DECLARATION OF JUDGE CANÇADO TRINDADE

1. I have voted in favour of the adoption of the present Order (of 15 November 2017) in the case concerning *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)*, whereby the International Court of Justice (ICJ) has taken the proper course in respect of the four counter-claims, namely, finding the first and second inadmissible, and the third and fourth admissible. Having supported the present Order, there is one particular point to which I attribute special relevance and which I feel obliged to dwell upon a bit further, so as to leave on the records the foundations of my personal position thereon.

2. I thus deem fit to append to the ICJ's Order the present declaration, wherein I shall focus on such particular point, — dealt with in the Order in relation to the third counter-claim, — namely, that of the traditional fishing rights of the inhabitants of the San Andrés Archipelago. I do so in the zealous exercise of the international judicial function, seeking ultimately the goal of the *realization of justice*, ineluctably linked, as I perceive it, to the settlement of disputes.

3. As to other related points, such as the *rationale* and admissibility of counter-claims, the cumulative requirements of Article 80 (1) of the Rules of Court (jurisdiction and direct connection to the main claim), and the legal nature and effects of counter-claims, I have already dwelt upon in detail in my extensive dissenting opinion (paras. 1-179, esp. paras. 4-30) in the case of *Jurisdictional Immunities of the State (Germany* v. *Italy), Counter-Claim, Order of 6 July 2010, I.C.J. Reports 2010 (I)*, pp. 329-397). It is not my intention to reiterate herein the considerations I then presented; I find it sufficient only to refer to them, recalling one particular point I made on that occasion, seven years ago.

4. In my aforementioned dissenting opinion, I pointed out, *inter alia*, that, even though counter-claims are interposed in the course of the process, being thus directly connected to the main claim and integrating the factual complex of the *cas d'espèce* (and so giving an impression of being "incidental"), this does not deprive them of their *autonomous* legal nature (*ibid.*, p. 336, para. 17). Counter-claims are to be treated on the same footing as the original claims, in faithful observance of the *principe du contradictoire*, thus ensuring the procedural equality of the parties (*ibid.*, p. 342, para. 30). The original applicant assumes the role of counter-claim respondent *(reus in excipiendo fit actor)*.

5. In enlarging the factual complex of the case, counter-claims (together with claims) enable the ICJ to have a better knowledge of the dispute at issue that it has been called to adjudicate upon (*I.C.J. Reports 2010 (I)*, pp. 340-342, paras. 28-29). Yet, in the same dissenting opinion in the case of *Jurisdictional Immunities of the State*, in my examination of the jurisprudential and doctrinal developments on the matter, I observed that "the Court's practice in relation to counter-claims is still in the making" (*ibid.*, pp. 340-341, para. 28, and cf. pp. 333-341, paras. 9-28). In the search for the realization of justice, there is still much to advance in this domain.

6. For example, both claims and counter-claims require, in my perception, prior public hearings so as to obtain further clarifications from the contending parties (*ibid.*, pp. 342 and 389, paras. 30 and 154). In any case, the Court is not bound by the submissions of the parties; it is perfectly entitled to go beyond them, so as *to say what the law is (juris dictio)* (*ibid.*, p. 392, para. 162). In enlarging the factual context to be examined in the adjudication of a dispute, main claims and counter-claims provide elements for a more consistent decision of the international tribunal seized of them.

7. Almost eight decades ago, international legal doctrine was already apprehending the autonomous legal nature of counter-claims[1]. Counter-claims are not simply a defence on the merits; in requiring the same degree of attention as the main claims, the counter-claims assist in achieving the sound administration of justice *(la bonne administration de la justice)*. Nowadays, we are required to keep on cultivating the examination of the institute of counter-claims.

8. In the conclusions of my aforementioned dissenting opinion in the case of *Jurisdictional Immunities of the State (Germany* v. *Italy)* (2010), I observed that "[c]ounter-claims, as a juridical institute transposed from domestic procedural law into international procedural law, already have their history, but the ICJ's jurisprudential construction on the matter is still in the making" (*I.C.J. Reports 2010 (I)*, p. 390, para. 155). And I summed up:

> "The same treatment is to be rigorously dispensed to the original claim and the counter-claim as a requirement of the sound administration of justice *(la bonne administration de la justice)*. They are, both, autonomous, and should be treated on the same footing, with a strict observance of the *principe du contradictoire*. Only in this way the *procedural equality* of the parties (Applicant and Respondent, ren-

[1] Cf., e.g., D. Anzilotti, "La demande reconventionnelle en procédure internationale", 57 *Journal du droit international*, Clunet (1930), p. 876; R. Genet, "Les demandes reconventionnelles et la procédure de la Cour permanente de justice internationale", 19 *Revue de droit international et de législation comparée* (1938), p. 148.

dered Respondent and Applicant by the counter-claim) is secured." (*I.C.J. Reports 2010 (I)*, p. 389, para. 154.)[2]

9. Turning now to the particular point I purport to address in the present declaration, may I begin by observing that this is not the first time that, in a case of the kind, the ICJ takes into account, in an inter-State dispute, the basic needs and in particular the fishing rights of the affected segments of local populations, on both sides. May I recall three Court decisions over the last eight years, concerning, like the present one, Latin American countries: it is significant that attention has constantly been given to that issue in those cases, like in the present one concerning *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*.

10. Thus, it is not to pass unnoticed that, in its Judgment of 13 July 2009, in the case of the *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua)*, the ICJ upheld the customary right of subsistence fishing (*Judgment, I.C.J. Reports 2009*, p. 266, paras. 143-144, and cf. p. 265, paras. 140-141) of the inhabitants of *both* banks of the San Juan River[3]. After all, those who fish for subsistence are not the States, but the human beings struck by poverty. The Court thus turned its attention, beyond the strict inter-State dimension, to the affected segments of the local populations.

11. In its subsequent Judgment of 20 April 2010, in the case concerning *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*, the Court likewise took into account aspects pertaining to the affected local populations, and consultation with them. This is what I deemed fit to single out in my lengthy separate opinion (*Judgment, I.C.J. Reports 2010 (I)*, p. 193, para. 156), in which I pondered that, even in the inter-State mechanism of judicial settlement of disputes by the ICJ, it was considered necessary to go in its reasoning beyond the strict inter-State dimension, taking due account of the basic needs of the affected segments of the local population (*ibid.*, paras. 156-157), on both sides.

12. And I added, in the aforementioned separate opinion, that in both cases concerning Latin American countries, in Central America and in the southern cone of South America, respectively, attentive to the living conditions and public health of neighbouring communities,

> "the ICJ looked beyond the strictly inter-State dimension, into the segments of the populations concerned. The contending States, in

[2] Dissenting opinion reproduced in: *Judge A. A. Cançado Trindade — The Construction of a Humanized International Law — A Collection of Individual Opinions (1991-2013)*, Vol. II (International Court of Justice), Leiden, Brill/Nijhoff, 2014, pp. 1298-1369.

[3] The Court further recalled that the respondent State had commendably reiterated that it had "absolutely no intention of preventing Costa Rican residents from engaging in subsistence fishing activities" (*I.C.J. Reports 2009*, p. 265, para. 140).

> both cases, advanced their arguments in pursuance of their vindications, without losing sight of the human dimension underlying their claims. Once again, Latin American States pleading before the ICJ have been faithful to the already mentioned deep-rooted tradition of Latin American international legal thinking, which has never lost sight of the relevance of doctrinal constructions and the general principles of law." (*I.C.J. Reports 2010 (I)*, pp. 193-194, para. 158.)

13. More recently, in its Judgment of 27 January 2014 in the case concerning the *Maritime Dispute (Peru* v. *Chile)*, on the Pacific coast in South America, the ICJ, in assessing "the extent of the lateral maritime boundary" which the Contending Parties acknowledged existed in 1954, it made clear, *inter alia*, that it was itself "aware of the importance that fishing has had for the coastal populations of both Parties" (*Judgment, I.C.J. Reports 2014*, p. 44, para. 109). This third Judgment once again revealed that, despite the fact that the dispute was an inter-State one and the mechanism of peaceful judicial settlement is also an inter-State one, there is no reason to make abstraction of the needs of the affected persons in the reasoning of the Court, thus transcending the strict inter-State outlook.

14. Now, in the present case concerning *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*, opposing a Central American to a South American country, the point at issue again comes to the fore, and the ICJ, once again, takes due care to keep it in mind. Both Contending Parties, Nicaragua and Colombia, expressed concerns about the rights of their respective fishermen[4]; furthermore, both Colombia and Nicaragua seemed aware of the needs of each other's fishermen[5].

15. In the course of the written arguments of the Contending Parties[6] in the *cas d'espèce*, special attention was given to the fishermen from the local population of the Archipelago of San Andrés, Providencia and Santa Catalina ("*los pueblos raizales*", the Raizal people), in particular their traditional and historic fishing rights from time immemorial, and the fact that they are vulnerable communities, highly dependent on traditional fishing for their own subsistence.

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[4] Memorial of Nicaragua, of 3 October 2014, paras. 2.22 and 2.54; Counter-Memorial of Colombia, of 17 November 2016, paras. 1.2, 1.24, 3.3, 3.86, 3.94 and 7.5.

[5] Memorial of Nicaragua, paras. 2.54-2.56 and 4.20; Counter-Memorial of Colombia, paras. 1.12, 3.109 and 9.5; Written Observations of Nicaragua on the Admissibility of Colombia's Counter-Claims, of 20 April 2017, paras. 2.49 and 3.42-3.45; Written Observations of Colombia on the Admissibility of Its Counter-Claims, of 28 June 2017, paras. 2.72-2.73.

[6] Memorial of Nicaragua, paras. 2.54-2.55 and 4.20; Counter-Memorial of Colombia, paras. 1.7, 2.10, 2.53, 2.69, 2.81, 2.87, 3.3, 3.77, 3.94, 3.102 and 3.109; Written Observations of Nicaragua on the Admissibility of Colombia's Counter-Claims, paras. 2.49-2.50; Written Observations of Colombia on the Admissibility of Its Counter-Claims, paras. 3.52 and 4.3.

16. For its part, the ICJ, in the present Order, has addressed the issue in its own considerations as to the cumulative requirements of admissibility of counter-claims, set forth in Article 80 (1) of the Rules of Court, i.e., as to their *direct connection* (to the principal claim), and as to *jurisdiction*. The Court's considerations pertain to the third counter-claim concerning the fishing rights of the local inhabitants of the Archipelago of San Andrés. In this respect, the ICJ notes that the facts relied upon by both Parties relate to the same time period, the same geographical area, and are of the same nature "in so far as they allege similar types of conduct of the naval forces of one Party vis-à-vis nationals of the other Party", engaged on "fishing in the same waters" (Order, para. 44).

17. The Court ponders that the Contending Parties,

> "are pursuing the same legal aim by their respective claims since they are both seeking to establish the responsibility of the other by invoking violations of a right to access and exploit marine resources in the same maritime area" (*ibid.*, para. 45).

The ICJ, accordingly, concludes that there is a direct connection, in fact and in law, between Colombia's third counter-claim and Nicaragua's principal claims (*ibid.*, para. 46), and finds that the third counter-claim is admissible (*ibid.*, para. 78).

18. In sequence, in its considerations on jurisdiction, the ICJ again dwells upon the traditional fishing rights of the inhabitants (artisanal fishermen) of the San Andrés Archipelago (*ibid.*, paras. 72 and 75). The Court observes that, since its Judgment of 19 November 2012 in the case concerning *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, senior officials of the Contending Parties have

> "exchanged public statements expressing their divergent views on the relationship between the alleged rights of the inhabitants of the San Andrés Archipelago to continue traditional fisheries, invoked by Colombia, and Nicaragua's assertion of its right to authorize fishing in its EEZ [exclusive economic zone]" (*ibid.*, para. 72).

The ICJ then, at last, finds that this third counter-claim "is admissible as such and forms part of the current proceedings" (resolutory point A (3) of the *dispositif*).

19. As can be seen, the present case concerning *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*, opposing two Latin American countries, brings to the floor rights of States together with rights of individuals, artisanal fishermen seeking to fish, for their own subsistence, in traditional fishing grounds. This once again shows that in the inter-State *contentieux* before the ICJ, one cannot make abstraction of the rights of individuals (surrounded by vulnerability).

20. The human factor has, in effect, marked presence in all four aforementioned cases concerning Latin American countries. In my perception, this is reassuring, bearing in mind that, after all, in historical perspective, it should not be forgotten that the State exists for human beings, and not vice versa. Whenever the substance of a case pertains not only to States but to human beings as well, the human factor marks its presence, irrespective of the inter-State nature of the *contentieux* before the ICJ[7], and is to be taken duly into account by it, as it has done in the aforementioned Latin American cases. It is, furthermore, to be duly reflected in the Court's decision.

21. Moreover, Latin American international legal doctrine has always been attentive also to the fulfilment of the needs and aspirations of peoples (keeping in mind those of the international community as a whole), in pursuance of superior common values and goals[8]. Furthermore, it has likewise always remained attentive to the importance of general principles of international law, reckoning that conscience *(recta ratio)* stands well above the "will", faithfully in line with the longstanding jusnaturalist international legal thinking.

22. Latin American international legal doctrine has remained aware that, in doing so, it rightly relies on the perennial lessons and legacy of the "founding fathers" of international law, going back to the flourishing of the *jus gentium (droit des gens)* in the sixteenth and seventeenth centuries. The *jus gentium* they conceived was for everyone, – peoples, individuals and groups of individuals, and the emerging States[9]. Solidarity

[7] Cf. A. A. Cançado Trindade, "La Presencia de la Persona Humana en el Contencioso Interestatal ante la Corte Internacional de Justicia", *Liber Amicorum: In Honour of a Modern Renaissance Man — G. Eiríksson* (eds. J. C. Sainz-Borgo *et al.*), New Delhi — India/San José C.R., Ed. O. P. Jindal University/Ed. University for Peace, 2017, pp. 383-411.

[8] A. A. Cançado Trindade, "The Contribution of Latin American Legal Doctrine to the Progressive Development of International Law", 376 *Recueil des cours de l'Académie de droit international de La Haye* (2014), pp. 19-92, esp. pp. 90-92; and cf. A. A. Cançado Trindade, "Los Aportes Latinoamericanos al Derecho y a la Justicia Internacionales", *Doctrina Latinoamericana del Derecho Internacional*, Vol. I (eds. A. A. Cançado Trindade and A. Martínez Moreno), San José/C.R., IACtHR, 2003, pp. 37-38, 40, 45, 54 and 56-57; A. A. Cançado Trindade, "Los Aportes Latinoamericanos al Primado del Derecho sobre la Fuerza", *Doctrina Latinoamericana del Derecho Internacional*, Vol. II (eds. A. A. Cançado Trindade and F. Vidal Ramírez), San José/C.R., IACtHR, 2003, pp. 42-44.

[9] Association Internationale Vitoria-Suarez, *Vitoria et Suarez — Contribution des théologiens au droit international moderne*, Paris, Pedone, 1939, pp. 169-170; A. Truyol y Serra, "La conception de la paix chez Vitoria et les classiques espagnols du droit des gens", A. Truyol y Serra and P. Foriers, *La conception et l'organisation de la paix chez Vitoria et Grotius*, Paris, Libr. Philos. J. Vrin, 1987, pp. 243, 257, 260 and 263; A. Gómez Robledo, "Fundadores del Derecho Internacional — Vitoria, Gentili, Suárez, Grocio", *Obras — Derecho*, Vol. 9, Mexico, Colegio Nacional, 2001, pp. 434-442, 451-452, 473, 481, 493-499, 511-515 and 557-563; A. A. Cançado Trindade, "*Totus Orbis*: A Visão Universalista e Pluralista do *Jus Gentium*: Sentido e Atualidade da Obra de Francisco de Vitoria", 24 *Revista da Academia Brasileira de Letras Jurídicas* — Rio de Janeiro (2008), No. 32, pp. 197-212.

marked its presence in the *jus gentium* of their times, as it does, in my view, also in the new *jus gentium* of the twenty-first century[10].

23. This is not the first time that I make this point within the ICJ. After all, the exercise of State sovereignty cannot make abstraction of the needs of the populations concerned, from one country or the other. In the present case, the Court is faced, *inter alia*, with artisanal fishing for subsistence. States have human ends, they were conceived and gradually took shape in order to take care of human beings under their respective jurisdictions. Human solidarity goes *pari passu* with the needed juridical security of boundaries, land and maritime spaces. Sociability emanated from the *recta ratio* (in the foundation of *jus gentium*), which marked presence already in the thinking of the "founding fathers" of the law of nations *(droit des gens)*, and ever since and to date, keeps on echoing in human conscience.

(Signed) Antônio Augusto CANÇADO TRINDADE.

[10] A. A. Cançado Trindade, *International Law for Humankind — Towards a New* Jus Gentium, 2nd rev. ed., Leiden/The Hague, Nijhoff/the Hague Academy of International Law, 2013, pp. 1-726.