DISSENTING OPINION OF JUDGE *AD HOC* CARON

Disagreement with holding of inadmissibility by the Court of Colombia's first and second counter-claims — Direct connection in fact or in law of Colombia's first and second counter-claims.

Direct connection in fact — Subject-matter of the claim — Colombia's Integral Contiguous Zone established by Presidential Decree 1946 of 9 September 2013 is a core part of the factual complex underlying Nicaragua's claim — Factual complex underlying Colombia's first and second counter-claims are the same facts that led to issue of the Decree.

Direct connection requirement — Disagreement that direct connection must exist both in fact and in law — Connectedness need only exist in fact or in law — Parties legal aims are connected as Nicaragua requests the revocation of the 1946 Presidential Decree while Colombia's first and second counter-claims aim to validate the motivations which underlay the issue of the said Decree.

Range of factors for admissibility of counter-claims — Court's unique role in the peaceful settlement of disputes — Disagreement that the counter-claim and claim must rely on the same legal principles or instruments.

I. Introduction

1. The Court in its Order of 15 November 2017 finds admissible two of the four counter-claims submitted by Colombia. The Court, referring to Article 80 of the Rules of Court, indicates that the admissibility of a counter-claim presents both a jurisdictional requirement and a direct connection requirement. I concur in much of the Court's Order and in particular concur in the Court's discussion of the jurisdictional requirement as it applies in this proceeding. I disagree with the Court's discussion of the direct connection requirement in two respects.

2. First, I respectfully dissent from the Court's holding that there is not a direct connection, either in fact or in law, between Colombia's first and second counter-claims and the subject-matter of Nicaragua's principal claims and that such counter-claims are as a result inadmissible.

3. Second, and more fundamentally I write separately to further the Court's articulation of the principles that animate its direct connection requirement. Although counter-claims have long been an aspect of the Court and its Rules, it is only in the past few decades that they have been

submitted in numbers. It remains timely to revisit the principles that motivate the Court's exercise of its measure of judgment.

II. Evaluating the Direct Connection Requirement in respect of the First and Second Counter-Claims

1. The Court's Statement of the Direct Connection Requirement

4. Article 80, a construction of the Court rather than a provision of its Statute, provides in relevant part that a counter-claim may be entertained "only if it . . . is directly connected to the subject-matter of the claim of the other party". This "direct connection" requirement has been described as the "spinal column of the counter-claim law and practice" that makes it possible to distinguish between claims that are incidental and those that are separate and require separate proceedings[1]. The Court has given shape to the direct connection requirement in Article 80 through its decisions in a number of cases.

5. The Court has stated that the requirement can be evaluated both in fact and in law[2]. In examining the connection in fact, the Court has identified as factors whether the facts relied upon by each party relate to the same geographical area and the same time period as well as whether the facts relied upon are of the same nature in that they allege similar types of conduct. In the *Application of the Genocide Convention (Bosnia and Herzegovina* v. *Yugoslavia)* case, the Court refers to the factual inquiry in total as whether the respective claims rest on facts that form "part of the same factual complex"[3].

6. As to the connection in law, the Court has identified as factors

> "whether there is a direct connection between the counter-claim and the principal claim in terms of the legal principles or instruments relied upon, as well as whether the applicant and respondent were

[1] Robert Kolb, *The International Court of Justice* (Hart Publishing, 2013), p. 659.

[2] See e.g. *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. 258, para. 33:

> "Whereas the Rules of Court do not define what is meant by 'directly connected'; whereas it is for the Court . . . to assess whether the counter-claim is sufficiently connected to the principal claim, taking account of the particular aspects of each case; and whereas, as a general rule, the degree of connection between the claims must be assessed both in fact and in law[.]"

[3] *Ibid.*, para. 34. The phrase "factual complex" has been used in numerous cases since *Application of the Genocide Convention*.

considered as pursuing the same legal aims by their respective claims" (paragraph 25 of the Court's Order).

7. Although Article 80 requires a direct connection to the subject-matter of the claim of the opposing party, the Court not infrequently examines instead whether there exists a direct connection to the claim omitting Article 80's specific reference "to the subject-matter" of the claim. Inclusion of the phrase "to the subject-matter" is significant as it suggests a focus more on the dispute before it, rather than the legal shape given to that dispute by the applicant in formulating its claim.

8. It has been recognized by several observers of the Court that the multiplicity of different factors identified by the Court is indicative of the room the Court has to the exercise of a measure of judgment. Shabtai Rosenne in examining the Court's practice writes of the direct connection requirement that:

> "lack of rigidity is a feature of the manner in which States and the Court approach counter-claims. Some difficulty, indeed, is seen in extracting any general principles from these cases, unless it be that each case is to be treated on its merits."[4]

It bears emphasis that the Court's statements that it "has taken into consideration *a range of factors* that could establish a direct connection" and done so "taking account of the particular aspects of each case" acknowledges that the Court exercises its measure of judgment on a case-by-case basis (paragraphs 22-23 of the Court's Order; emphasis added). This is significant because it indicates that the Court's analysis is — in my opinion wisely — not easily reduced to a set of factors to be mechanically applied. Although the mentioned factors are identified in the Court's Order, it is difficult to assess which factors are or should be more important than others, and, more fundamentally, what principle or principles lead to the identification of the factors and their relative importance. The question of animating principles is discussed in Part 3 of this opinion.

9. It suffices for now to observe that the Court's reasoning involves a measure of judgment that makes difficult criticism of the Court's holding that there is not a direct connection, in fact or in law, as regards the first and second counter-claims. Judge Schwebel in the context of the Court applying a law that involves equitable considerations observed that:

> "Despite the extent of the difference between the line of delimitation which the Chamber has drawn and the line which my analysis

[4] Shabtai Rosenne, *The Law and Practice of the International Court. 1920-1996*, Vol. III, 3rd ed., 1997, p. 1276. Sean Murphy writes that applying the direct connection requirement is "more of an art than a rigid science", Sean Murphy, "Counter-claims Article 80 of the Rules", *The Statute of the International Court of Justice: A Commentary*, A. Zimmermann *et al.*, eds., 2012, 2nd ed., p. 1010.

> produces, I have voted for the Chamber's Judgment. I have done so . . . because I recognize that the factors which have given rise to the difference between the lines are open to more than one legally — and certainly equitably — plausible interpretation . . . On a question such as this, the law is more plastic than formed, and elements of judgment, of appreciation of competing legal and equitable considerations, are dominant."[5]

Likewise, the case-by-case measure of judgment exercised by the Court in its assessment of whether a direct connection exists allows for a range of appreciation of the directness of the connection. In this sense, I dissent because I believe it is important to explain why, in exercising that same measure of judgment, I reach a different conclusion. The existence of a measure of judgment allows for a range of views, but not any view. The exercise of a measure of judgment is not without limits; to be respected, its exercise needs be practiced and refined through the articulation of reasons. In the following section, I summarize the Court's explanation of its measure of judgment as regards the first and second counter-claims and why I reach a different conclusion.

2. The Direct Connection of the First and Second Counter-Claims to Subject-Matter of the Principal Claims

10. The Court's discussion of the direct connection of the first and second counter-claims to the subject-matter of the principal claims is succinct. As described by the Court at paragraph 35, the first counter-claim is based on "Nicaragua's alleged breach of a duty of due diligence to protect and preserve the marine environment of the Southwestern Caribbean Sea" and the second counter-claim is based on "Nicaragua's breach of its alleged duty of due diligence to protect the right of the inhabitants of the San Andrés Archipelago, in particular the Raizales, to benefit from a healthy, sound and sustainable environment."

11. Evaluating the first and second counter-claims in terms of their connection in fact to the subject-matter of the principal claims, the Court concludes that they both "essentially relate to the same geographical area that is the focus of Nicaragua's principal claims" (Order, para. 36). The Court makes no mention of whether the same time period is involved (although it does so with regard to the third counter-claim), in all likelihood because there is no question that the same period is involved. The Court describes the various types of conduct that Colombia alleges Nicaragua to be engaged in (namely, Nicaragua's alleged failure to curb pri-

[5] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984*, p. 357, separate opinion of Judge Schwebel.

vate Nicaraguan predatory fishing and destruction of the marine environment) and finds it distinct from the types of Colombian conduct complained of by Nicaragua (namely, Colombia's alleged interference with Nicaragua's exclusive sovereign rights and jurisdiction in Nicaragua's exclusive economic zone). The Court concludes that "the nature of the alleged facts underlying Colombia's first and second counter-claims and Nicaragua's principal claims is different" (Order, para. 37).

12. Evaluating the first and second counter-claims in terms of their connection in law, the Court finds the legal principles or instruments relied upon to be different inasmuch as Colombia points to the rules of customary international law and instruments relating to the protection of the marine environment, while Nicaragua points to the customary international law rules relating to the law of the sea as reflected in Parts V and VI of UNCLOS. The Court likewise finds the legal aims to be different inasmuch as Colombia seeks to have Nicaragua act to protect and preserve the marine environment, while Nicaragua seeks to have Colombia not interfere with Nicaragua's sovereign rights and jurisdiction in the same area (Order, para. 38).

13. The Court's reasoning, confident as it is, illuminates the malleability of such a range of factors and thus the measure of judgment that is present.

14. The Court correctly finds the types of conduct involved to be factually different, even though both types of conduct result in alleged breaches of mirror obligations in the very same area. Colombia's affirmative actions complained of by Nicaragua allegedly seek to, among other things, preserve and protect the marine environment, while Nicaragua's omissions complained of by Colombia allegedly permit predatory fishing and destruction of the marine environment. The Court correctly finds the legal principles or instruments relied upon to be different, even though they all relate to the oceans and to the obligations and responsibilities of States in the very same oceanic area. The Court finds the legal aims to be different, even though both Colombia and Nicaragua seek to clarify mirror obligations of each other for the very same oceanic area.

15. Recalling the language of Article 80, the Court, in exercising its measure of judgment, is instructed to inquire into the direct connection of the counter-claim with the subject-matter of the opposing claim. But what is the subject-matter of Nicaragua's claim?

16. As a unilateral legislative act may itself be part of a factual complex, a central aspect of the subject-matter of Nicaragua's claim and the factual complex underlying it is Colombia's Integral Contiguous Zone established by its Presidential Decree 1946 of 9 September 2013. The Court's Order notes at paragraph 12 that Nicaragua in this proceeding

seeks the revocation of "laws and regulations enacted by Colombia, which are incompatible with the Court's Judgment of 19 November 2012 including the provisions in the Decrees 1946 of 9 September 2013. . ." Indeed, in paragraph 70 of its Judgment of 17 March 2016 referring to "Colombia's proclamation of an 'Integral Contiguous Zone'", the Court observed that "the Parties took different positions on the legal implications of such action in international law".

17. Given that the existence of Presidential Decree 1946 is an explicit target of Nicaragua's Application and a core part of the factual complex underlying its claim, it is critical for a direct connection analysis to recognize that the factual complex underlying the first and second Colombian counter-claims consists of the very same facts that led in significant part to the issuance of the Decree. Indeed, the preamble to Decree 1946, which indicates Colombia's motivations for its issuance, in relevant part and with my emphasis added, states:

> "Considering
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> . . . . . .
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> That in conformity with customary international law as regards the contiguous zone, States may exercise sovereign rights and jurisdiction and control in the areas of security, drug trafficking, *environmental protection*, fiscal and customs matters, immigration, health and other matters.
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> That the extension of the contiguous zone of insular territories conforming the Western Caribbean has to be determined, specifically of those insular territories that conform the San Andrés, Providencia and Santa Catalina Archipelago, so that the orderly management of the Archipelago and its maritime spaces may be guaranteed thereby ensuring *protection of the environment and natural resources* and maintenance of comprehensive security and public order.
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> That the Colombian State is *responsible for the preservation of the Archipelago's ecosystems which are fundamental to the ecological equilibrium of the area and in order to preserve its inhabitants' historic, traditional, ancestral, environmental and cultural rights, and their right to survival*."[6]

In this sense, Presidential Decree 1946 is a dramatically clear intersection of the factual complex underlying both the subject-matter of Nicaragua's claim, and Colombia's first and second counter-claims. In my opinion, therefore the first and second counter-claims are directly connected to the subject-matter of the claim of Nicaragua.

[6] The English translation of Presidential Decree 1946 of 9 September 2013 reprinted in Memorial of Nicaragua, Annex 9, 3 October 2014, pp. 157-159.

18. But what of the inquiry into the direct connection in law? First, it must be stressed that Article 80 in requiring a direct connection does not demand that it exist in both fact and law. Rather, in my opinion, the connection need exist only in fact or law. Indeed, in the context of municipal litigation involving issues of sovereign immunity, the International Law Commission in Article 9 (counter-claims) of its Draft Articles on Jurisdictional Immunities of States and Their Property, adopted in 1991, indicates that codification of the subject leads to either a factual or legal connection being a sufficient direct connection:

> "A State instituting a proceeding before a court of another State cannot invoke immunity from the jurisdiction of the court in respect of any counter-claim arising out of the same legal relationship or facts as the principal claim."[7]

Second, the legal aim of the Parties as regards Presidential Decree 1946 also establishes a direct connection in law in that Nicaragua's claim requests the Court to order the revocation of Presidential Decree 1946, while the first and second Colombian counter-claims aim to validate and potentially satisfy the motivations that underlay the issuance of Presidential Decree 1946.

19. Thus, in my exercise of a measure of judgment, I find the first and second Colombian counter-claims to have a direct connection to the subject-matter of the claims of Nicaragua. Turning to the principles that animate the requirement of a direct connection as well as the factors identified by the Court only serves to reinforce this conclusion.

III. Principles Animating Considerations regarding the Admissibility of Counter-Claims

20. What principles animate the Court's reasoning into the admissibility of counter-claims? How do the various factors mentioned by the Court in its Order further such principles? Do such principles emphasize some factors more than others? Although the Court does not mention such principles in the present Order, it has done so previously. In the following section, this opinion reviews the principles that the Court has so far identified and what those principles suggest as to the exercise of a measure of judgment.

21. The Court has in several decisions identified principles that animate its thinking concerning the admissibility of counter-claims and the range of factors that inform the assessment of whether a direct connection exists. I would suggest that at least five principles have been voiced by the Court.

[7] *Yearbook of the International Law Commission*, 1991, Vol. II (Part Two), p. 30.

22. First, the Court on several occasions has mentioned that counter-claims can promote "procedural economy". If the question is whether a counter-claim (an autonomous legal act within the jurisdiction of the Court) should be heard as a separate case or as a counter-claim, then one clear principle animating the Court's approach is that such a counter-claim should be a part of the same case if admitting it serves to promote procedural economy. Although this is not explicitly indicated by the Court, presumably such procedural economy includes both the Court's limited resources as well as the resources of the parties. Second, a related principle, often stated by the Court alongside procedural economy, is that of avoiding inconsistent results which can follow from the fragmented consideration of connected aspects of the same dispute in separate cases before the Court.

23. Both of these animating principles are mentioned in the Court's discussion of counter-claims in the *Application of the Genocide Convention* case. The Court writes:

> "whereas, as far as counter-claims are concerned, the idea is essentially to achieve a procedural economy whilst enabling the Court to have an overview of the respective claims of the parties and to decide them more consistently"[8].

24. Between the principles of procedural economy and avoidance of inconsistent results, I would regard the latter as the more compelling for a court such as the International Court of Justice where the cases are of great public significance. Arriving at what is perceived as a sound decision for such cases is, in my opinion, more compelling than arriving at a decision in an efficient manner. One may hope to accomplish both, but if one must choose in the context of a very significant case, then I would choose the avoidance of inconsistent results as such a result would, among other things, undermine the influence of the decision.

25. Third, the Court has referred to the sound administration of justice although that phrase is not unpacked in any detail and may simply be a succinct means of referring to procedural economy and the avoidance of inconsistent results. Fourth, the Court, less clearly and less consistently, has suggested that a further principle is the applicant's right to present its case as it has chosen and that the possibility of counter-claims should not derail the applicant's effort to have its claims adjudicated. This principle may reflect the general aversion to abuse of process and may be more properly viewed as a part of the objective of sound administration of justice.

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[8] *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. 30.

26. The third and fourth principles arguably are present in the *Application of the Genocide Convention* case where the Court writes that

> "the Respondent cannot use [the means of counter-claim] either to impose on the Applicant any claim it chooses, at the risk of infringing the Applicant's rights and of compromising the proper administration of justice"[9].

27. These four principles in all likelihood animate the reasoning of all courts regarding counter-claims. But while these principles are common to all courts of which I am aware, there is a fifth that is unique to this Court.

28. The final principle reflects the Court's unique role in the peaceful settlement of international disputes. Article 33 (1) of the United Nations Charter provides that

> "[t]he parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice".

The judicial resolution of the dispute presented is only one of the various methods listed and there is little doubt that the drafters of the Charter had the International Court of Justice in mind when referring to judicial settlement. It is not clear, however, that legal analysis necessarily offers the most enduring solutions to complex disputes. The reality is that complex international disputes resist resolution. The complexity of such disputes is manifest in the fact that even views as to what is at dispute are often very different for the various participants involved. It should be no surprise that a State, in constructing its application to the Court, will form its case from its perspective of the dispute. But in accepting that proposition, we need also accept that the Court may be presented with only a partial description of a complex matter. For this reason, I do not find it necessarily significant whether the counter-claim and claim rely on the same legal principles or instruments. Certainly, reliance on the same legal instrument furthers the principles of procedural economy and avoidance of inconsistent results. But there is no reason to expect that a counter-claim involving the same factual complex approaches the dispute from the same perspective or that, in its legal expression, it must rely on the very same instruments[10]. Indeed, to the extent that the Court seeks to more fully appreciate the complexity of the dispute before it, the Court should expect as often as not that different principles or instruments will

[9] *I.C.J. Reports 1997*, pp. 257-258, para. 31.

[10] See A. D. Renteln, "Encountering Counterclaims", *Denver Journal of International Law and Policy*, Vol. 15, 1986-1987, pp. 392-393.

be relied upon. In this sense, counter-claims involving the same factual complex allow the Court to appreciate and address the dispute more comprehensively thereby furthering the objective of peaceful resolution of disputes. S. Murphy writes:

> "International disputes that cannot be resolved through diplomacy are often complicated, with potentially valid claims by both sides. By being flexible in its procedure, the Court recognizes such complexity, and opens the door for considering the dispute in its broadest factual and legal context, thereby allowing a more comprehensive and just solution."[11]

IV. Concluding Observation

29. A dispute is viewed differently not only by the States involved, but also by the citizenry of those States. The Preamble to the Constitution of UNESCO wisely observes that since international disputes begin in the minds of men, "it is in the minds of men that defences of peace must be constructed". Similarly, international disputes before the Court are not merely legal disagreements between governmental officials, but rather are in most cases also disputes that reside in the minds of the people of both States. And it is in the minds of the people of both States that the meaningful resolution of significant international disputes is to be gained. It is true that not all viewpoints will win a court case, but a diversity of views as to what is truly at issue in a dispute can be recognized.

30. The Court's admission of the third and fourth counter-claims contributes to a fuller consideration of the international dispute presented in this proceeding and to the possibility for a long-term peaceful resolution of that dispute. For reasons detailed above, in my opinion, the admission of the first and second counter-claims would have done likewise.

(Signed) David D. Caron.

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[11] Sean Murphy, "Amplifying the World Court's Jurisdiction through Counter-Claims and Third-Party Intervention", *George Washington International Law Review*, Vol. 33, 2000, p. 20.