations of Nicaragua, para. 3.48.

internal waters and territorial sea, thus changing the regimes applicable to the maritime areas adjudged to appertain to Nicaragua.

3.67. The discussion regarding Nicaragua's basepoints and baselines, its effect on the extent of the exclusive economic zone, and on Colombia's sovereign rights and maritime spaces, is clearly for the merits stage. Colombia will thus address it in due course.

### *(b) Legal Connection*

3.68. As far as the legal connection is concerned, Nicaragua again seeks to divide UNCLOS, and more importantly the customary international law of the sea, into different parts or sets of rules in a manner that is contrary to the jurisprudence of the Court. [151] Unsurprisingly, Nicaragua considers that Colombia's argument based on "the customary international law governing straight baselines, as reflected in Article 7", which is in Part II of UNCLOS, "is wholly irrelevant" to its claims based on the breach of rules of customary international law "codified in Parts V and VI" of that convention. [152] Yet, Nicaragua overlooks the fact that claims and counter-claims need not refer to the exact same legal principles. Moreover, in its own Memorial Nicaragua relied on Article 33, which is also in Part II

151 Written Observations of Nicaragua, para. 3.54.

152 *Ibid.*, para. 3.54.

of UNCLOS,[153] and not merely on customary international law reflected in Parts V and VI of that instrument, in order to dismiss the legality of Colombia's Decree 1946.

3.69. Besides, the fourth counter-claim is of particular relevance in order to determine the regime that is applicable in the area where the purported incidents underlying both the claims and counter-claims occurred. Whether the freedom of navigation or the right of innocent passage will apply are decisive factors for the purpose of assessing both Nicaragua's claims and Colombia's counter-claims. This reinforces the direct legal connection between the two.

153 Memorial of Nicaragua, paras 3.15-3.31.

# Chapter 4

# CONCLUSIONS

4.1. Nicaragua chose to end its Written Observations by stressing that, because it was Colombia "that severed the consensual bond between the Parties", Colombia should not be allowed to make counter claims at this stage.[154] While Colombia's notification of denunciation of the Pact of Bogotá was entirely legitimate and took effect after the Institution of Proceedings, Nicaragua opportunistically picks two different critical dates so as to argue that only its own claims can fall within the Court's jurisdiction *ratione temporis*. Providing little argumentation and no authority whatsoever for this proposition, aside from the two cases that it has plainly misinterpreted,[155] Nicaragua insists that the critical date for assessing whether the counter-claims come within the jurisdiction of the Court is the date of the filing of the Counter-Memorial. What is more, confronted with Colombia's counter-claims which were rightly limited to events that occurred prior to 27 November 2013, Nicaragua asserts that all the purported incidents underlying its own claims, including those that would have taken place well after the termination of the Pact, fall within jurisdiction *ratione*

154 Written Observations of Nicaragua, para. 4.7.

155 Cf. *Supra* paras 2.28-2.37.

*temporis*. Clearly, it is Nicaragua, and not Colombia, that is infringing the *ratione temporis* scope of the Court's jurisdiction.

4.2. Colombia's counter-claims are autonomous acts. Nevertheless, they are linked to Nicaragua's claims since they react to them by "pursuing objectives other than the mere dismissal of the claim[s] of the Applicant in the main proceedings". [156] While it is true that a counter-claim is "distinguishable from a defence on the merits" in so far as it does not necessarily aim to obtain the total or partial dismissal of the principal claims,[157] Colombia's reliance on similar, and in some case the same, facts in order both to refute the allegations of Nicaragua and to obtain judgment against that State reinforces the connection between claims and counter-claims.[158]

4.3. Significantly, Nicaragua does not ignore that the radio exchanges between the Colombian Navy and the Nicaraguan vessels underlying its claims of harassment and violation of its sovereign rights attest to the fact that Colombia considered that it was acting in conformity with its rights and duties to protect and preserve the marine environment as well as the historic fishing rights of Colombia and of the inhabitants of the

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156 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Counter-Claims, Orders of 17 December 1997, I.C.J. Reports 1997*, p. 243, at p. 256, para. 27.

157 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Counter-Claims, Orders of 17 December 1997, I.C.J. Reports 1997*, p. 243, at p. 256, para. 27.

158 *Colombian-Peruvian Asylum case, Judgment of November 20th, 1950: I.C.J. Reports 1950*, p. 266, at pp. 280-281; *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Counter-claim, Order of 10 March 1998, I.C.J. Reports 1998*, p. 190, at 205, para. 38.

Archipelago of San Andrés, including the indigenous Raizal people.

4.4. Nicaragua's restrictive views concerning the interpretation of Article 80, paragraph 1 of the Rules of Court resembles the arguments put forward by Bosnia and Herzegovina, Iran and the DRC previously rejected in the Court's *jurisprudence constante*. In particular, the Court has already rejected Nicaragua's narrow approach to the factual connection, as well as its outmoded suggestion that the material rules underlying both the claims and counter-claims should be exactly the same.

4.5. Colombia has not added a new dispute to the proceedings. What Colombia's counter-claims do, in conformity with their *rationale*, is to provide the Court with the other half of the story presented in Nicaragua's Memorial. Because Nicaragua has adopted a myopic view of the applicable facts and rules, Colombia's counter-claims highlight that, on the one hand, Nicaragua's newly recognized sovereign rights come with responsibilities and duties, and that, on the other hand, Colombia has likewise rights and duties that apply in the exclusive economic zone of Nicaragua.

4.6. If the case were to proceed to the merits dismissing the incidental proceedings commenced by Colombia in conformity with the Rules of Court, Nicaragua's unjustified belief that it enjoys unfettered rights and jurisdiction over its exclusive

economic zone would be upheld in contradiction to the principle of the equality of the Parties.

4.7. The counter-claims of Colombia turn heavily on the protection and preservation of the marine environment and the habitat of the local communities in the Colombian islands in the Southwestern Caribbean Sea. In this regard, the *laissez-faire* attitude of one of only two countries in the world who has not signed the Paris Agreement on Climate Change is already highly detrimental to Colombia and to the inhabitants of the Archipelago of San Andrés, in particular the indigenous Raizal people. Similarly, the coercive measures taken by the Nicaraguan Naval Force vis-à-vis the artisanal fishermen are particularly detrimental to the inhabitants of the Archipelago, whose livelihood depends on traditional fishing in the Southwestern Caribbean Sea.

4.8. For all the reasons put forward in the present Observations, the Republic of Colombia requests the Court to adjudge and declare that the counter-claims made in the Counter-Memorial fulfil the requirements of Article 80 of the Rules of Court and are admissible.