

Nicaragua v Colombia: A Stalemate in the Caribbean

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Abstract

The Nicaragua v Colombia is one of the most recent verdicts given by the International Court of Justice. The decision given has been extremely controversial, and is leading to an unstable situation in the archipelago of San Andres. This essay looks at the history behind the case and what are the repercussions of the decision.

Key Words: Nicaragua v Colombia court case, Nicaragua, Colombia, International Court of Justice

Introduction

For over eleven years the courtrooms of the International Court of Justice (ICJ) have witnessed the case brought on by the Republic of Nicaragua towards the Republic of Colombia. Nicaragua v Colombia is one of the most recent cases in which the International Court of Justice has given a verdict. The importance of this case does not lie within the case itself, its history or the international law that was used by the ICJ, but in the consequences that its verdict could bring to the Colombian and Nicaraguan community and the ICJ itself. Although the honorable judges of the court carefully deliberated the case with the evidence provided by both states, the conclusion puts the economy in jeopardy of the territory in question, the diplomatic relations between both states and the validity of the decisions of the International Court of Justice.

The verdict that was supposed to put an end to the dispute over the territory in question has actually increased the tension in the 82nd meridian, along with causing Colombia to reject the Pact of Bogota (which gave the ICJ jurisdiction) and in turn rejected the court itself. While the judges of the court allowed Colombia to hold sovereignty over the islands of San Andres, Providencia, Santa Catalina, and the rest of the islands that composed the archipelago of San Andres; with its verdict the court also gave Nicaragua nearly 60 percent of the disputed seas territory that has been part of the Colombian Republic for many years. (Valencia, 2013) This case at a glance this seems like any other territorial dispute that the ICJ handles, but the history and legality of it go much deeper. In order to understand the case, it is important to understand its history.

Brief History of the Case

The Republic of Nicaragua claims ownership of the territory in question upon historical events. These events began in 1821, when the independence of Spain was imminent allowing the providences that formed the Captaincy General of Guatemala to become the Federation of Central American States. “(t)he islands of San Andres and Providencia pertain to those groups

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of islands and keys that in 1821 became part of the newly formed Federation of Central American States and, after the dissolution of the federation in 1838... Came to be part of the sovereignty territory of Nicaragua” (Witteveen, 2001). The Republic of Nicaragua also claims sovereignty by the international legal principle of *uti possidetis juris*, this signifies that the parties are to retain possession of what they have acquired by force. (Stegemoller, 2005)

In 1928 José Bárcenas Meneses, Minister of Foreign Affairs of the Republic of Nicaragua, and Manuel Esguerra, Envoy Extraordinary and Minister Plenipotentiary of Colombia, signed the Barcenas-Esguerra treaty in Managua. This short document, composed of only two articles, states: In Article One, that the Republic of Colombia recognizes the ownership and sovereignty of the Costa de Mosquitos and gives the Republic of Nicaragua the islands of Mangle Grande and Mangle Chico, (both located on the Atlantic Ocean); and that Nicaragua recognizes Colombia’s sovereignty over the territory of San Andres, Providencia, Santa Catalina, and the rest of the islands, that composed the archipelago of San Andres. In the treaty it is also stated that the keys of Roncador, Quitasueno Y Serrana are not included or considered because their dominion was being litigated between the Republic of Colombia and the United States. (Cavelier, 1984) The Barcenas-Esguerra treaty was ratified in Managua in May of 1930. The ratification was done by the signing of the Protocol, which noted that the treaty would be the conclusion of any territorial dispute between both Nicaragua and Colombia. The protocol would also note that the Barcenas-Esguerra treaty would not extend west of the 82nd degree of longitude west of Greenwich. ("Territorial and maritime," 2007)

After the signing of the Barcenas-Esguerra treaty in 1928 and while the treaty was still in full force, the Republic of Nicaragua wrote and validated a new version of its Constitution in 1948. This would affirm that the archipelago of San Andres was still part of the national territory of the state, then in 1958 and in 1965 it created two different decrees that stated sovereignty over the territory. The decree of 1958 outlined the exact ownership of the continental shelf for the exploitation of natural resources and to the exploration and exploitation of petroleum, and the latter declared the national fishing zone of 200 nautical miles from the coast of Nicaragua. (Witteveen, 2001)

The years between 1969 and 1980 were filled with difficult moments between the Republic of Nicaragua and the Republic of Colombia, but it was also incredibly important for this case. A diplomatic note sent by the government of Colombia in 1969 helped unravel a series of situations that would eventually lead the case to end up in an ICJ court room. The note sent was to protest the oil exploration that was being performed in the Quitasueno area by the Republic of Nicaragua. “Colombia observed that the 82nd meridian had been noted in the 1930 Protocol as the western boundary of the archipelago of San Andres and Providencia.” ("Territorial and maritime," 2007) Nicaragua would reply with a diplomatic note, asserting that the oil exploration was being done within its own continental shelf, and that the state was in its sovereign right to explore the area. Nicaragua justify the Quitasueno area as part of its national territory, using the protocol of 1930, arguing that the protocol should not be interpreted as a creator of the border between both states. ("Territorial and maritime," 2007) In response Colombia recalled Barcenas-Esguerra treaty which noted that Quitasueno was excluded from the area in question.

In 1971, Nicaragua reserved its rights over the area of Roncador and Quitasueno by sending a memorandum to the Department of State of the United States, with this action Nicaragua rejected the Colombian contention of the 1930 Protocol and the design set with it. A year later on September 8 of 1972 the Republic of Colombia and the United States would sign

and ratify the Vasquez- Saccio Treaty. This treaty allows the government of the United States to completely renounce any claims of sovereignty over Quitasueno, Roncador and the Serrana territories. The United States would affirm that the 1928 treaty would not apply to the Roncador and Serrana area and that sovereignty over Quitasueno cannot be exercised due to it being submerged at high tide. ("Territorial and maritime," 2007) With the United States renouncing the territory of Quitasueno, Roncador, and Serrana, the Republic of Colombia would be the only legitimate title holder on those banks and cays, according to the 1928 Treaty, the 1930 Protocol and international law. ("Territorial and maritime," 2007) A month later the Republic of Nicaragua would formally protest the Vasquez- Saccio Treaty saying, "that the banks located in that zone...[were] part of [Nicaragua's] territory and therefore subject to its sovereignty." ("Territorial and maritime," 2007)

On February 4 of 1980 the Republic of Nicaragua unilaterally declared the Barcenas-Esguerra treaty null and void, because when Nicaragua signed the treaty, it did so under duress. "(t)he nullity and validity of the Barcenas-Esguerra treaty..[concluded] in a historical context which incapacitated as rulers the presidents imposed by the American forces if intervention in Nicaragua and which infringed ...the principles of the national constitution in force..."("Territorial and maritime," 2007) From that point in time this would be a stance that all Nicaraguan administrations would take in regard to the territory in question. Colombia would completely reject this stance and would go to state that the Barcenas-Esguerra treaty was still in full force in eyes of the international legal system.

Another document that played an extremely important part in this case is the American Treaty on Pacific Settlement or also known as the Pact of Bogota, this treaty was initially ratified by 21 states including both the republic of Colombia and the Republic of Nicaragua. The treaty signed in the Colombian capital (Santa Fe de Bogota) imposes a general understanding that all conflicts should be resolved through peaceful means. "In the event that a controversy arises between two or more signatory states which, in the opinion of the parties, cannot be settled by direct negotiations through the usual diplomatic channels, the parties bind themselves to use the procedures established in the present Treaty" ("American treaty on," 1948) The treaty also Recognizes the importance of the rulings of the International Court of Justice in article XXXI.

In conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice, the 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... ("American treaty on," 1948)

The Case Brought Forward by Nicaragua

On December 6 of 2001 the Republic of Nicaragua brought forward a suit against the Republic of Colombia. The suit brings into question the sovereignty over the islands of San Andres, Providencia, and Santa Catalina, including the keys of Roncador, Serrana, Serranilla and Quitasueno. "Nicaragua also alleges that the problem is compounded by Colombia's assertion that its title over the disputed territories also provides for sovereignty over an immense part of the Caribbean Sea pertaining to Nicaragua" ("Application: Nicaragua v Colombia," 2001)

According to the case application, the Colombian state is hungry for power and territory. One of the main examples that the Nicaraguan government brings forward to prove this point are

the many times that Colombia has threatened the use of force to the stop Nicaraguan vessels from searching resources pass the 82nd meridian. Nicaragua also states that the Colombian navy also goes west of the 82nd meridian to simply intimidated those vessels, boats and other ships that are in the area ("Application: Nicaragua v Colombia," 2001). Another example of the Colombian ambition was the development and publication of its most updated map establishing the complete Colombian territory. "With a total land area of 44 kilometers and an overall coastal length that is under 20 kilometers, Colombia claims dominion over more than 50,000 square kilometers or maritime spaces that appertain to Nicaragua" ("Application: Nicaragua v Colombia," 2001). The situation that the Colombian government and its military are creating for the people of Nicaragua is not only degrading but is seriously hurting the livelihood of those Nicaraguans that depend on the resources of the sea.

In the case application Nicaragua also states how the diplomatic negotiations between both states have completely failed. Between 1995 and 1999 the Nicaraguan government marked several times which they approached the Colombian government to discuss and find an amicable solution to the issues that both states have with respect of their frontiers. Between cancelled meetings, naval demonstrations of authority by the Colombian military in the 82nd meridian, and the creation of treaties and agreements with other states that violated the territorial limits of Nicaragua, it is pretty clear that the Colombian government is not in the same page of a clean and diplomatic negotiation. ("Application: Nicaragua v Colombia," 2001)

While the Colombian government claims sovereignty over the archipelago of San Andres with the Barcenas-Esguerra treaty, the Nicaraguan government attests that the treaty is not valid and that any obligation listed in such treaty must be terminated. With the elimination of the Barcenas-Esguerra the treaty, Colombia will rightfully cede full sovereignty of the San Andres, Providencia, and Santa Catalina islands to Nicaragua. "Nicaragua contends that even if the 1928 treaty is valid, it is not a treaty of delimitation (a treaty fixing boundary lines), and therefore, Colombia does not have a legal basis to claim sovereignty over the waters." (Stegemoller, 2005) It is also important to note that in its application the Republic of Nicaragua looks to find jurisdiction with the International Court of Justice on the provisions of Article XXXI and the American treaty on Pacific Settlement, also known as the Pact of Bogota to which both Nicaragua and Colombia are parties. Nicaragua also refers to the statute of the International Court of Justice and more specifically article 36, by which both states accepted the compulsory jurisdiction of the court, in 1929 and 1937 respectively. "(i)n addition Nicaragua relies upon the "optional clause of the International Court of Justice whereby the two states have accepted the Court's compulsory jurisdiction." (Witteveen, 2001).

Due to the legalities brought forward, the Republic of Nicaragua has three main requests for the judges of the court: First and most importantly, the need to declare that it has complete and absolute sovereignty over the San Andres, Providencia, Santa Catalina, and Roncador, Serrana, Serranilla, and the Quitasueno keys. Second, that when the sovereignty of the territory above has been given to Nicaragua, the court needs to determine the course of a single maritime boundary between areas of continental shelf and exclusive economic zone belonging to each state, "in accordance with equitable principles and relevant circumstances recognizes by general international law as applicable to such a delimitation of a single maritime boundary." (Witteveen, 2001) Third, Nicaragua reserves the right to claim compensation for elements of unjust enrichment from the Colombian wrongful possession of the territory in question including the keys and the maritime spaces of the 82nd meridian. "The Government of Nicaragua also

reserves the right to claim compensation for interference with fishing vessels of Nicaraguan nationality or vessels licensed by Nicaragua.” (“Application: nicaragua v colombia,” 2001)

The Response of Colombia

According to the Republic of Colombia, the issues that were brought forward by the republic of Nicaragua had all already been resolved for over 50 years, with the validation and ratification of the Barcenas-Esguerra treaty and the Protocol of 1930. Colombia would also deny jurisdiction to the ICJ and the Republic of Nicaragua because the Pacific Settlement or pact of Bogota does not support the establishment of any type of jurisdiction. Colombia noted that the Article VI of the Pact “may not be applied to matters which are governed by agreements or treaties in force on the date of conclusion of the present treaty, it displaces jurisdiction that would otherwise exist under Article XXXI.” (Mathias, 2008) Colombia would base their sovereignty on the 1928 Barcenas-Esguerra treaty and the Protocol of 1930. According to their counter-memorial both the treaty and its protocol are still in full force in the eyes of the law and the international community.

In the 1928/1930 Treaty, Nicaragua expressly recognized the full and entire sovereignty of the Republic of Colombia over the islands of San Andres, Providencia, Santa Catalina and all other islands, islets and cays that form part of the said Archipelago of San Andres. In the treaty Colombia recognized the sovereignty of Nicaragua over the Mosquito Coast and the Mangle Grande (Great Corn) and Mangle Chico (Little Corn) Islands. The 1928/1930 Treaty which is in force, settle the entire dispute between the parties. (“Counter- memorial of,” 2008)

Just like Nicaragua did, Colombia also used historical facts in order to attest its sovereignty over the territory in question. According to the Colombian government, all the islands and cays have always been considered a single unit during the colonial and post-colonial periods, allowing the Republic of Colombia to become the only successor state (from the Viceroyalty of Santa Fe) that will rightfully exercise sovereignty over the archipelago. (“Counter- memorial of,” 2008) Since its independence from Spain in 1810, Colombia has received the complete and full title of sovereign (*titre de souverain*) over the Archipelago of San Andres. This means that for over two centuries the Colombian government has implemented publicly and peacefully its sovereignty over the territory. Nicaragua on the other hand has not exercised any type of sovereignty or governance in any part of the archipelago. (“Counter- memorial of,” 2008) “This is the situation was recognized by third states... Even Nicaragua did so...and Nicaragua is unable to show the exercise of any element of administration in either the 19th or 20th centuries” (“Counter- memorial of,” 2008)

The Republic of Colombia also notes that both states agreed on the characterization of the 82nd meridian with the Protocol of 1930. According to the Counter-Memorial of Colombia this was added at the insistence of the Nicaraguan government to not only set a territorial limit between both states, but also to protect itself for claims by Colombia for the islets and cays of the Nicaragua coast. (“Counter- memorial of,” 2008) “ Given the geographic facts, and taking into account the conduct of the Parties and the relevance of the 82nd West meridian, a median line...produces an equitable result...respects the legal methodology for delimitation articulated

by the court in its jurisprudence and accords to each party the maritime areas generated by its relevant coasts and baselines.” (“Counter- memorial of,” 2008)

With its Counter-Memorial the Republic of Colombia takes into account and rejects all of the information submitted by the Republic of Nicaragua. Colombia asks the judges of the court to declare two things: First, to re-state that Colombia has sovereignty over all the territory that forms the Archipelago of San Andres, including Quitasueno, Roncador, and Serrana, Serranilla and Bajo Nuevo. Second, that the maritime boundary will be equidistance from the nearest point on the baselines from the territorial seas of each state as it was depicted and decided in earlier treaties. (“Counter- memorial of,” 2008)

Application by Costa Rica to Intervene

On February of 2010 the Republic of Costa Rica submitted an application to intervene in the case between the Republic of Colombia and the Republic of Nicaragua, Costa Rica requested to intervene with the status of nonparty state. This application was done only to inform the court about the rights and interests of the state of Costa Rica, and to make sure that the court when deliberating their decision, does not affect their interest and rights. (“Application by Costa,” 2011) While the Republic of Colombia agrees with the intervention of Costa Rica, the Republic of Nicaragua on the other hand sets the ground to deny the intervention, by critiquing their application and proving that it failed to comply with the requirements of the Statue of the Court. The Court agrees that Costa Rica did have an interest in the case because its territory would overlap with the areas claimed in the case, but in the end the application was rejected because the information provided by Costa Rica could not and would not affect the court’s final judgment. (Cogan, 2012)

Costa Rica did not show that its interest of a legal nature...need[ed] a protection that [was] not provided by the...decisions of the Court...[n]either Colombian nor Nicaragua asked the Court to fix the...maritime boundary between them..as doing it so might affect [a] third States interest such as Costa Rica (Cogan, 2012)

Application by Honduras to Intervene

In June of 2010 the Republic of Honduras brought forward an application to intervene in the case between Colombia and Nicaragua. In contrast of Costa Rica who wanted to intervene as a nonparty state, Honduras requested to intervene as a state party, allowing them to recognize the binding force of any decision made by the court. (“Application by Honduras,” 2011) The reason why they created and submitted the application was to protect their own rights in the Caribbean Sea, and to inform the court that the verdict could seriously affect the sovereignty of the territory shared with Nicaragua. Honduras’ application was based on two very important claims: First, that the decision of Nicaragua v Honduras of 2007 did not delimit the maritime border between the states past the 82nd meridian. Second, Honduras asked the court to make sure the treaty that they had with the Republic of Colombia was still valid. (Cogan, 2012) If such claims would turn out to be correct, “Honduras would have a legal interest potentially affected by the dispute.” (Cogan, 2012) Nicaragua opposed the intervention, and Colombia agreed as long as Honduras would intervene as a nonparty state, in the end the court did not granted Honduras permission to intervene. (“Application by Honduras,” 2011)

The Courts decision in the case of Nicaragua v Colombia

A. The Courts decision with respect of sovereignty

It is important to note that in order to give their decision; the International Court of Justice established that international law allows the appropriation of the territory in question, including the Quitasueno area. “Alburquerque Cays, East-Southeast Cays, Roncador, Serrana, Serranilla and Bajo Nuevo... cannot be regarded as sufficient to establish that any of them constitutes an islands, as defined by international law; it finds that they are low –tide elevations” (“Summary of the,” 2012) and thus can also be included in the deliberation of sovereignty.

The Court notes that the 1928 Barceñas-Esquerria treaty gives the Republic of Colombia complete and utter sovereignty over San Andres, Providencia, and Santa Catalina. The problem lies in the fact that according to the ICJ neither the treaty, the protocol nor any historical records that were submitted by any either state accurately declares the complete and exact composition of the Archipelago. (“Summary of the,” 2012) In order to establish the sovereignty of the territory in question the Court relied on the international law basis of *effectivites*, which is when a state displays authority on a given territory. (“Summary of the,” 2012)

The Court considers the different categories of *effectivites* presented by Colombia, namely: public administration and legislation, regulation of economic activities, public works, law enforcement measures, naval visits and search and rescue operations and consular representation. On the basis of the evidence...the Court finds that for many decades Colombia continuously and consistently acted *a titre de souverain* in respect of the maritime dispute...no evidence of protest from Nicaragua prior 1969...the Court concludes that the facts provided strong support for Colombia’s claim of sovereignty. (“Summary of the,” 2012)

B. The Courts decision with respect of delimitation

While the first part of the verdict read by the ICJ indicated that Colombia would win the case, the plot would thicken when the court continued reading the final part of the verdict. In this section the Court would satisfy Nicaragua’s claim to create a form of delimitation from the mainland coasts of the states, and this would divide the continental shelf by equal parts for both parties. What this means is that the International Court of Justice would grant sovereignty to the republic of Nicaragua to “nearly 60 percent of the disputed seas, some 75,000 square meters of maritime territory.” (Valencia, 2013) This new set up of maritime borders would encompass an area that could potentially be rich in resources, including oil. (“Colombia pulls out,” 28)

Consequences of the decision from the International Court of Justice on Nicaragua v Colombia

A. Colombia denounces the American Treaty on Pacific Settlement and with it also denounces the ICJ

Nine days after the International Court of Justice gave the verdict on the case, the Colombian president Juan Manuel Santos announced that Colombia would be pulling out of the Pact of Bogota which recognizes ICJ rulings. By pulling out of the pact, Colombia would ignore the verdict given in November of 2012 and any other future territorial disputes that end up in the International Court of Justice. (Valencia, 2013)

Santos would go to say: "These are all omissions, errors, excesses and inconsistencies that we cannot accept...taking all this into account, Colombia-represented by its head of state-emphatically rejects this aspect of the ruling by the Court... the government respects the law but the ICJ is seriously wrong in altering the maritime boundaries to give more to Nicaragua...it is evident that this ruling contradicts our *Magna Carta* and various international treaties" ("Colombia rejects court," 2012)

As of now Colombia has hired a group of lawyers that would help create a road that will confront the verdict given by the International Court of Justice. The briefing for the response of Colombia is scheduled to be presented in May of 2013, and it will include testimonies from the natives of the islands, especially those who are the most affected by the decision-the fishermen. (Politica, 2013)

B. The habitants of the territory in question

One of the most important and difficult challenges that the verdict of the ICJ brings forward is the negative impact that it has on the native islanders. The islanders are descendants from British pirates, African slaves and Puritan settlers, all of whom earn most of their income and resources from the fishing industry. (Stegemoller, 2005) This industry will take a huge and very damaging hit thanks to the verdict that the ICJ decided to bring forward. The territories that were divided by the courts verdict (the Quitasueno and Serrana area) are the richest in sea products and are extremely important for the local fisherman, because that is where they gather most of their profitable product. ("Esta es la," 11) Alain Manjarres the President of Commerce from the San Andres area says "this is going to impact in a terrible way the economy of the region, because the families of the fishermen are not the only ones being hurt, but also the fishing industries would see their production diminish" ("Esta es la," 11) The Department of Prosperity estimates that around 700 families of San Andres and Providencia would be affected by the new marital delimitation. ("Esta es la," 11)

Only three months from the conclusion of the trial, the Colombian congress would receive multiple complaints from the local fishermen and their families. According to Senator Alexandra Moreno Piraquive, Colombian fisherman that sailed around the area of Serranilla have been taken into custody by members of the naval forces of Nicaragua for a total 72 hours to forcefully exclude them from the area but would be eventually released. ("Se registra primer," 2013) This event would lead to the Secretary of Agriculture from the San Andres area Marcela

Sjogren to state that even though the Colombian Naval forces were in the area giving protection to the fisherman, they cannot be objects of control by the Nicaraguan authorities. (Delgado, 2013) Senator Alexandra Moreno Piraquive would go on to state that this not only creates a problem for the local population but, it also hurts the diplomatic relationship between both Nicaragua and Colombia. According to Moreno Piraquive the lies of the Nicaraguan President Daniel Ortega are the main problem in the relationship, because Ortega stated that the ICJ verdict would not hurt the Colombian fisherman nor would it impact their work, this clearly isn't true. (Delgado, 2013)

After thirty years of a territorial disagreement and twelve years of a bitter legal dispute, both the Republic of Colombia and the Republic of Nicaragua are still looking to find an amicable solution to a problem that in the eyes of the international legal system and the International Court of Justice has already been solved. It is still too soon to know if the repercussions from the verdict of the case are going to have a long-term effect on the relationships between both of the states. But while the long-term effects are unknown, the short-term effects are very straight forward: the economy of the territory in question has been put in jeopardy, the diplomatic relationship between both states is very tense, and the decisions and validity of the International Court of Justice have been overlooked and downgraded. One thing is very clear and that is that the verdict of the ICJ was not the end of the road for this territorial dispute, but a bump on a very long road.

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