INTERNATIONAL COURT OF JUSTICE

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

(NICARAGUA V. COLOMBIA)

WRITTEN OBSERVATIONS OF NICARAGUA ON THE ADMISSIBILITY OF COLOMBIA'S COUNTER-CLAIMS

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PART III

INTRODUCTION

1.1. Pursuant to the Court's decision communicated in its 17 January 2017 letter to the Parties, Nicaragua respectfully submits these Observations showing that Colombia's counter-claims are inadmissible.[1]

1.2. Colombia's counter-claims are set out at pages 233–349 of its Counter-Memorial. Colombia identifies four counter-claims. In summary, they concern:

(1) "Nicaragua's violation of its duty of due diligence to protect and preserve the marine environment of the Southwestern Caribbean Sea";[2]

(2) "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";[3]

[1] Nicaragua notes that it uses the term "admissibility" here in its broad sense. As Colombia itself observed in presenting its counter-claims: "'[A]dmissibility in this context must be understood broadly to encompass both the jurisdictional requirement and the direct-connection requirement…'." Counter-Memorial of the Republic of Colombia ("CMC"), para. 7.7 (quoting *Jurisdictional Immunities of the State (Germany v. Italy), Counter-Claims, Order of 6 July 2010, I.C.J. Reports 2010*, pp. 315-16, para. 14).
[2] *Ibid*., para 8.2.
[3] *Ibid*.

(3) "Nicaragua's infringements of the artisanal fishing right to access and exploit the traditional banks";[4] and

(4) "Nicaragua's straight baselines decree, which is contrary to international law, violates Colombia's sovereign rights and maritime spaces."[5]

1.3. Article 80, paragraph 1, of the Rules of 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".

1.4. The Rule is clear that "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.'"[6] These two requirements are,

[4] *Ibid*., ch. 9.
[5] *Ibid*., ch. 10.
[6] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Counter-Claims, Order of 18 April 2013, I.C.J. Reports 2013*, p. 208, para. 20.

moreover, "cumulative; each requirement must be satisfied for a counter-claim to be found admissible."[7]

1.5. Colombia's counter-claims do not meet either requirement.

1.6. They do not "come within the jurisdiction of the Court" for three different reasons:

- The Court's jurisprudence makes clear that a counter-claim constitutes an autonomous legal act the object of which is to submit a new claim to the Court. The critical date for determining jurisdiction over a counter-claim must therefore be the date on which it is presented to the Court. Yet here, the nominal title of jurisdiction, the Pact of Bogotá, ceased to be in force between the Parties nearly three years before Colombia submitted its counter-claims;

- Colombia has not established the existence of a dispute with Nicaragua with respect to its first, second and third counter-claims; and

[7] *Ibid*., p. 210, para. 27. Even if the counter-claim meets these two requirements, the use of "may entertain" rather than "shall entertain" in Article 80(1) of the Rules of Court makes clear that acceptance of the counter-claim as a part of the case is wholly within the *discretion* of the Court; it still remains open for the Court to decline to address the counter-claim within the proceedings.

- Colombia has not shown that any of the matters it submits could not, in the opinion of the Parties, be settled by negotiations, as Article II of the Pact of Bogotá requires. Indeed, the evidence is to the contrary.

1.7. None of Colombia's four counter-claims is "directly connected" in fact or law with the subject matter of Nicaragua's main claim because:

- The facts on which Nicaragua relies concern Colombia's illegal exercise of sovereign rights and jurisdiction in areas adjudged to appertain to Nicaragua;
- Nicaragua bases its legal claim on the Court's 2012 Judgment and the rules of customary international law recognizing the exclusive sovereign rights and jurisdiction of a coastal State within its maritime areas, as reflected in Parts V and VI of the 1982 U.N. Convention on the Law of the Sea ("UNCLOS");
- Colombia's **first two counter-claims** relate to Nicaragua's purported violations of its obligation to protect and preserve the marine environment;

- The alleged acts on which Colombia purports to rely, which concern Nicaragua's nominal failure to fulfill its duty of due diligence within its own maritime areas, are of a different nature from Nicaragua's claims;
- By seeking to establish Nicaragua's international responsibility under the rules of customary international law related to the preservation and protection of the environment, as reflected in Part XII of UNCLOS, as well as various provisions of the CITES Convention, the Cartagena Convention, and the FAO Code of Conduct on Sustainable Fishing, Colombia is pursuing a different legal aim from that of Nicaragua;

- Colombia's **third counter-claim** concerns Nicaragua's ostensible refusal to respect the traditional fishing rights of Colombian residents of the San Andrés archipelago.
  - The facts on which Colombia relies concern individual harms allegedly suffered by Colombian fishermen as a result of Nicaragua's enforcement of its sovereign rights and jurisdiction within its own maritime areas, and are therefore of a fundamentally different nature from the facts on which Nicaragua relies;

- By acting as *parens patriae* to vindicate the alleged non-exclusive traditional fishing rights of its citizens in areas that appertain to Nicaragua, Colombia is pursuing a different legal aim from that pursued by Nicaragua;

- Colombia's **fourth counter-claim** alleges that Nicaragua's 2013 straight baselines violate international law;
  - The facts relied upon by Colombia, which concern solely the *extent* of Nicaragua's *territorial sea* are of a different nature from those relied upon by Nicaragua, which concern Colombia's challenge to the *existence* of Nicaragua's rights in areas of *EEZ*[8] already adjudged to appertain to it; and
  - The Parties are also pursuing different legal aims because Colombia's claims are based on the rules of customary international law on straight baselines rules, which are wholly irrelevant to Nicaragua's main claim.

1.8. For each of these reasons, and for all of them, Colombia's counter-claims are inadmissible.

[8] Nicaragua's 200 nautical mile ("nm") limit is the same whether measured from normal baselines or its declared straight baselines. *See infra*, para. 3.49 and Figure 1.

PART I

COLOMBIA'S COUNTER-CLAIMS DO NOT COME WITHIN THE JURISDICTION OF THE COURT

A. THE PACT OF BOGOTÁ CEASED TO BE IN FORCE BETWEEN THE PARTIES THREE YEARS BEFORE COLOMBIA SUBMITTED ITS COUNTER-CLAIMS

2.1. The first requirement for a counter-claim to be admissible under Article 80, paragraph 1, is that it "comes within the jurisdiction of the Court".

2.2. Colombia argues this requirement is met because the Pact of Bogotá "was still in force, and expressed the consent of the Parties to jurisdiction of the Court, on 26 November 2013, the date when Nicaragua lodged its Application instituting the present proceedings."[9] Colombia is mistaken: the critical date for determining jurisdiction over its counter-claims is the date on which those claims were submitted, not the date of Nicaragua's Application. And because the Pact of Bogotá ceased to be in force between the Parties nearly three years before Colombia submitted its counter-claims, they do not come with the jurisdiction of the Court.

[9] CMC, para. 7.14.

2.3. In the versions of the Article prior to the 2001 amendment, the jurisdictional requirement was placed after the direct connection requirement. In the current formulation, the order is reversed.

2.4. The reversal emphasizes the significance of the jurisdictional requirement. A former Registrar of the Court observed that the new article 80 inverses the order of the conditions and puts the jurisdictional requirement first in order to stress the importance of the jurisdictional requirement.[10]

2.5. The reason that Article 80, paragraph 1, of the Rules requires a counter-claim to come "within the jurisdiction of the Court" stems from the consensual nature of the Court's power; the Court "cannot decide a dispute between States without the consent of those States to its

[10] Torres Bernardez Santiago, "La modification des articles du règlement de la Cour internationale de Justice relatifs aux exceptions préliminaires et aux demandes reconventionnelles", 49 Annuaire français de droit international (2003), p. 242, para. 132: ("La seule modification à cet égard du texte du paragraphe 1er de l'article 80 concerne l'ordre dans lequel les conditions sont énoncées dans la disposition. Dans la version de 1978, la condition de la connexité directe précédait celle de la compétence de la Cour. L'ordre inverse des conditions ne modifie en rien le sens ou la portée de la règle car les deux conditions sont toujours, comme on vient de le dire, cumulatives, *mais elle montre tout de même une sensibilité accrue pour les questions de compétence que peuvent poser les demandes présentées par voie reconventionnelle*. D'autre part, l'inversion est logique du moment où la règle est formulée en termes de ce que la Cour ne peut pas faire et non plus, comme en 1978, en fonction des demandes que les parties peuvent présenter comme demandes reconventionnelles. *Il est évident que si la Cour constate que la demande reconventionnelle ne relève pas de sa compétence dans l'affaire, on n'aura pas besoin d'examiner si la deuxième condition est remplie pour conclure à l'irrecevabilité de la demande en tant que demande reconventionnelle*.)" (emphasis added).

jurisdiction".[11] As the Court put it in the *Genocide* case: "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."[12]

2.6. The jurisdictional requirement also stems from the nature of a counter-claim. 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."[13]

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[11] *East Timor (Portugal v. Australia)*, *Judgment, I.C.J. Reports 1995*, p. 101, para. 26. *See* also e.g., *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, *Application for Permission to Intervene, Judgment, I.C.J. Reports 1984*, p. 25, para. 40; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility*, *Judgment, I.C.J. Reports 1984*, p. 431, para. 88; *Frontier Dispute (Burkina Faso/Republic of Mali)*, *Judgment, I. C. J. Reports 1986*, p. 579, para. 49; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Judgment, I. C. J. Reports 1990*, pp. 114-116, paras. 54-56, and p. 122, para. 73; *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I. C. J. Reports 1992,* pp. 259-262, paras. 50-55; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, pp. 18-19, para. 21 and p. 39, para. 88; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment, I.C.J. Reports 2008*, p. 200, para. 48.

[12] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997,* p. 257, para. 31; *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Counter-Claim, Order of 10 March 1998, I.C.J. Reports 1998*, pp. 203-204*,* para. 33; *Jurisdictional Immunities of the State (Germany v. Italy), Counter-Claims, Order of July 6, 2010, I.C.J. Reports 2010*, p. 316*,* para.15.

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

2.7. The mere fact that the Court has jurisdiction over the Applicant's principal claim is therefore not, by itself, sufficient to establish jurisdiction over the counter-claim. Judge Higgins explained in her separate opinion in the *Oil Platforms* case that what matters in a counter-claim is "the jurisdiction mutually recognized by the parties under the Treaty—*not* the jurisdiction established by the Court in respect of the [principal claim]."[14] Indeed, if the existence of jurisdiction over the principal claim meant *ipso facto* that there was also jurisdiction over the counter-claim, the jurisdictional requirement in Article 80, paragraph 1, would be rendered meaningless.

2.8. Whether a counter-claim "comes within the jurisdiction of the Court" must be established by reference to normal jurisdictional principles. The Committee for the Revision of the Rules made this absolutely clear. In addressing the requirement that a counter-claim comes within the jurisdiction of the Court, the Committee expressed the view 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.*"[15]

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[14] Separate opinion of Judge Higgins, *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Counter-Claim, Order of 10 March 1998, I.C.J. Reports 1998*, p. 220 (emphasis in original).
[15] *Ibid.,* p. 219 (emphasis in original).

2.9. Here, it is clear that the Court would not have jurisdiction over Colombia's counter-claims had they been the subject of an ordinary application. The title of jurisdiction on which Colombia relies, the Pact of Bogotá, ceased to be in force as between the Parties on 27 November 2013. Colombia's counter-claims were not presented until 17 November 2016, *nearly three years later*. They therefore "exceed the limits of its jurisdiction as recognized by the parties"[16] and must be rejected.

2.10. The Court's case law is clear that whether a counter-claim comes within the Court's jurisdiction must be determined by reference to any limitations inhering in the title of jurisdiction. In *Jurisdictional Immunities of the State (Germany v. Italy),* Italy attempted to bring a counter-claim under the 1957 European Convention for the Peaceful Settlement of Disputes (the "European Convention"), the same instrument that conferred jurisdiction over Germany's principal claims. Article 27(a) of the European Convention, however, excludes from jurisdiction "disputes relating to facts or situations prior to the entry into force of the

[16] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997,* p. 257, para. 31; *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Counter-Claim, Order of 10 March 1998, I.C.J. Reports 1998*, pp. 203-204, para. 33; *Jurisdictional Immunities of the State (Germany v. Italy), Counter-Claims, Order of 6 July 2010, I.C.J. Reports 2010*, p. 316, para.15.

Convention …".[17] The question before the Court was whether Italy's counter-claim concerned a dispute whose source, or real cause, was to be found in facts and situations arising prior to the European Convention's entry into force as between Germany and Italy in April 1961.

2.11. In its Order on counter-claims, the Court found that the dispute that Italy tried to bring before the Court did in fact relate "to facts and situations existing prior to the entry into force of the European Convention as between the Parties", and therefore fell "outside the temporal scope of this Convention."[18] The Court was therefore without jurisdiction over Italy's counter-claims.

2.12. The Court's rejection of Italy's counter-claim shows that jurisdiction over counter-claims must be assessed independently of jurisdiction over the principal claims, based on the requirements of, and limitations in, the title of jurisdiction.

2.13. Similarly, in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Serbia brought a counter-claim alleging that Croatia violated its obligations under the Genocide Convention by taking action,

[17] European Convention for the Peaceful Settlement of Disputes, Article 27 (a), United Nations *Treaty Series*, Vol. 320, p. 256; *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012,* p. 118, para. 42.
[18] *Jurisdictional Immunities of the State (Germany v. Italy), Counter-Claims, Order of 6 July 2010, I.C.J. Reports 2010*, pp. 320-321, para. 30.

and failing to punish actions taken, against the Serb population in the Krajina region of Croatia. The counter-claim related exclusively to the fighting which took place in 1995 in the course of what was described by Croatia as Operation "Storm" and its aftermath.[19]

2.14. Examining its jurisdiction over Serbia's counter-claim, the Court observed: "By the time that Operation 'Storm' took place, both Croatia and the FRY had been parties to the Genocide Convention for several years. Croatia does not contest that the counter-claim thus falls within the jurisdiction of the Court under Article IX of the Genocide Convention."[20] *A contrario*, had the Convention not been in force between the parties at the relevant time, Serbia's counter-claims would not have come within the Court's jurisdiction.

2.15. The conclusion is therefore unavoidable: jurisdiction over a counter-claim must be assessed by reference to the date on which it was filed, *not* the date of the Application.

2.16. Colombia's Counter-memorial does not address any of this authority in arguing that its counter-claims come within the jurisdiction of the Court. In fact, it cites no authority at all. As stated, it simply contends,

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[19] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* Judgment of 3 February 2015, paras. 51, 443-444.
[20] *Ibid.,* para. 121.

without elaboration, that the Pact of Bogotá "was still in force, and expressed the consent of the Parties to jurisdiction of the Court, on 26 November 2013, the date when Nicaragua lodged its Application instituting the present proceedings. Thus, jurisdiction [over its counter-clams] is established both *ratione personae* and *ratione temporis*."[21]

2.17. The only would-be justification Colombia offers for this approach is found in the assertion that "the Court's jurisdiction over incidental proceedings must be assessed at the time of the filing of the main proceedings."[22]

2.18. Colombia is mistaken on all fronts.

2.19. There is no support for Colombia's assertion that the critical date for determining jurisdiction over a counter-claim is the date of the filing of an Application instituting proceedings on the main claim and, as stated, Colombia offers none.

2.20. Colombia's approach is incompatible with the Court's consistent jurisprudence, which treats a counter-claim as "*independent* of the principal claim in so far as it constitutes a *separate* 'claim', that is to

[21] CMC, para. 7.14 (emphasis in original).
[22] *Ibid*., para. 7.15.

say an *autonomous legal act* the *object of which is to submit a new claim* to the Court."[23]

2.21. Colombia's invitation to treat a counter-claim not as an independent legal act, but rather a dependent one, the date of which should relate back to the date of the Application would turn this jurisprudence on its head. It would also stand in direct opposition to the observation of the Committee for the Revision of the Rules that jurisdiction over a counter-claim must be assessed as if it has "been the subject of an ordinary application to the Court."[24]

2.22. Colombia itself notably concedes that if a matter were introduced as a "separate claim" after the treaty conferring jurisdiction ceases to be in force, it would not come within the Court's jurisdiction. Specifically, in connection with making its (erroneous) argument that the Court does not have jurisdiction to consider Colombia's violations of Nicaragua's rights committed after the Pact of Bogotá ceased to be in force between the Parties, Colombia argues:

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

[24] Separate opinion of Judge Higgins, *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.

> "The situation is different when it comes to post-critical date events. Pursuant to Colombia's denunciation of the Pact of Bogota on 27 November 2012, the Pact, including its dispute resolution provisions, ceased to be in force for Colombia as of 27 November 2013, the day after Nicaragua's Application was filed. Given that Colombia's consent to the Court's jurisdiction lapsed as of that day, the Court has no jurisdiction *ratione temporis* to consider any alleged violations that occurred afterwards. Stated another way, any facts on which Nicaragua relies in support of its claim that post-date 26 November 2013 are not apposite or subject to judicial review. *Had those facts been adduced in connection with a* ***separate claim or a new case*** *introduced by Nicaragua against Colombia after 26 November 2013, there clearly would have been no jurisdiction.*"[25]

2.23. This is a critical admission. The Court has repeatedly emphasized that the purpose of a counter-claim is precisely to submit a "separate claim" and a "new claim"[26] of just the sort over which Colombia says the Court "would have … no jurisdiction".[27] Colombia's own reasoning therefore dictates that its counter-claims be rejected.

2.24. Colombia's attempt to analogize counter-claims to other "incidental proceedings" is equally unpersuasive. The purpose of other

[25] CMC, para. 4.21 (emphasis added).
[26] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997,* p. 256, para. 27; *Jurisdictional Immunities of the State (Germany v. Italy), Counter-Claims, Order of 6 July 2010, I.C.J. Reports 2010*, p. 315*,* para. 13; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua); Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Counter-Claims, Order of 18 April 2013, I.C.J. Reports 2013*, pp. 207-208, para. 19.
[27] CMC, para. 4.21.

incidental proceedings such as interim protection and preliminary objections is not to submit a "new claim". Rather, such proceedings all effectively constitute subsidiary procedures bearing on the main claim. They are therefore appropriately subject to the *forum perpetuum* principle.

2.25. To consider counter-claims subject to the *forum perpetuum* principle merely because the provisions governing them happen to be included in Section D of the Rules of Court would elevate form over substance to an absurd degree. Counter-claims are of a fundamentally different character from other "incidental proceedings", and the rules applicable to incidental proceedings cannot properly be extended to counter-claims based simply on the assertion that they are "analogous".

2.26. The history of the Court's Rules confirms the point. In the 1922 Rules of Court adopted by the Permanent Court of International Justice, the provision on counter-claims (then Article 40) was included in the section on "Written Proceedings."[28] In the 1936 revision of the Rules, Article 40 became Article 63 and was placed in the section captioned "Occasional Rules" ("Règles particulières").[29] The same was true in the

[28] Permanent Court of International Justice, *Rules of the Court (adopted 24 March 1922),* Publications of the Permanent Court of International Justice (1922-1946), Series D, No. 1, 1926, p. 21.

[29] Permanent Court of International Justice, *Elaboration of the Rules of Court of March 11th, 1936*, Publications of the Permanent Court of International Justice (1922-1946), Series D, fourth addendum to Nº.2, 1943, p. 261; Permanent Court of International

1946 and 1972 revisions of the Rules of this Court. Only in 1978 was the name of the category changed from "Occasional Rules" to "Incidental Proceedings".[30]

2.27. This history shows that the category "Incidental Proceedings" was intended as a "catch-all" for proceedings other than the main proceedings on the principal claim, rather than a group defined by formal juridical characteristics. Colombia therefore has it wrong when it argues that the jurisdictional principles applicable to other incidental proceedings apply equally to counter-claims. The Court's jurisprudence discussed above is clear: the jurisdictional considerations applicable to counter-claims are different.

2.28. Because Colombia's counter-claims were submitted nearly three years after the Pact of Bogotá ceased to be in force between the Parties, they do not come within the jurisdiction of the Court and must be dismissed.

Justice*, Statute and Rules of Court*, Publications of the Permanent Court of International Justice (1922-1946)*,* Series D. Nº.1, fourth Edition - April 1940, pp. 52-53.

[30] International Court of Justice*, Rules of Court (Adopted on 14 April 1978 and entered into force on 1 July 1978)*, Section D (Incidental Proceedings), available at: http://www.icj-cij.org/documents/index.php?p1=4&p2=3&p3=0.

2.29. The text of the Pact of Bogotá itself further confirms this conclusion and shows that the Court lacks jurisdiction over Colombia's counter-claims.

2.30. Article XXXI of the Pact states:

> "[T]he High Contracting Parties declare that they recognize, in relation to any other American State, the jurisdiction of the Court as compulsory *ipso facto*, without the necessity of any special agreement so long as the present Treaty is in force, in all disputes of a juridical nature that arise among them …"

2.31. Stripped to its essence, Article XXXI provides that States "recognize … the jurisdictional of the Court … *so long as the present Treaty is in force*, in all disputes of a juridical nature ….". By its plain terms, this means that States no longer recognize the jurisdiction of the Court in respect of disputes that are submitted *after* the Pact ceases to be in force between them. Such disputes "exceed the limits of [the Court's] jurisdiction as recognized by the parties."[31]

2.32. This is significant because the disputes Colombia attempts to bring before the Court are plainly different from the dispute Nicaragua submitted in its Application. They are, in other words, new disputes in

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

respect of which the Parties no longer recognize the jurisdiction of the Court.

2.33. Whereas the dispute Nicaragua submitted concerns Colombia's violations of Nicaragua's exclusive sovereign rights and jurisdiction as determined by the Court in 2012, the disputes that Colombia has submitted concern Nicaragua's alleged violations of: (1) its obligation to protect and preserve the marine environment (first and second counter-claims); (2) the traditional fishing rights of the Raizales (third counter-claim); and (3) customary international law governing straight baselines (fourth counter-claim).

2.34. The Court itself has already expressly found these issues to be different from the dispute reflected in Nicaragua's Application. The Court will recall that Colombia initially resisted the Court's jurisdiction on multiple grounds. In its third preliminary objection, Colombia argued that because the Parties had expressed openness to dialogue in the wake of the Court's 2012 Judgment, they were not of the opinion that the dispute on Nicaragua's main claim could not be settled by negotiation, as Article II of the Pact of Bogotá requires.[32]

[32] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections*, Judgment of 17 March 2016, paras. 80-83.

2.35. The Court rejected this argument in its 17 March 2016 Judgment denying Colombia's preliminary objections in their entirety. It observed:

> "The 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 notes, however, that the above-mentioned subject-matter for negotiation is different from the subject-matter of the dispute between the Parties."[33]

2.36. The text of Article XXXI of the Pact of Bogotá is clear: because (1) the alleged disputes Colombia submits are different from the dispute Nicaragua has presented, and because (2) the Pact of Bogotá long since ceased to be in force between them, the Parties do not recognize the jurisdiction of the Court in respect of Colombia's counter-claims.

B. COLOMBIA HAS NOT ESTABLISHED THE EXISTENCE OF DISPUTES WITH NICARAGUA ON THE SUBJECT MATTER OF ITS COUNTER-CLAIMS

2.37. Colombia's first, second and third counter-claims do not come within the Court's jurisdiction for another reason: Colombia has

[33] *Ibid*., paras. 97-98.

failed to establish the existence of a dispute with respect to the subject matter of those claims.[34]

2.38. The Court's function under Article 38 of its Statute is to decide disputes in accordance with international law. Article XXXI of the Pact of Bogotá provides that the States parties accept the compulsory jurisdiction of the Court for "all disputes of a juridical nature that arise among them". The existence of a dispute between the Parties is therefore a condition of the Court's jurisdiction.[35]

2.39. It is well-established that a "dispute" is "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons".[36] It is equally well-established that "[w]hether there exists an international dispute is a matter for objective determination" by the Court.[37] This determination "must turn on an examination of the facts. The

[34] Colombia's fourth counter-claim concerning Nicaragua's straight baseline decree is different. Colombia protested Nicaragua's decree by diplomatic note submitted to the General Secretary of the United Nations on 1 November 2013. "Diplomatic Note No. S-GACIJ-13-044275 from the Minister of Foreign Affairs of Colombia to the Secretary-General of the United Nations Organization", (CMC, Annex 25). There is therefore a "dispute" on this issue.

[35] *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, pp. 270-271, para. 55 ("The existence of a dispute is the primary condition for the Court to exercise its judicial function.").

[36] *Mavrommatis Palestine Concessions* (*Greece v. United Kingdom), Judgment (Merits*), 30 August 1924, 1924 PCIJ (ser. A), No. 2, p. 11; *see* also *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 84, para. 30.

[37] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, p. 442, para. 46; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v.*

matter is one of substance, not of form."[38]

2.40. The facts must show "that the claim of one party is positively opposed by the other."[39] What matters is that "the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain" international obligations.[40] Although the existence of a dispute can sometimes be inferred, it must nevertheless be shown "on the basis of the evidence, that the respondent was aware, or could not have been unaware, that its views were 'positively opposed' by the applicant".[41]

2.41. In the section of its Counter-Memorial presenting its counter-claims, Colombia elides the "dispute" requirement. Still less does it adduce any evidence demonstrating that a dispute exists. There is

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Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011, p. 84, para. 30; *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, pp. 270-271, para. 55; *Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974,* p. 476, para. 58).

[38] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 84, para. 30.

[39] *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment of 21 December 1962, I.C.J. Reports 1962*, p. 328.

[40] *Interpretation of Peace Treaties, Advisory Opinion (First Phase), I.C.J. Reports 1950*, p. 74.

[41] *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Island v. United Kingdom), Preliminary Objections*, *Judgment of 5 October 2016*, para. 41 (citing *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections*, *Judgment of 17 March 2016*, para. 73; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011,* p. 99, para. 6, pp. 109-110, para. 87, and p. 117, para. 104.

nothing in the record whether by way of diplomatic note, public statements from high-ranking officials or anything else—that shows that Colombia counter-claims are positively opposed by Nicaragua.

2.42. There is therefore no basis on which the Court can even infer the existence of a dispute and therefore no basis on which it can exercise jurisdiction over Colombia's counter-claims. They must be rejected for this reason as well.

C. THERE IS NO EVIDENCE THAT THE MATTERS COLOMBIA PRESENTS COULD NOT, IN THE OPINION OF THE PARTIES, BE SETTLED BY NEGOTIATIONS

2.43. Even if the Court were to find that the Pact of Bogotá offers a basis for jurisdiction and even if the Court were to find that a dispute exists, there is yet one more reason that Colombia's counter-claims do not come within the jurisdiction of the Court: Colombia has not met—and cannot meet—the jurisdictional precondition stated in the Pact of Bogotá.

2.44. Article II of the Pact obliges States parties to have recourse to the dispute settlement mechanisms provided in the Pact in the event the dispute "in the opinion of the parties, cannot be settled by direct negotiations through the usual diplomatic channels". The Court has repeatedly held that this Article creates a precondition to the exercise of its

jurisdiction.[42] Indeed, as stated, Colombia itself initially attempted to avoid the Court's jurisdiction in this case based in part on this very provision.[43]

2.45. It makes no difference that Colombia has presented its claims in the form of counter-claims. For the reasons explained in Part I(A), jurisdiction over counter-claims must be assessed by reference to normal jurisdictional principles as if they had been submitted by way of an ordinary application. Preconditions stated in the title of jurisdiction must still be satisfied. *Germany v. Italy* is decisive on this point: the Court's application of the precondition in the European Convention that was the basis of its jurisdiction in that case is a clear application of this principle.[44]

2.46. Like the "dispute" issue addressed in the previous section, the Article II precondition is another matter on which Colombia maintains a studied silence. It makes no argument concerning the opinion of the Parties regarding the alleged "disputes" it presents. Still less does it provide evidence that the Parties, whether individually or collectively,

[42] *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 94, para. 62; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections,* Judgment of 17 March 2016, para. 101.
[43] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections,* Judgment of 17 March 2016, paras. 80-83.
[44] *See supra*, Part I, paras. 2.10-2.12.

were of the opinion that the matters Colombia raises could not be settled by direct negotiations.

2.47. The absence of evidence is by itself decisive. The Court has made clear that States are "expected to provide substantive evidence to demonstrate that they considered in good faith that their disputes could or could not be settled by direct negotiations through the usual diplomatic channels."[45] Colombia's failure to meet this expectation dictates that its counter-claims be rejected.

2.48. Even beyond the lack of evidence, the fact is that the Parties were *not* of the opinion that the matters Colombia raises could not be settled by direct negotiations. Indeed, Colombia itself previously admitted this to the Court, at least with respect to the first, second and third counter-claims.

2.49. Colombia's first three counterclaims concern the protection of the marine environment and the traditional fishing rights of the Raizales. In its preliminary objections to jurisdiction in this case, Colombia pointed to the Parties' publicly expressed willingness to negotiate on these same issues as a reason to decline jurisdiction. It stated: "Colombia was, and continues to be, looking for the resolution of any

[45] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections, Judgment of 17 March 2016*, para. 93.

controversy that might stem from the Court's 2012 Judgment within the framework of 'direct negotiations'".[46]

2.50. In language quoted already above, the Court itself took note of this fact, observing:

> "The 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."[47]

2.51. Even after the Court issued its Judgment in this case rejecting Colombia's preliminary objections, Colombia still wanted to negotiate. Immediately after the Court issued its Judgment, the President of Colombia stated emphatically that "The bilateral issues between Nicaragua and Colombia … should be addressed through direct negotiations between the parties…".[48]

2.52. Colombia cannot have it both ways. It cannot be allowed to say that these matters *could* be settled by negotiations when it served its

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[46] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections of the Republic of Colombia*, *19 December 2014 (Vol. I)*, para. 4.61.

[47] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections, Judgment of 17 March 2016*, para. 97 (emphasis added).

[48] "*Colombia Rompe con la Corte de la Haya por Pleito con Nicaragua*", *El Heraldo*, 18 March 2016. ("Los temas bilaterales entre Nicaragua y Colombia no van a seguir sujetos a la decisión de un tercero y deberán abordarse mediante negociaciones directas entre las partes, de conformidad con el derecho internacional".) (NWO, Annex 2).

litigation interests, and then say the same issues could *not* be settled by negotiations when its interests change. Its counter-claims do not come within the jurisdiction of the Court for this fourth reason as well.

PART II

COLOMBIA'S COUNTER-CLAIMS ARE NOT DIRECTLY CONNECTED WITH THE SUBJECT MATTER OF NICARAGUA'S CLAIM

3.1. Article 80, paragraph 1, of the Rules also requires that a counter-claim be "directly connected with the subject‑matter of the claim of the other party".

3.2. The direct connection requirement exists to prevent a respondent from using a counter-claim as a "means 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".[49]

3.3. The direct connection requirement is a stringent one: a counter-claim must be directly connected with the main claim "both in fact and in law".[50] The facts on which the counter-claim is based must be

[49] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997,* p. 257, para. 31; *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Counter-Claim, Order of 10 March 1998, I.C.J. Reports 1998*, pp. 203-204, para. 33; *Jurisdictional Immunities of the State (Germany v. Italy), Counter-Claims, Order of 6 July 2010, I.C.J. Reports 2010*, p. 316, para.15.

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

of the "same nature" as the facts underpinning the principle claim, and the Parties must be pursuing the "same legal aims".[51]

3.4. With respect to the required factual connection, the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* provides an instructive example. There, the Court found admissible Uganda's counter-claim relating to the DRC's attacks on Uganda's diplomatic premises and certain Ugandan nationals. The Court determined that "the facts relied upon by each party are of the same nature, in that they allege similar types of conduct"; namely, "acts of oppression accompanying an illegal use of force".[52]

3.5. In contrast, in the case concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* the Court rejected Nicaragua's third counter-claim because the facts alleged by Nicaragua were of "a different nature from those underpinning

[51] *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. 212, para. 32; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 258, paras. 34-35; *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; *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).

[52] *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. 40.

Costa Rica's claims[.]"[53] Whereas Nicaragua's counter-claim was based on the "damage allegedly caused by Costa Rica's effort to prevent Nicaragua from dredging the San Juan River", Costa Rica's main claims concerned the alleged violations of its territorial sovereignty and Nicaragua's ostensible violations of its international environmental obligations by dredging the San Juan River.[54]

3.6. The Court concluded that "the facts relied on by Costa Rica in its principal claims and the facts invoked by Nicaragua to substantiate its third counter-claim" were of a "different nature." [55] The direct connection was therefore not met despite the fact that there was overlap between the Parties' claims (in the sense that Costa Rica complained about the harm caused by Nicaragua's dredging and Nicaragua complained about the harm caused by Costa Rica's efforts to prevent it from dredging).

3.7. In assessing whether the facts alleged are of the "same nature", the Court has sometimes considered whether the facts relied upon

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

in the main claim and in the counter-claim relate to the same geographical area and the same time period.[56]

3.8. In the *Certain Activities* case, for example, the Court found Nicaragua's second counter-claim inadmissible because it did not relate to the same geographic area as Costa Rica's main claim. The Court did so even though Nicaragua's claim related to the former Bay of San Juan del Norte, which lies immediately adjacent to the area that was the subject of Costa Rica's principal claims: Isla Portillos. The Court explained:

> "In geographical terms, Nicaragua's second counter‑claim relates, *in a general sense*, to the same region that is the focus of Costa Rica's principal claims, an area that is near the mouth of the San Juan River. However, *the geographical point of reference of each Party's claims is different*, *in the sense that the claim and the counter‑claim do not relate to the same area*."[57]

3.9. Territorial connection "in a general sense" is thus not sufficient to establish a direct connection in fact; a counter-claim must relate to the same area, narrowly defined, as the principal claim.

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

[57] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Counter-Claims, Order of 18 April 2013, I.C.J. Reports 2013,* p. 213, para. 34 (emphasis added).

3.10. But even then, the mere fact of a geographic and temporal overlap is not, by itself, enough. Here again, *DRC v. Uganda* is instructive. In addition to its counter-claims concerning the DRC's attacks on its diplomatic premises and nationals, Uganda also submitted a counter-claim relating to the DRC's alleged violations of the Lusaka Ceasefire Agreement.[58] The Court dismissed the counter-claim because the facts relied upon by the parties were not of the same nature, even though they related to the same geographic area and took place during the same time period as the DRC's main claim.

3.11. The Court stated:

> "Whereas Uganda's claim concerns quite specific claims [that refer] to the Congolese national dialogue, to the deployment of the United Nations Organization Mission in the DRC and to the disarmament and demobilization of armed groups; whereas these questions, which relate to *methods for solving the conflict* in the region agreed at multilateral level…concern facts of a different nature from those relied on in the Congo's claims, which relate to acts for which Uganda was allegedly responsible *during that conflict...*"[59]

3.12. Thus, while the existence of a geographic and temporal overlap between a claim and counter-claim may sometimes be indicative

[58] *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. 678, para. 37, p. 680, para. 42.
[59] *Ibid*., p. 680, para. 42 (emphasis in original).

of a direct factual connection, it is not dispositive. The facts alleged must still be of the same nature.

3.13. The requirement that a claim and counter-claim be directly connected in law is equally strict. There must be "a direct connection between the counter-claim and the principal claims of the other party *based on the legal principles* or *instruments relied upon,* or whether the Applicant and Respondent were considered as *pursuing the same legal aim* by their respective claims."[60]

3.14. *DRC v. Uganda* once again provides useful guidance. The Court found Uganda's counter-claim relating to the DRC's alleged violations of the Lusaka Ceasefire Agreement inadmissible not just because the facts alleged were of a different nature, but also because it lacked the requisite direct legal connection. The Court reasoned that the DRC sought to establish Uganda's responsibility based on the violations of the rules governing the use of force, whilst Uganda sought to establish

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

Congo's responsibility based on violations of the Lusaka Agreement, which established mechanisms for resolving the conflict.[61]

3.15. In the *Certain Activities* case, the Court similarly found no direct legal connection between Nicaragua's third counter-claim (pursuant to which Nicaragua sought a declaration that it had navigational rights on the Colorado River) and Costa Rica's principal claim, even though they were both based on provisions of the same 1858 Treaty of Limits. The Court held:

> "Nicaragua has failed to establish the existence of a direct legal connection between its third counter‑claim and Costa Rica's principal claims. Costa Rica and Nicaragua do not pursue the same legal aims in their respective claims and counter‑claim. Costa Rica's claims concern allegations of violations of its territorial sovereignty and its navigational rights on the San Juan River, and of environmental damage to its territory. Nicaragua, for its part, seeks to assert its alleged navigational rights on the Colorado River, on the basis of Article V of the 1858 Treaty of Limits, which provided for the temporary shared use and possession of Punta Castilla and designated the Colorado River as a boundary until such time as Nicaragua recovered full possession over the Port of San Juan del Norte, which it did in 1860."[62]

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[61] *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. 680, para. 42.

[62] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Counter-Claims, Order of 18 April 2013, I.C.J. Reports 2013*, p. 214, para. 37.

3.16. It is therefore not enough that the conventional or customary law at issue in the claim and counter-claim be the same in a general sense. Rather, there must be sufficient identity between the legal bases of the claims such that it can truly be said that the parties are pursuing the "same legal aim".

A. COLOMBIA'S FIRST AND SECOND COUNTER-CLAIMS ARE NOT DIRECTLY CONNECTED WITH NICARAGUA'S CLAIM

3.17. Colombia's first and second counter-claims are inadmissible because they are not directly connected with Nicaragua's principal claim either in fact or in law.

3.18. The claims of Nicaragua over which the Court has found that is has jurisdiction concern:

3.19. Colombia's obligation not to violate Nicaragua's maritime zones as delimited in paragraph 251 of the ICJ 2012 Judgment, as well as Nicaragua's sovereign rights and jurisdiction in these zones;

3.20. Colombia's obligation not to violate Nicaragua's rights under customary international law as reflected in Parts V and VI of UNCLOS; and

3.21. Colombia's obligation to comply with the 2012 Judgment, wipe out all legal and material consequences of its internationally wrongful acts, and make full reparation for the harm caused by those acts.[63]

3.22. Colombia describes its **first counter-claim** as being "based on Nicaragua's violation of its duty of due diligence to protect and preserve the marine environment in the Southwestern Caribbean Sea"[64]; and its **second counter-claim** as being "a logical consequence of the first one and dealing with Nicaragua's violation of its duty of due diligence to protect the right of the inhabitants on the San Andres Archipelago, in particular the Raizales, to benefit from a healthy, sound and sustainable environment."[65]

3.23. Colombia argues that these two counter-claims are directly connected in fact with Nicaragua's main claims because they relate to "the same geographical area" and "the same period of time".[66]

3.24. Nicaragua observes in the first instance that Colombia is factually mistaken; some of the alleged facts upon which it relies do *not* relate to the same geographic area as Nicaragua's claims. Specifically, the

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[63] *Application in the case concerning Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia),* p. 24.
[64] CMC, para. 8.2.
[65] *Ibid*.
[66] *Ibid*., paras. 8.5 and 8.7.

incidents of alleged predatory fishing and pollution by Nicaraguan fishermen that Colombia refers to in paragraphs 8.13-8.16 and 8.42-8.44 of its Counter-Memorial occurred either in the territorial sea around Colombia's Serrana Cay or in the Colombia-Jamaica Joint Regime Area.[67] In contrast, the scope of Nicaragua's claims *ratione loci* is limited to Nicaragua's undisputed EEZ. To that extent, "the geographical point of reference of each Party's claims is different, in the sense that the claim and the counter‑claim do not relate to the same area."[68]

3.25. Moreover, regardless of whether they relate to the same geographic area, all the alleged facts underlying Colombia's first and second counter-claims involve different types of conduct than the facts supporting Nicaragua's claims.

3.26. The facts relevant to Nicaragua's claims concern Colombia's interference with and violations of Nicaragua's exclusive *sovereign rights and jurisdiction* in maritime areas adjudged by the Court to appertain to Nicaragua in 2012. In contrast, the ostensible facts on which Colombia relies in its first and second counter-claims relate to Nicaragua's alleged failure to observe its *sovereign duties*; specifically, its

[67] *See Ibid*., paras. 8.13-8.16, 8.42-8.44.
[68] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Counter-Claims, Order of 18 April 2013, I.C.J. Reports 2013,* p. 213, para. 34.

duty of due diligence to protect and preserve the marine environment in the Southwestern Caribbean Sea.

3.27. Colombia itself admits this critical difference. It states: "Nicaragua asserts that Colombia has violated its *sovereign rights* and maritime spaces. But these accusations fail to take into account that Nicaragua has legal *obligations* with respect to its own conduct in the same areas."[69] Colombia nevertheless argues that the direct connection requirement is met because its "counter-claims represent the other side of the coin of Nicaragua's claims, and are thus of the same nature."[70]

3.28. This "other side of the same coin argument" is unavailing. In the *Certain Activities* case, it might equally have been said that Nicaragua's counter-claim relating to the "damage allegedly caused by Costa Rica's effort to prevent Nicaragua from dredging the San Juan River"[71] was the other side of the same coin to Costa Rica's main claim concerning Nicaragua's alleged violations of its international environmental obligations by dredging the very same river. The Court nevertheless rejected Nicaragua's counter-claim for want of a direct factual connection.

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[69] CMC, para. 8.6 (emphasis added).
[70] *Ibid*.
[71] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Counter-Claims, Order of 18 April 2013, I.C.J. Reports 2013*, p. 214, para. 36.

3.29. Uganda's counter-claim concerning violations of the Lusaka Ceasefire Agreement in *DRC v. Uganda* could also have been said to be "the other side of the same coin" to the DCR's principal claims. The DRC's claims arose from the fact of an armed conflict and Uganda's counter-claim from methods for solving that conflict. Yet, the Court had no difficulty rejecting Uganda's counter-claim because the required factual connection was lacking.

3.30. At a more practical level, the facts on which Nicaragua and Colombia rely in the present case are of a fundamentally different character. Nicaragua's claims concern Colombia's *active* assertion of rights and jurisdiction in areas that do not appertain to Colombia (whether in the form of the harassment of Nicaraguan vessels by the Colombian navy or the unilateral assertion of rights in areas adjudged to be Nicaragua's). In contrast, Colombia's claims are based on the alleged *inactivity* of Nicaragua in the face of the environmentally destructive practices of Nicaragua's own citizens. The Parties' claims plainly do not concern facts of the same nature.

3.31. Colombia's first two counter-claims are also inadmissible because they are not directly connected with Nicaragua's claim as a matter of law. The respective claims are not based on the same legal principles and instruments, and therefore do not pursue the same legal aim.

3.32. Colombia argues that the direct connection requirement is met because its counter-claims are based on the same corpus of international law as Nicaragua's claims; namely, "customary international law."[72] Such a high level of generality is unacceptable. Far greater specificity is required lest the direct connection in law requirement be read out of the Court's jurisprudence in its entirety for all practical purposes.

3.33. Even the most cursory review of the Parties' claims shows that they are not pursuing the same legal aim. With its first two counter-claims, 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 environment, and the exercise of due diligence,[73] as well as the provisions of various international instruments, including the CITES Convention, the Cartagena Convention, and the FAO Code of Conduct on Sustainable Fishing.[74]

3.34. None of these instruments or rules is relevant to Nicaragua's claims. Nicaragua relies instead on the Court's 2012 Judgment and the rules of customary international law as reflected in Parts V and VI of UNCLOS, which recognize the exclusive sovereign rights and jurisdiction of a coastal State within its maritime areas.

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[72] CMC, para. 8.8.
[73] *Ibid*., para. 8.6.
[74] *Ibid*., paras. 8.38, 8.40.

3.35. The Parties are therefore not pursuing the same legal aims.

B. COLOMBIA'S THIRD COUNTER-CLAIM IS ALSO NOT DIRECTLY CONNECTED WITH NICARAGUA'S CLAIM

3.36. Colombia's third counter-claim, which relates to Nicaragua's alleged violations of the traditional fishing rights of the residents of the San Andrés archipelago in Nicaragua's EEZ, also fails the direct connection test and is therefore inadmissible.

3.37. The facts underlying Colombia's third counter-claim do generally relate to the same geographical area and the same time period as the facts stated in Nicaragua's claim. They are nevertheless of a different nature.

3.38. Colombia argues to the contrary. It asserts that:

> "it suffices to say that Colombia's counter-claim relates to Nicaraguan Naval Force's harassment of the artisanal fisherman of the Archipelago. Accordingly, there is a parallel between the alleged conduct of the Colombia Navy *vis-à-vis* Nicaraguan fishermen and the Nicaraguan naval force's treatment of the artisanal fishermen of the Archipelago."[75]

3.39. This argument misses a critical point. The facts pertinent to Nicaragua's claim concern Colombia's violations of Nicaragua's

[75] *Ibid*., para. 9.7.

sovereign rights and jurisdiction as adjudged and declared by the Court in 2012. The facts underlying Colombia's third counter-claim, in contrast, concern damage individual Colombian fishermen allegedly suffered as a result of Nicaragua's efforts to enforce its indisputable sovereign rights and jurisdiction within its own maritime areas.

3.40. Put another way, although it may be true that the facts relied upon by the Parties took place in the same geographic areas, they took place in very difference legal zones. The harassment that Nicaragua complains about took place in its own maritime zones and was committed by another State that has no sovereign rights of jurisdiction in those areas. The harassment Colombia alleges, on the other hand, took place outside Colombia's maritime zones in areas that are subject to excusive sovereign rights and jurisdiction of Nicaragua. This distinction makes all the difference. The facts Colombia alleges are not of the same nature.

3.41. Colombia is equally wrong in suggesting that the legal principles and instruments that underlie its third counter-claim are the same as those that underlie Nicaragua's principal claims.[76] Whereas Nicaragua 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

[76] *Ibid*., para. 9.8.

traditional fishing activities in Nicaragua's EEZ despite the 2012 Judgment. Unlike Nicaragua, which seeks reaffirmation of its rights and jurisdiction *qua* sovereign, Colombia is acting as *parens patriae* on behalf of its people to assert putative private rights.

3.42. Colombia itself admits the significance of this distinction. In attempting to explain why it never raised the issue of these so-called traditional fishing rights in the earlier delimitation case, Colombia states:

> "The former [i.e., traditional fishing rights] are often invoked independently from the drawing of the boundary in order to allow certain nationals to fish where they have done so customarily."[77]

3.43. Colombia thus acknowledges the importance of the legal distinction between traditional fishing rights, on the one hand, and drawing of maritime boundaries, with the attendant allocation of sovereign rights and jurisdiction, on the other.

3.44. Because the Parties claims do not have the same legal foundation, Nicaragua and Colombia are pursuing different legal aims. As a result, Colombia's third counter-claim is inadmissible.

[77] *Ibid*., para. 9.13.

C. COLOMBIA'S FOURTH COUNTER-CLAIM IS NO MORE DIRECTLY CONNECTED WITH NICARAGUA'S CLAIM THAN ANY OF ITS OTHERS

3.45. Colombia's fourth counter-claim alleges that Nicaragua's 2013 straight baselines decree is contrary to international law and violates Colombia's sovereign rights and maritime spaces. This counter-claim is no more directly connected with Nicaragua's principal claims than any of the others and should therefore be dismissed.

3.46. The heart of Colombia's argument that the direct connection requirement is met is its assertion that Colombia's challenge to Nicaragua's straight baseline decree is a "domestic legal act fixing … the extent of all Nicaragua's maritime zone in the Caribbean Sea"[78] just like Colombia's declaration of its Integral Contiguous Zone is a "domestic legal [act] fixing the extent of a maritime zone, namely Colombia's contiguous zone."[79] On this basis, Colombia claims that "[t]he connection between Nicaragua's claim and Colombia's counter-claim is obvious in fact and in law".[80]

3.47. Colombia may call the connection "obvious", but that does not make it so. In fact, the required connection is lacking.

[78] *Ibid*., para. 10.9.
[79] *Ibid*., para. 10.6.
[80] *Ibid*., para. 10.12.

3.48. With respect to the required factual connection, the facts relied upon by Colombia are not of the same nature as the facts underlying Nicaragua's claim. In the first instance, they do not concern the same geographic area. All of the facts Nicaragua invokes, including Colombia's declaration of its Integral Contiguous Zone, relate to Colombia's violations of Nicaragua's rights and jurisdiction in its EEZ. The facts relevant to Colombia's counter-claim instead relate only to the extent of Nicaragua's internal waters and territorial sea. There is no question of Nicaragua impinging on any of Colombia's maritime zones either to the west or to the east of San Andrés and Providencia.

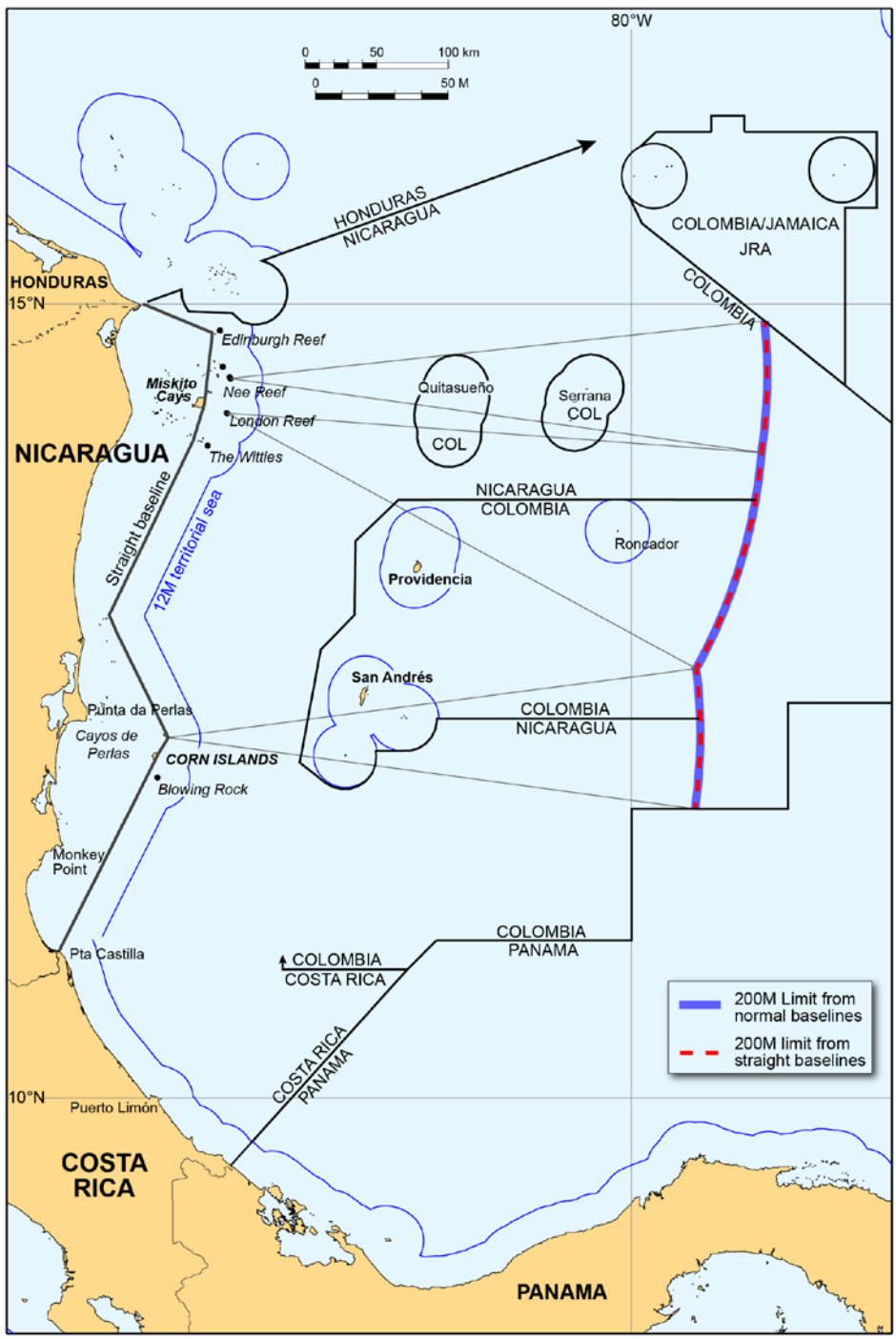
3.49. In this respect, Nicaragua observes that, as depicted on **Figure 1**, its 200 nm limit is precisely the same whether measured from its straight baselines or from normal baselines. This is because Nicaragua's 200 nm limit is entirely controlled by the most seaward land features used to define its straight baselines.

3.50. Moreover, on Colombia's own admission, its challenge to Nicaragua's 2013 baseline decree concerns "the *extent* of all Nicaragua's maritime zones in the Caribbean Sea."[81] In contrast, the facts bearing on Nicaragua's claim concerning Colombia's Integral Contiguous Zone relate

[81] *Ibid*., para. 10.9 (emphasis added).

to Colombia's challenge to the *existence* of Nicaragua's exclusive sovereign rights and jurisdiction in maritime

Figure 1. Nicaragua's 200 nautical miles limits



3.51. areas delimited in the 2012 judgment and recognized under customary international, as reflected in Parts V and VI of UNCLOS.

3.52. Put another way, Nicaragua's claims concern matters that were expressly settled by the Court in 2012. Colombia's claim, on the other hand, relates to an issue that the Court had no occasion to address in 2012: the baselines from which Nicaragua measures the breadth of its territorial sea.[82]

3.53. Colombia equally fails to show a direct legal connection between its counter-claim and Nicaragua's principal claims.

3.54. Nicaragua bases its claim on the 2012 Judgment establishing the maritime boundary between the Parties within 200 nm, as well as the customary international law rules codified in Parts V and VI of UNCLOS providing for Nicaragua's exclusive sovereign rights and jurisdiction in maritime areas adjudged to appertain to it. Colombia's claim, in contrast, is premised on the assertion that Nicaragua's baseline

[82] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012*, p. 683, para. 159: "Nicaragua's coast, and the Nicaraguan islands adjacent thereto, project a potential maritime entitlement across the sea bed and water column for 200 nautical miles. That potential entitlement thus extends to the sea bed and water column to the east of the Colombian islands where, of course, it overlaps with the competing potential entitlement of Colombia derived from those islands. Accordingly, the relevant area extends from the Nicaraguan coast to a line in the east 200 nautical miles from the baselines from which the breadth of Nicaragua's territorial sea is measured. *Since Nicaragua has not yet notified the Secretary-General of the location of those baselines under Article 16, paragraph 2, of UNCLOS, the eastern limit of the relevant area can be determined only on an approximate basis*." (emphasis added).

decree does not comport with the rules of customary international law governing straight baselines, as reflected in Article 7 of UNCLOS. These rules are wholly irrelevant to Nicaragua's claim.

3.55. Colombia nevertheless attempts to analogize its counter-claim to Nicaragua's principal claim by claiming that Nicaragua's straight baselines violate "Colombia's rights and jurisdiction by claiming absolute sovereignty, or sovereignty subject to innocent passage, in areas where Nicaragua has no absolute sovereignty, or where freedom of navigation and overflight are to be respected".[83] This argument elides a critical difference between the Parties legal claims. Nicaragua's claim is based on Colombia's violations of its *exclusive sovereign* rights and jurisdiction *as a coastal State* under customary international law. Colombia's counter-claim, on the other hand, is based on Nicaragua's alleged violations of Colombia's *non-exclusive* navigational rights that belong to *the ships of all States*.

3.56. Finally, Colombia attempts to salvage its claim by arguing that the Parties are pursuing the same legal aims because Nicaragua's straight baselines decree "violates Colombia's EEZ and continental shelf"[84] in a manner that is allegedly akin to the way Colombia's Integral

[83] CMC, para. 10.10.
[84] *Ibid*.

Contiguous Zone violates Nicaragua's EEZ and continental shelf. But, as stated, this is not true. Nicaragua's 200 nm limit is precisely the same whether measured from its straight baselines or from normal baselines. The straight baseline decree therefore does not have the effect of impinging on Colombia's EEZ or continental shelf in any way.

3.57. Because the Parties are not pursuing the same legal aim, Colombia's fourth counter-claim should be rejected.

PART III

CONCLUSION

4.1. All of Colombia's counter-claims must be dismissed because none of them comes within the jurisdiction of the Court or is directly connected with the subject-matter of Nicaragua's principal claim.

4.2. In Nicaragua's view, Colombia's meritless counter-claims are not a genuine effort to bring serious international disputes before the Court. They are, instead, a transparent attempt to distract the Court from the gravity of Colombia's actions flouting the Court's 2012 Judgment. Colombia hopes that by trying to make it seem like Nicaragua too is failing to fulfill its international obligations in the Caribbean Sea, its own behavior will be viewed in a less harsh light. The Court should not countenance such an inartful litigation ploy by agreeing to entertain Colombia's counter-claims.

4.3. Indeed, Nicaragua cannot help but observe that in addition to being an obvious tactical device intended to blur the Court's focus, Colombia's counter-claims constitute an act of extraordinary *chutzpah*. Immediately after the Court issued the 2012 Judgment, the President of Colombia emphatically rejected it because of what he called "omissions,

errors, excuses, inconsistencies that we cannot accept".[85] The Minister of Foreign Affairs went further, declaring the Court to be Colombia's "enemy".[86] These statements were promptly followed by Colombia's renunciation of the Pact of Bogotá on 26 November 2013.

4.4. Later, when Nicaragua brought its Application instituting these proceedings, Colombia sought to deny Nicaragua its day in court by presenting five different preliminary objections to the Court's jurisdiction. And when the Court denied Colombia's preliminary objections in their entirety, Colombia reaffirmed its hostility to the Court and its jurisdiction. At a press conference held immediately after the Court's Judgment on preliminary objections, President Santos stated that Colombia "will not continue appearing" in the proceedings because the Court "fell into contradictions".[87] He added: "Colombia respects the law, but it also demands respect for the law and that is not what has happened today".[88]

4.5. Against this backdrop, for Colombia to argue that the Pact of Bogotá still "expressed the consent of the Parties to jurisdiction of the

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[85] *Application in the case concerning Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia),* p. 8.
[86] *Ibid.*
[87] "*Colombia Rompe con la Corte de la Haya por Pleito con Nicaragua*", El Heraldo, 18 March 2016. ("El presidente Juan Manuel Santos anunció que el país 'no seguirá compareciendo' ante la Corte Internacional de Justicia, CIJ, de La Haya para tratar el litigio marítimo con Nicaragua porque considera que ese tribunal incurrió en 'contradicciones' en los fallos emitidos ayer".) (NWO, Annex 2).
[88] *Statement of the Colombian President, Juan Manuel Santos, on the judgments of the International Court of Justice in The Hague*, 17 March 2016. ("Colombia respeta el derecho, pero exige también respeto al derecho, y eso es lo que NO ha ocurrido hoy".) (NWO, Annex 1).

Court" nearly three years after the Pact ceased to be in force between the Parties and to ask the Court to entertain its counter-claims are bold affronts to this Court and the system of international justice for which it stands.

4.6. For the reasons explained in Part I of these Observations, the *travaux* of the Rules of Court and the Court's consistent jurisprudence dictate the conclusion that when the title of jurisdiction lapses between the filing of an application and the filing of counter-claims, the counter-claims do not come within the jurisdiction of the Court.

4.7. This rule has even greater force here. It was Colombia, the would-be counter-claimant, that severed the consensual bond between the Parties recognizing the Court's jurisdiction. Having done so, Colombia cannot and should not be heard to say that the Court may nevertheless entertain its wholly baseless counter-claims. They must be rejected.

SUBMISSIONS

For the reasons expressed in these Observations, the Republic of Nicaragua requests 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.

The Hague, 20 April 2017

Carlos J. Argüello Gómez

Agent of the Republic of Nicaragua

CERTIFICATION

I have the honour to certify that these Written Observations and the documents annexed to it, are true copies and conform to the original documents and that the translations into English made by the Republic of Nicaragua are accurate translations.

The Hague, 20 April 2017.

Carlos J. Argüello-Gómez

Agent of the Republic of Nicaragua

LIST OF ANNEXES