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RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

VIOLATIONS ALLÉGUÉES DE DROITS SOUVERAINS ET D'ESPACES MARITIMES DANS LA MER DES CARAÏBES

(NICARAGUA c. COLOMBIE)

DEMANDES RECONVENTIONNELLES

ORDONNANCE DU 15 NOVEMBRE 2017

2017

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

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

(NICARAGUA *v.* COLOMBIA)

COUNTER-CLAIMS

ORDER OF 15 NOVEMBER 2017

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

(NICARAGUA *v.* COLOMBIA)

COUNTER-CLAIMS

ORDER

Present: *President* Abraham; *Vice-President* Yusuf; *Judges* Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Gevorgian; *Judges* ad hoc Daudet, Caron; *Registrar* Couvreur.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Article 48 of the Statute of the Court and to Article 80 of the Rules of Court,

Makes the following Order:

Whereas:

1. By an Application filed in the Registry of the Court on 26 November 2013, the Government of the Republic of Nicaragua (hereinafter "Nicaragua") instituted proceedings against the Republic of Colombia (hereinafter "Colombia") concerning a dispute in relation to "the viola-

tions 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".

2. In its Application, Nicaragua invoked as a basis of the jurisdiction of the Court Article XXXI of the American Treaty on Pacific Settlement signed at Bogotá on 30 April 1948 (hereinafter the "Pact of Bogotá"). In the alternative, Nicaragua stated that the jurisdiction of the Court "lies in its inherent power to pronounce on the actions required by its Judgments".

3. By an Order of 3 February 2014, the Court fixed 3 October 2014 as the time-limit for the filing of the Memorial of Nicaragua and 3 June 2015 for the filing of the Counter-Memorial of Colombia. Nicaragua filed its Memorial within the time-limit so prescribed.

4. On 19 December 2014, within the time-limit set by Article 79, paragraph 1, of the Rules of Court, Colombia raised preliminary objections to the jurisdiction of the Court. Consequently, by an Order of 19 December 2014, the President, noting that, by virtue of Article 79, paragraph 5, of the Rules of Court, the proceedings on the merits were suspended, and taking account of Practice Direction V, fixed 20 April 2015 as the time-limit for the presentation by Nicaragua of a written statement of its observations and submissions on the preliminary objections raised by Colombia. Nicaragua filed its statement within the prescribed time-limit.

5. The Court held public hearings on the preliminary objections raised by Colombia from 28 September to 2 October 2015. 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.

6. By an Order of 17 March 2016, the Court fixed 17 November 2016 as the new time-limit for the filing of the Counter-Memorial of Colombia. The Counter-Memorial was filed within the time-limit thus fixed. In Part III of its Counter-Memorial, Colombia, making reference to Article 80 of the Rules of Court, submitted four counter-claims.

7. Referring to Article 53, paragraph 1, of the Rules of Court, the Government of the Republic of Chile and the Government of the Republic of Panama asked to be furnished with copies of the pleadings and documents annexed in the case. Having ascertained the views of the Parties in accordance with the same provision, the Court decided to grant each of these requests. However, further to a specific request received from the Agent of Colombia, the Court decided that the copies of the Counter-Memorial being furnished would not include Annexes 28 to 61 "for reasons of national security". The Registrar duly communicated these decisions to the said Governments and to the Parties.

8. At a meeting held by the President of the Court with the representatives of the Parties on 19 January 2017, Nicaragua indicated that it considered the counter-claims contained in the Counter-Memorial of Colombia to be inadmissible, and proposed that Nicaragua and Colombia each be given three months, successively, to file written observations on the admissibility of Colombia's counter-claims. At the same meeting, Colombia stated that it considered three months to be an excessively long period of time, but that in any case it wished to benefit from the same amount of time as that accorded to Nicaragua for the preparation of its written observations.

9. By letters dated 20 January 2017, the Registrar informed the Parties that the Court had decided that the Government of Nicaragua should specify in writing, by 20 April 2017 at the latest, the legal grounds on which it relied in maintaining that the Respondent's counter-claims were inadmissible, and that the Government of Colombia should present its own views on the question in writing, by 20 July 2017 at the latest. Nicaragua and Colombia submitted their written observations on the admissibility of Colombia's counter-claims within the time-limits thus fixed.

10. Having received full and detailed written observations from each of the Parties, the Court considered that it was sufficiently well informed of their respective positions as to the admissibility of Colombia's counter-claims, and did not consider it necessary to hear the Parties further on the subject.

*

11. In the Application, the following claims were presented by Nicaragua:

> "On the basis of the foregoing statement of facts and law, Nicaragua, while reserving the right to supplement, amend or modify this Application, requests the Court to adjudge and declare that Colombia is in breach of:
>
> — its obligation not to use or threaten to use force under Article 2 (4) of the UN Charter and international customary law;
>
> — its obligation not to violate Nicaragua's maritime zones as delimited in paragraph 251 of the ICJ Judgment of 19 November 2012 as well as Nicaragua's sovereign rights and jurisdiction in these zones;
>
> — its obligation not to violate Nicaragua's rights under customary international law as reflected in Parts V and VI of UNCLOS;

— and that, consequently, Colombia is bound to comply with the Judgment of 19 November 2012, wipe out the legal and material consequences of its internationally wrongful acts, and make full reparation for the harm caused by those acts."

12. In the Memorial, the following submissions were presented by Nicaragua:

"1. For the reasons given in the present Memorial, the Republic of Nicaragua requests the Court to adjudge and declare that, by its conduct, the Republic of Colombia has breached:

(a) its obligation not to violate Nicaragua's maritime zones as delimited in paragraph 251 of the Court Judgment of 19 November 2012 as well as Nicaragua's sovereign rights and jurisdiction in these zones;

(b) its obligation not to use or threaten to use force under Article 2 (4) of the UN Charter and international customary law;

(c) and that, consequently, Colombia has the obligation to wipe out the legal and material consequences of its internationally wrongful acts, and make full reparation for the harm caused by those acts.

2. Nicaragua also requests the Court to adjudge and declare that Colombia must:

(a) Cease all its continuing internationally wrongful acts that affect or are likely to affect the rights of Nicaragua.

(b) Inasmuch as possible, restore the situation to the *status quo ante*, in

(i) revoking 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 1119 of 17 June 2014 to maritime areas which have been recognized as being under the jurisdiction or sovereign rights of Nicaragua;

(ii) revoking permits granted to fishing vessels operating in Nicaraguan waters; and

(iii) ensuring that the decision of the Constitutional Court of Colombia of 2 May 2014 or of any other National Authority will not bar compliance with the 19 November 2012 Judgment of the Court.

(c) Compensate for all damages caused insofar as they are not made good by restitution, including loss of profits resulting from the loss of investment caused by the threatening statements of Colombia's highest authorities, including the threat or use of force by the Colombian Navy against Nicaraguan fishing boats [or ships

exploring and exploiting the soil and subsoil of Nicaragua's continental shelf] and third State fishing boats licensed by Nicaragua as well as from the exploitation of Nicaraguan waters by fishing vessels unlawfully 'authorized' by Colombia, with the amount of the compensation to be determined in a subsequent phase of the case.

(d) Give appropriate guarantees of non-repetition of its internationally wrongful acts."

13. With regard to the above-mentioned submission 1 *(b)* in Nicaragua's Memorial (quoted in the preceding paragraph), the Court recalls that in its Judgment on preliminary objections of 17 March 2016, it found that there was no dispute between the Parties regarding alleged violations by Colombia of its obligation not to use force or threaten to use force.

14. In the Counter-Memorial, the following submissions were presented by Colombia:

"I. For the reasons stated in this Counter-Memorial, the Republic of Colombia respectfully requests the Court to reject the submissions of the Republic of Nicaragua in its Memorial of 3 October 2014 and to adjudge and declare that

1. Nicaragua has failed to prove that any Colombian naval or coast guard vessel has violated Nicaragua's sovereign rights and maritime spaces in the Caribbean Sea;

2. Colombia has not, otherwise, violated Nicaragua's sovereign rights and maritime spaces in the Caribbean Sea;

3. Colombia's Decree 1946 of 9 September 2013 establishing an Integral Contiguous Zone is lawful under international law and does not constitute a violation of any of Nicaragua's sovereign rights and maritime spaces, considering that:
   (a) the Integral Contiguous Zone produced by the naturally overlapping concentric circles forming the contiguous zones of the islands of San Andrés, Providencia, Santa Catalina, Alburquerque Cays, East-Southeast Cays, Roncador, Serrana, Quitasueño and Serranilla and joined by geodetic lines connecting the outermost points of the overlapping concentric circles is, in the circumstances, lawful under international law;
   (b) the powers enumerated in the Decree are consistent with international law; and

4. No Colombian action in its Integral Contiguous Zone of which Nicaragua complains is a violation of international law or of Nicaragua's sovereign rights and maritime spaces.

II. Further, the Republic of Colombia respectfully requests the Court to adjudge and declare that

5. Nicaragua has infringed Colombia's sovereign rights and maritime spaces in the Caribbean Sea by failing to prevent its flag or licensed vessels from fishing in Colombia's waters;

6. Nicaragua has infringed Colombia's sovereign rights and maritime spaces in the Caribbean Sea by failing to prevent its flag or licensed vessels from engaging in predatory and unlawful fishing methods in violation of its international obligations;

7. Nicaragua has infringed Colombia's sovereign rights and maritime spaces by failing to fulfil its international legal obligations with respect to the environment in areas of the Caribbean Sea to which said obligations apply;
8. Nicaragua has failed to respect the traditional and historic fishing rights of the inhabitants of the San Andrés Archipelago, including the indigenous Raizal people, in the waters to which they are entitled to said rights; and
9. Nicaragua's Decree No. 33-2013 of 19 August 2013 establishing straight baselines violates international law and Colombia's maritime rights and spaces.

III. The Court is further requested to order Nicaragua

10. With regard to submissions 5 to 8:
    (a) To desist promptly from its violations of international law;
    (b) To compensate Colombia for all damages caused, including loss of profits, resulting from Nicaragua's violations of its international obligations, with the amount and form of compensation to be determined at a subsequent phase of the proceedings; and
    (c) To give Colombia appropriate guarantees of non-repetition.

11. With regard to submission 8, in particular, to ensure that the inhabitants of the San Andrés Archipelago enjoy unfettered access to the waters to which their traditional and historic fishing rights pertain; and
12. With regard to submission 9, to adjust its Decree No. 33-2013 of 19 August 2013 in order that it complies with the rules of international law concerning the drawing of the baselines from which the breadth of the territorial sea is measured.

IV. Colombia reserves its right to supplement or amend these submissions."

15. With regard to the admissibility of the counter-claims presented by Colombia, Nicaragua, at the end of its written observations, requested the Court to adjudge and declare that: "Colombia's first, second, third and fourth counter-claims as presented in its 17 November 2016 Counter-Memorial are inadmissible".

16. For its part, at the end of its written observations on the admissibility of its counter-claims, Colombia requested the Court to adjudge and declare that "the counter-claims made in the Counter-Memorial fulfil the requirements of Article 80 of the Rules of Court and are admissible".

I. General Framework

17. Article 80 of the Rules of Court provides as follows:

> "1. The Court may entertain a counter-claim only if it comes within the jurisdiction of the Court and is directly connected with the subject-matter of the claim of the other party.
>
> 2. A counter-claim shall be made in the Counter-Memorial and shall appear as part of the submissions contained therein. The right of the other party to present its views in writing on the counter-claim, in an additional pleading, shall be preserved, irrespective of any decision of the Court, in accordance with Article 45, paragraph 2, of these Rules, concerning the filing of further written pleadings.
>
> 3. Where an objection is raised concerning the application of paragraph 1 or whenever the Court deems necessary, the Court shall take its decision thereon after hearing the parties."

18. Counter-claims are autonomous legal acts the object of which is to submit new claims to the Court which are, at the same time, linked to the principal claims, in so far as they are formulated as "counter" claims that react to those principal claims (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 256, para. 27; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Counter-Claims, Order of 18 April 2013, I.C.J. Reports 2013*, pp. 207-208, para. 19).

19. 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". In earlier pronouncements, the Court has characterized these requirements as relating to the "admissibility of a

counter-claim as such" (*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Counter-Claim, Order of 10 March 1998, I.C.J. Reports 1998*, p. 203, para. 33; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Counter-Claims, Order of 29 November 2001, I.C.J. Reports 2001*, p. 678, para. 35; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Counter-Claims, Order of 18 April 2013, I.C.J. Reports 2013*, p. 208, para. 20). In this context, the Court has accepted that the term "admissibility" must be understood to encompass both the jurisdictional requirement and the direct-connection requirement for a claim to be presented as a counter-claim (*Jurisdictional Immunities of the State (Germany* v. *Italy), Counter-Claim, Order of 6 July 2010, I.C.J. Reports 2010 (I)*, p. 316, para. 14; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Counter-Claims, Order of 18 April 2013, I.C.J. Reports 2013*, p. 208, para. 20).

20. The requirements of admissibility under Article 80 of the Rules of Court are cumulative; each requirement must be satisfied for a counter-claim to be found admissible. In examining those requirements, the Court, however, is not bound by the sequence set out in that Article (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Counter-Claims, Order of 18 April 2013, I.C.J. Reports 2013*, p. 210, para. 27).

21. In the present case, the Court deems it appropriate to begin with the question whether Colombia's counter-claims are directly connected with the subject-matter of Nicaragua's principal claims.

II. Direct Connection

22. 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" (see *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Counter-Claims, Order of 18 April 2013, I.C.J. Reports 2013*, pp. 211-212, para. 32).

23. In previous decisions relating to the admissibility of counter-claims as such, the Court has taken into consideration a range of factors that could establish a direct connection in fact and in law between a counter-claim and the claims of the other party for the purposes of Article 80.

24. With respect to the connection in fact, the Court has considered whether the facts relied upon by each party relate to the same factual complex, including the same geographical area or the same time period (see *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Counter-Claims, Order of 18 April 2013, I.C.J. Reports 2013*, p. 213, para. 34; *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. 34; *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Counter-Claim, Order of 10 March 1998, I.C.J. Reports 1998*, p. 205, para. 38). It has also considered whether the facts relied upon by each party are of the same nature, in that they allege similar types of conduct (see *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Counter-Claims, Order of 18 April 2013, I.C.J. Reports 2013*, pp. 212-213, para. 33; *Armed Activities on the Territory of the Congo (Democratic Republic of Congo* v. *Uganda), Counter-Claims, Order of 29 November 2001, I.C.J. Reports 2001*, p. 679, para. 38).

25. With respect to the connection in law, the Court has examined 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 the respondent were considered as pursuing the same legal aim by their respective claims (see *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Counter-Claims, Order of 18 April 2013, I.C.J. Reports 2013*, p. 213, para. 35; *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. 35; *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Counter-Claim, Order of 10 March 1998, I.C.J. Reports 1998*, p. 205, para. 38; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Order of 30 June 1999, I.C.J. Reports 1999 (II)*, pp. 985-986; *Armed Activities on the Territory of the Congo (Democratic Republic of Congo* v. *Uganda), Counter-Claims, Order of 29 November 2001, I.C.J. Reports 2001*, p. 679, paras. 38 and 40).

A. First and Second Counter-Claims

26. In the body of the Counter-Memorial and in its written observations, Colombia explains that its first counter-claim is based on "Nicaragua's violation of its duty of due diligence to protect and preserve the marine environment of the Southwestern Caribbean Sea", and that its

second counter-claim, which "is a logical consequence of the first one", deals with "Nicaragua's violation of its 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".

27. These two counter-claims are formulated differently in the submissions contained at the end of Colombia's Counter-Memorial, which read as follows:

> "II. . . . [T]he Republic of Colombia respectfully requests the Court to adjudge and declare that
>
> 5. Nicaragua has infringed Colombia's sovereign rights and maritime spaces in the Caribbean Sea by failing to prevent its flag or licensed vessels from fishing in Colombia's waters;
>
> 6. Nicaragua has infringed Colombia's sovereign rights and maritime spaces in the Caribbean Sea by failing to prevent its flag or licensed vessels from engaging in predatory and unlawful fishing methods in violation of its international obligations;
>
> 7. Nicaragua has infringed Colombia's sovereign rights and maritime spaces by failing to fulfil its international legal obligations with respect to the environment in areas of the Caribbean Sea to which said obligations apply."

28. According to Colombia, there are a number of elements which show that the first and second counter-claims "are directly connected with the subject-matter of Nicaragua's claims and pursue the same legal aims, and are thus admissible" under Article 80, paragraph 1, of the Rules of Court.

29. In particular, Colombia asserts that these two counter-claims arise out of the same factual complex as Nicaragua's principal claims. First, according to Colombia, these counter-claims and Nicaragua's principal claims refer to the same geographical area, that is the area comprising parts of the Seaflower Biosphere Reserve and the Seaflower Marine Protected Area, including the maritime area around the Luna Verde Bank, "which is where most of the 'incidents' mentioned by Nicaragua are said to have taken place", as well as within Colombia's declared contiguous zone. Secondly, Colombia explains, these counter-claims and the principal claims are based on facts of the same nature because they address the conduct of the Parties with respect to the preservation and protection of the marine environment and the exercise of due diligence within the relevant maritime area. Thirdly, Colombia maintains that they concern events that occurred within the same period of time.

30. Colombia further contends that its first and second counter-claims have a direct legal connection with Nicaragua's principal claims. Colombia asserts that they are based on the same corpus of law, namely the

customary international law of the sea which addresses the sovereign rights of coastal States in connection with those States' international obligations, as well as the rights and duties of other States, including environmental rules. Moreover, Colombia, in its counter-claims, and Nicaragua, in its principal claims, pursue the same legal aims because, according to Colombia, "each Party is contesting the legality of the conduct of the other in the same maritime areas".

*

31. For its part, Nicaragua contends that some of the alleged facts upon which Colombia relies in its first two counter-claims, i.e., the incidents of alleged predatory fishing and pollution by Nicaraguan fishermen, do not relate to the same geographical area as the facts invoked in its own claims. According to Nicaragua, the facts adduced by Colombia took place "in the territorial sea around Colombia's Serrana Cay or in the Colombia-Jamaica Joint Regime Area"; by contrast, the facts underpinning Nicaragua's claims occurred in its exclusive economic zone (EEZ). Nicaragua further contends that the first two counter-claims and Nicaragua's principal claims involve different types of conduct — Colombia relies on the alleged failure of Nicaragua to protect and preserve the marine environment in the south-western Caribbean Sea, while Nicaragua invokes Colombia's interference with, and violations of, Nicaragua's exclusive sovereign rights and jurisdiction in the maritime areas adjudged by the Court in 2012 to appertain to it. In Nicaragua's view, the facts on which Nicaragua and Colombia rely "are of a fundamentally different nature". Indeed, according to Nicaragua, its claims concern the "*active* assertion" by Colombia of rights and jurisdiction in areas which do not appertain to Colombia; whereas Colombia's counter-claims "are based on the alleged *inactivity* of Nicaragua in the face of the environmentally destructive practices of Nicaragua's own citizens" (emphasis in the original).

32. Nicaragua also argues that Colombia's first two counter-claims and Nicaragua's claims are not based on the same legal principles and instruments, and therefore do not pursue the same legal aim. In Nicaragua's view, Colombia seeks to establish Nicaragua's international responsibility for alleged violations of the rules of customary international law relating to the preservation and protection of the environment, and the exercise of due diligence, as well as of the provisions of various international instruments, including the Convention on International Trade in Endangered Species of Wild Fauna and Flora (the "CITES Convention"), the Convention for the Protection and Development of the Marine

Environment in the Wider Caribbean Region (the "Cartagena Convention"), and the Code of Conduct on Responsible Fisheries of the Food and Agriculture Organization (FAO). Nicaragua, for its part, relies on the Court's 2012 Judgment in the case concerning *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)* (hereinafter referred to as the "2012 Judgment") and the rules of customary international law as reflected in Parts V and VI of UNCLOS, which recognize the exclusive sovereign rights and jurisdiction of a coastal State within its maritime areas.

33. Nicaragua accordingly concludes that Colombia has failed to show that its first and second counter-claims meet the condition of direct connection set out in Article 80 of the Rules of Court, and contends that, consequently, these two counter-claims must be declared inadmissible as such.

* *

34. The Court has already noted 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 (see paragraphs 26 and 27 above). 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.

35. 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.

36. A majority of the incidents referred to by Colombia in its first and second counter-claims allegedly occurred in Nicaragua's 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.

37. 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.

38. Furthermore, 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.

39. 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

40. 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.

41. In order to demonstrate that there is a direct connection between its third counter-claim and Nicaragua's principal claims, Colombia contends that the third counter-claim, in the same manner as Nicaragua's principal claims, relates to events that occurred in the aftermath of the 2012 Judgment in the maritime zones declared by the Court to appertain to Nicaragua and, in particular, "in the shallow waters of the area of Cape Bank known as Luna Verde, or the deep-sea banks situated between the Northern Colombian islands of Quitasueño and Serrana". Thus, according to Colombia, there is "an obvious temporal and geographic overlapping" between Nicaragua's principal claims and Colombia's third counter-claim inasmuch as they relate to the same time period and the same geographical area. Furthermore, Colombia alleges that the facts relied upon by Nicaragua in its principal claims and by Colombia in its third counter-claim are of the same nature, in that they allege similar types of conduct. It explains that "Nicaragua has complained because of the conduct of the Colombian Navy vis-à-vis Nicaraguan fishermen" and that "Colombia has complained because of the conduct of the Nicaraguan Navy vis-à-vis Colombian fishermen in the same area".

Finally, Colombia asserts that there is a legal connection between Nicaragua's principal claims and Colombia's counter-claim because the Parties' respective claims are based on the same legal principles or instruments, that is customary international law. Indeed, Nicaragua's claims concern customary rules relating to the coastal State's rights to exploit marine resources in its own EEZ, and Colombia's counter-claim relates to customary rights to access and exploit marine resources located in the same maritime zone. Colombia adds that the Parties are pursuing the same legal aim, since they are both seeking to establish the international responsibility of the other by invoking violations of customary rules relating to the access to fishing resources in the same maritime zone.

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42. For its part, Nicaragua contends that, although the facts underlying Colombia's third counter-claim "generally relate to the same geographical area and the same time period as the facts stated in Nicaragua's claim", their nature is different because they took place "in very different legal zones". Nicaragua considers that, while the harassment of which it complains occurred "in its own maritime zones and was committed by another State that has no sovereign rights or jurisdiction in those areas", the harassment of which Colombia complains allegedly took place "outside Colombia's maritime zones in areas that are subject to exclusive sovereign rights and jurisdiction of Nicaragua".

43. Furthermore, Nicaragua asserts that the legal principles that underlie Colombia's third counter-claim are not the same as those that support Nicaragua's principal claims and that the Parties' claims do not pursue the same legal aim. In this regard, Nicaragua argues that, while it "seeks to vindicate its *exclusive sovereign rights* as adjudged by the Court in its 2012 Judgment", Colombia's third counter-claim concerns "the alleged *non-exclusive private rights* of its citizens to continue traditional fishing activities in Nicaragua's EEZ despite the 2012 Judgment" (emphasis in the original). Nicaragua adds that it is seeking "reaffirmation of its rights and jurisdiction *qua* sovereign", unlike Colombia, which is "acting as *parens patriae* on behalf of its people to assert putative private rights".

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44. 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. At this stage of the proceedings, for the purposes of deciding on the question whether Colombia's third counter-claim is admissible as such, the Court does not need to address the issue of the relationship between the legal status of the maritime zones involved and the rights of the respective Parties, which belongs to the merits.

45. 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. Consequently, the Court considers that there is a direct legal connection between Colombia's third counter-claim and Nicaragua's principal claims.

46. 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

47. 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. According to Colombia, "Nicaragua's unlawful decision to establish a system of straight baselines to determine the limit from which the breadth of its maritime zones are measured has directly infringed Colombia's rights in the Caribbean Sea" in three different ways: first, Nicaragua's adoption of Decree No. 33-2013 extended its internal waters eastward, thereby "den[ying] the right of innocent passage and freedom of navigation in vast stretches of sea in which these rights and freedoms should be enjoyed"; secondly, it extended the territorial sea of Nicaragua, having the consequence of unduly restraining Colombia's navigational rights; thirdly, it extended Nicaragua's exclusive economic zone, which "created an artificial overlap with Colombia's entitlement to its exclusive economic zone and continental shelf". 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".

48. Colombia asserts that its fourth counter-claim and Nicaragua's principal claims — both dealing with the adoption of the respective decrees — are connected in fact and in law. First, Colombia points out that the two decrees were adopted during the same period, namely Nicaragua's decree on 19 August 2013 and Colombia's decree on 9 September 2013. Secondly, according to Colombia, they "are domestic acts that relate to the delineation of Coastal States' maritime areas". Thirdly, both decrees "allegedly extend the Parties' maritime areas beyond what is allowed under international law". Fourthly, they concern the implementation of the 2012 Judgment.

49. As far as the legal connection is concerned, Colombia is of the view that its fourth counter-claim and Nicaragua's principal claims regarding Colombia's Decree 1946 are based on legal principles pertaining to the same corpus of international law, namely the customary international law of the sea. That is, according to Colombia, sufficient to establish their direct connection in law. Colombia also considers that both claims have the same legal aim.

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50. For its part, Nicaragua contends that Colombia's fourth counter-claim has no direct factual connection with Nicaragua's principal claims. First, Nicaragua explains that these claims do not concern the same geographical area. In particular, Nicaragua's claims relate to "Colombia's violations of Nicaragua's rights and jurisdiction in its EEZ", while Colombia's fourth counter-claim relates "only to the extent of Nicaragua's internal waters and territorial sea". Secondly, according to Nicaragua, the facts relied upon by Colombia are not of the same nature as the facts underlying Nicaragua's claims. Whereas Colombia refers to Nicaragua's decree which relates to the extent of Nicaragua's maritime zones in the Caribbean Sea, the facts underpinning Nicaragua's claim "concerning Colombia's Integral Contiguous Zone relate to Colombia's challenge to the *existence* of Nicaragua's exclusive sovereign rights and jurisdiction in maritime areas delimited in the 2012 Judgment" (emphasis in the original). Finally, Nicaragua alleges that its claim concerns matters that were expressly settled by the Court in its 2012 Judgment. In contrast, Colombia's fourth counter-claim relates to an issue which was not addressed in that Judgment, namely the baselines from which Nicaragua is to measure the breadth of its maritime spaces.

51. Nicaragua argues that Colombia has equally failed to show a direct legal connection between its fourth counter-claim and Nicaragua's princi-

pal claims. Nicaragua contends that its claims are based on the 2012 Judgment which established the maritime boundary between the Parties "within 200 [nautical miles]", as well as on the customary international law rules governing a coastal State's rights, jurisdiction and duties in the EEZ and its rights over the continental shelf. Nicaragua notes that Colombia's claim is premised on the assertion that Nicaragua's decree is not in conformity with the customary international law rules governing the use of straight baselines as a method for drawing the baselines from which the breadth of maritime spaces is measured. Finally, Nicaragua contends that the Parties are not pursuing the same legal aim, because Nicaragua's 200-nautical-mile limit is the same whether measured from straight or normal baselines. Nicaragua's decree, therefore, "does not have the effect of impinging on Colombia's EEZ or continental shelf" whereas Colombia's decree "violates Nicaragua's EEZ and continental shelf".

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52. 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. Nicaragua's Decree No. 33-2013 was adopted on 19 August 2013 and Colombia's Decree 1946 was adopted on 9 September 2013. The Court 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.

53. The Court observes 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. Furthermore, the Court notes 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. The fact that the limits of these zones in the south-western part of the Caribbean Sea (lying east of the Nicaraguan coast and around the Colombian Archipelago of San Andrés) were established by the 2012 Judgment does not change the ultimate legal basis of the rights pertaining to Nicaragua and Colombia. Although the Court observed in its Judgment on preliminary objections that "[t]he 2012 Judgment of the Court is undoubtedly relevant to [the] dispute [between the Parties] in that it determines the maritime boundary between the Parties and, consequently, which of the Parties possesses sovereign rights under customary

international law in the [relevant] maritime areas", it made clear, however, that "those rights are derived from customary international law" (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, pp. 41-42, para. 109). In addition, 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. Consequently, the Court considers that there is a direct legal connection between Colombia's fourth counter-claim and Nicaragua's principal claims.

54. 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.

D. Conclusion of the Court with respect to the Direct Connection Requirement

55. The Court concludes that there is no direct connection between Colombia's first and second counter-claims and Nicaragua's principal claims. It does however consider that Colombia's third and fourth counter-claims are directly connected with the subject-matter of Nicaragua's principal claims.

III. Jurisdiction

56. It is now for the Court to examine whether Colombia's third and fourth counter-claims meet the requirement of jurisdiction contained in Article 80, paragraph 1, of the Rules of Court.

* *

57. Nicaragua contends that the Court has no jurisdiction to entertain Colombia's counter-claims. It argues that the critical date for determining jurisdiction over Colombia's counter-claims is the date on which they were submitted, not the date of Nicaragua's Application. In this regard, it notes that Colombia submitted its counter-claims nearly three years after the Pact of Bogotá had ceased to be in force between the Parties, by virtue of its denunciation by Colombia. Nicaragua concludes that, since the Pact is the only basis of jurisdiction in the present case, Colombia's counter-claims do not come within the jurisdiction of the Court and must be dismissed.

58. Nicaragua also asserts that, under Article XXXI of the Pact of Bogotá, the existence of a dispute between the Parties is a condition of the

Court's jurisdiction. Nicaragua argues that Colombia, however, has failed to establish the existence of such a dispute with respect to the subject-matter of its third counter-claim. It contends that there is nothing in the record, either by way of diplomatic Note, public statements from high-ranking officials or anything else, that shows that this counter-claim was positively opposed by Nicaragua. According to Nicaragua, there is therefore no basis on which the Court can infer the existence of a dispute.

59. Finally, Nicaragua is of the view that Colombia has not met the precondition stated in Article II of the Pact of Bogotá. Under this provision, Nicaragua recalls, States parties may have recourse to the dispute settlement mechanisms provided in the Pact, only in the event that the dispute "in the opinion of the parties, cannot be settled by direct negotiations through the usual diplomatic channels". In this regard, Nicaragua observes that Colombia has not demonstrated that the Parties were of the opinion that the matters raised by Colombia in its third counter-claim could not be settled by direct negotiations.

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60. For its part, Colombia contends that its counter-claims come within the jurisdiction of the Court on the basis of the Pact of Bogotá. Colombia observes that the Court's jurisdiction over incidental proceedings must be assessed at the time of the filing of the main proceedings, i.e., on 26 November 2013 in the present case, when Nicaragua filed its Application instituting proceedings. Colombia adds that all the facts it alleges in its counter-claims occurred before that critical date. Thus, the fact that the Pact of Bogotá ceased to be in force on 27 November 2013 between the Parties does not deprive the Court of the jurisdiction already established under this instrument with regard to the principal proceedings to entertain Colombia's counter-claims. Therefore, according to Colombia, as long as the issues raised in Colombia's counter-claims are directly connected with the principal claims and relate to situations that arose between Nicaragua and Colombia before the critical date of 26 November 2013 — when the Pact of Bogotá was still in force — the Court has jurisdiction to entertain those counter-claims.

61. Colombia further observes that it does not have to establish the existence of a dispute with Nicaragua on the subject-matter of its counter-claims, nor does it need to provide evidence that the matters presented in its counter-claims could not, in the opinion of the Parties, be settled by negotiations. It is of the view that these conditions are irrelevant in determining the Court's jurisdiction under Article 80 of the Rules of Court.

62. As for the first condition, Colombia considers that Article 80 of the Rules of Court does not require the respondent presenting counter-claims

to demonstrate that it has a dispute with the applicant regarding the subject-matter of these counter-claims because that provision "presupposes the existence of a dispute over which the Court has already accepted jurisdiction". According to Colombia, its counter-claims are admissible under the same basis of jurisdiction upon which the Court entertains Nicaragua's claims, that is the Pact of Bogotá, because Colombia's counter-claims are "inextricably linked to the subject-matter of the dispute", as defined by the Court in its Judgment on preliminary objections. In any event, Colombia considers that it has submitted sufficient and substantial evidence that Nicaragua was aware or could not have been unaware of the existence of a dispute between the Parties relating to the subject-matter of Colombia's counter-claims. In particular, with regard to the first, second and third counter-claims, it maintains that

> "Nicaragua and Colombia have opposite views regarding the rights, obligations and duties of the coastal State (Nicaragua) and the rights and duties of other States (in this case, Colombia) in the exclusive economic zone, as well as opposite views regarding how their counter-party is performing or failing to perform its obligations and duties or guaranteeing the rights of the other".

63. As for the second condition, Colombia disagrees with Nicaragua that the matters presented in Colombia's counter-claims should have been the subject of prior negotiations. It claims that "a dispute has already crystallized, adjudication is the mean chosen to resolve it and the Colombian counter-claims are reactions to the Nicaraguan claims that could not be settled by negotiations". In any event, Colombia is of the view that Nicaragua has not presented any evidence that the maritime issues between the Parties which have arisen after the 2012 Judgment could be settled by direct negotiations through the usual diplomatic channels.

* *

64. 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.

65. 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 had subsequently ceased to be in force between the Parties did not affect the jurisdiction which existed on the date that the proceedings were instituted (see *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, pp. 25-26, para. 48).

66. 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.

67. 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. As the Court stated in the *Nottebohm* case, in the context of the lapse, after the filing of the application, of the respondent's declaration of acceptance of the compulsory jurisdiction of the Court:

> "When an Application is filed at a time when the law in force between the parties entails the compulsory jurisdiction of the Court . . . the filing of the Application is merely the condition required to enable the clause of compulsory jurisdiction to produce its effects in respect of the claim advanced in the Application. Once this condition has been satisfied, the Court must deal with the claim; it has jurisdiction to deal with all its aspects, whether they relate to jurisdiction, to admissibility or to the merits. An extrinsic fact such as the subsequent lapse of the Declaration, by reason of the expiry of the period or by denunciation, cannot deprive the Court of the jurisdiction already established." (*Nottebohm (Liechtenstein* v. *Guatemala), Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 123.)

Although, as the Court noted above (see paragraph 18), 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 notes that the opposite approach would have the disadvantage of allow-

ing the applicant, in some instances, to remove the basis of jurisdiction after an application has been filed and thus insulate itself from any counter-claims submitted in the same proceedings and having a direct connection with the principal claim.

68. The Court recalls that, in its Judgment on preliminary objections of 17 March 2016, it recognized that, at the time the Application was filed, it had jurisdiction on the basis of Article XXXI of the Pact of Bogotá. It also recalls that the title of jurisdiction had elapsed before Colombia's Counter-Memorial was filed. However, Colombia's third and fourth counter-claims were brought under the same title of jurisdiction as Nicaragua's principal claims and have been found to be directly connected to these claims (see paragraph 55 above). 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.

69. 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 (see for example *Jurisdictional Immunities of the State (Germany* v. *Italy), Counter-Claim, Order of 6 July 2010, I.C.J. Reports 2010 (I)*, pp. 316-321, paras. 17-31). It follows that, in ascertaining whether it has jurisdiction to entertain Colombia's third and fourth counter-claims, the Court needs to examine whether the conditions set out in the Pact of Bogotá have been met.

70. The Court recalls that by virtue of Article XXXI of the Pact of Bogotá, the States parties agreed to accept the compulsory jurisdiction of the Court, in conformity with Article 36, paragraph 2, of the Statute, for "all disputes of a juridical nature that arise among them". Thus, the existence of a dispute between the parties is a condition of its jurisdiction. Therefore the Court, for the purposes of determining whether it has jurisdiction under this instrument in a given case, must establish the existence of a dispute between the parties with regard to the subject-matter of the counter-claims.

71. According to the established case law of the Court, a dispute is "a disagreement on a point of law or fact, a conflict of legal views or of interests between [parties]" (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016 (II)*, p. 849, para. 37). In order for a dispute to exist, "[i]t must be shown that the claim of one party is positively opposed by the other" (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328).

72. In the present case, 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.

73. 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". Therefore, it appears that a dispute has existed between the Parties on the matter since November 2013, if not earlier.

74. The Court now 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". The Court recalls that it must determine whether the evidence demonstrates that "neither of the Parties could plausibly maintain that the dispute between them could be settled by direct negotiations through the usual diplomatic channels" (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 37, para. 95).

75. With respect to the third counter-claim, the Court recalls that, in its Judgment on preliminary objections of 17 March 2016, it acknowledged that "[t]he issues that the Parties identified for possible dialogue include[d] fishing activities of the inhabitants of San Andrés, Providencia and Santa Catalina in waters that have been recognized as appertaining

to Nicaragua by the Court" (*I.C.J. Reports 2016 (I)*, p. 38, para. 97). However, it also observed that the fact that the Parties remained open for dialogue was not a "decisive factor", because what was essential for the Court to decide was whether "the Parties considered in good faith a certain possibility of a negotiated settlement to exist or not to exist" (*ibid.*, para. 99). 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.

76. 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 (see paragraph 73 above) 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.

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

IV. Conclusion

78. Given the above reasons, the Court concludes that the third and fourth counter-claims presented by Colombia are admissible as such.

* * *

79. The Court observes that a decision given on the admissibility of a counter-claim taking account of the requirements of Article 80 of the Rules of Court, in no way prejudges other questions with which the Court would have to deal during the remainder of the proceedings.

80. In order to protect the rights which third States entitled to appear before the Court derive from the Statute, the Court instructs the Registrar to transmit a copy of this Order to them.

81. Taking into account the conclusions it has reached above regarding the admissibility of the third and fourth counter-claims, the Court 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.

* * *

82. For these reasons,

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.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this fifteenth day of November, two thousand and seventeen, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Colombia, respectively.

(Signed) Ronny ABRAHAM,
President.

(Signed) Philippe COUVREUR,
Registrar.

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.

(Initialled) R.A.
(Initialled) Ph.C.

DECLARATION OF VICE-PRESIDENT YUSUF

[Original English Text]

1. 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 at the same time as the principal 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".

2. The Court has expounded the second limb of this test — the requisite direct connection — in the previous cases that dealt with the admissibility of counter-claims. The Court has not, however, elaborated on what is meant by the first limb — "comes within the jurisdiction of the Court" — in the context of Article 80. This lack of clarification of the jurisdictional requirement may give the impression that jurisdiction must in all cases be assessed *de novo* for each counter-claim. This is of course the case if the title of jurisdiction invoked for the counter-claims differs from that of the principal claim. However, as I will try to explain in this declaration, there is no need to do so where counter-claims have the same title of jurisdiction as the principal claim. Consequently, it was also unnecessary for the Court to examine whether a dispute existed between the Parties in the present proceedings.

I. Jurisdiction under Article 80, Paragraph 1, of the Rules of Court

3. One of the principal points of disagreement between the Parties in this case relates to the jurisdiction required by Article 80. Colombia contended that jurisdiction under Article 80 means jurisdiction over the principal claim. In its view, "[s]ince the Court has found that it has jurisdiction over the main proceedings, jurisdiction is also established over the counter-claims". Nicaragua, on the other hand, argued that counter-claims are autonomous legal acts for which jurisdiction must be assessed *de novo*.

4. Nicaragua is correct that counter-claims have been characterized by the Court as "an autonomous legal act the object of which is to submit a new claim to the Court . . . [and] thus to widen the original subject-matter of the dispute by pursuing objectives other than the mere dismissal of the claim of the Applicant in the main proceedings" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bos-*

nia and Herzegovina v. *Yugoslavia), Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 256, para. 27).

5. The autonomous nature of counter-claims is, however, just one aspect of their character. As the Court emphasized in its Order on counter-claims in the *Bosnian Genocide* case, counter-claims are intimately linked to the procedure initiated by the principal claim:

> "[a counter-claim] is linked to the principal claim, in so far as, formulated as a 'counter' claim, it reacts to it . . . 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; and whereas the admissibility of the counter-claims must necessarily relate to the aims thus pursued and be subject to conditions designed to prevent abuse" (*ibid.*, pp. 256-257, paras. 27 and 30).

6. It is this second aspect of counter-claims — the intimate link with the principal claim — that allows the Court to achieve procedural economy by giving it a more thorough and detailed overview of all the facts relevant to the dispute that has been submitted to the Court. In this respect, the counter-claim is grafted onto the ongoing procedure that was initiated by the principal claim. One might say that counter-claims are functionally autonomous in that they are addressed separately from the principal claim, but that they are also incidental in that they must be affixed to the main proceedings.

7. In paragraph 67 of the present Order, the Court states that "[o]nce the Court has established jurisdiction to entertain a case, it has jurisdiction to deal with all its phases", including incidental proceedings, such as counter-claims. As the Court notes, the subsequent lapse of jurisdiction cannot deprive the Court of the jurisdiction already established. The Court then continues to assess whether the third and fourth counter-claims submitted by Colombia fall within the jurisdiction of the Court on the basis of Article XXXI of the Pact of Bogotá.

8. I agree with much of this reasoning. The scope of jurisdiction of the Court in any given case is established according to the limits set forth in the instrument that founds the jurisdiction of the Court. The Court only has jurisdiction to address disputes within those limits. It is therefore 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 (*Jurisdictional Immunities of the State (Germany* v. *Italy), Counter-Claim, Order of 6 July 2010, I.C.J. Reports 2010 (I)*, pp. 316-321, paras. 17-31). The Court does not, however, have to establish its jurisdiction over the counter-claims *de novo*.

II. The Court's Examination of the Existence of a Dispute

9. The Court did not follow, in my view, this line of reasoning to its logical conclusion. The jurisdiction of the Court, for which the existence of a dispute is a necessary condition, has already been established by the Court in its Judgment on preliminary objections. It is therefore unnecessary for the Court to examine whether a "dispute" exists between the Parties, as the Court did in the present case in relation to the third and fourth counter-claims. A dispute has already been found to exist and that is sufficient to establish the Court's jurisdiction. The Court's enquiry at this stage of proceedings should simply be limited to ascertaining whether the counter-claims fall within the bounds of the jurisdiction that the Court has already found to exist under the Pact of Bogotá, and whether the counter-claims are directly connected, in law and in fact, to the principal claims.

10. This conclusion is not only logical but is also judicious. The requirement that a counter-claim be directly connected with the principal claim allows the Court to hear arguments related to another aspect of the dispute over which it has already asserted jurisdiction, thus enabling the Court to adjudicate in a holistic manner on the dispute brought before the Court. This is one aspect of the procedural economy afforded by counter-claims to which the Court referred in its Order in the *Bosnian Genocide* case, cited in paragraph 5 above. The Court does not need to ascertain the existence of a dispute anew.

11. The Court has most commonly addressed counter-claims that purport to be based on the same title of jurisdiction as the principal claim (see e.g. *Jurisdictional Immunities of the State (Germany* v. *Italy), Counter-Claim, Order of 6 July 2010, I.C.J. Reports 2010 (I)*, p. 316; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Counter-Claims, Order of 29 November 2001, I.C.J. Reports 2001*, p. 678; *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Counter-Claim, Order of 10 March 1998, I.C.J. Reports 1998*, p. 203; and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 256). However, Article 80 does not preclude the invocation of a title of jurisdiction different from that of the principal claim. It is when the Court is faced with reliance on a different title of jurisdiction, and in that kind of scenario only, that it will have to address the question of jurisdiction over the counter-claims separately from the question of jurisdiction over the principal claim. In such a case, jurisdiction over the principal claim will not be decisive in terms of jurisdiction

over a counter-claim based on some other title, and the validity of the jurisdictional basis of the counter-claims must be assessed at the moment such counter-claims are brought to the Court.

(Signed) Abdulqawi A. YUSUF.

JOINT OPINION OF JUDGES TOMKA, GAJA, SEBUTINDE, GEVORGIAN AND JUDGE *AD HOC* DAUDET

Requirements for the admissibility of counter-claims — Jurisdiction over counter-claims and direct connection with claim of the applicant — Discretion of the Court to entertain counter-claim — Juridical nature of counter-claim — Counter-claim as independent claim — Sequence of consideration of the requirements for counter-claim — Lapse of title of jurisdiction prior to the submission of counter-claim — Judgment in Nottebohm *not relevant for counter-claims — Counter-claims not within subject-matter of the dispute as earlier determined by the Court — Court has no jurisdiction over counter-claims in the present case — Bad faith of the applicant not to be presumed — Good and efficient administration of justice.*

1. The Court has found the first and second counter-claims presented by Colombia to be inadmissible. We agree with this conclusion, albeit on a different ground. The third and fourth counter-claims of Colombia have been found by the Court to be admissible; we respectfully disagree. In our view, all four counter-claims made by Colombia are inadmissible because none of them falls within the jurisdiction of the Court, which is one of the requirements to be met in order that the Court may entertain them.

2. The relevant provision on counter-claims is contained in Article 80, paragraph 1, of the Rules of Court, the Statute of the Court remaining silent on this matter.

Article 80, paragraph 1, of the Rules of Court, in its current version[1] reads as follows: "The Court may entertain a counter-claim only if it

[1] This version has been in force since 1 February 2001. Article 80 of the 1978 Rules of Court originally stated that "[a] counter-claim may be presented provided that it is directly connected with the subject-matter of the claim of the other party and that it comes within the jurisdiction of the Court".

The first provision on counter-claims appeared in the original Rules of Court adopted by the Permanent Court of International Justice ("PCIJ") on 24 March 1922. It was included in Article 40, describing what should be contained in the written pleadings of the parties. It provided that

"Counter-cases [in today's terminology Counter-Memorials] shall contain . . .

comes within the jurisdiction of the Court and is directly connected with the subject-matter of the claim of the other party."

3. This provision thus stipulates two conditions which must be met in order for a counter-claim to be found "admissible" by the Court. A counter-claim has to "come[. . .] within the jurisdiction of the Court"[2], that is the first condition. At the same time a counter-claim must be "directly connected with the subject-matter of the claim of the other party"[3]. The requirements for admissibility of a counter-claim under Article 80 of the Rules of Court are thus cumulative (Order, para. 20; see also *Certain Activities Carried Out by Nicaragua in the Border Area*

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conclusions based on the facts stated; these conclusions may include counter-claims, in so far as the latter come within the jurisdiction of the Court."

No change was made to this provision in the Revised Rules of Court, adopted by the PCIJ on 31 July 1926. It was in the Rules of Court adopted on 11 March 1936 that the provision on counter-claims was separated from the provision on written pleadings and revised. The 1936 Rules of Court contained a separate article on counter-claims, Article 63, which was included in Subsection II entitled "Occasional Rules" ("Règles particulières"), and formed part of Section I — Procedure before the Full Court, that Section being itself contained in Heading II — Contentious Procedure. Article 63 provided:

> "When proceedings have been instituted by means of an application, a counter-claim may be presented in the submissions of the Counter-Memorial, provided that such counter-claim is directly connected with the subject of the application and that it comes within the jurisdiction of the Court. Any claim which is not directly connected with the subject of the original application must be put forward by means of a separate application and may form the subject of distinct proceedings or be joined by the Court to the original proceedings."

When the International Court of Justice adopted, on 6 May 1946, its Rules of Court, a separate article on counter-claims remained as Article 63 in Subsection II (Occasional Rules). The first sentence remained in substance the same as that contained in the 1936 Rules of Court, applied by the PCIJ. The second sentence was, however, modified as follows:

> "In the event of doubt as to the connection between the question presented by way of counter-claim and the subject-matter of the application the Court shall, after due examination, direct whether or not the question thus presented shall be joined to the original proceedings."

No change was made to this provision on counter-claims in the 1972 Rules of Court, it just became Article 68, still in Subsection II (Occasional Rules).

[2] This requirement was already spelled out in the 1922 Rules of Court, adopted by the PCIJ.

[3] This requirement was for the first time expressly provided in Article 63 of the 1936 Rules of Court of the PCIJ which formulated it as "provided that such counter-claim is directly connected with the subject of the *application*" (emphasis added). No change to this formulation was made in 1946, except that the subject became subject-matter. The formulation remained the same in the 1972 version of the Rules. It was only in the 1978 Rules that the formulation was changed into "provided that it is directly connected with the subject-matter of the *claim* of the other party" (emphasis added).

(Costa Rica v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Counter-Claims, Order of 18 April 2013, I.C.J. Reports 2013*, p. 210, para. 27).

4. However, the Court is under no obligation to entertain a counter-claim even if the two requirements are satisfied. The verb "may" in the text of Article 80, paragraph 1, of the Rules of Court ("The Court may entertain a counter-claim") indicates that the Court enjoys a certain measure of discretion[4] to refuse to deal with a counter-claim. It is true that the Court has never refused to entertain a counter-claim if it satisfied the two requirements. But one cannot exclude that in an exceptional situation, when dealing with a counter-claim would not serve the sound (proper) and effective administration of justice, the Court may decline to entertain such a counter-claim, leaving it open to the respondent to file a new application instituting separate proceedings against the applicant in the original (first) case.

5. The Court has in the past stated that "a counter-claim has a dual character in relation to the claim of the other party" elaborating that it is

> "independent of the principal claim in so far as it constitutes a separate 'claim', that is to say an autonomous legal act the object of which is to submit a new claim to the Court, and . . . at the same time, it is linked to the principal claim, in so far as, formulated as a 'counter' claim, it reacts to it" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 256, para. 27).

6. Leaving aside the rather infelicitous expression "principal claim", since Article 80 of the Rules of Court does not use it and there is no justification for distinguishing between claims which are "principal" and those which apparently are not, what is important in the Court's dictum is the fact that a counter-claim is *independent* of the claim of the other party and that it constitutes a *separate* claim. The fact that it reacts to the claim of the other party, so that it can be perceived as "linked" to that claim, does not make it subordinate to the latter. For that matter, a

[4] Judge *ad hoc* Lauterpacht expressed the view that "the Court enjoys a significant measure of discretion" (*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. 284, para. 18, separate opinion of Judge *ad hoc* Lauterpacht). Vice-President Weeramantry in that same case stressed that "even if all these prior requisites are satisfied, joinder is not automatic . . . Whether that counter-claim *will* be *accepted* must still depend on the undoubted discretion of the Court as the master of its own procedure" (*ibid.*, p. 288, dissenting opinion of Vice-President Weeramantry, emphasis in the original).

counter-claim may survive even after the applicant has withdrawn its claim or claims. Under Article 89, paragraph 2, of the Rules of Court, the respondent may oppose the discontinuance of the proceedings.

7. The Court in the above-quoted Order observed that "a claim should normally be made before the Court *[doit normalement être portée devant le juge]* by means of an application instituting proceedings" (*I.C.J. Reports 1997*, p. 257, para. 30). It further explained why "it is permitted for certain types of claim to be set out . . . within the context of a case which is already in progress" *(ibid.)*. The purpose of allowing such a claim to be made "is merely in order to ensure better administration of justice, given the specific nature of the claims in question" and in relation to counter-claims "to achieve a procedural economy" *(ibid.)*. The French text of that Order, which is the authoritative text, describes the purpose of permitting counter-claims even more categorically — counter-claims are permitted "aux *seules fins* d'assurer une meilleure administration de la justice" (*ibid.*, emphasis added).

8. The Court, however, also warned that "the Respondent cannot use a counter-claim as a means of referring to an international court claims which exceed the limits of its jurisdiction as recognized by the parties" (*ibid.*, para. 31) and explained that "it is for that reason that paragraph 1 of Article 80 of the Rules of Court requires that the counter-claim 'comes within the jurisdiction of the Court'" *(ibid.)*.

9. The Court thus has to satisfy itself that the counter-claims come within its jurisdiction as recognized by the parties. The Court has done so in the present case but only in relation to the third and fourth counter-claims, having earlier concluded that the first and the second counter-claims lack a direct connection to the claims of Nicaragua.

10. The Court has reversed the order of consideration of the two requirements, provided for in Article 80, paragraph 1, of the Rules of Court. Although we accept that the Court, in examining these requirements, is not bound by the sequence in which they are set out in that Article (Order, para. 20, referring to the Court's pronouncement in *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa* Rica along the San *Juan River (Nicaragua* v. *Costa Rica), Counter-Claims, Order of 18 April 2013, I.C.J. Reports 2013*, p. 210, para. 27), we consider that the more usual and logical approach is to start with consideration of the jurisdictional requirements. One may otherwise wonder what was the purpose of a lengthy exercise by the Rules Committee in 1999, resulting in the Court adopting, in 2000, amendments to Article 80. As far as paragraph 1 is concerned, the changes consisted, in part, in switching the order of the two requirements, starting with the jurisdictional

requirement and substituting "only if" for the previous "provided that".

11. In this case, in our view, it would have been more appropriate to start with a consideration of whether the Court possesses jurisdiction to adjudicate Colombia's counter-claims. We think that all four counter-claims are legally in the same position as far as the Court's jurisdiction is concerned. From this point of view, there is no difference between them.

12. The majority has, however, only determined that the Court has jurisdiction in relation to the third and fourth counter-claims. Having found the first and second counter-claims inadmissible for the lack of direct connection with the claims of Nicaragua, but not taking a position on whether they fall within the Court's jurisdiction, it left open the question whether Colombia may successfully bring these two claims before the Court by way of a new application. In our view, Colombia cannot do so, due to its denunciation of the Pact of Bogotá which, in accordance with Article LVI of the Pact, took effect on 27 November 2013. Since that date, the Pact of Bogotá ceased to be in force with respect to Colombia. Colombia not having accepted the Court's jurisdiction by a declaration under Article 36, paragraph 2, of the Statute of the Court, and not being any longer a party to the Pact of Bogotá, it cannot invoke any jurisdictional title as a basis for the Court's jurisdiction.

13. The Court has, in an expedient way, avoided the issue of its jurisdiction in respect of the first and second counter-claims made by Colombia. Had it considered that question, applying the same approach to the issue of its jurisdiction with regard to the third and fourth counter-claims, its conclusion would apparently have been that it has jurisdiction also over the first and second counter-claims which, however, are inadmissible because of the lack of direct connection with Nicaragua's claims. Such a conclusion by the Court on the existence of its jurisdiction in respect of the first and second counter-claims might have been perceived as an invitation to resubmit them by way of an application under Article 38 of the Rules of Court. But, as previously mentioned, such an application would have no prospects of success in view of the lack of any title of jurisdiction which Colombia could invoke.

14. This shows that the majority's approach to jurisdiction over Colombia's third and fourth counter-claims "is not free from legal difficulties" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 14, para. 18).

15. Even if one takes the view that the Court's jurisdiction, established at the date an application is filed, extends to the dispute between the parties, the counter-claims of Colombia in this case do not concern the same

dispute as that brought before the Court by Nicaragua in its Application. In the event that a counter-claim brings a new dispute, or widens the dispute already before the Court, and if the applicant raises an objection, the Court will have to ascertain whether there is a jurisdictional basis for the counter-claim. The Court has already determined in this case that the dispute between the Parties concerns "the alleged violations by Colombia of Nicaragua's rights in the maritime zones which, according to Nicaragua, the Court declared in its 2012 Judgment appertain to Nicaragua" (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 34, para. 79). None of the four claims presented by Colombia as counter-claims can be considered to be an aspect or part of the dispute brought by Nicaragua. Colombia's claims either widen the dispute or bring new disputes and therefore the Court lacks jurisdiction. In its 2016 Judgment, after recalling that

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

the Court noted that "the above-mentioned subject-matter for negotiation is different from the subject-matter of the dispute between the Parties" (*ibid.*, p. 38, paras. 97-98). The first three counter-claims concern those same issues, and thus, according to the 2016 Judgment, fall outside the subject-matter of the dispute of which the Court is seised. The fourth counter-claim also concerns a different dispute. The dispute regarding whether Colombia has violated Nicaragua's sovereign rights in its maritime zones is distinct from any dispute regarding whether Nicaragua, by adopting a system of straight baselines from which the breadth of the territorial sea is measured, has acted contrary to customary international law.

16. There is no reason for asserting that the jurisdiction of the Court over the identical claims of a party should depend on whether they are presented as counter-claims or separately, by means of an application, as claims, this second way being the manner in which — in the Court's view — they "should normally be made" (*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).

17. In the present case, the Respondent uses a counter-claim "route" to bring before the Court claims which otherwise could not have been

successfully raised, since the Court would have had no jurisdiction to consider them on the merits subsequent to Colombia's termination of its acceptance of the Court's jurisdiction under the Pact of Bogotá with effect from 27 November 2013.

18. We do not find the majority's reliance on the Court's pronouncement in the *Nottebohm* case (Order, para. 67) appropriate. The Judgment in that case is inapposite to the issue of jurisdiction over counter-claims. That Judgment started a line of jurisprudence of the Court on the critical date for the establishment of its jurisdiction when proceedings are instituted by a unilateral application (see e.g. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 28, para. 36; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 445, para. 95; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 18, para. 33). The decisive issue, according to that jurisprudence, is the fact that the application "is filed at a time when the law in force between the parties entails the compulsory jurisdiction of the Court" (*Nottebohm (Liechtenstein* v. *Guatemala), Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 123).

19. The Court in the present Order (Order, para. 67) quotes the following passage from the Judgment in the *Nottebohm* case:

> "When an Application is filed at a time when the law in force between the parties entails the compulsory jurisdiction of the Court . . . the filing of the Application is merely the condition required to enable the clause of compulsory jurisdiction to produce its effects in respect of the claim advanced in the Application. Once this condition has been satisfied, the Court must deal with the claim; it has jurisdiction to deal with all its aspects, whether they relate to jurisdiction, to admissibility or to the merits. An extrinsic fact such as the subsequent lapse of the Declaration, by reason of the expiry of the period or by denunciation, cannot deprive the Court of the jurisdiction already established." *(Ibid.)*

However, in this passage, when the Court wrote that it must deal with the claim "[o]nce this condition has been satisfied", what is meant by "this condition" is not jurisdiction, as the majority implies when it reasons that "[o]nce the Court has established jurisdiction to entertain a case, it has jurisdiction to deal with all its phases" *(ibid.)*. What the Court referred to in 1953 by the expression "[o]nce this condition has been satisfied" was the fact that the Application was "filed at a time when the law in force between the parties entails the compulsory jurisdiction of the Court". In other words, the two declarations made under Article 36, paragraph 2, of the Statute were in force when the Application instituting proceedings

was submitted to the Court. It is in this context that the opinion of the Court that "[o]nce this condition has been satisfied . . . it has jurisdiction to deal with all its aspects [i.e. the claim's aspects], whether they relate to jurisdiction, to admissibility or to the merits" must be understood. It would be rather bizarre for the Court to deal with jurisdiction "once the Court has established jurisdiction to entertain a case" (Order, para. 67), as the majority seems to suggest.

20. The Court in the *Nottebohm* case did not have to deal with counter-claims and in fact said nothing that is of relevance for the interpretation of Article 80, paragraph 1, of the Rules of Court. Its dictum is clearly focused on the Application instituting proceedings and the claim contained therein. As the Court explained, "the filing of the *Application* is merely the condition required to enable the clause of compulsory jurisdiction to produce its effects in respect of *the claim advanced in the Application*" (*ibid.*, emphasis added). And the Court continued:

> "Once this condition has been satisfied [i.e. that an application was filed at a time when the law in force between the parties entailed the compulsory jurisdiction of the Court], the Court must deal with the *claim*; it has jurisdiction to deal with all *its* [i.e. the claim's] aspects, whether they relate to jurisdiction, to admissibility or to the merits." (*Ibid.*, emphasis added.)

No reference to counter-claims is made, nor can it be implied.

21. The majority — by failing to appreciate the context and circumstances in which the Court's dictum in the *Nottebohm* case was pronounced — takes the view that "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" *(ibid.)*. How can a claim, in the form of a counter-claim, be brought on a nonexistent jurisdictional basis, nonexistent due to the fact that it has lapsed? This position of the majority clearly contradicts the view of the Committee for the Revision of the Rules of Court, when it retained the condition that a counter-claim "comes within the jurisdiction of the Court". As has been noted, the Committee had explained that this "phrase meant that a counter-claimant could not introduce a matter which the Court *would not have had jurisdiction to deal with had it been the subject of an ordinary application to the Court*"[5].

[5] Separate opinion of Judge Higgins in *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Counter-Claim, Order of 10 March 1998, I.C.J. Reports 1998*, p. 219 (emphasis in the original).

22. The majority in support of its conclusion,

> "notes that the opposite approach would have the disadvantage of allowing the applicant, in some instances, to remove the basis of jurisdiction after an application has been filed and thus insulate itself from any counter-claims submitted in the same proceedings" (Order, para. 67).

Two remarks can be made. First, this is a purely speculative consideration. Never, in the more than 95-year history of adjudication before the World Court, has any *applicant* terminated or allowed to lapse a title of jurisdiction it relied on when instituting proceedings during their pendency. To the contrary, there are a number of examples when it was the *respondent* which terminated its acceptance of the Court's jurisdiction because an application was filed (or was to be filed against it), or in the aftermath of the Court's judgment. In some other instances, States which appeared before the Court as respondents subsequently restricted the scope of their acceptance of the Court's jurisdiction. Secondly, it would be a wrong move on the part of an applicant "to remove the basis of jurisdiction after an application has been filed and thus insulate itself from any counter-claims" *(ibid.)*, because such an action would cast serious doubts on whether the applicant is pursuing the litigation in good faith. As the Court has stated on several occasions, bad faith of States is not to be presumed (see e.g. *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 267, para. 150; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 437, para. 101). It is therefore rather unfortunate that the majority, in an effort to support its conclusion, has simply forgotten what the Court said in the past.

23. The jurisdiction of the Court is based on the consent of the parties (see e.g. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 456, para. 120); it "exists only because and in so far as the parties have so desired" (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Counter-Claims, Order of 29 November 2001, I.C.J. Reports 2001*, p. 684, declaration of Judge *ad hoc* Verhoeven). Colombia withdrew its consent to the Court's jurisdiction with effect as of 27 November 2013. Almost three years later, on 17 November 2016, it brought before the Court some claims against Nicaragua, by way of counter-claims. It could hardly have complained if the Court dismissed all of them for lack of jurisdiction.

* * *

We finally note that the Court's decision does not contribute to the good and efficient administration of justice. Filing of counter-claims has already resulted in a one year delay of these proceedings. It is highly likely that this case, brought before the Court in 2013, will be heard and adjudicated only some seven years later.

(*Signed*) Peter TOMKA.
(*Signed*) Giorgio GAJA.
(*Signed*) Julia SEBUTINDE.
(*Signed*) Kirill GEVORGIAN.
(*Signed*) Yves DAUDET.

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.

SEPARATE OPINION OF JUDGE GREENWOOD

1. I have voted against the decision that the fourth counter-claim submitted by Colombia is admissible and, while I have voted with the majority in respect of the third counter-claim, my reasoning differs in certain respects from that in the Order. In this opinion, I shall endeavour briefly to explain the reasons for those differences.

2. According to Article 80, paragraph 1, of the Rules of Court, "[t]he Court may entertain a counter-claim only if it comes within the jurisdiction of the Court and is directly connected with the subject-matter of the claim of the other party". The two requirements laid down in the paragraph are cumulative. They are also distinct. There is, however, an important relationship between them which is not fully reflected in the present Order.

3. With regard to the requirement that the counter-claim "comes within the jurisdiction of the Court", the first issue raised by the present case is whether, as Colombia asserts, it is sufficient that the Court had jurisdiction over the principal claim at the time the Application was filed and that the counter-claim comes within the scope of the relevant jurisdictional instrument, or whether, as maintained by Nicaragua, it has to be established that the Court would have jurisdiction at the date that the counter-claim was filed had that counter-claim been brought on that day as a principal claim in a fresh application.

4. The issue is important in the present case, because the Pact of Bogotá, on which Nicaragua bases the jurisdiction of the Court over its principal claim, ceased to be in force between Colombia and Nicaragua on 27 November 2013, one day after Nicaragua filed its Application and nearly three years before Colombia presented its counter-claims. In its Judgment on preliminary objections of 17 March 2016 (*I.C.J. Reports 2016 (I)*, p. 3), the Court held that it had jurisdiction with regard to most of Nicaragua's principal claims, although not its claim that Colombia had violated the obligation not to use, or threaten to use, force. Neither Party has suggested a basis of jurisdiction other than the Pact of Bogotá.

5. The text of Article 80, paragraph 1, gives no clear indication regarding the date at which jurisdiction in respect of a counter-claim must be established. Nor has the matter come before the Court on any previous occasion. In its Judgment on preliminary objections in *Nottebohm* in

1953, however, the Court made an important statement of principle regarding the effects of a lapse in the basis for jurisdiction after the filing of an application. According to the Court,

> "When an Application is filed at a time when the law in force between the parties entails the compulsory jurisdiction of the Court . . . the filing of the Application is merely the condition required to enable the clause of compulsory jurisdiction to produce its effects in respect of the claim advanced in the Application. Once this condition has been satisfied, the Court must deal with the claim; it has jurisdiction to deal with all its aspects, whether they relate to jurisdiction, to admissibility or to the merits. An extrinsic fact such as the subsequent lapse of the Declaration, by reason of the expiry of the period or by denunciation, cannot deprive the Court of the jurisdiction already established." (*Nottebohm (Liechtenstein* v. *Guatemala), Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 123.)

This statement was not about counter-claims (there were none in that case). The context was a Guatemalan argument that the Court lacked jurisdiction, because Guatemala's declaration accepting the jurisdiction of the Court had lapsed after the filing of the Application. Nevertheless, the basis on which the Court rejected Guatemala's argument is significant. As the Court explained, the filing of the Application, on a date when there is a basis for jurisdiction between the parties, is "the condition required to enable the clause of compulsory jurisdiction to produce its effects in respect of the claim advanced in the Application" and, once that condition is satisfied, the Court must deal with "all aspects" of the claim.

6. The question is what is meant by all the aspects of the claim. The Court in *Nottebohm* referred only to jurisdiction, admissibility and merits. Yet, as a matter of principle, the jurisdiction to deal with the claim itself must also embrace jurisdiction to deal with incidental proceedings, such as a request for provisional measures of protection (which may be made by either party). Like the majority of the Court, I consider that it also embraces jurisdiction to deal with a counter-claim. Although a counter-claim is an autonomous legal act, it is one which must have a direct connection with the subject-matter of the principal claim and is dealt with in Section D of the Rules of Court, entitled "incidental proceedings".

7. When a State exercises its right to file an application with the Court, it undertakes an action which, as the Court explained in *Nottebohm*, enables the jurisdictional instrument on which that State relies to produce its legal effects, and to continue to produce those legal effects irrespective of any subsequent lapse in, or change to, that jurisdictional basis. One of the effects which is produced is that the applicant is exposed to the possibility of a counter-claim by the respondent. In my opinion, that exposure continues whether or not the title of jurisdiction on which the applicant relied when it filed its application lapses or otherwise changes.

8. To hold otherwise, as Nicaragua has suggested, would change the very nature of a counter-claim. Instead of being an incidental step — autonomous but nevertheless possessing a direct connection with the principal claim — in the main proceedings, it would become a separate proceeding, linked to the principal claim only by a form of truncated joinder.

9. Moreover, the interpretation of Article 80 urged by Nicaragua risks producing considerable unfairness. Nicaragua filed its Application in the present case on the eve of the expiry of the Pact of Bogotá as a basis for jurisdiction between itself and Colombia. In Nicaragua's view, the fact that the Pact ceased to be in force between the two States on the following day does not affect the jurisdiction of the Court over all aspects of Nicaragua's claim but does operate to prevent any responsive counter-claim by Colombia. It is true that Colombia would have had only itself to blame for that situation; the Pact had ceased to have effect between Colombia and Nicaragua because Colombia had chosen to denounce it in November 2012 and that denunciation had taken effect on 27 November 2013. However, on Nicaragua's argument, the same consequences would have followed if it had been Nicaragua which had denounced the Pact but had nevertheless filed its Application on the last possible day. A reading of Article 80 of the Rules which would allow an applicant State that withdrew its acceptance of the jurisdiction of the Court immediately after filing an application to gain all the benefits of the *Nottebohm* principle with regard to its claims while avoiding the possibility of being subjected to a counter-claim permits a fundamental distortion of the principle of equality between the parties.

10. I am therefore in full agreement with the decision of the Court on the first jurisdictional issue. Where I differ is regarding the Court's treatment of the second jurisdictional issue in the case.

11. It is, of course, well established that a counter-claim must satisfy the various requirements, such as limitations *ratione temporis* and *ratione materiae*, in the relevant jurisdictional instrument. The Italian counter-claim in *Jurisdictional Immunities of the State (Germany* v. *Italy), Counter-Claim, Order of 6 July 2010, I.C.J. Reports 2010 (I)*, p. 310, was held inadmissible because it failed to satisfy the temporal requirements in the 1957 European Convention for the Peaceful Settlement of Disputes. In the present case, the Court has engaged (in paragraphs 69-76 of the Order) in a careful analysis of whether the third and fourth counter-claims concerned disputes of a juridical nature (as required by Article XXXI of the Pact) and whether each was a dispute which, in the opinion of the Parties, could not be settled by direct negotiations (as required by Article II of the Pact).

12. It is at this point, however, that the Court fails, in my opinion, properly to appreciate the relationship between the requirement of jurisdiction and the requirement that there be a direct connection between the counter-claim and the subject-matter of the principal claim. With regard to Colombia's third counter-claim, that direct connection seems to me to be of the closest possible kind. In effect, the subject-matter of the claim and the subject-matter of the counter-claim are one and the same. They arise out of the same dispute. Since the Court has already held, in its Judgment of 17 March 2016, that this dispute existed at the time the Application was filed (*I.C.J. Reports 2016 (I)*, pp. 31-34, paras. 67-79) and that it was one which the Parties did not contemplate settling by direct negotiations (*ibid.*, pp. 37-39, paras. 92-101), to examine these questions again in the present Order seems to me unnecessary and somewhat artificial. In reaching that conclusion, I am in no way suggesting that the Court can generally assume that if the requirements for jurisdiction laid down in the relevant jurisdictional instrument have been satisfied in respect of the principal claim, then they are met in respect of the counter-claim. That would plainly be wrong, as the analysis in *Jurisdictional Immunities* demonstrates. All I am saying is that, where the direct connection between the subject-matter of the claim and a counter-claim is as close as it is with the third counter-claim in this case, the analysis of the jurisdictional requirements in the context of the principal claim may make it unnecessary to engage in a separate analysis of the same requirements with regard to that counter-claim. Whether that is so will depend upon the specific requirements in the relevant jurisdictional instrument and the nature of the connection enjoyed by the counter-claim with the subject-matter of the principal claim.

13. Turning to the fourth counter-claim, I regret that I cannot agree with the Court's finding that this counter-claim is directly connected with the subject-matter of the principal claim (Order, para. 53). The Court finds such a direct connection in the fact that, while the principal claim concerns respect for Nicaragua's rights in the exclusive economic zone (EEZ), the counter-claim concerns the extent of that EEZ. It is true that a use of straight baselines which encloses a substantial amount of maritime space as internal waters may have the effect of pushing further out to sea the outer limit of the coastal State's EEZ, although Nicaragua denies that this is the case here (a matter on which it is both unnecessary and inappropriate to comment). However, the status of the area in which the incidents that lie at the heart of Nicaragua's claim and Colombia's third counter-claim are said to have taken place would not be affected by any decision regarding Nicaragua's baselines. I agree that there is a dispute between Colombia and Nicaragua regarding the latter's decree establishing a system of straight baselines, but that dispute is entirely separate and distinct from the dispute which has given rise to the princi-

pal claim and the third counter-claim and, in my opinion, the required connection between Colombia's fourth counter-claim and the subject-matter of the principal claim has simply not been made out. I have therefore voted against paragraph A (4) of the *dispositif*.

(*Signed*) Christopher GREENWOOD.

SEPARATE OPINION OF JUDGE DONOGHUE

Article 80, paragraph 1, of the Rules of Court — Jurisdiction over counter-claims — Termination of the title of jurisdiction taking effect after the filing of the Application but before the submission of counter-claims — Consequence of such termination on the scope of the Court's jurisdiction.

1. Article 80, paragraph 1, of the Rules of the Court provides: "The Court may entertain a counter-claim only if it comes within the jurisdiction of the Court and is directly connected with the subject-matter of the claim of the other party."

2. I consider 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. As I do not believe that the first and second counter-claims meet this requirement, I find them to be inadmissible and have voted in favour of operative paragraphs 82 (A) (1) and 82 (A) (2). The third counter-claims falls within the scope of the dispute that was the subject-matter of Nicaragua's Application and the conditions of jurisdiction contained in the Pact of Bogotá have been met. The Court has jurisdiction over that counter-claim, which is directly connected to the subject-matter of Nicaragua's claims against Colombia. I therefore have voted in favour of operative paragraph 82 (A) (3). The fourth counter-claim falls outside the scope of the dispute that is the subject-matter of Nicaragua's Application and thus is outside of the Court's jurisdiction. On that basis, I have voted against operative paragraph 82 (A) (4). I submit this separate opinion to set out the reasons for these conclusions.

3. Article LVI of the Pact of Bogotá provides that the Pact "may be denounced upon one year's notice". Colombia denounced the Pact on 27 November 2012. On 26 November 2013, Nicaragua filed the Application in the present case. One day later, the Pact of Bogotá ceased to be in force between the Parties. Thereafter, Colombia presented four counter-claims in its Counter-Memorial.

4. According to Colombia, because the Pact of Bogotá was in force between the Parties as of the date of Nicaragua's Application, the Court has jurisdiction over its counter-claims. Nicaragua, on the other hand, maintains that the "critical date" is the date on which the counter-claims were presented to the Court, which took place after termination of the Pact of Bogotá as between the Parties.

5. Thus, both Parties take an all-or-nothing approach to the question of the Court's jurisdiction over Colombia's counter-claims, focusing on the date to be used in determining the Court's jurisdiction. Neither Party convinces me.

6. By becoming parties to the Pact of Bogotá, both Colombia and Nicaragua consented broadly to the Court's jurisdiction. Their shared consent to the Court's jurisdiction came to an end, however, when Colombia's termination of the Pact of Bogotá took effect. After that date, neither State could file an application relying on the Pact as the title of jurisdiction. In particular, had Colombia made its claims against Nicaragua in an application filed after the termination of the Pact of Bogotá had taken effect, the Pact would not have provided a basis for the Court's jurisdiction. Nonetheless, according to Colombia, the Court should approach its jurisdiction over the counter-claims as if there had been no change in Colombia's consent to the Court's jurisdiction.

7. The approach urged by Nicaragua is also problematic. An applicant that terminates a title of jurisdiction immediately after filing an application could prevent the respondent from making any counter-claim in the case. If instead (as is the case here) it is the respondent that notifies its intention to terminate a title of jurisdiction, the applicant could cut off the ability of the respondent to file a counter-claim, however closely linked to the applicant's claims, by filing the application just before the termination of the title of jurisdiction takes effect.

8. Although the *Nottebohm* case did not involve a counter-claim, I find the reasoning that the Court followed there to be instructive in determining the scope of the Court's jurisdiction over Colombia's counter-claims.

9. In the *Nottebohm* case, the respondent argued that the Court lacked jurisdiction over the case because the respondent's optional clause declaration had lapsed after the application was filed. The Court rejected this argument, stating that

> "[w]hen an Application is filed at a time when the law in force between the parties entails the compulsory jurisdiction of the Court . . . the filing of the Application is merely the condition required to enable the clause of compulsory jurisdiction to produce its effects in respect of the claim advanced in the Application. Once this condition has been satisfied, the Court must deal with the claim; it has jurisdiction to deal with all its aspects, whether they relate to jurisdiction, to admissibility or to the merits. An extrinsic fact such as the subsequent lapse of the Declaration . . . cannot deprive the Court of the jurisdiction already established." (*Nottebohm (Liechtenstein* v.

Guatemala), Preliminary Objection, Judgment, I.C.J. Reports 1953, p. 123.)

10. Both in the *Nottebohm* case and in the present case, the Parties had given their consent to the Court's jurisdiction through a title of jurisdiction that was broad, *ratione materiae*, was in force as between the Parties on the date of the application and conferred jurisdiction upon the Court with respect to "disputes" between States. Here, as in the *Nottebohm* case, the subsequent lapse of the title of jurisdiction (the Pact of Bogotá) did not deprive the Court of the jurisdiction that was established by the filing of the application. But what is the scope, *ratione materiae*, of the jurisdiction that is established by a State's application?

11. Applying the Court's approach, when a State acts to terminate a title of jurisdiction, the Court nonetheless retains jurisdiction over any claim by that State that falls within the scope of that title of jurisdiction, *ratione materiae*, so long as the claim is presented in the form of a counter-claim in response to an application filed before the title of jurisdiction terminated. This conclusion ignores a central insight of the *Nottebohm* case — that it is the application that enables a title of jurisdiction to produce its effect, which cannot be vitiated by the subsequent lapse of the title of jurisdiction.

12. Nicaragua's Application did not have the effect of establishing in all respects the Court's jurisdiction under the Pact of Bogotá. It enabled the title of jurisdiction to produce its effect only with respect to the subject-matter of the dispute presented by the Application. After the termination of the Pact of Bogotá, the Court retained jurisdiction only to that extent. Thus, when Colombia submitted its counter-claims, the Court's jurisdiction *ratione materiae* was limited to claims fitting within the subject-matter of the dispute presented in Nicaragua's Application. Because of this jurisdictional limitation, the present case is unlike most cases, in which counter-claims directly connected to the applicant's claim may "widen the original subject-matter of the dispute" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 256, para. 27).

13. To determine whether the Court has jurisdiction over Colombia's counter-claims, it is necessary, first, to identify the subject-matter of the dispute presented in Nicaragua's Application over which the Court established its jurisdiction and then to consider whether each counter-claim fits within that subject-matter.

14. The subject-matter of a dispute is not identical to the claims that appear in the application. As the Court has repeatedly stated,

> "[i]t is for the Court itself . . . to determine on an objective basis the subject-matter of the dispute between the parties, that is, to 'isolate the real issue in the case and to identify the object of the claim' (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 262, para. 29; *Nuclear Tests (New Zealand* v. *France), Judgment,*

> *I.C.J. Reports 1974*, p. 466, para. 30). In doing so, the Court examines the positions of both parties, 'while giving particular attention to the formulation of the dispute chosen by the [a]pplicant' (*Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 448, para. 30; see also *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 848, para. 38)." (*Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015 (II)*, p. 602, para. 26.)

15. In identifying the subject-matter of the dispute presented by Nicaragua's Application and over which the Court established its jurisdiction, I consider the Application and the pleadings of the Parties. I also take account of the Court's Judgment of 17 March 2016.

16. Nicaragua's Application states that its dispute with Colombia "concerns the violations of Nicaragua's sovereign rights and maritime zones declared by the Court's Judgment of 19 November 2012 and the threat of the use of force by Colombia in order to implement these violations" (Application of Nicaragua, p. 4, para. 2). In 2016, however, the Court concluded that the dispute between the Parties did not extend to the alleged violations of the obligation not to use or threaten the use of force (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 33, para. 78).

17. Nicaragua appends to its Application and its Memorial various statements made by President Santos in the wake of the 2012 Judgment, whereby he "reject[ed]" the Court's delimitation (Application of Nicaragua, p. 28 (Annex 1)) and indicated that Colombia would not apply the Judgment until a treaty protecting the rights of Colombians is concluded (*ibid.*, p. 54 (Annex 9)). According to Nicaragua, Colombia has violated Nicaragua's rights in the maritime zones that appertain to Nicaragua pursuant to the 2012 Judgment by establishing an "Integral Contiguous Zone" which overlaps with Nicaragua's exclusive economic zone as delimited by the Court. Nicaragua also alleges incidents of enforcement and harassment by Colombia against vessels operating in Nicaragua's exclusive economic zone in the area around the Luna Verde Bank and complains of the issuance of "fishing licenses and marine research authorizations to Colombians and nationals of third States operating in" Nicaragua's exclusive economic zone (*ibid.*, pp. 12-20, paras. 10-15; Memorial of Nicaragua, pp. 26-51, paras. 2.11-2.52).

18. In its 2016 Judgment, the Court concluded that it had jurisdiction, pursuant to the Pact of Bogotá, to adjudicate the "dispute regarding the alleged violations by Colombia of Nicaragua's rights in the maritime

zones which, according to Nicaragua, the Court declared in its 2012 Judgment appertain to Nicaragua" (*I.C.J. Reports 2016 (I)*, p. 42, para. 111 (1) *(b)*; p. 43, para. 111 (2)). As the Court noted in 2016, after the 2012 Judgment, senior officials of the Parties spoke of a possible treaty or agreement. However, for Nicaragua, negotiations were to be "restricted to the modalities or mechanisms for the implementation" of the boundary established in the 2012 Judgment, whereas Colombia sought a treaty "*that establishes the boundaries*" (*ibid.*, p. 38, para. 98).

19. In speaking of a possible agreement, the two Presidents also addressed the particular question of fishing by Colombians in waters lying on Nicaragua's side of the boundary, but they did so in different terms. For example, in one of the statements that Nicaragua appends to its Application, President Santos is quoted as stating:

> "I have given peremptory and precise instructions to the Navy; the historical rights of our fishermen are going to be respected no matter what. No one has to request permission to anybody in order to fish where they have always fished." (Application of Nicaragua, p. 38 (Annex 6).)

Nicaragua also points to a statement in which President Santos is reported to have said that "his Government would 'not rule out any action' to defend Colombia's rights, especially those of the inhabitants on the island of San Andrés and surrounding archipelago" (Memorial of Nicaragua, p. 351 (Annex 25)).

20. These statements are to be compared with those attributed by Nicaragua to its President, who reportedly stated that Nicaragua is "not denying the right to fish to any sister nation, to any peoples" and that, within the framework of an agreement or treaty recognizing the delimitation of the Court,

> "Nicaragua will authorize [Colombian] fisheries in that area, where they have historically practiced fisheries, both artisanal and industrial fisheries, in that maritime area, in that maritime space, where even before the ruling by the Court, the permit was granted by Colombia and now, the permit is granted by Nicaragua" (*ibid.*, p. 360 (Annex 27)).

21. Thus, the statements on which Nicaragua has relied indicate that Colombia asserted that certain of its inhabitants maintained the "right" to fish without Nicaraguan authorization, whereas Nicaragua asserted the prerogative to "authorize" fisheries by Colombians, in maritime areas attributed to Nicaragua by the Court. As Nicaragua has stated in responding to Colombia's counter-claims, the dispute that it submitted in its Application "concerns Colombia's violations of Nicaragua's exclusive sovereign rights and jurisdiction as determined by the Court in 2012" (Written Observations of Nicaragua on the Admissibility of Colombia's Counter-Claims, p. 20, para. 2.33).

22. Taking into account the Application, the Parties' pleadings and the Court's 2016 Judgment, I therefore conclude that the subject-matter of the dispute is whether Nicaragua's rights in the maritime zones appertaining to it by virtue of the 2012 Judgment are exclusive to Nicaragua as a coastal State, as Nicaragua maintains, or are subject to limitations indicated by the actions and statements of Colombia.

23. I consider next whether Colombia's counter-claims fit within the subject-matter of the dispute.

24. *Colombia's first and second counter-claims.* Colombia bases its first two counter-claims on alleged conduct that it characterizes as "activities of predatory fishing by Nicaraguan vessels that . . . threaten the marine environment" (Counter-Memorial of Colombia, Vol. I, p. 247 para. 8.11). Most of the incidents on which these counter-claims are based allegedly took place in the maritime area around the Luna Verde Bank, an area which is part of both the Seaflower Biosphere Reserve and the Seaflower Marine Protected Area (*ibid.*, p. 251, para. 8.17). The first counter-claim alleges "Nicaragua's violation of its duty of due diligence to protect and preserve the marine environment of the Southwestern Caribbean Sea". Colombia's second counter-claim, which it describes as a "logical consequence of the first one" is that Nicaragua has violated "its 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" in the same maritime area around the Luna Verde Bank (*ibid.*, pp. 243-244, para. 8.2).

25. These two counter-claims do not appear to fall within the subject-matter of the dispute presented by Nicaragua's Application. In making these claims, Colombia does not counter Nicaragua's assertion that its rights in its exclusive economic zone are exclusive, nor does it invoke as a basis for these claims the series of incidents that, according to Nicaragua, violate those rights. Instead, it presents in its Counter-Memorial another set of alleged incidents that, according to Colombia, support its claim that Nicaragua has failed to meet certain duties that Nicaragua has in the area around the Luna Verde Bank.

26. *Colombia's third counter-claim.* In support of its third counter-claim, Colombia asserts that some residents of the San Andrés Archipelago engage in "artisanal" fishing in areas that are located within maritime areas allocated to Nicaragua by the Court, or are located within areas that appertain to Colombia, but that are reached by transiting areas appertaining to Nicaragua (*ibid.*, p. 75, para. 2.90; p. 300, para. 9.24). Colombia maintains that there exists a "local customary right" for these residents of the Archipelago to fish in maritime zones appertaining to Nicaragua "without having to request an authorization", and that Nicaragua has infringed these rights (*ibid.*, pp. 152-154, paras. 3.109 and 3.112).

27. As noted earlier, Nicaragua has supported its Application by invoking statements of Colombia's President asserting certain rights to fishing by Colombian nationals in waters appertaining to Nicaragua, whereas Nicaragua has maintained that it has the exclusive right to authorize activities in its exclusive economic zone. Colombia's third counter-claim, which claims that no Nicaraguan authorization is required for fishing by Colombians who are engaged in "artisanal" fishing, therefore fits within the dispute that is the subject-matter of Nicaragua's Application. The third counter-claim is within the jurisdiction, *ratione materiae*, that was established by the filing of Nicaragua's Application, notwithstanding the termination of the title of jurisdiction after the Application was filed.

28. The Parties have also addressed two conditions of the Court's jurisdiction — the existence of a dispute and the precondition contained in Article II of the Pact of Bogotá, requiring that the "controversy . . . in the opinion of the parties, cannot be settled by direct negotiations".

29. The above-cited statements of the Presidents of both States make clear the Parties' held opposing views on the question whether the inhabitants of the Colombian islands have a right to fish in maritime areas allocated to Nicaragua by the 2012 Judgment without Nicaraguan authorization, and that each Party was aware of the position of the other (see *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, pp. 32-33, para. 73; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016 (II)*, p. 850, para. 41).

30. With respect to the negotiation precondition, as the Court noted in the 2016 Judgment, there were indications that both Parties were willing to discuss the issue of fishing by the inhabitants of the Colombian islands (*I.C.J. Reports 2016 (I)*, p. 38, para. 97). However, the Parties' overall approaches to a possible agreement diverged. It appears that Colombia was seeking an agreement establishing maritime boundaries and protecting the historical rights of Colombian fishermen whereas Nicaragua was considering an agreement based on the maritime boundary already established by the Court and authorizing fishing activities by Colombian fishermen. Given that the overall dispute concerning the violation of the maritime zones as delimited by the Court could not be settled by negotiation (*ibid.*, pp. 38-39, paras. 100-101), it cannot be said that the Parties considered that there was a possibility of resolving through negotiation their differences regarding the particular question of fishing by Colombian nationals in waters appertaining to Nicaragua pursuant to the 2012 Judgment.

31. I therefore consider that the Court has jurisdiction over the third counter-claim. For the reasons set out in the Order, the third counter-

claim is "directly connected with the subject-matter" of Nicaragua's claims against Colombia. The third counter-claim is thus admissible.

32. *Colombia's fourth counter-claim.* Colombia's fourth counter-claim concerns

> "Nicaragua's straight baselines decree which extended its internal waters, territorial sea, contiguous zone, EEZ and continental shelf, in violation of international law and of Colombia's sovereign rights and jurisdiction" (Written Observations of Colombia on the Admissibility of its Counter-claims, p. 77, para. 3.62).

The exclusive rights of a coastal State that Nicaragua invokes in its Application, which Colombia allegedly violated, are neither predicated on nor affected by Nicaragua's assertion of straight baselines. Regardless of whether Nicaragua's straight baselines are applied, both the area around the Luna Verde Bank (where the incidents cited by Nicaragua allegedly occurred) and Colombia's "Integral Contiguous Zone" overlap with Nicaragua's exclusive economic zone. These areas are simply too far from Nicaragua's land territory to fall within its territorial sea, even using Nicaragua's straight baselines. It therefore appears that the fourth counter-claim does not fit within the subject-matter of the dispute presented in Nicaragua's Application. For this reason, the Court lacks jurisdiction over the fourth counter-claim. (I do not express any view here about Nicaragua's statement that its 200-nautical-mile limit would be the same whether measured from its asserted straight baselines or from normal baselines (Written Observations of Nicaragua on the Admissibility of Colombia's Counter-Claims, p. 46, para. 3.49), as the accuracy of this statement and the legality of Nicaragua's straight baselines are not matters to be decided today.)

(Signed) Joan DONOGHUE.

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
>
> . . . . . .
>
> 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.
>
> 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.
>
> 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.