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Summary
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Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea

Summary of the Order of 15 November 2017

The Court begins by recalling that, on 26 November 2013, Nicaragua instituted proceedings against Colombia on the basis of Article XXXI of the Pact of Bogotá with regard to a dispute concerning "violations of Nicaragua's sovereign rights and maritime zones declared by the Court's Judgment of 19 November 2012 [in the case concerning Territorial and Maritime Dispute (Nicaragua v. Colombia)] and the threat of the use of force by Colombia in order to implement these violations". It further recalls that, on 19 December 2014, Colombia raised preliminary objections to the jurisdiction of the Court. By a Judgment dated 17 March 2016, the Court found that it had jurisdiction, on the basis of Article XXXI of the Pact of Bogotá, to adjudicate upon the dispute between Nicaragua and Colombia regarding the alleged violations by Colombia of Nicaragua's rights in the maritime zones which, according to Nicaragua, the Court declared appertain to Nicaragua in its above-mentioned Judgment of 19 November 2012. In its Counter-Memorial filed on 17 November 2016, Colombia submitted four counter-claims. Having recalled that, under Article 80, paragraph 1, of the Rules of Court, two requirements must be met for the Court to be able to entertain a counter-claim, namely, that the counter-claim "comes within the jurisdiction of the Court" and that it "is directly connected with the subject-matter of the claim of the other party", the Court deems it appropriate in the present case to begin with the question whether Colombia's counter-claims are directly connected with the subject-matter of Nicaragua's principal claims.

I. DIRECT CONNECTION (PARAS. 22-25)

A. First and second counter-claims (paras. 26-39)

The Court notes that Colombia's formulations of the first and second counter-claims differ in the submissions contained at the end of the Counter-Memorial, and in the body of the Counter-Memorial and in its Written Observations. While broadly similar in scope, these formulations are worded in a different way. In this respect, the Court notes that submissions formulated by the Parties at the end of their written pleadings must be read in light of the arguments developed in the body of those pleadings. In the present case, the Court further observes that the arguments of the Parties on direct connection are based on the wording used by Colombia in the body of its Counter-Memorial and Written Observations. Consequently, for the purposes of considering the admissibility of the first and second counter-claims as such, the Court will refer to the wording used by Colombia in the body of its Counter-Memorial and Written Observations.

The Court begins by observing that both the first and second counter-claims relate to Nicaragua's purported violations of its obligation to protect and preserve the marine environment. 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 south-western Caribbean Sea. The second

counter-claim deals with 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. The Court notes that Colombia characterizes the second claim as a "logical consequence" of the first one and that Nicaragua does not challenge this assertion. Therefore, the Court will examine the first and second counter-claims jointly, keeping in mind, nevertheless, that they are separate.

The Court observes that a majority of the incidents referred to by Colombia in its first and second counter-claims allegedly occurred in Nicaragua's exclusive economic zone (EEZ), and more specifically in the maritime area around the Luna Verde Bank, which is located in the Seaflower Biosphere Reserve. Yet, in its counter-claims, Colombia also refers to certain incidents that have allegedly taken place within Colombia's territorial sea and the Joint Regime Area with Jamaica (around Serranilla and Bajo Alicia). However, since the number of these incidents is limited and most of the incidents referred to by Colombia have allegedly occurred in the maritime area around the Luna Verde Bank in Nicaragua's EEZ, the Court is of the view that Colombia's first and second counter-claims essentially relate to the same geographical area that is the focus of Nicaragua's principal claims.

With regard to the alleged facts underpinning Colombia's first and second counter-claims and Nicaragua's principal claims, respectively, the Court observes that Colombia relies on the alleged failure of Nicaragua to protect and preserve the marine environment in the south-western Caribbean Sea. In particular, Colombia contends that private Nicaraguan vessels have engaged in predatory fishing practices and have been destroying the marine environment of the south-western Caribbean Sea, thus preventing the inhabitants of the San Andrés Archipelago, including the Raizal community, from benefiting from a healthy, sound and sustainable environment and habitat. By contrast, the principal claims of Nicaragua are based upon Colombia's Navy's alleged interference with and violations of Nicaragua's exclusive sovereign rights and jurisdiction in Nicaragua's EEZ. Nicaragua states that Colombia has prevented Nicaraguan fishing vessels and its naval and coast guard vessels from navigating, fishing and exercising jurisdiction in Nicaragua's EEZ. Thus, the Court finds that the nature of the alleged facts underlying Colombia's first and second counter-claims and Nicaragua's principal claims is different, and that these facts do not relate to the same factual complex.

Furthermore, the Court is of the opinion that there is no direct legal connection between Colombia's first and second counter-claims, and Nicaragua's principal claims. First, the legal principles relied upon by the Parties are different. In its first two counter-claims, Colombia invokes rules of customary international law and international instruments relating essentially to the preservation and protection of the environment; by contrast, in its principal claims, Nicaragua refers to customary rules of the international law of the sea relating to the sovereign rights, jurisdiction and duties of a coastal State within its maritime areas, as reflected in Parts V and VI of UNCLOS. Secondly, the Parties are not pursuing the same legal aim by their respective claims. While Colombia seeks to establish that Nicaragua has failed to comply with its obligation to protect and preserve the marine environment in the south-western Caribbean Sea, Nicaragua seeks to demonstrate that Colombia has violated Nicaragua's sovereign rights and jurisdiction within its maritime areas.

The Court therefore concludes that there is no direct connection, either in fact or in law, between Colombia's first and second counter-claims and Nicaragua's principal claims.

B. Third counter-claim (paras. 40-46)

In its third counter-claim, Colombia requests the Court to declare that Nicaragua has infringed the customary artisanal fishing rights of the local inhabitants of the San Andrés Archipelago, including the indigenous Raizal people, to access and exploit their traditional fishing

grounds. In particular, Colombia refers to various alleged acts of intimidation and harassment of the artisanal fishermen of the San Andrés Archipelago by Nicaragua's Navy — such as the seizure of the artisanal fishermen's products, fishing gear, food and other property.

The Court observes that the Parties agree that the facts relied upon by Colombia, in its third counter-claim, and by Nicaragua, in its principal claims, relate to the same time period (following the delivery of the 2012 Judgment) and the same geographical area (Nicaragua's EEZ). The Court further notes that the facts underpinning the third counter-claim of Colombia and the principal claims of Nicaragua 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. In particular, Colombia complains about the treatment (alleged harassment, intimidation, coercive measures) by Nicaragua's Navy of Colombian artisanal fishermen in the waters in the area of Luna Verde and in the area between Quitasueño and Serrana, while Nicaragua complains about the treatment (alleged harassment, intimidation, coercive measures) by Colombia's Navy of Nicaraguan licensed vessels fishing in the same waters. With regard to the legal principles relied upon by the Parties, the Court notes that Colombia's third counter-claim is based on the alleged right of a State and its nationals to access and exploit, under certain conditions, living resources in another State's EEZ. The Court further notes that Nicaragua's principal claims are based on customary rules relating to a coastal State's sovereign rights and jurisdiction in its EEZ, including the rights of a coastal State over marine resources located in this area. Thus, the respective claims of the Parties concern the scope of the rights and obligations of a coastal State in its EEZ. In addition, the 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.

The Court therefore concludes that there is a direct connection, as required by Article 80 of the Rules of Court, between Colombia's third counter-claim and Nicaragua's principal claims.

C. Fourth counter-claim (paras. 47-54)

In its fourth counter-claim, Colombia requests the Court to declare that Nicaragua, by adopting Decree No. 33-2013 of 19 August 2013, which established straight baselines and, according to Colombia, had the effect of extending its internal waters and maritime zones beyond what international law permits, has violated Colombia's sovereign rights and jurisdiction. Colombia considers that there is a direct connection between its fourth counter-claim and Nicaragua's principal claims regarding Colombia's Decree 1946 of 9 September 2013 establishing its "Integral Contiguous Zone", as subsequently amended by Decree 1119 of 17 June 2014. It recalls that Nicaragua contends that, by virtue of these decrees, Colombia has claimed for itself large parts of the maritime area that the Court had determined to belong to Nicaragua and has, therefore, allegedly "violated Nicaragua's maritime zones and sovereign rights".

The Court observes that the facts relied upon by Colombia in its fourth counter-claim and by Nicaragua in its principal claims — i.e. the adoption of domestic legal instruments fixing the limits or the extent of their respective maritime zones — relate to the same time period. It notes, above all, that both Parties complain about the provisions of domestic law adopted by each Party with regard to the delineation of their respective maritime spaces in the same geographical area, namely in the south-western part of the Caribbean Sea lying east of the Nicaraguan coast and around the Colombian Archipelago of San Andrés. The Court also notes that Nicaragua claims the respect of its rights in the EEZ and that the limits of Nicaragua's EEZ depend on its baselines, which are challenged in Colombia's fourth counter-claim. It further observes that, in their respective claims, Nicaragua and Colombia allege violations of the sovereign rights they each claim to possess on the basis of customary international rules relating to the limits, régime and spatial extent of the EEZ and contiguous zone, in particular in situations where these zones overlap between States with opposite coasts. In addition, it notes that the Parties are pursuing the same legal aim by their

respective claims, since each is seeking a declaration that the other Party's decree is in violation of international law.

The Court therefore concludes that there is a direct connection, as required by Article 80 of the Rules of Court, between Colombia's fourth counter-claim and Nicaragua's principal claims.

II. JURISDICTION (PARAS. 56-77)

The Court then examines whether Colombia's third and fourth counter-claims meet the requirement of jurisdiction contained in Article 80, paragraph 1, of the Rules of Court.

The Court recalls that, in the present case, Nicaragua has invoked Article XXXI of the Pact of Bogotá as a basis of the Court's jurisdiction. According to this provision, the parties to the Pact recognize as compulsory the jurisdiction of the Court "so long as the present Treaty is in force". Under Article LVI, the Pact remains in force indefinitely, but "may be denounced upon one year's notice". Thus, after the denunciation of the Pact by a State party, the Pact shall remain in force between the denouncing State and the other parties for a period of one year following the notification of denunciation.

Colombia ratified the Pact of Bogotá on 14 October 1968, but subsequently gave notice of denunciation on 27 November 2012. The Application in the present case was submitted to the Court on 26 November 2013, i.e. after the transmission of Colombia's notification of denunciation, but before the one-year period referred to in Article LVI had elapsed. In its Judgment on preliminary objections of 17 March 2016, the Court noted that Article XXXI of the Pact was still in force between the Parties on the date that the Application in the present case was filed, and considered that the fact that the Pact subsequently ceased to be in force between the Parties did not affect the jurisdiction which existed on the date that the proceedings were instituted.

Colombia, relying on Article XXXI of the Pact of Bogotá, presented its counter-claims, which appeared as part of the submissions contained in its Counter-Memorial, on 17 November 2016, i.e. after the Pact of Bogotá had ceased to be in force between the Parties. Accordingly, the question that arises is whether, in a situation where a respondent has invoked in its counter-claims the same jurisdictional basis as that invoked by the applicant when instituting the proceedings, that respondent is prevented from relying on that basis of jurisdiction on the grounds that it has ceased to be in force in the period between the filing of the application and the filing of the counter-claims.

Once the Court has established jurisdiction to entertain a case, it has jurisdiction to deal with all its phases; the subsequent lapse of the title cannot deprive the Court of its jurisdiction. Although counter-claims are autonomous legal acts the object of which is to submit new claims to the Court, they are, at the same time, linked to the principal claims, and their purpose is to react to them in the same proceedings in respect of which they are incidental. Consequently, the lapse of the jurisdictional title invoked by an applicant in support of its claims subsequent to the filing of the application does not deprive the Court of its jurisdiction to entertain counter-claims filed on the same jurisdictional basis.

The Court recalls that Colombia's third and fourth counter-claims were brought under the same title of jurisdiction as Nicaragua's principal claims. It further recalls that they have been found to be directly connected to these claims. It follows that the termination of the Pact of Bogotá as between the Parties did not, per se, deprive the Court of its jurisdiction to entertain those counter-claims.

The Court observes that, in order to establish if counter-claims come within its jurisdiction, it must also examine whether the conditions contained in the instrument providing for such jurisdiction are met. In this connection, it notes that it must first establish the existence of a dispute between the parties regarding the subject-matter of the counter-claims.

With regard to the third counter-claim, the Court considers that the Parties hold opposing views on the scope of their respective rights and duties in Nicaragua's EEZ. Nicaragua was aware that its views were positively opposed by Colombia, since, after the 2012 Judgment, the senior officials of the Parties 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. According to Colombia, Nicaragua's naval forces have also intimidated Colombian artisanal fishermen who seek to fish in traditional fishing grounds. Therefore, it appears that a dispute has existed between the Parties regarding the alleged violation by Nicaragua of the rights at issue since November 2013, if not earlier.

With regard to the fourth counter-claim, the Court considers that the Parties hold opposing views on the question of the delineation of their respective maritime spaces in the south-western part of the Caribbean Sea, following the Court's 2012 Judgment. In this regard, the Court notes that, in a diplomatic Note of protest addressed to the Secretary-General of the United Nations on 1 November 2013, the Minister for Foreign Affairs of Colombia stated, inter alia, that "[t]he Republic of Colombia wishe[d] to inform the United Nations and its Member States that the straight baselines . . . claimed by Nicaragua [in Decree No. 33-2013 of 19 August 2013] [were] wholly contrary to international law". The Court further observes that, referring to this diplomatic Note, Nicaragua acknowledged that "[t]here [was] therefore a 'dispute' on this issue". Thus, it appears that a dispute has existed between the Parties on the matter since November 2013, if not earlier.

The Court then turns to the question whether, in accordance with the condition set out in Article II of the Pact of Bogotá, the matters presented by Colombia in its counter-claims could not "in the opinion of the Parties . . . be settled by direct negotiations".

With respect to the third counter-claim, the Court notes that, although following the 2012 Judgment the Parties have made general statements on issues relating to fishing activities of the inhabitants of the San Andrés Archipelago, they have never initiated direct negotiations in order to resolve these issues. This shows that the Parties did not consider that there was a possibility of finding a resolution of their dispute regarding the question of respect for traditional fishing rights through the usual diplomatic channels by direct negotiations. Therefore the Court considers that the condition set out in Article II of the Pact of Bogotá is met with respect to the third counter-claim.

With respect to the fourth counter-claim, the Court considers that Nicaragua's adoption of Decree No. 33-2013 of 19 August 2013 and Colombia's rejection of it by means of a diplomatic Note of protest from the Minister for Foreign Affairs of Colombia dated 1 November 2013, show that it would, in any event, no longer have been useful for the Parties to engage in direct negotiations on the matter through the usual diplomatic channels. The Court therefore finds that the condition set out in Article II of the Pact of Bogotá is met with respect to the fourth counter-claim.

The Court concludes that it has jurisdiction to entertain Colombia's third and fourth counter-claims.

III. CONCLUSION (PARAS. 78-81)

Given the above reasons, the Court concludes that the third and fourth counter-claims presented by Colombia are admissible as such. It considers it necessary for Nicaragua to file a

Reply and Colombia a Rejoinder, addressing the claims of both Parties in the current proceedings, the subsequent procedure being reserved.

IV. OPERATIVE CLAUSE (PARA. 82)

THE COURT,

(A) (1) By fifteen votes to one,

Finds that the first counter-claim submitted by the Republic of Colombia is inadmissible as such and does not form part of the current proceedings;

IN FAVOUR: President Abraham; Vice-President Yusuf; Judges Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Gevorgian; Judge ad hoc Daudet;

AGAINST: Judge ad hoc Caron;

(2) By fifteen votes to one,

Finds that the second counter-claim submitted by the Republic of Colombia is inadmissible as such and does not form part of the current proceedings;

IN FAVOUR: President Abraham; Vice-President Yusuf; Judges Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Gevorgian; Judge ad hoc Daudet;

AGAINST: Judge ad hoc Caron;

(3) By eleven votes to five,

Finds that the third counter-claim submitted by the Republic of Colombia is admissible as such and forms part of the current proceedings;

IN FAVOUR: President Abraham; Vice-President Yusuf; Judges Owada, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Bhandari, Robinson; Judge ad hoc Caron;

AGAINST: Judges Tomka, Gaja, Sebutinde, Gevorgian; Judge ad hoc Daudet;

(4) By nine votes to seven,

Finds that the fourth counter-claim submitted by the Republic of Colombia is admissible as such and forms part of the current proceedings;

IN FAVOUR: President Abraham; Vice-President Yusuf; Judges Owada, Bennouna, Cançado Trindade, Xue, Bhandari, Robinson; Judge ad hoc Caron;

AGAINST: Judges Tomka, Greenwood, Donoghue, Gaja, Sebutinde, Gevorgian; Judge ad hoc Daudet;

(B) Unanimously,

Directs Nicaragua to submit a Reply and Colombia to submit a Rejoinder relating to the claims of both Parties in the current proceedings and fixes the following dates as time-limits for the filing of those pleadings:

For the Reply of the Republic of Nicaragua, 15 May 2018;

For the Rejoinder of the Republic of Colombia, 15 November 2018; and

Reserves the subsequent procedure for further decision.

Vice-President YUSUF appends a declaration to the Order of the Court; Judges TOMKA, GAJA, SEBUTINDE, GEVORGIAN and Judge ad hoc DAUDET append a joint opinion to the Order of the Court; Judge CANÇADO TRINDADE appends a declaration to the Order of the Court; Judges GREENWOOD and DONOGHUE append separate opinions to the Order of the Court; Judge ad hoc CARON appends a dissenting opinion to the Order of the Court.

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Declaration of Vice-President Yusuf

1. Judge Yusuf agrees in general with the Court's Order on the admissibility of Colombia's counter-claim. Nonetheless, he wishes to make some remarks expanding on certain aspects of the requirement on jurisdiction contained in Article 80 of the Rules of Court.

2. In Judge Yusuf's view, the Court has not previously elaborated in an adequate manner on what is meant by the jurisdictional limb of Article 80, which requires that a counter-claim "comes within the jurisdiction of the Court".

3. One aspect of counter-claims is their autonomous character. Another aspect of counter-claims is that they are intimately linked to and grafted onto the ongoing procedure that was initiated by the principal claim. Thus, while counter-claims are functionally autonomous in that they are addressed separately from the principal claim, they are also incidental in that they are affixed to the main proceedings.

4. The scope of jurisdiction of the Court is established according to the limits set forth in the instrument that founds the jurisdiction of the Court. It is imperative for the Court, when examining the admissibility of counter-claims that purport to be based on the same title of jurisdiction as the principal claim, to ensure that those counter-claims fall within the scope of the jurisdiction thus prescribed. In this type of scenario, the Court need not establish its jurisdiction over the counter-claims de novo.

5. In the present case, the jurisdiction of the Court had already been established by the Court in its judgment on preliminary objections, which made it unnecessary for the Court to examine anew whether a "dispute" exists between the Parties. The Court should have simply ascertained whether the counter-claims falls within the bounds of the jurisdiction that the Court has already found to exist. This approach promotes procedural economy as it enables the Court to adjudicate in a holistic manner on the dispute brought before the Court.

6. It is moreover necessary to draw a distinction between counter-claims where the title of jurisdiction invoked differs from that of the principal claim and counter-claims that invoke the same title of jurisdiction as the principal claim. The Court has most commonly addressed counter-claims that purport to be based on the same title of jurisdiction as the principal claim; but Article 80 does not preclude the invocation of a title of jurisdiction different from that of the principal claim. It is only when the Court is faced with reliance on a different title of jurisdiction that it will have to address the question of jurisdiction over a counter-claim separately from the question of jurisdiction over the principal claim. Only in such a case must the validity of the jurisdictional basis of the counter-claims be assessed at the moment such counter-claims are brought to the Court.

Joint opinion of Judges Tomka, Gaja, Sebutinde, Gevorgian and Judge ad hoc Daudet

Judges Tomka, Gaja, Sebutinde, Gevorgian and Judge ad hoc Daudet take the view, in their joint opinion, that all four of Colombia's counter-claims are inadmissible as not falling within the jurisdiction of the Court, which is one of the requirements counter-claims must meet under Article 80, paragraph 1, of the Rules of Court.

The joint opinion outlines that a counter-claim, while a reaction to the claim of the applicant and thus "linked" to that claim, constitutes a separate and independent claim. Not only may such a claim survive withdrawal of the applicant's claim, but the Court also has discretion, under Article 80, paragraph 1, of the Rules of Court, to refuse to entertain a counter-claim if dealing with it would not serve the good and sound administration of justice. Indeed, the joint opinion notes that

the Court has, in the past, made clear that a claim should normally be brought by way of application, and it is only to serve the administration of justice and procedural economy that claims are permitted to be brought as counter-claims.

The five judges observe that the Court in this case has reversed the order in which the two requirements under Article 80, paragraph 1, of the Rules of Court have been considered. While the Court is not bound to consider those requirements in a particular order, they note that it is more usual and logical to consider the requirements in the order in which they are set out in the latest version of Article 80, paragraph 1, of the Rules of Court, and it would have been more appropriate to do so in this case. In having found Colombia's first and second counter-claims inadmissible for lack of direct connection with Nicaragua's claims, the Court has left open whether those claims fall within the jurisdiction of the Court and could be brought by way of a new application. However, given that the Pact of Bogotá ceased to be in force with respect to Colombia with effect from 27 November 2013, and that Colombia does not have a declaration in force under Article 36, paragraph 2, of the Court's Statute, it cannot invoke any jurisdictional title as a basis for the Court's jurisdiction.

The joint opinion continues that, even if one takes the view that the Court's jurisdiction extends to the dispute between the Parties, the counter-claims of Colombia in this case do not concern the same dispute as that defined by the Court in its 2016 Judgment in this case. In respect of the first, second and third counter-claims, this is made clear by the 2016 Judgment itself, while the fourth counter-claim is also distinct from that dispute.

The joint opinion considers that there is no reason for asserting that the jurisdiction of the Court over identical claims should depend on whether they are presented as counter-claims or separately, by means of an application. It outlines that the majority's reliance on the Nottebohm case is inapposite to the issue of jurisdiction over counter-claims, that case being concerned, as it was, with the critical date for the establishment of the Court's jurisdiction over a claim instituted by way of a unilateral application. The fact that the two parties had Article 36, paragraph 2, declarations in force as at the date the application was filed sufficed to enable the Court to deal with all the aspects of the claim formulated therein. However, the Court in that case did not address, even implicitly, counter-claims.

The five judges query how it is possible for a counter-claim to be brought on the basis of a jurisdictional title that has lapsed, observing that the view of the Committee for the Revision of the Rules of Court appears to be contrary to the approach taken by the majority in this case. Moreover, the joint opinion raises concerns with the Court's speculation that an applicant might remove a basis of jurisdiction once an application has been filed. It observes, first, that such a situation has never occurred and, secondly, that such an action would raise concerns with respect to the pursuit by the applicant of litigation in good faith.

The joint opinion concludes that, the jurisdiction of the Court being based on consent and Colombia having withdrawn its consent prior to the filing of its counter-claims, Colombia could hardly have complained if the Court had dismissed all its counter-claims for lack of jurisdiction.

Declaration of Judge Cançado Trindade

1. In his Declaration, Judge Cançado Trindade observes at first that he has concurred with the adoption of the present Order (of 15.11.2017) of the International Court of Justice (ICJ) in the case concerning Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua versus Colombia), wherein the Court 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; yet he feels obliged, at the same time, to lay on the records his reflections on one particular point to which he attributes special relevance.

2. The point, as indicated in the Order, relates to the third counter-claim: it is that of the traditional fishing rights of the inhabitants of the Archipelago of San Andrés. 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, — have already been dealt with in detail by Judge Cançado Trindade in his extensive Dissenting Opinion in the case of Jurisdictional Immunities of the State (Germany versus Italy, counter-claim, Order of 06.07.2010), to which he deems it sufficient only to refer to in the present Declaration.

3. He adds 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. 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. The original applicant assumes the role of counter-claim respondent (reus in excipiendo fit actor)" (para. 4).

4. Yet, — he proceeds, — the Court's practice in relation to counter-claims is still "in the making"; thus, "in the search for the realization of justice, there is still much to advance in this domain" (para. 5). In his perception, e.g. both claims and counter-claims "require, in my perception, prior public hearings, so as to obtain further clarifications from the contending parties" (para. 6). The Court, in any case, "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). 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" (para. 6).

5. Almost eight decades ago, — Judge Cançado Trindade recalls, — international legal doctrine was already apprehending the autonomous legal nature of counter-claims. 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). 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). Judge Cançado Trindade adds that 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, rendered respondent and applicant by the counter-claim) is secured" (paras. 7-8).

6. As to the key point he singles out, Judge Cançado Trindade observes 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. It is significant – he recalls – that in three other ICJ decisions along the last eight years, concerning, like the present one, Latin American countries, attention has constantly been given to the point at issue, like in the cas d'espèce. Thus, in the case of the Dispute Regarding Navigational and Related Rights (Costa Rica versus Nicaragua, Judgment of 13.07.2009), the ICJ upheld the customary right of subsistence fishing of the inhabitants of both banks of the San Juan River (paras. 9 - 10).

7. Subsequently, in the case concerning Pulp Mills on the River Uruguay (Argentina versus Uruguay, Judgment of 20.04.2010), the Court likewise took into account aspects pertaining to the affected segments of local populations on both sides, and consultation with them. In his Separate Opinion appended to that Judgment, Judge Cançado Trindade ponders that the two aforementioned cases, concerning Latin American countries "attentive to the living conditions and public health of neighbouring communities", the ICJ has looked beyond the strictly inter-State dimension, into the segments of the populations concerned, and the Latin American States pleading before the ICJ have been faithful to the "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" (paras. 11-12).

8. More recently, in the case concerning the Maritime Dispute (Peru versus Chile, Judgment of 27.01.2014), in the Pacific coast in South America, the ICJ expressed its awareness "of the importance that fishing has had for the coastal populations of both Parties"; it made clear once again — Judge Cançado Trindade proceeds — 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" (para. 13)

9. 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 have expressed concerns about the rights of their respective fishermen, seeming aware of the needs of each other's fishermen (para. 14). Special attention has been 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" (para. 14).

10. For its part, the ICJ, in the present Order, 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 in "fishing in the same waters" (para. 16). In sequence, in its considerations on jurisdiction, the ICJ again dwells upon the traditional fishing rights of the inhabitants (artisanal fishermen) of the Archipelago of San Andrés (para. 18); it then finds that the third counter-claim "is admissible as such and forms part of the current proceedings" (resolutory point A(3) of the dispositif). In his appended Declaration, Judge Cançado Trindade ponders that the present case concerning Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea, "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).

> 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, 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" (paras. 19-20).

11. Judge Cançado Trindade adds that 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", as well as 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" (para. 21). And Judge Cançado Trindade concludes that

> "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 XVIth and XVIIth centuries. The jus gentium they conceived was for everyone, —

peoples, individuals and groups of individuals, and the emerging States. Solidarity marked its presence in the jus gentium of their times, as it does, in my view, also in the new jus gentium of the XXI[st] century.

This is not the first time that I make this point within the ICJ[1]. 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" (paras. 22-23).

Separate opinion of Judge Greenwood

In his separate opinion, Judge Greenwood recalls that, while he has joined the majority with respect to the third counter-claim raised by Colombia, his reasoning differs in certain respects from that in the Order. Further, Judge Greenwood dissents in respect of the Court's finding on Colombia's fourth counter-claim.

In relation to the third counter-claim, Judge Greenwood considers that the test for a direct connection between the Nicaragua's claim and the third counter-claim has in this case revealed that the subject-matter of the dispute raised by the claim and the counter-claim are one and the same. He recalls that the Court has already, at the preliminary objections phase, considered whether the dispute raised by the principal claim falls within the terms of the jurisdictional limits of the Pact of Bogotá. As such, Judge Greenwood considers that it was unnecessary and somewhat artificial for the Court in its Order to engage in a separate analysis of the third counter-claim's ability to meet the Pact of Bogotá's jurisdictional requirements.

In relation to the fourth counter-claim, Judge Greenwood finds that the status of the area in which the incidents that lie at the heart of Nicaragua's claim are said to have taken place would not be affected by any decision regarding Nicaragua's baselines. On this basis, he disagrees with the Court in its finding of a direct connection between the counter-claim and the subject-matter of the principal claim.

Separate opinion of Judge Donoghue

The Pact of Bogotá was in force between the Parties when Nicaragua filed its Application, but that was no longer the case when Colombia submitted its counter-claims. In these circumstances, Judge Donoghue considers that the Court has jurisdiction over Colombia's counter-claims only to the extent that each counter-claim falls within the dispute that was the subject-matter of Nicaragua's Application.

After identifying the subject-matter of the dispute presented in Nicaragua's Application, Judge Donoghue concludes that the first, second and fourth counter-claims of Colombia do not fit within that subject-matter. These counter-claims fall outside the scope of the jurisdiction of the Court and are therefore inadmissible under Article 80, paragraph 1, of the Rules of Court. However, Judge Donoghue considers that the third counter-claim (concerning the alleged rights of

[1] He further refers, in this connection, to his Separate Opinion in the case of the Frontier Dispute (Burkina Faso versus Niger, Judgment of 16.04.2013).

inhabitants of Colombian islands to "artisanal" fishing without Nicaraguan authorization in maritime areas attributed to Nicaragua by the 2012 Judgment of the Court) falls within the jurisdiction of the Court, as it fits within the subject-matter of the dispute presented in Nicaragua's Application and the other conditions of jurisdiction (existence of a dispute and negotiation precondition) are met. The third counter-claim is also "directly connected with the subject-matter of the claim" of Nicaragua, so it is admissible under the Rules of Court.

Dissenting opinion of Judge ad hoc Caron

Judge Caron dissents in respect of the Court's finding on Colombia's first and second counter-claims inasmuch as the Court finds 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. Judge Caron also dissents regarding the principles that animate the direct connection requirement. In particular, Article 80 of the Rules of Court does not require that the direct connection must exist both in fact and in law. Judge Caron dissents because in his view, the connection need only exist in fact or in law.

Judge Caron dissents from the Court's Order in respect of the direct connection because the Presidential Decree 1946 is a core part of the factual complex underlying Nicaragua's claim and the Court's direct connection analysis does not recognize that the factual complex underlying Colombia's first and second counter-claims consists of the very same facts that led in significant part to the issuance of the decree.

Judge Caron recalls that the Court's Order, in respect of the first and second counter-claims concludes in paragraph 37 that "the nature of the alleged facts underlying Colombia's first and second counter-claims and Nicaragua's principal claims is different". However, 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 in 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 . . ." And, 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". 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. Presidential Decree 1946 is a part of the factual complex underlying both the subject-matter of Nicaragua's claim, and Colombia's first and second counter-claims. Therefore the first and second counter-claims are directly connected to the subject-matter of the claim of Nicaragua.

Turning to the direct connection requirement in law on Colombia's first and second counter-claims, Judge Caron points out that Article 80 of the Rules of Court does not require that the direct connection must exist both in fact and in law.

Judge Caron dissents because in his view, the connection need only exist in fact or law. Further, the legal aim of the Parties as regards the Presidential Decree 1946 is connected as Nicaragua requests the revocation of the Presidential Decree 1946 while Colombia's first and second counter-claims aim to validate the motivations which underlay the issue of the said decree.

Finally, Judge Caron emphasizes that the Court's unique role in the peaceful settlement of disputes means that the Court must recognize that a State in construing its application before the

Court will frame its case from its perspective of the dispute. Therefore, it should not be significant whether the counter-claim and claim rely on the same legal instruments or principles.

Judge Caron concludes that the admission of the first and second counter-claims would have allowed for a fuller consideration of the international dispute presented in the proceedings and to the possibility of a longer-term peaceful resolution to that dispute.

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