Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*, 2022): Commentary on the Case and the Judgment on the Merits by the International Court of Justice

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Structured Abstract

Article classification: Case Law Commentary—Case Study Based Research Article

Purpose—The article presents a commentary on the case *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia*), aiming to deliver a comprehensive summary of the case and general commentary on the most relevant claims and the procedural history.

Design, Methodology, Approach—The article comments on the case following a procedural structure, explaining the principal factual and jurisdictional issues, the application presented by Nicaragua, the preliminary exceptions, and the counterclaims presented by Colombia during the jurisdictional phase of the case leading to the judgment on jurisdiction in 2016, and the decision on the merits rendered by the Court in 2022.

Findings—The commentary highlights the difficulties raised before the ICJ when entertaining the admissibility of counterclaims, and studies the factual pattern that led to Nicaragua's application as a manifestation of a conduct of resistance to international courts and tribunals.

Practical Implications—The article may provide readers with in-depth knowledge of

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recent litigation that is relevant to the law of the sea but also the authority of the ICJ and the effectiveness of its judgments.

Originality, Value—The article is one of the few case commentaries on the procedural history and legal claims before the ICJ in this very recent case that was decided by the Court in 2022.

Keywords: counterclaims, customary fishing rights,
International Court of Justice, law of the sea

I. Introduction

The Judgment of April 21, 2022, of the International Court of Justice in the case *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*,[1] better known by the parties as NICOL 3, faced: once again with Nicaragua as applicant and Colombia as respondent. The case completes another piece in a long history of litigation between the parties over the maritime spaces and sovereign rights in the area of the Western Caribbean and the San Andres Archipelago. It is a history that was initiated with the 2001 application by Nicaragua that led to the 2012 judgment that established the final maritime delimitation between the parties. Issues surrounding the implementation of that decision, and the subsequent application by Nicaragua, initiated in 2013, are the core of the case analyzed in this commentary, and which will be continued by the case concerning the extended continental shelf, also initiated in 2013, shortly before Colombia's denunciation of the Pact of Bogota having effect, and currently on the docket of the Court.

Methodologically, this case commentary will, first, address the background and factual matters that led to the implementation issues that sparked Nicaragua's application in 2013, in particular, the denunciation of the Pact of Bogotá by Colombia, the Constitutional resistance to the Judgments in Colombia's domestic law and the enactment by Colombia of legislation allegedly contrary to the ICJ Judgment (Decree 1946 of 2003) accompanied by certain conducts in opposition taken at sea. Secondly, the commentary will address the most relevant issues during the procedural history of the case, including the application in 2013, the counterclaims, the judgment on jurisdiction in 2016, and the oral proceedings held during 2021, and thirdly, the commentary will address the decision on the merits, rendered by the Court in April 2022.

Following the framework set out above, in order to achieve a full understanding of this case, it is necessary to look back to the ruling on the merits in the earlier case of November 19, 2012, and the difficulties raised in the implementation of this decision. There are certain acts of resistance to the decision by Colombia that require brief explanation since they constitute the essence of Nicaragua's claims. First, as an aftermath of the 2012 ruling, Colombia denounced the Pact of Bogotá on November 27, 2012.[2] Secondly, the President of the Republic of Colombia issued Decree 1946 of 2013 regarding maritime spaces in the Western Caribbean which responded to the situation resulting from the decision of the Court[3] and, thirdly, the president filed a claim of unconstitutionality of the said treaty in order to delay the effects of the decision in domestic law based upon the constitutional territorial regime of Colombia.[4] These were in addition to many other manifestations of public opinion from

different sectors in Colombia that shared their opinion on the ruling which, without necessarily officially representing the views of Colombia as a State, were used by Nicaragua in 2021 during the oral arguments[5] in The Hague.

1.1 Denunciation of the Pact of Bogotá

As a direct consequence of the ruling of the International Court of Justice (ICJ) of November 19, 2012, and the pressure exerted by different sectors of Colombian society, the Government of Colombia decided to denounce the American Treaty on Peaceful Settlement Mechanisms, better known as the Pact of Bogotá, which includes a broad International Court of Justice jurisdictional clause (Article XXXI). The letter of denunciation was sent to the Organization of American States on November 27, 2012. The letter stated that the denunciation would be effective immediately, despite the fact that paragraph 1 of Article LVI of the treaty states that the effect of the denunciation shall be delayed by one year,[6] a common formula in these kinds of treaties to deter States from abusing the denunciation clause in order to avoid the activation of the jurisdictional clause before a Court.

It must be noted that on December 5, 2001, Colombia withdrew the declaration of acceptance of the jurisdiction to the Court that had been presented by Ambassador Jesús María Yepes on October 30, 1937, made under Article 36, paragraph 2, of the Statute of the Permanent Court of International Justice (Declarations made under the PCIJ Statute, that have not expired or been withdraw and inherited by the ICJ) and that amends the declaration presented by Ambassador Antonio José Restrepo on January 6, 1932; the declaration presented by Ambassador Yepes was retroactive only to the date of presentation of the first declaration, thus this acceptance of competence had a clear and specific *ratione temporis* limit.[7]

Consequently, with the withdrawal of the declaration in 2001 and the denunciation of the Pact of Bogotá in 2012, Colombia considered that it would be shielded *ipso facto* against applications that other States could submit before the International Court of Justice. This situation was clarified by the ICJ in its 2016 judgment on preliminary objections in the other concurrent case, *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v Colombia)*,[8] where the ICJ upheld the rationale set in Article LVI of the Pact of Bogotá regarding the one year's notice before the denunciation is effective, in a judgment rendered in the face of threats of non-appearance by the State, that were later retracted.[9] In addition, Colombian public opinion allegedly believed that the denunciation had been used to affect the binding effect of the 2012 judgment to some extent. In addition, while there are still specific treaties, ratified by Colombia, which give the ICJ the jurisdiction to settle differences that may arise within the context of those treaties, the denunciation of the Pact of Bogota deprives Colombia of the possibility to present applications against other Latin-American States.

1.2 Decree 1946 of 2013

The former president of the Republic of Colombia, Juan Manuel Santos, issued Decree 1946 of 2013 on September 9, 2013, which sought to clarify the different maritime spaces

generated by the Colombian islands located in the western Caribbean,[10] thereby expanded the domestic laws regulating maritime spaces prior to the ICJ judgments, namely, Law 10 of 1978 and Law 47 of 1993.

In general terms the Decree identifies, *ex post* the ICJ judgment of 2012, all the Colombian islands and maritime formations located in the Western Caribbean. It describes their territorial sea and their contiguous zone, and establishes that the respective baselines must be drawn for each of the ten islands found in the western Caribbean in addition to the islands, islets, cays, headlands, banks, low-tide elevations, shoals, and reefs adjacent to each of these islands. Likewise, it indicates that in no case will the Decree affect the rights of third States.[11]

Nicaragua has opposed the Decree since projecting that the different alleged Colombian contiguous zones included in the Decree produces an overlap with the Exclusive Economic Zone that the 2012 ICJ ruling granted to Nicaragua. Although these different zones produce different rights (relevant for different activities, ranging from fishing to the fight against drug trafficking) Nicaragua considers that the Decree does not conform to general customary international law and its claims against it were part of the application filed by Nicaragua before the ICJ in "NICOL 3." The ruling of the Court in 2022 established that the "Zona Contigua Integral" (Integral Contiguous Zone) designed by Colombia in the Decree is not contrary to customary law regarding the activities allowed by the law of the sea to States in the EEZ, but the Court also found that the overlaps with Nicaragua's maritime spaces found in the Decree must be corrected, as will be explained below.

1.3 Judicial Review of the Pact of Bogota Before the Colombian Constitutional Court

As additional acts of Colombian resistance to the 2012 ICJ judgment, three judicial review actions were filed before the Constitutional Court, requesting that the Court declare the unconstitutionality of several Articles of Law 37 of 1961, which incorporates the Pact of Bogotá into Colombian domestic law. The first two actions were presented by a group of private citizens and the third one by the former President of Colombia, Juan Manuel Santos. In general, all the actions base their arguments upon the idea that the Pact of Bogota, and subsequently the 2012 ICJ ruling, violate the Colombian Constitution, specifically, Article 101, which defines the national boundaries and established that existing boundaries can only be modified by Congress. Naturally, this argument collides with basic principles of international law, including *pacta sunt servanda*, the impossibility of using domestic law to detract from international obligations, whether they come from treaties or international judgments,[12] and the effect of jurisdictional clauses ratified by the State as international binding obligations that allow an international Court to settle an international dispute.[13] Also, the rationale of the claims presented before the Constitutional Court collides with the fact-finding activity of the ICJ in the 2012 *Nicaragua v. Colombia* judgment (merits), where it found that there was no existing boundary between the two States in the relevant zone in the Caribbean and that the Court was within its jurisdiction to settle it (in the end, creating a boundary is different than modifying a boundary).[14]

In its decision of 2014, the Constitutional Court declared that the Law incorporating the Pact of Bogota and all of its provisions were constitutional and binding domestically,

which *a priori* was a decision that was consistent with international law. However, the Constitutional Court declared that further steps needed to be taken in order to fully implement the ICJ judgment of 2012, an unprecedented condition that formed part of Nicaragua's claims: "The Constitutional Court (…) Declares Article XXXI of Law 37 of 1961 as CONSTITUTIONAL 'by which the American Treaty on Peaceful Settlement (Pact of Bogotá) is approved,' on the understanding that the decisions of the International Court of Justice adopted regarding border disputes, must be incorporated into domestic law through a duly approved and ratified treaty, under the terms of Article 101 of the Political Constitution."[15]

This paragraph of the judgment of the Constitutional Court left Colombia in a complex international situation to the extent that the ICJ did not modify any treaty in its 2012 judgment. According to the ICJ, the Esguerra-Bárcenas Treaty of 1928 is not a boundary treaty, as was clearly stated in the judgment of December 13, 2007 (jurisdiction): "the Court concludes that the 1928 Treaty and 1930 Protocol did not effect a general delimitation of the maritime boundary between Colombia and Nicaragua. It is therefore not necessary for the Court to consider the arguments advanced by the Parties regarding the effect on this question on changes in the law of the sea since 1930. Since the dispute concerning maritime delimitation has not been settled by the 1928 Treaty and 1930 Protocol within the meaning of Article VI of the Pact of Bogotá, the Court has jurisdiction under Article XXXI of the Pact."[16]

II. Presidential Declarations

Contextually, presidential declarations have taken on a role of particular relevance in this case. Presidential declarations from the head of state of Colombia, Juan Manuel Santos, originally led to acts of Colombian non-appearance during the early stages of the application and as a reaction to the ICJ judgment on jurisdiction of 2016. This position was rapidly retracted by Colombia when it decided to return to proceedings on the merits.[17] On the other hand, a number of Colombian presidential declarations were taken into account by Nicaragua during the early stages of the proceedings, as the president of Colombia, following the judicial review judgment of the Constitutional Court in 2014, adhered to the position that a negotiated treaty was a requirement imposed by the Constitution to make any modification to the boundaries. These declarations, besides being relevant to the case, as understood under the doctrine of unilateral acts of the State, were taken into the account by the ICJ in the judgment on jurisdiction of 2016 in its rejection of Colombia's third preliminary objection regarding a possible prerequisite of negotiation before referring the case to the ICJ. Colombia argued that its declaration, accompanied by several declarations of the President of Nicaragua opening the door to negotiation on fishing rights,[18] implied that the Court had no jurisdiction since attempted negotiations existed. The Court took note that the subject of the declarations was different and rejected this position.

Having examined the factual situation that represents Colombia´s resistance to the 2012 judgment and which serves as the base for Nicaragua's claims, we can now delve into the analysis of the proceedings and the judgments on jurisdictions and merits.

III. The Application in the NICOL 3 Case and the Judgment on the Merits of 2016

On November 26, 2013, the Republic of Nicaragua filed what would be a third application against the Republic of Colombia before the International Court of Justice. This application was presented one day before the year had passed following the denunciation of the Pact of Bogotá by Colombia, a denunciation made by Colombia in an effort to resist the effects of the ICJ, both internationally and domestically, as explained in section I. This third application referred to Colombia's alleged non-compliance, according to Nicaragua, with the Judgment of November 19, 2012. In the initial application, Nicaragua recounts the facts that allegedly establish Colombia's non-compliance with the 2012 judgment. The claims presented by Nicaragua before the Court, requested it to declare that Colombia: (1) fails to comply with its obligation under Article 2, paragraph 4, of the Charter of the United Nations and customary international law to refrain from the threat and use of force; (2) fails to comply with its obligation not to violate the maritime spaces of Nicaragua as defined by the Court in paragraph 251 of the judgment of November 19, 2012, as well as the sovereign rights and jurisdiction of Nicaragua over said spaces, (3) fails to comply with its obligation not to violate the rights of Nicaragua under customary international law as reflected in Sections V and VI of the UNCLOS (United Nations Convention on the Law of the Sea), and (4) must comply with the ruling of November 19, 2012, erase the legal and material consequences of its internationally wrongful acts, and fully repair the damage caused by these acts.[19]

The claims of Nicaragua included several complex elements. The first of these is to submit that Colombia has threatened to resort to the use of force, or has used such force; secondly, it asserts that Colombia has not complied with the Judgment of November 19, 2012, when it has also been contended by Colombia that the Nicaraguan Fishing Authority has issued fishing permits and exercised rights in zones that do not conform with the zones established by the ICJ in 2012,[20] and, thirdly, the claim asserts that Colombia has violated Nicaragua's rights in the exclusive economic zone as well as on the continental shelf.

3.1 Preliminary Exceptions in the "Alleged Violations" Case

Within the rules of the Court, Colombia presented preliminary exceptions (also known as preliminary objections), an incidental procedure intended to argue the absence of jurisdiction of the Court, for which Colombia presented the following arguments: (1) Lack of competence *ratione temporis* due to the supposed immediate effect of the denunciation of the Pact of Bogotá on November 27, 2012, (2) Absence of effective dispute at the date of the application and the absence of a dispute regarding the use of force (3) The fact that the conditions devised in the Pact of Bogotá in order to resort to the ICJ have not been met (exhaustion of other peaceful settlement of disputes mechanisms), (4) The fact that there is no "inherent power" of the ICJ to settle the case without jurisdiction, and (5) The fact that the ICJ has no jurisdiction over the implementation of its own judgments (no post-adjudicative jurisdiction). The complex and diverse nature of the preliminary exceptions raised by Colombia, in this case, must also be understood within the context of the

preliminary exceptions raised in the concurrent case *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v Colombia)* (2016), where Colombia raised the preliminary exception of res judicata, that was rejected by the Court.[21] In this concurrent case, Colombia accompanied its collection of preliminary objections, similar to those presented in the "Alleged violations" case, with objections related to the ongoing debate of the effects of UNCLOS proceedings (such as the role of the Commission on the Limits of the Continental Shelf in the establishment of the outer limits of Nicaragua's continental shelf), on States such as Colombia, not bound by UNCLOS.[22] The combination of rejected objections of res judicata in both cases, together with the overall rejection of the objections in the "Alleged violations" case and its decision on merits which we analyze below, added to the possibility of an unfavorable judgment in the "Question of the delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaragua Coast" case, could resurrect the complex political background and behaviors of resistance that haunted the previously discussed 2012 judgment.

In its decision on jurisdiction, the Court only accepted, unanimously, Colombia's second exception, and only in regard to the use of force.[23] The ICJ held that there were no grounds to entertain a claim regarding the threat or use of force by Colombia, a result that, at least politically, was very favorable for Colombia, since the State has continuously expressed its status as a law-abiding country and as a State respectful of the peaceful settlement of disputes.

Regarding the other exceptions, these were rejected by the Court. The first and the fourth unanimously; while the third and fifth by a vote of fifteen-to-one, and by fourteen-to-two, concluding that the Court was competent to proceed to the merits stage of the case in accordance with Article XXXI of the Pact from Bogota.[24]

Regarding the first exception (and in consequence, the fourth) the Court held that in Article LVI, paragraph 1 of the Pact of Bogotá, is clear that the jurisdiction of the Court ceases only one year after the denunciation of the treaty has been filed. Unfortunately, the ICJ did not make a more profound analysis of the second paragraph "The denunciation shall have no effect with respect to pending procedures initiated prior to the transmission of the particular notification"[25]—a paragraph that, according to Colombia, should be interpreted *a contrario*, a position that was very complex to accept and that the Court rejected given the clarity of the first paragraph. Consequently, as Nicaragua filed the application one day before the expiration of the first year since the denunciation, the ICJ declared it had jurisdiction to hear the case. The third exception, as explained above in the background of the presidential declarations surrounding the case, was rejected by the Court as the declarations of both presidents in different senses, did not amount to an ongoing negotiation.

The rejection of the fifth exception raises some questions since the Court answered, in a rather obscure way, that the ICJ was not being summoned to study the role of the Security Council, or the application of paragraph 2 of Article 94 of the UN Charter to the behavior of Colombia, or to entertain the post-adjudicative powers of any other involved international organizations (i.e., The Meeting of Ministers of Foreign Affairs of the OAS) and therefore it was not being asked to enforce the judgment. The question raised by Nicaragua, in the sense that it only referred to the breach of recently declared maritime zones and rights, could not be understood as a non-compliance claim[26] which would be outside the

scope of the jurisdiction of the Court; however, the request could lead to a Colombian duty to uphold its obligations and make reparations, which would still be under the scope of the jurisdiction of the Court.[27]

3.2 Counterclaims

In accordance with Article 80 of the Rules of Procedure of the International Court of Justice, "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."[28] Furthermore, paragraph 2 of Article 80 establishes that "A counter-claim shall be made in the Counter-Memorial and shall appear as part of the submissions contained therein.."[29] Article 80 contains a series of broad concepts, so the interpretation of the judges plays a fundamental role when deciding whether or not to accept a counterclaim filed by the respondent State. The breadth of interpretation that can be given to the requirements has meant that historically, the ICJ has admitted counterclaims on only a very few occasions.[30]

In this sense, authors such as Yves Nouvel consider that the Rules do not define what should be understood as "directly connected," and it is up to the Court to assess the link "aussi bien en fait que en droit"[31] (considering both facts and law). For Nouvel, every application at the end is based on circumstances that are historically linked, and the facts invoked by both parties can be linked together to be sufficient to meet this requirement if it is clear they have the "same nature"; on the other hand, a former member of the office of the Greffier of the ICJ, Hugh Thirlway, emphasizes the direct connection of the nature of the counterclaim and its relation with the original submission, and not only on the association of facts. He states that "the concept of a counter-claim implies some relationship between the claims made by one State and those made by the other."[32]

In the same sense, Tania Elena Pacheco considers that "there are gray areas regarding the application of Article 80 of the Rules of Procedure, not only regarding the scope of the notion of 'directly connected,' which seem to leave the Court with a wide level of discretion, but also of a procedural nature, since both parties will have to state their opinion, in writing, on the admissibility of the counterclaim. On the other hand, a State must never underestimate a counterclaim, no matter how extravagant it may seem, since, if it is not admitted, there is always the possibility that it will become the basis of a future claim."[33]

As Juan José Quintana Aranguren affirms, the meeting of two elements is a *sine qua non* requirement for a counterclaim to be accepted. These elements are: (1) that there is jurisdiction of the Court and, (2) that there is a full relationship between the counterclaims and the claim. This means that in some cases, the Court can reject a counterclaim, in which there are clearly allegations of a factual situation running contrary to international law that constitutes a real dispute, simply because that fact does not have a direct link with the claims of the application. Nonetheless, that particular issue could comprise the center of a different dispute.

In the present case, Colombia submitted four counterclaims: the first counterclaim related to "Nicaragua's violation of its duty of due diligence to protect and preserve the marine environment of the Southwestern Caribbean Sea."[34] The Court, by fifteen votes to one, held that this counterclaim filed by the Republic of Colombia was inadmissible and

that, consequently, it will not be taken into account in the following proceedings.[35] The second counterclaim related to "Nicaragua's violation of its duty of due diligence to protect the rights of the inhabitants of the San Andrés Archipelago, in particular the Raizales, to benefit from a healthy, sound and sustainable environment,"[36] this counterclaim being a direct continuation of the first counterclaim.[37]

The third counterclaim raised by Colombia is related to alleged infringements of the recognized customary artisanal fishing rights of the inhabitants of the Archipelago attributable to Nicaragua.[38] The Court, by eleven votes to five, held that this counterclaim filed by the Republic of Colombia was admissible.[39] The fourth and final counterclaim filled by Colombia stated that Nicaragua, "by adopting Decree No. 33-2013 of August 19, 2013, has extended its internal waters, its territorial sea, its contiguous zone, its EEZ and its continental shelf, in violation of international law, and, in so doing, has violated Colombia's sovereign rights and jurisdiction."[40] The Court, by nine votes to seven, held that this counterclaim filed by the Republic of Colombia was admissible and will be taken into account in the proceedings. The admitted counterclaims show a closer relation to the maritime space issues and the rights and activities allowed within the spaces allocated to each State in the 2012 judgment and show that the Court has adopted an approach that places a strong emphasis on the relationship between the original claims and the counterclaim. It does not extend to a general overview of facts that can be tangentially related to the behavior of the States involved in the disputed area, such as issues related to the environment and human rights, which certainly will see further episodes in regional courts.[41]

IV. "Raizal" Representation and the Oral Pleadings on the Merits (September–October 2021)

From September 20 to October 1, 2021, the oral proceedings in the case took place. The oral hearings are a fundamental step in litigation before the ICJ to the extent that they constitute the closing presentation of the States before the Court. From that moment forward, the parties may no longer present any additional documents and, from the moment the oral hearings end, all the documents presented by the parties become public. The oral hearings are the moment in which the agents and the team of legal counsel present the main arguments. Two rounds are advanced so that the parties can refute and counter-argue what has been raised by their counterparts,[42] and this is the last image that the judges will have before their deliberation begins. Normally, this stage lasts about six months and ends with the reading of the final judgment. Both the claims from Nicaragua and the counterclaims from Colombia were entertained. During the hearings, one of the highlights was the intervention of Mr. Kent Francis James, former Ambassador and member of the Colombian Academy of Jurisprudence, and member of the Raizal community, who, on behalf of the Raizales, presented before the ICJ its origins and its special relationship with the sea, explained in a more-than-legal fashion, how fishing and environmental rights are fundamental for the community, and constitute traditional customary fishing rights. This particular participation (available in the Verbatim record)[43] is relevant for the ICJ's legitimacy in general since it constitutes a progressive approach to litigation in the ICJ which is usually regarded as conservative and reserved for experts and Governmental agents.

V. The 2022 *"Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea"* Judgment on the Merits

Considering the discovery of evidence advanced by both States, the available audio, video, and cartographical evidence presented both by Nicaragua and Colombia, and the admission of the counterclaims, the final decision was expected to be as divided as it proved to be in the judgment rendered by the Court on April 21, 2022. The Court faced the task of taking special measures not to appear to be deciding under a non-existent post adjudicatory power (ordering, supervising or sanctioning the implementation of its 2012 judgment, a power reserved for the Security Council),[44] and was called on to take a delicate approach to the establishment of international State responsibility for internationally wrongful acts allegedly committed by both States. This was an exercise in which the ICJ needed to apply the same legal standards to the allegations of both States to not only strengthen the legitimacy of its decision, but also to provide its judgment on the merits of a road map for peaceful relations of both Nicaragua and Colombia in their corresponding neighboring maritime areas. In this final section, we will summarize, analytically, the judgments on the merits.

5.1 Applicable Law and Ratione Temporis Clarifications by the Court

In both the public sittings held on April 21, 2022, to deliver the judgment on the merits and in the decision itself,[45] the Court needed the clarify the scope of the current proceedings and the background formed by the 2012 judgment. The Court recalls that the fact that the eastern endpoints of the delimitation were not determined in 2012, since Nicaragua at the moment had not notified its baselines to the Court, does not affect the subject matter of the case and that the current case related specifically to the alleged violations of sovereign rights by Colombia, including the obstruction of Nicaragua's rights in the EEZ, its exploitation and navigation, along with Nicaragua's claims against the Colombian "Integral Contiguous Zone" and the counterclaims presented by Colombia regarding fishing rights (paras. 1–32).

The judgment continues with a clarification of the scope of the jurisdiction in light of *ratione temporis*. The Court recognizes the need to answer the jurisdictional question that could be raised by entertaining facts presented by Nicaragua and Colombia in the judgment, which occurred after the entry into force of the denunciation of the Pact of Bogotá by Colombia. As the first argument in para. 42 the ICJ recalls its case law regarding the lapse of the jurisdictional title, citing several cases in which it held that "according to its established jurisprudence, if a title of jurisdiction is shown to have existed at the date of the institution of proceedings, any subsequent lapse or withdrawal of the jurisdictional instrument is without effect on the jurisdiction of the Court." Regarding additional incidents that have occurred after the lapse of jurisdiction (the entry into force of the denunciation of the Pact of Bogota), the Court describes these facts as generally including alleged issues with vessels at sea, policing operations, and interferences in the EEZ and concludes that these acts, which occurred after November 27, 2013, arise directly from the subject-matter of the application and fall within the jurisdiction (para. 47).

Then, the Court, before entertaining the merits of the claims and counterclaims, proceeds to specify the applicable law, taking note that Colombia is not part of UNCLOS. This led the Court to note that the parties have acknowledged several provisions of UNCLOS as a reflection of customary international law (Articles 56, 58, 61, 62, and 73) and will discuss them each in the different relevant sections of the judgment (paras. 49–50).

5.2 Claims Regarding Incidents at Sea

The first section of claims entertained by the judgment corresponds to the incidents alleged by Nicaragua in the southwestern Caribbean Sea. Regarding the burden of proof, the Court recognizes that, following its jurisprudence on questions of proof, since several of those fifty or more incidents attributed to Colombia are logged, documented, or recorded solely by Nicaragua in reports prepared for the case, the Court will treat said evidence with reservations (para. 67). Regarding Colombia's evidence, the Court highlights its maritime travel reports and navigation logs to have probative value, as contemporaneous and direct sources. Additionally, the Court considered several pieces of evidence involving private owners of fishers as unclear and uncorroborated (paras. 66–70).

Beginning with the alleged incidents of November 17, 2013, involving the ARC Almirante Padilla and following with other alleged interferences up to 2018 and taking into account the different types of evidence mentioned above and its differentiated value, the Court finds that on several occasions Colombian Military Vessels (Fragatas) were present within Nicaragua's EEZ performing acts of jurisdiction. The Court addressed then the Colombian justifications (para. 93) regarding that said actions are linked to the freedoms of overflight, navigation, the Cartagena Regime, and environmental concerns. For the Court, the freedoms of navigation and overflight enjoyed by other States, as reflected in Article 58 of UNCLOS, do not include the enforcement and jurisdictional activities conducted by Colombia, and that the Cartagena Regime only allows Colombia to exercise said activities in waters where it has sovereignty (para. 99). For these reasons, the Court found that Colombia has violated its international obligation to "respect Nicaragua's sovereign rights and jurisdiction in the latter's exclusive economic zone by interfering with fishing activities and marine scientific research by Nicaraguan-flagged or Nicaraguan-licensed vessels and with the operations of Nicaragua's naval vessels, and by purporting to enforce conservation measures in that zone" (para. 101).

5.3 Claims Related to Fishing Authorizations

The Court then turns to the claims regarding Colombia's alleged authorization of fishing activities and marine scientific research in Nicaragua's exclusive economic zone, which includes both measures and resolutions as well as incidents at sea. The Court analyzed the evidentiary claims raised by both parties and concludes that several vessels engaged in fishing activities in Nicaragua's EEZ under the protection of Colombian naval ships and authorities, such as the incident of January 6, 2017, involving the Honduran flagged ship *Capitan Geovanie*, allegedly authorized to fish in Nicaraguan spaces under Colombian authorization. Colombia furthermore contended that there was no direct evidence that Colombia had authorized scientific research in Nicaragua's EEZ, and the Court concluded

that the evidence is insufficient in that matter. The Court concluded that Colombia violated Nicaragua's sovereign rights and jurisdiction in its exclusive economic zone by authorizing vessels to conduct fishing activities in Nicaragua's exclusive economic zone (paras. 111–134).

To finish entertaining the claims relating to the contested activities in Nicaragua's maritime zones, the Court turned its attention to the alleged oil exploration licensing by Colombia. This claim arose from the reply of Nicaragua and shows developments up to 2017 by the Colombian National Hydrocarbon Agency that showed exploration blocks available in Nicaraguan spaces. The Court considered the claim admissible because it follows facts that originally arose in 2011 but rejected the merits of the claim because the evidence was insufficient (paras. 135–144).

5.4 Claims Related to Colombia's "Integral Contiguous Zone" Decree

The Court then continued with the other section of the alleged violations of Colombia, namely, Colombia's "integral contiguous zone" in Decree 1946. Nicaragua considers that the geographical extent and the scope of the powers that Colombia claims to exercise, collide with customary law, and violate Nicaragua's EEZ; the parties disagreed on whether Article 33 of UNCLOS reflects custom. The Court recognizes the complex development of the codification history regarding the CZ and although neither the ILC nor UNCLOS include security, policy, and control powers in the CZ, several States have included them in their powers in the zone (paras. 148–160). The Court notes that in the judgment of 2012 the CZ was not discussed in depth and that the CZ and EEZ are governed by different regimes, and both regimes imply the obligation to respect the rights of third States. The Court finds that Colombia has the right to establish a CZ in the Archipelago and finds that Articles 33 and 58 of UNCLOS do not necessarily encompass all the rights that Colombia has within its contiguous zone. The Court considered that despite the right of Colombia to establish a CZ in the Archipelago, the zone set in the Decree is not in accordance with the geographical extent allowed by international law because it overlaps in certain spaces with the EEZ of Nicaragua, and certain powers exercised under the Decree regarding environmental protection and cultural heritage are beyond the scope of customary law. The court ordered Colombia to bring the decree into conformity with international law by the means of its own choosing (paras 170–196). In this same sense, the Court rejects additional reparations or compensations claimed by Nicaragua, along with its request for the Court to remain seized of the claims until Colombia complies.

5.5 Counterclaim Regarding Artisanal Fishing Rights

Finally, the Court entertained Colombia's counterclaims, beginning with the counterclaim related to Nicaragua's alleged infringement of the artisanal fishing rights of the inhabitants of the San Andrés Archipelago to access and exploit the traditional banks. The Court recalls that in general, the onus is on Colombia to prove the historical practices of the Raizales in areas that now fall within Nicaragua's EEZ. The affidavits presented by Colombia were entertained by the Court despite it considering the evidence to have lower weight and probative value since it was created for the specific purpose of the case and did not reflect a long-standing history of a local customary norm and offered no certainty

of the periods of said practices. The Court also considered the Presidential Declarations from Nicaragua in which President Ortega referred to said fishing rights in order to analyze if it recognized the existence of these rights or was just an expression of political will (paras. 201–221). Consequently, the Court did not waive the possibility of historical or artisanal fishing rights from Colombian Raizales co-existing with the Nicaraguan EEZ of Nicaragua but decided that Colombia had failed to prove that Raizales enjoy artisanal fishing rights in Nicaragua's EEZ or that Nicaragua has recognized them by declarations or unilateral statements (para 231). As an innovative element in the longstanding litigation between the parties, the Court recognized, expressly, the willingness of the parties to negotiate an agreement regarding the access of members of the Raizal community to fisheries located in Nicaragua's EEZ and suggests it as the most appropriate solution (para 232).

5.6 Counterclaim Regarding Nicaragua's Straight Baselines

The Court dedicates the final pages of the judgment to Colombia's counterclaims regarding the legality of and use by Nicaragua of straight baselines, established by Decree 33 of August 27, 2013, and their alleged violation of Colombia's sovereign rights and maritime spaces. It begins by clarifying that articles 5 and 7 of UNCLOS are considered by the parties to reflect customary international law. This includes the use of straight baselines instead of coastal baselines under special circumstances or geographical preconditions such as the presence of islands in the vicinity of coastal indentations (para. 241–244). Nicaragua invokes said conditions in two of the points described in Decree 33.

First, recalling its *Fisheries*, *Delimitation in the Black Sea and Maritime Delimitation and Territorial Questions between Qatar and Bahrain* cases, the Court pointed out that although there is not a single test for determining the indentation of the coast, the coastal State must refer to international law when establishing its baselines and a mere indentation is not sufficient. The Court considers that the curve inward described by points 8 and 9 of Decree 33 is not sufficient. Secondly, in the section of the baselines referring to several cays and the Corn Islands, the Court debated whether these mentioned formations constitute a "fringe of islands" with sufficient proximity, and decided that they do not form a coherent cluster along the coast, sufficiently linked to the land to be considered an outer edge of the coast or to produce a masking effect and that the straight baselines convert certain spaces that should be territorial sea or EEZ into internal waters, thereby limiting Colombia's rights such as innocent passage. Therefore, the Court decides that Nicaragua must amend the straight baselines set by Decree 33 in accordance with international law and finishes the judgment with the *dispositif* (para. 256–260).

VI. Conclusion

In conclusion, the judgment presented a balanced result for both parties in the sense that both Colombia and Nicaragua were ordered to amend their current national legislation in accordance with international law, and both claims and counterclaims gave partial positive results to both parties. Finally, the invitation of the Court for the parties to negotiate the exercise of artisanal fishing rights was received by Colombia as the second-best

solution since the Court did not rule out the existence of these rights. It only declared that Colombia had not proved them in the process and that the parties should produce a negotiated regime. This suggestion has had recent consequences for the parties, since the new government of Colombia, which came into office in August 2022, has begun negotiations on the matter with Nicaragua which, to date, have been maintained under secrecy.

Notes

1. *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, March 17, 2016, ICJ Reports 2016.

2. Pact of Bogota, Status of Ratifications, Organization of American States, April 30, 1948, http://www.oas.org/juridico/spanish/firmas/a-42.html#10, accessed January 22, 2022.

3. Presidency of the Republic of Colombia, Decree 1946 of September 9, 2013, http://wsp.presidencia.gov.co/Normativa/Decretos/2013/Documents/SEPTIEMBRE/09/DECRETO%201946%20DEL%2009%20DE%20SEPTIEMBRE%20DE%202013.pdf, accessed January 22, 2022.

4. Constitutional Court of Colombia, Judgment C-269/14 of May 2, 2014, M.P.: Mauricio González Cuervo.

5. *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (Nicaragua v. Colombia*),* Public sitting held on Monday September 20, 2021, at 3 p.m., at the Peace Palace, VERBATIM RECORD, pp. 19–21, https://www.icj-cij.org/public/files/case-related/155/155-20210920-ORA-01-00-BI.pdf, accessed October 26, 2022.

6. Maria Teresa Infante, "The Pact of Bogota: Cases and Practice" *Anuario Colombiano de Derecho Internacional* 10 (2017), p. 85, https://doi.org/10.12804/revistas.urosario.edu.co/acdi/a.5294.

7. *Collection of Texts Governing the Jurisdiction of the Court*, ICJ, Series D. Nº 4, 4ª ed., 1932, p. 54

8. *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, March 17, 2016, ICJ Reports 2016.

9. Walter Arévalo Ramírez and Andres Sarmiento Lamus, "Non-Appearance Before the International Court of Justice and the Role and Function of Judges *ad hoc*" *The Law & Practice of International Courts and Tribunals* 16(3) (2017), pp. 398–412, https://doi.org/10.1163/15718034-12341358.

10. (1) San Andrés; (2) Providencia; (3) Santa Catalina; (4) Cayos de Alburquerque; (5) Cayos de East Southeast (Este Sudeste); (6) Cayos de Roncador; (7) Cayos de Serrana; (8) Cayos de Quitasueño; (9) Cayos de Serranilla; (10) Cayos de Bajo Nuevo. It is a curious finding that Decree 1946 of 2013 does not mentions Banco Alicia (ocean bank), which is mentioned in Law 47 of 1993 and is located in the joint fishing zone with Jamaica, very close to the maritime border between the two States.

11. Presidency of the Republic of Colombia (2013), Articles 1, 7.

12. Virdzhiniya Petrova Georgieva, "Hierarchy Between Domestic and International Tribunals: Utopia or Near Future?" *Anuario Colombiano de Derecho Internacional* 14 (2021), p. 21, https://doi.org/10.12804/revistas.urosario.edu.co/acdi/a.10114.

13. Walter Arévalo-Ramírez, "Resistance to Territorial and Maritime Delimitation Judgments of the International Court of Justice and Clashes with 'Territory Clauses' in the Constitutions of Latin American States" *Leiden Journal of International Law* (2021), pp. 1–24, https://doi.org/10.1017/S0922156521000522.

14. Walter Arévalo-Ramírez, "Resistance to Territorial and Maritime Delimitation Judgments of the International Court of Justice and Clashes with 'Territory Clauses' in the Constitutions of Latin American States" *Leiden Journal of International Law* (2021), p. 5, https://doi.org/10.1017/S0922156521000522.

15. Constitutional Court of Colombia (2014).

16. *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, ICJ Reports 2007, p. 869.

17. Presidency of the Republic of Colombia, "Declaración del presidente de Colombia, Juan Manuel Santos, sobre decisions de la Corte Internacional de Justicia de La Haya [Statement by the President of Colombia, Juan Manuel Santos, on the Decisions of the International Court of Justice in the Hague]," March 17, 2016, https://www.cancilleria.gov.co/newsroom/news/declaracion-presidente-colombia-juan-manuel-santos-decisiones-corte-internacional, accessed October 26, 2022.

18. ICJ Reports, *Alleged Violations*. . . (March 17, 2016), paras. 80–100.

19. ICJ Reports, *Alleged Violations*. . . (March 17, 2016), paras. 11–13.

20. Maria Otero, "Problems in the Caribbean: The Absence of Finality to the Territorial Dispute in Nicaragua v. Colombia Will Have Negative Impacts in the Region" *University of Toledo Law Review* 46 (2014), p. 617.

21. Diego Mejía-Lemos, "The Principle of Res Judicata, Determination by 'Necessary Implication,' and the Settlement of Maritime Delimitation Disputes by the International Court of Justice" *The Journal of Territorial and Maritime Studies* 5(2) (2018), p. 46–74.

22. Massimo Lando "Delimiting the Continental Shelf Beyond 200 Nautical Miles at the International Court of Justice: The Nicaragua v. Colombia cases" *Chinese Journal of International Law* 16(2) (2017), pp. 137–173, https://doi.org/10.1093/chinesejil/jmx014.

23. ICJ Reports, *Alleged Violations*. . . (March 17, 2016), paras. 67–79.

24. *Ibid*., para.111.

25. Pact of Bogota (1948).

26. Edgardo Sobenes Obregon, "Non-Compliance of Judgments and the Inherent Jurisdiction of the ICJ" *The Journal of Territorial and Maritime Studies* 7(1) (2020), p. 53–67.

27. ICJ Reports, *Alleged Violations*. . . (March 17, 2016), para. 109.

28. ICJ, Rules of Court. Adopted on April 14, 1978, entered into force on July 1, 1978, https://www.icj-cij.org/en/rules, accessed January 23, 2022.

29. *Ibid*.

30. Juan José Quintana, *Litigation at the International Court of Justice—Practice and Procedure* (Leiden/Boston: Brill / Nijhoff, 2015), p. 808, https://doi.org/10.1163/9789004297517.

31. Yves Nouvel, "La recevabilité des demandes reconventionnelles devant la Cour Internationale de Justice à la lumière de deux ordonnances récentes [The Admissibility of Counterclaims Before the International Court of Justice in Light of Two Recent (Legislative) Orders]," *Annuaire Français de Droit International* 44 (1998) CNRS, París, p. 330, https://doi.org/10.3406/afdi.1998.3518.

32. Hugh Thirlway, *The International Court of Justice* (Oxford: Oxford University Press, 2016), p. 94; See also, Ricardo Abello-Galvis, *Introduction to the International Court of Justice—ICJ* (Bogota: Ediciones Rosaristas, 2013).

33. Tania Elena Pacheco Blandino, "La demanda reconvencional o reconvención en la CIJ [counterclaims in the ICJ]," *in.omnem.terram,* https://inomnemterram.wordpress.com/2017/01/11/la-demanda-reconvencional-o-reconvencion-en-la-c-i-j/, accessed January 23, 2022.

34. *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Counter-Memorial of the Republic of Colombia, Vol. 1, November 17, 2016, pp. 243–286, https://www.icj-cij.org/public/files/case-related/155/155-20161117-WRI-01-00-EN.pdf, accessed January 23, 2022.

35. *Ibid*., p. 314.

36. *Ibid*., pp. 243–286.

37. *Ibid*., p. 314.

38. *Ibid*., p. 289.

39. *Ibid*., p. 314.

40. *Ibid*., p.303.

41. Ricardo Abello-Galvis and Walter Arevalo-Ramirez, "Inter-American Court of Human Rights Advisory Opinion OC-23/17: Jurisdictional, Procedural and Substantive Implications of Human Rights Duties in the Context of Environmental Protection," *Review of European, Comparative & International Environmental Law* 28(2) (2019), pp. 217–222, https://doi.org/10.1111/reel.12290.

42. Hugh Thirlway, *The International Court of Justice* (Oxford: Oxford University Press, 2016) p. 97, https://doi.org/10.1093/obo/9780199796953-0125.

43. *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Public sitting held on Wednesday September 22, 2021, at 11 a.m., at the Peace Palace, VERBATIM RECORD, pp. 18–22, https://www.icj-cij.org/public/files/case-related/155/155-20210922-ORA-01-00-BI.pdf, accessed January 23, 2022.

44. Dapo Akande, "The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations?," *International & Comparative Law Quarterly* 46(2) (1997), pp. 309–343, https://doi.org/10.1017/S0020589300060450.

45. *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean* Sea (Nicaragua v. Colombia), Merits, Judgment, April 21, 2022, paras. 1–47.

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