INTERNATIONAL COURT OF JUSTICE

DISPUTE CONCERNING

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

(NICARAGUA V. COLOMBIA)

MEMORIAL

OF THE REPUBLIC OF NICARAGUA

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TABLE OF CONTENTS

LIST OF ACRONYMS ..... **i**

LIST OF FIGURES ..... **ii**

CHAPTER I: INTRODUCTION **1**

A. PROCEDURAL HISTORY 1

B. SCOPE OF THE DISPUTE 2

1. The 19 November 2012 *Judgment* 2

2. Colombia's Violations of Nicaragua's rights and Breaches of Its International Obligations 3

3. Nicaragua's Peaceful Response 6

C. JURISDICTION 7

1. The Pact of Bogotá 7

2. Inherent Jurisdiction of the Court over Disputes Arising from Non-compliance with Its *Judgments* 12

3. The Court's Task 17

D. OUTLINE OF THE *MEMORIAL* 18

CHAPTER II: THE FACTS **21**

A. THE DECLARATIONS OF THE PRESIDENT AND OF THE FOREIGN MINISTER OF COLOMBIA 21

B. PRESIDENTIAL DECREE 1946 26

C. COLOMBIA'S VIOLATIONS OF NICARAGUA'S SOVEREIGN RIGHTS AND JURISDICTION 33

D. NICARAGUA'S SELF-RESTRAINT 51

CHAPTER III: COLOMBIA'S BREACHES OF ITS OBLIGATION NOT TO VIOLATE NICARAGUA'S SOVEREIGN RIGHTS AND JURISDICTION 57

A. THE JUDGMENT OF 19 NOVEMBER 2012 HAS ESTABLISHED A DEFINITIVE MARITIME BOUNDARY BETWEEN THE PARTIES WITHIN 200 NAUTICAL MILES AND DETERMINED THE MARITIME SPACES OVER WHICH EACH PARTY CAN EXERCISE SOVEREIGN RIGHTS 57

B. COLOMBIA'S DUTIES ARISING UNDER THE INTERNATIONAL COURT OF JUSTICE STATUTE AND THE UN CHARTER 59

1. The Sources of the Duties 59

2. The Violations of the Duties 61

i. Decrees 1946 and 1119 62

C. COLOMBIA'S DUTIES ARISING UNDER THE INTERNATIONAL LAW OF THE SEA 69

D. COLOMBIA'S BREACHES OF ITS OBLIGATION NOT TO USE OR TO THREATEN TO USE FORCE 70

CHAPTER IV: REMEDIES 79

A. CESSATION OF COLOMBIA'S CONTINUING INTERNATIONALLY WRONGFUL ACTS 84

B. COLOMBIA MUST RE-ESTABLISH THE *STATUS QUO ANTE* 95

C. COLOMBIA HAS AN OBLIGATION TO COMPENSATE NICARAGUA FOR THE FINANCIALLY ASSESSABLE DAMAGE IT HAS SUFFERED 100

D. NICARAGUA IS ENTITLED TO APPROPRIATE GUARANTEES OF NON-REPETITION BY COLOMBIA OF ITS INTERNATIONALLY WRONGFUL ACTS 103

SUBMISSIONS 107

CERTIFICATION **109**

LIST OF ANNEXES **113**

LIST OF ACRONYMS

ARC (Spanish Acronym)	Armada de la República de Colombia
BL (Spanish Acronym)	Logistics Boat
DIMAR (Spanish Acronym)	Colombian National Maritime Authority
FM (Spanish Acronym)	Missile Frigate
GC (Spanish Acronym)	Coast Guard
ICZ	Integral Contiguous Zone
NM	Nicaragua's Memorial
PO (Spanish Acronym)	Oceanic Patrol Vessel
PZE (Spanish Acronym)	Exclusive Economic Zone Patrol Vessel
UNCLOS	United Nations Convention on the Law of the Sea

LIST OF FIGURES

Figure 2.1. Colombia's "Integral Contiguous Zone" Pursuant to Decree 1946.

Figure 2.2. Colombia's ICZ Impinges on Nicaragua's Sovereign Rights and Jurisdiction.

Figure 2.3. Location of reported incidents in the *Luna Verde* area.

Figure 2.4. Blown up of the location of reported incidents in the *Luna Verde* area.

Figure 2.5. Location of *Luna Verde* in relation to the maritime boundary determined by the Court.

Figure 2.6. ARC Antioquia (FM-53).

Figure 2.7. ARC Almirante Padilla (FM-51).

Figure 2.8. ARC Independiente (FM-54).

Figure 2.9. ARC 20 de Julio (PZE-46).

Figure 2.10. ARC San Andrés (PO-25).

CHAPTER I: INTRODUCTION

A. PROCEDURAL HISTORY

1.1 The *Application* was filed on 26 November 2013 by the Republic of Nicaragua against the Republic of Colombia concerning the violations of Nicaragua's sovereign rights and jurisdiction in the waters and seabed unanimously declared by the Court to belong to Nicaragua in its *Judgment* of 19 November 2012.

1.2 In its *Application*, Nicaragua asked the Court to adjudge and declare that Colombia is in breach of:

> - its obligation not to use or threaten to use force under Article 2(4) of the UN Charter and customary international law;
>
> - its obligation not to violate Nicaragua's maritime zones as delimited in paragraph 251 of the Court Judgment of 19 November 2012 as well as Nicaragua's sovereign rights and jurisdiction in these zones;
>
> - its obligation not to violate Nicaragua's rights under customary international law as reflected in Parts V and VI of the United Nations Convention on the Law of the Sea (UNCLOS);
>
> - and that, consequently, Colombia is bound to comply with the Judgment of 19 November 2012, wipe out the legal and material consequences of its internationally wrongful acts, and make full reparation for the harm caused by those acts.[1]

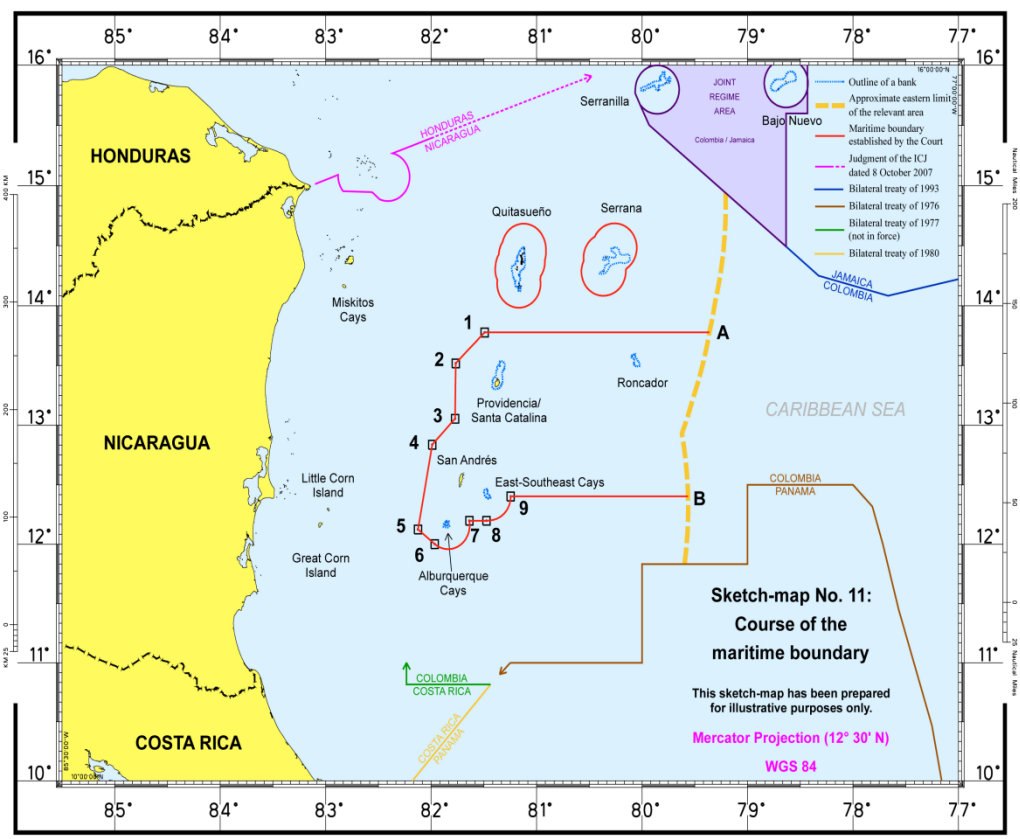
[1] *Application in the case concerning Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, p. 15.

1.3 By Order of 3 February 2014, the Court fixed 3 October 2014 as the time-limit for the filing of the *Memorial*.

B. SCOPE OF THE DISPUTE

1. The 19 November 2012 *Judgment*

1.4 The 19 November 2012 *Judgment* was rendered after more than ten years of litigation. The Court's unanimous decision is reflected in Sketch Map No. 11 attached to the Judgment depicting the course of the maritime boundary within 200 nautical miles of the Nicaraguan coast:



1.5 Besides fixing the maritime boundary between Nicaragua and Colombia, the Court also found that Colombia had "sovereignty over the islands at Albuquerque, Bajo Nuevo, East-Southeast Cays, Quitasueño, Roncador, Serrana and Serranilla"[2]. Nicaragua has fully respected the Court's *Judgment* in all its aspects.

2. Colombia's Violations of Nicaragua's rights and Breaches of Its International Obligations

1.6 On the same day the *Judgment* was issued, the President of Colombia, Juan Manuel Santos, reacted by (i) praising the Court's decision on sovereignty over the maritime features, which he described as "final and unappealable"[3], while, in the same speech, (ii) rejecting the rest of the *Judgment* (that is, the delimitation of the maritime boundary) because of "omissions, errors, excesses, inconsistencies that we cannot accept"[4]. The highest authorities of the Colombian Government also took this view; in particular, the Minister of Foreign Affairs declared the Court as Colombia's "enemy"[5] and questioned the election of "those judges to decide such an important judgment"[6].

1.7 This outburst of hostile declarations was followed by Colombia's denunciation of the Pact of Bogota[7], but did not stop there. On 9 September 2013, Colombia issued a Decree creating a so called "Integral Contiguous Zone"

---

[2] *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, *Judgment, I.C.J. Reports* 2012, p. 624.

[3] "Declaration of President Juan Manuel Santos on the judgment of the International Court of Justice", 19 November 2012 (NM, Annex 1), available at http://wsp.presidencia.gov.colPrensa/2012/NoviembrelPaginas/20121119 02.aspx

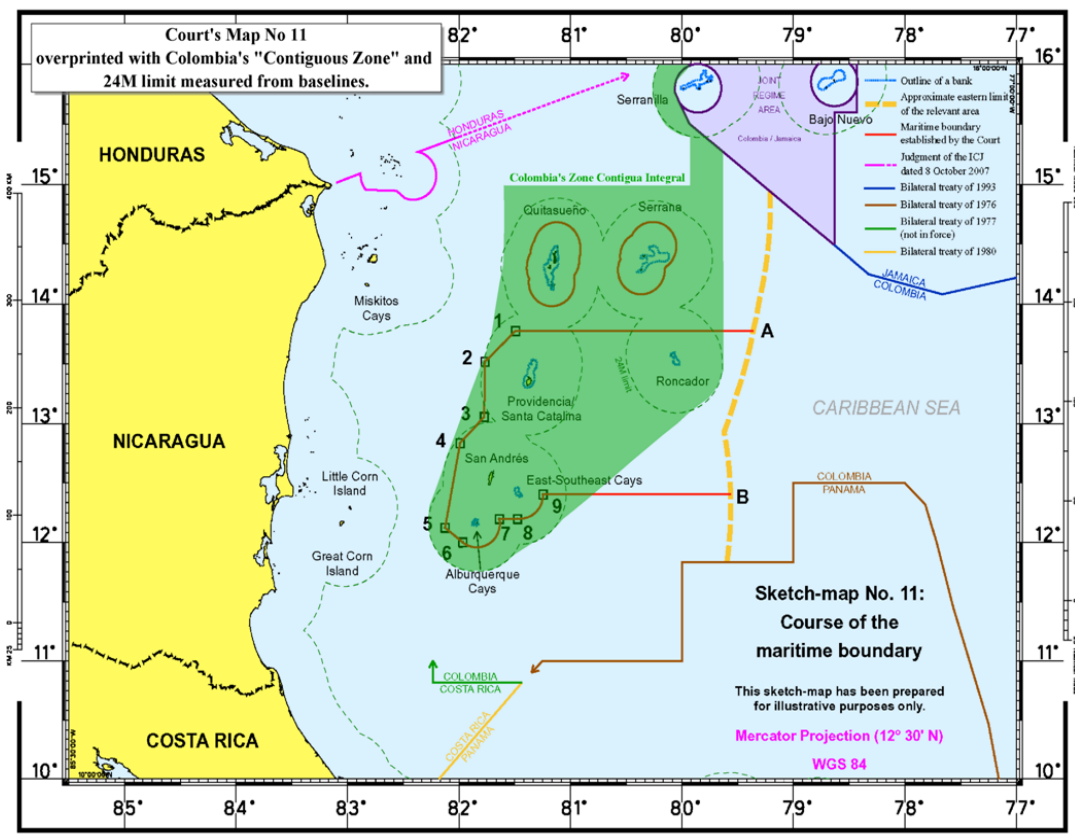
[4] *Ibid.*

[5] "The Colombian Foreign Minister Calls The Hague an Enemy", *El Nuevo Herald,* 28 November 2012 (NM, Annex 30) (http://www.elnuevoherald.com/20 1211112711353049/cancillercolombiana-califica.html). ("*El enemigo es la Corte que no falló en derecho, ese fallo está lleno de exabruptos, uno lo lee y no puede creer que los países que lo conforman hayan elegido esos jueces para un fallo tan importante*".)

[6] *Ibid.*

[7] *See* Jurisdiction Section below.

claiming for itself large parts of the maritime area that the Court had determined to belong to Nicaragua. Colombia's violation of Nicaragua´s sovereign rights to its maritime areas in the Caribbean Sea as established by the Court´s *Judgment*, may be appreciated in the following figure, which superimposes the "ICZ" proclaimed by Colombia (in green and purple), on the Court's Sketch Map No. 11, depicting the course of the maritime boundary established by the *Judgment*:



1.8 Upon the issuance of the Decree creating Colombia's "Integral Contiguous Zone", President Santos declared the Court's *Judgment* "inapplicable"[8] and ordered the Navy (*Armada de la República de Colombia*) to defend with "cloak and sword"[9] the waters that Colombia still claims for itself in violation of Nicaragua's sovereign rights and jurisdiction established by the Court's *Judgment* and its international obligations.

1.9 Since then, the orders of President Santos have been complied with by the Colombian Navy, which has deployed substantial force inside the waters adjudged to belong to Nicaragua, and has systematically interfered with Nicaragua's established rights and jurisdiction in those waters. In particular, it has regularly harassed and intimidated fishing vessels licensed by Nicaragua, and chased them back across the 82nd meridian, which Colombia still treats as its *de facto* boundary with Nicaragua, and has prevented the Nicaraguan navy from exercising its law enforcement mission east of that meridian. In addition to the repeated violations of Nicaragua's sovereign rights and jurisdiction, these actions have resulted in serious economic consequences for Nicaragua as it has not been able to fully enjoy the resources of its maritime area, while Colombia has continued to exploit them by issuing fishing permits to its nationals.[10] Up to this day, Colombia maintains that the boundary determined by the Court can only become binding on it upon the conclusion of a Treaty with Nicaragua to be approved in accordance with Colombian national law[11].

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[8] "Declaration of President Juan Manuel Santos on the integral strategy of Colombia on the Judgment of the International Court of Justice", 9 September 2013 (NM, Annex 4) (http://wsp.presidencia.gov.co/Prensa/2013/Septiembre/Paginas/20130909_04-Palabras-Santos-Colombia-presenta-su-Estrategia-Integral-frente-al-fallo-de-La-Haya.aspx)

[9] "Santos orders defense of the continental shelf with cloak and sword", *El Espectador*, 19 September 2013 (NM, Annex 41) (http://www.elespectador.com/noticias/politica/santos-ordena-defender-plataforma-continental-capa-y-es-articulo-447445).

[10] Generally, *see* Chapter II on the Facts, for a detailed list of incidents *see* Annexes 23 and 24.

[11] Presidency of the Republic of Colombia, Press Release, "The Limits of Colombia with Nicaragua continue to be those established in the Esguerra-Barcenas Treaty, affirmed the President of Colombia", 2 May 2014 (NM, Annex 7) (http://wsp.presidencia.gov.co/Prensa/2014/Mayo/

3. Nicaragua's Peaceful Response

1.10 Since the issuance of the 19 November 2012 *Judgment*, the President of Nicaragua, Daniel Ortega, has publicly and repeatedly sought to cooperate with President Santos in order to achieve an amicable solution respectful of the Court's *Judgment,* and to work out cooperative arrangements on its basis. As President Ortega explained, although there is no legal requirement for a treaty in order to make the 19 November 2012 *Judgment* effective or binding on the parties, Nicaragua is willing to accommodate Colombia's insistence on concluding a boundary treaty, provided that it recognizes and respects the rights and jurisdiction that belong to Nicaragua as a result of the *Judgment*.

1.11 In keeping with this policy, Nicaragua's Navy has acted with restraint in responding to Colombia's naval deployment, and violations of Nicaragua's sovereign rights and jurisdiction, in Nicaraguan waters. In particular, Nicaragua has not responded in kind to Colombia's use or threat of force against Nicaraguan fishing, naval or coast guard vessels, choosing to avoid confrontation rather than exercise its right to stand its ground. Nevertheless, the Colombian Navy's continued deployment in Nicaragua's waters for the purpose of preventing Nicaragua from enforcing its jurisdiction represents a serious and continuing

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Paginas/20140502_04-Los-limites-Colombia-Nicaragua-continuan-siendo-establecidos-tratado-Esguerra%E2%80%93Barcenas.aspx); *See* also recent public declarations dated 24 September 2014, just a few days before printing this memorial, in which the Head of the Navy Command of the Archipelago of San Andres and Providencia, Almirant Luis Hernan Espejo, declared that "the fishermen do not have to ask for permission from anybody that is not the Republic of Colombia (to work east of the 82 [meridian]) it is for that reason that the Army is permanently there to guarantee that they can fish freely". ("*Los pescadores no tienen que pedir permiso a nadie diferente de la República de Colombia (para trabajar al este del paralelo 82) y para eso está la Armada ahí permanentemente para garantizarles que puedan hacer su pesca con total libertad*"). "Colombia garantiza actividad de pescadores en aguas disputadas con Nicaragua", *El Espectador*, 24 September 2014, *available at* (http://www.elespectador.com/noticias/actualidad/colombia-garantiza-actividad-de-pescadores-aguas-disput-articulo-518557).

threat to international peace and security, as well as a defiance of international law.

C. JURISDICTION

1. The Pact of Bogotá

1.12 The jurisdiction of the Court in this case is based on Article XXXI of the American Treaty on Pacific Settlement (Pact of Bogotá) of 30 April 1948. This provision reads as follows:

> "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, in all disputes of a juridical nature that arise among them concerning:
>
> (a) the interpretation of a treaty;
> (b) any question of international law;
> (c) the existence of any fact which, if established, would constitute the breach of an international obligation;
> (d) the nature or extent of the reparation to be made for the breach of an international obligation."

1.13 Both Nicaragua and Colombia signed the Pact of Bogotá on 30 April 1948. Nicaragua ratified the Pact on 21 June 1950 and deposited its instrument of ratification on 26 July of the same year with no reservation relevant to this case. Colombia ratified the Pact on 14 October 1968 and deposited its instrument of ratification on 6 November of the same year with no reservations.

1.14 Under Article XXXI of the Pact, the Parties' matching declarations, in which they each "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," were in effect on 26 November 2013, the date Nicaragua filed its Application in this case. Therefore, the Court was properly seised of jurisdiction on that date.

1.15 Colombia's denunciation of the Pact of Bogota, which took effect on 27 November 2013 – the day after the Application was filed – has no bearing on the Court's jurisdiction.

1.16 Under Article XXXI of the Pact, Colombia's declaration in conformity with Article 36, paragraph 2 of the Court's Statute remained effective "for so long as the present Treaty [i.e. the Pact itself] is in force." Article LVI of the Pact provides that: "The present Treaty shall remain in force indefinitely, but may be denounced upon one year's notice, at the end of which it shall cease to be in force for the state denouncing it, but shall continue in force for the remaining signatories." Thus, by virtue of Article LVI, the Pact remained "in force" for Colombia until one year after Colombia gave notice of its denunciation. Such notice was given on 27 November 2012. Hence, under Article LVI's express terms, the Pact remained in force for Colombia until 27 November 2013. And hence, because Article XXXI provides that Colombia's declaration remained in force "so long as the present Treaty is in force," that declaration was necessarily in force at all times prior to 27 November 2013. Between 27 November 2012 and 27 November 2013, therefore, there was nothing to prevent Nicaragua from filing an Application with the Court and thereby seising it with jurisdiction.

1.17 Based on its public comments, Colombia appears to have come to the opposite conclusion, based on a strained reading of the second sentence of Article LVI. That sentence provides: "The denunciation shall have no effect with respect to pending procedures initiated prior to the transmission of the particular

notification." For obvious reasons, this language cannot defeat the Court's jurisdiction under Article XXXI.

1.18 First, there is nothing in this sentence that negates the effectiveness of Colombia's declaration accepting the Court's compulsory jurisdiction under Article XXXI for "so long as the present Treaty is in force." Nor is there anything in the sentence that negates the provision in Article LVI, first paragraph (which immediately precedes the sentence upon which Colombia apparently relies) that it is not until one year after a denunciation notice is given (in this case, until 27 November 2013) that "the Treaty shall cease to be in force with respect to the state denouncing it (in this case, Colombia)." Thus, there is nothing in the one-sentence second paragraph of Article LVI to dispute the conclusion that Colombia's declaration under Article XXXI was in effect on 26 November 2013, when Nicaragua's Application was filed. To read the language otherwise, as Colombia apparently does, would not only be illogical, and out of keeping with the plain text, but would also be in direct contradiction of the other Treaty provisions quoted above, to wit, Article XXXI and LVI, first paragraph; and this would be inconsistent with the rules of treaty interpretation set forth in Articles 31 to 33 of the Vienna Convention on the Law of Treaties.

1.19 Second, the second sentence of Article LVI cannot apply to declarations under Article XXXI because those declarations are not "pending procedures." The declarations were binding undertakings made by the parties, which were self-contained and became fully perfected international obligations immediately upon ratification of the Treaty and its entry into force. They were completed acts, and their legal consequences took effect, at that time. There was nothing "pending" about them. They do not constitute the "pending procedures" to which the sentence applies.

1.20 Third, the sentence does not address "pending procedures" initiated after a notice of denunciation has been circulated. Nor does it define "pending procedures". It merely states that some procedures, i.e., those initiated *prior* to the notice, would *not* be affected. Colombia's apparent *a contrario* reading of the sentence cannot stand against the express language of Articles XXXI and LVI, first paragraph, which ensure the effectiveness of Colombia's declaration for 12 months after notification has been given.

1.21 Fourth, as the Court has made clear since at least its response to Guatemala's preliminary objections in the *Nottebohm* case more than 60 years ago, when an Application is filed during the period when a soon-to-expire declaration under Article 36(2) is still in force, the Court's jurisdiction is unaffected by the subsequent expiration of the declaration[12]. Once properly seised, the Court's jurisdiction continues past the expiration, termination or withdrawal of the declaration on which jurisdiction was based.

1.22 Finally, the case for jurisdiction is even stronger for a declaration under Article XXXI of the Pact of Bogota, than it is under the optional clause of Article 36(2). The point was made by former President Jiménez de Aréchega in his article on " The Compulsory Jurisdiction of the International Court of Justice":

> "6. Despite these apparent analogies between Article XXXI of the Pact of Bogota and Article 36(2) and 36(3) of the Statute, the *Yearbook* of the Court does not list Article XXXI among the declarations recognizing as compulsory the jurisdiction of the Court. On the contrary, it lists the Pact of Bogota among 'other instruments governing the jurisdiction of the Court.' This is a correct classification, because Article XXXI of the Pact of Bogota, despite its terminology, falls in substance within paragraph 1 of

[12] *Nottebohm case (Preliminary Objections), Judgment of November 18th, 1953: I.C.J. Reports* 1953, p.111.

Article 36 of the Statute, referring to treaties and conventions in force, and not under paragraphs 2, 3 and 4 of Article 36.

"7. This is so because Article XXXI has the legal effect of 'contractualizing,' that is to say, of transforming, among the American States which are Parties to the Pact, the loose relationship which arises from the unilateral declarations under 36(2), into a treaty relationship. This treaty relationship thus acquires, between those States, the binding force and stability which is characteristic of a conventional link, and not the regime of the optional clause. In this way, the Latin American States which have accepted the Pact of Bogota have established, in their mutual relations, and in view of the close historical and cultural ties between the compulsory jurisdiction of the Court on much stronger terms than those resulting from the network of declarations made under Article 36(2) of the Statute. This is confirmed by two main features of the optional clause regime: the possibility of withdrawals and of new reservations.

"8. Unilateral declarations made under Article 36(2) of the Statute without time limits may be withdrawn a reasonable time after giving notice of such intention, and new reservations may be introduced at will. *On the other hand, the relationship created by Article XXXI has significant legal differences from the normal regime of the optional clause. As to withdrawal, the Pact of Bogota, once accepted by an American State, continues in force indefinitely, and may be denounced only by giving one year's notice, remaining in force during all that period (Article LVI of the Pact of Bogota). This means that the withdrawal of the acceptance of compulsory jurisdiction as soon as the possibility of a hostile application looms in the horizon has been severely restricted."*[13] (emphasis added)

[13] E. Jiménez de Aréchaga, 'The Compulsory Jurisdiction of the International Court of Justice under the Pact of Bogotá and the Optional Clause', *International Law at a time of perplexity: Essays in honour of Shabtai Rosenne*, Martinus Nijhoff, 1989, p. 356-357.

1.23 Indeed, the Court itself has recognized that a State's consent to compulsory jurisdiction under Article XXXI of the Pact of Bogotá: "remains valid *ratione temporis* for as long as that instrument itself remains in force between those States"[14]. As shown above, by virtue of Article LVI, first paragraph, the Pact remained in force between Nicaragua and Colombia until 27 November 2013. Consequently, Colombia's acceptance of the Court's compulsory jurisdiction was valid *ratione temporis* on 26 November 2013, when the Application was filed. The Court's jurisdiction in this case is therefore unimpeachable.

2. Inherent Jurisdiction of the Court over Disputes Arising from Non-compliance with Its *Judgments*

1.24 The very particular circumstances of this case are such that the Court can exercise its jurisdiction on another ground, based on its inherent jurisdiction – which comes as a complement to Article XXXI of the Pact of Bogotá.[15]

1.25 As the Court recalled in several circumstances, it "possesses an inherent jurisdiction"[16]:

> "Such inherent jurisdiction […] derives from the mere existence of the Court as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded."[17]

1.26 Being a court of justice, the International Court of Justice has an inherent jurisdiction to pronounce itself on cases of non-compliance with a previous

[14] *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988,* p. 84, para. 34

[15] *See* PCIJ, Judgment, 4 April 1939, *The Electricity Company of Sofia*, Series A/B, No. 77, p. 76.

[16] I.C.J., Judgment, 20 December 1974, *Nuclear Tests (Australia* v. *France)*, *Reports 1974*, pp. 259-260, para. 23; *(New-Zealand v. France)*, *ibid.*, p. 463, para. 23.

[17] I.C.J., Judgments, 20 December 1974, *Nuclear Tests (Australia* v. *France)*, *Reports 1974*, pp. 259-260, paras. 22-23; *(New-Zealand v. France)*, *ibid.*, p. 463, para. 23. *See* also: I.C.J., Judgment, 2 December 1963, *Northern Cameroons (Cameroon* v. *United Kingdom)*, Separate Opinion of Judge Fitzmaurice, *Reports 1963*, p. 103.

Judgment. And, of course, it is immaterial that no provision in the Rules or the Statute of the Court confirms such inherent jurisdiction: as a matter of definition "inherent jurisdiction" need not be expressed but stems from the very nature of the International Court of Justice as a court of law and is implied in the texts determining the jurisdiction of the Court.

1.27 In his persuasive opinion in *Fabris v. France*, basing himself on the now abundant case-law of the ECHR,[18] Judge Pinto de Albuquerque wrote: "it is evident that the jurisdictional nature of the Court would be dangerously at risk if the Court did not react to infringements of its judgments and, even worse, if the final word on the execution of its judgments were *de facto* dependent on the will of the first addressees of the judgments themselves: the governments."[19] Moreover, as Judge Pinto de Albuquerque aptly noted, as applied to international courts and tribunals the implied powers doctrine "requires that international tribunals and adjudication bodies be implicitly vested with the power to supervise the execution of their judgments when this is necessary for the discharge of their functions[20]."[21] For its part, the Inter-American Court of Human Rights also has

[18] E.C.H.R., Grand Chamber, Judgment, 30 June 2009, *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)*, Application no. 32772/02, paras. 64-68; Judgment, 10 April 2008, *Wasserman v. Russia (no. 2)*, Application no. 21071/05, para. 37; Judgment, 15 November 2011, *Ivantoc, Popa and Others v. Moldova and Russia*, Application no. 23687/05, paras. 86 and 95-96. *See* also E.C.H.R., Judgment, 11 October 2011, *Emre v. Switzerland (no. 2)*, Application no. 5056/10, paras. 43 and 68-77. The position of the European Court is all the more noticeable that, contrary to the ICJ's Statute, Article 46 of the ECHR provides for a mechanism for the execution of its Judgments, which is not the case in respect to the World Court's Judgments if one excepts the very hypothetical use of Article 94, paragraph 2, of the Charter.

[19] E.C.H.R., Grand Chamber, 7 February 2013, *Fabris v. France*, Application no. 16574/08, Concurring Opinion of Judge Pinto de Albuquerque, *Rec.*, p. 31.

[20] Fn. 14 as included in the original text: "For the formulation of this consolidated doctrine *see Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: ICJ Reports 1949*, p. 180, and specifically on the implied powers of an international court, *see Factory at Chorzow (Germ. v. Pol.), 1927, PCIJ, Series A, No. 9 (July 26)*, pp. 21-22, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986*, p. 142, and *LaGrand (Germany v. United States of America), Judgment, ICJ Reports 2001*, p. 485, and IACHR, *Baena-Ricardo and Others v. Panama, judgment on competence*, 28 November 2003, Series C, no. 104, paras. 72, 114 and 132."

[21] Opinion prec. at note 19, p. 32.

competence for examining all matters concerning compliance with its judgments.[22]

1.28 Leaving aside interpretation and revision, or the case when a judgment expressly provides for a subsequent phase of the proceedings - neither of those situations being relevant in the present case - there exists another situation which affects the fundamental basis of the Court's Judgment; that is, the validity itself of the Judgment and the obligation of compliance.

1.29 The situation in the present case is legally similar to that presented by the *Nuclear Tests* cases. In its 1974 *Judgment*, the Court had found that, in view of the assurances given by France, the dispute had disappeared.[23] Then, the Court specified that "[o]nce the Court has found that a State has entered into a commitment concerning its future conduct it is not the Court's function to contemplate that it will not comply with it."[24] Similarly, in the present case – as is normally the case when the Court renders its judgments – the Court of course delivered its November 2012 *Judgment* with the understanding that "the Court 'neither can nor should contemplate the contingency of the judgment not being complied with' *(Factory at Chorzow, P.C.I.J., Series A, No. 17,* p. 63). Both Parties have undertaken to comply with the decisions of the Court, under Article 94 of the Charter…"[25] Significantly in this last passage of its 1984 *Judgment* in

[22] I.-A.C.H.R., Judgment, 28 November 2003, *Baena Ricardo et al. v. Panama*, Jurisdiction, para. 90 and, in the same case, Order, 5 February 2013, Monitoring Compliance with Judgment, Considering clause 1. *See* also e.g.: I.-A.C.H.R., Order, 26 November 2013, *García Asto and Ramírez Rojas v. Peru*, Monitoring Compliance with Judgment, Considering clause 1; Order, 28 August 2013, *Castañeda Gutman v. Mexico***,** Monitoring Compliance with Judgment, Considering clause 1 or Order, 22 August 2013, *Yatama v. Nicaragua*, Monitoring Compliance with Judgment, Considering clause 1. In all these Judgments the Court recalls that: "One of the inherent attributes of the jurisdictional functions of the Court is to monitor compliance with its decisions."

[23] *See* I.C.J., Judgment, 20 December 1974, *Nuclear Tests (New Zealand* v. *France)*, *Reports 1974*, p. 476, para. 58.

[24] *Ibid.*, p. 477, para. 63.

[25] I.C.J., Judgment, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility*, *Reports 1984*, pp. 437-438, para. 101. *See* also: P.C.I.J., Judgment, 17 August 1923, *S.S. "Wimbledon"*, Series A, No. 1, p. 32; or I.C.J.,

Nicaragua v. United States, the Court assimilates the obligation to comply with its judgments with a commitment of future conduct taken by the concerned State, since it immediately adds, in the same sentence, the quote from the *Nuclear Tests* case appearing above.[26]

1.30 It is therefore on the understanding that France would respect its commitments made to both the Court and the Applicants that, in the *Nuclear Tests* cases, the Court observed "that if the basis of this Judgment were to be affected, the Applicant could request an examination of the situation in accordance with the provisions of the Statute; the denunciation by France, by letter dated 2 January 1974, of the General Act for the Pacific Settlement of International Disputes, which is relied on as a basis of jurisdiction in the present case, cannot by itself constitute an obstacle to the presentation of such a request."[27] It is on this basis that the Court dismissed New Zealand's "Request for an examination of the situation" since it considered in that case that

> "the basis of the Judgment delivered on 20 December 1974 in the *Nuclear Tests (New Zealand v. France) case* has not been affected; […] the 'Request for an Examination of the Situation' submitted by New Zealand on 21 August 1995 does not therefore fall within the provisions of paragraph 63 of that Judgment; and […] that Request must consequently be dismissed."[28]

It is on the similar understanding that Colombia would comply with its November 2012 *Judgment* that the Court decided in the *Territorial and Maritime Dispute*.

1.31 Indeed, in the present case, the Court had not expressly envisaged "an examination of the situation" in its *Judgment*. However, the issue is not whether

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Judgment, 10 December 1985, *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the* Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Tunisia v. Libyan Arab Jamahiriya), *Reports 1985*, p. 229, para. 67

[26] At para. 1.29.

[27] I.C.J., Judgment, 20 December 1974, *Nuclear Tests (New Zealand* v. *France)*, *Reports 1974*, p. 476, para. 63.

[28] I.C.J., Order, 22 September 1995, *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the* Nuclear Tests *(New Zealand* v. *France) Case*, *Reports 1995*, pp. 306, para. 65.

the Court made a formal "reservation" similar to that contained in paragraph 63 in the *Nuclear Tests* Judgment (in *New Zealand* v. *France*); the question is on what basis the Court made this declaration and whether the reasons which prompted the Court to make that "reservation" also exists in the present case. In effect, the possibility of an examination of the situation in the *Nuclear Test* cases was not *created* by paragraph 63 of the 1974 *Judgment*: in this passage the Court implicitly refers to a general principle that a commitment by a Party before the Court is presumed to be respected. Whether such a commitment is taken through assurances given by a Party or by the acceptance of the legally binding force of the judgment on the Parties as provided for in Article 59 of the Statute[29] does not change the principle. And, while in its Order of 1995, the Court found that the New Zealand request did not fall within what was contemplated in paragraph 63, it is obvious in the present case that Colombia's behaviour does affect the basis of the Court's November 2012 *Judgment*. It has therefore an inherent power to re-examine the situation created by Colombia's calling into question the very basis of that *Judgment*.

1.32 Therefore, if *quod non* the Court were to find that it has no jurisdiction on the basis of the Pact of Bogotá, as a consequence of the denunciation of the Pact by Colombia, this denunciation would not prevent the Court from exercising jurisdiction in respect of the claims presented in the *Application.* To be clear: Nicaragua does not request an interpretation by the Court of its November 2012 *Judgment* under Article 60. It requests the Court to exercise its inherent jurisdiction to examine the situation created by Colombia's behaviour affecting the very basis of that Judgment. Such inherent power constitutes an alternative basis for its jurisdiction in the present case.

[29] In its Preliminary Objections in the case concerning the *Question of the Delimitation of the continental shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan coast*, Colombia rightly recalls: "The affirmative consequence [of the principle *reservation judicata*] is that the substance of the holding is definitive and binding" (p. 108, para. 5.35).

3. The Court's Task

1.33 To avoid any doubt, Nicaragua will make clear what the dispute submitted to the Court is *not*: it is not a request for interpretation of the November 2012 *Judgment* in that the present dispute is not "a difference of opinion or views between the parties as to the meaning or scope of a judgment rendered by the Court"[30]. As a consequence, contrary to interpretation proceedings under Article 60 of the Statute, the Court's role in the present case is *not* "to clarify the meaning and scope of what the Court decided in the judgment which it is requested to interpret"[31] but to decide *new* legal questions and to examine "facts other than those which it has considered in the judgment [of 19 November 2012], and consequently all facts subsequent to that judgment", something "the Court, when giving an interpretation, refrains from [doing]."[32]

1.34 Nor does Nicaragua ask the Court to reaffirm what it has already decided in its *Judgment*: this is *res judicata* and Article 59 of the Statute imposes upon Colombia an unconditional duty to comply without delay or any restriction. And Nicaragua would have nothing to gain by asking the Court to simply repeat what it has already very clearly decided.

1.35 The present case takes place downstream: it originates in Colombia's actions subsequent to the *Judgment,* beginning with its rejection of it and

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[30] I.C.J., Judgment, 11 November 2013, *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the* Temple of Preah Vihear (Cambodia *v.* Thailand) *(Cambodia* v. *Thailand)*, para. 33, quoting *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning* the Temple of Preah Vihear (Cambodia *v.* Thailand) *(Cambodia* v. *Thailand), Provisional Measures, Order of 18 July 2011, I.C.J. Reports 2011 (II)*, p. 542, para. 22).

[31] I.C.J., Judgment, 27 November 1950, *Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case (Colombia* v. *Peru), Reports 1950*, p. 402. *See* also Judgment, 11 November 2013, *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the* Temple of Preah Vihear (Cambodia *v.* Thailand) *(Cambodia* v. *Thailand)*, para. 66.

[32] P.C.I.J., Judgment, 16 December 1927, *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów),* Series A, No. 13, p. 21. *See* also I.C.J., Judgment, 11 November 2013, *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the* Temple of Preah Vihear (Cambodia *v.* Thailand) *(Cambodia* v. *Thailand)*, para. 75.

declaration that it is "inapplicable," and consisting of its assertion of new claims to the waters adjudged to belong to Nicaragua, its exercise of purported sovereign rights and jurisdiction in those waters, and its prevention of Nicaragua from exercising its sovereign rights and jurisdiction within its maritime boundaries as fixed by the Court. This is not a new delimitation case because the Court has definitely settled the maritime boundary between the Parties, except in regard to the maritime boundary of the continental shelf beyond 200 M from Nicaragua's coast, which is the object of another case submitted by Nicaragua. There is no need for a restatement of that boundary. The present case seeks to hold Colombia internationally responsible for the breaches of its obligations to comply with, and to respect the rights recognized in, the November 2012 *Judgment*.

D. OUTLINE OF THE *MEMORIAL*

1.36 The *Memorial* is presented in one volume, consisting of four Chapters, Nicaragua's formal Submissions, and evidentiary Annexes. Following Chapter I (Introduction), Chapter II sets out the relevant facts, including Colombia's declarations of rejection and inapplicability of the November 2012 *Judgment*; its assertion of new claims to the waters adjudged to belong to Nicaragua; the deployment of its naval forces with instructions to defend Colombia's new claims with force if necessary; the exercise by Colombia of its purported sovereign rights and jurisdiction in Nicaragua's waters; and Colombia's prevention of Nicaraguan licensed fishing vessels and its naval and coast guard vessels from navigating, fishing or exercising jurisdiction in those waters.

1.37 Chapter III addresses the legal consequences of Colombia's actions. It is divided into two parts. Part A refers to the formal sources of the binding authority of the Court's Judgment of 19 November 2012 and describes its legal effects. Part B, C and D identify the main categories of legal obligations binding upon

Colombia in wake of that Judgment, and point to the Colombian actions described in Chapter II that breach those obligations.

1.38 Chapter IV discusses the remedies sought by Nicaragua for Colombia's violations of Nicaragua's international legal rights. This is followed by Nicaragua's formal Submissions, and evidentiary materials submitted as Annexes.

CHAPTER II: THE FACTS

2.1 This Chapter sets out the facts concerning Colombia's violations of Nicaragua's sovereign rights and jurisdiction in the waters, seabed and subsoil adjudged by the Court to pertain to Nicaragua in its Judgment of 19 November 2012. It is divided into four sections. Section A describes the declarations of the President and of the Minister of Foreign Affairs of Colombia rejecting as "inapplicable" the November 2012 Judgment, and asserting Colombia's rights in maritime areas that the Court unanimously found to belong to Nicaragua. Section B discusses the issuance of Presidential Decree 1946, in which the President of Colombia established a so-called "Integral Contiguous Zone" that claims for Colombia maritime areas determined by the Court to appertain to Nicaragua. Section C details the declarations and actions of the Colombian navy to protect Colombia's purported "rights" in that "Zone" in violation of Nicaragua's sovereign rights and jurisdiction. Finally, Section D describes Nicaragua's self-restraint in avoiding confrontation with Colombian naval forces, notwithstanding Colombia's unlawful disregard of Nicaragua's judicially established rights and jurisdiction.

A. THE DECLARATIONS OF THE PRESIDENT AND OF THE FOREIGN MINISTER OF COLOMBIA

2.2 The Court issued its judgment in the case concerning *Territorial and Maritime Dispute (Nicaragua v. Colombia)* on 19 November 2012. The decision to grant Colombia sovereignty over the insular features in dispute (i.e., Alburquerque, Bajo Nuevo, East-Southeast Cays, Quitasueño, Roncador, Serrana and Serranilla) was unanimous, and included the Judges ad hoc of both States.[33]

[33] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012*, para. 251 (1).

The decision with respect to the maritime boundary within 200 M of Nicaragua's baselines was equally unanimous.[34] Although Colombia's relevant coast was found to be shorter than that of Nicaragua by a ratio of more than 8:1, Colombia received fully 25 % of the relevant maritime area, significantly more than a proportionate delimitation would have given it.[35]

2.3 The President of Colombia, Juan Manuel Santos, responded to the Judgment the same day it was rendered. On the one hand, President Santos praised the Court's decision awarding Colombia sovereignty over the disputed islands, which he described as "a final and unappealable judgment on this issue".[36] On the other, he criticized and rejected the Court's delimitation of the maritime boundary between Nicaragua and Colombia in strong terms. Claiming that the Court had "made serious mistakes",[37] President Santos asserted:

> "Inexplicably – after recognizing the sovereignty of Colombia over the entire archipelago and holding that it as a unit generated continental shelf and exclusive economic zone rights – the Court adjusted the delimitation line, leaving the Keys of Serrana, Serranilla, Quitasueño and Bajo Nuevo separated from the rest of the archipelago.
>
> This is inconsistent with what the Court itself acknowledged, and is not compatible with the geographical conception of what is an archipelago.
>
> All of these are really omissions, errors, excesses, inconsistencies that we cannot accept."[38]

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[34] *Ibid*, para. 251 (4), (5).
[35] *Ibid*., paras. 153, 243.
[36] "Declaration of President Juan Manuel Santos on the judgment of the International Court of Justice", 19 November 2012 (NM, Annex 1) (http://wsp.presidencia.gov.colPrensa/2012/NoviembrelPaginas/20121119 02.aspx) ("*Hoy esta Corte rechazó las pretensiones de soberanía de Nicaragua sobre nuestro archipiélago. Es un fallo definitivo e inapelable en esta tema*")(emphasis added).
[37] *Ibid.*
[38] *Ibid*. *See* also, "ICJ ruling on San Andres a 'serious judgment error': Santos", *Colombia Reports*, 20 November 2012 (NM, Annex 25) (http://colombiareports.co/icj-ruling-on-san-andres-a-serious-judgement-error-santos/); "International Court Gives Nicaragua More Waters, Outlying Keys to

2.4 On this basis, President Santos declared: "Colombia – represented by its Head of State – *emphatically rejects that aspect of the judgment* rendered by the Court today".[39]

2.5 Colombia's Minister of Foreign Affairs, María Ángela Holguín, elaborated: "The enemy is the Court which did not base its decision on the law, that Judgment is full of inadequacies and one reads it and cannot believe that the states parties that conform the Court elected those judges to decide such an important Judgment".[40] The Foreign Minister followed this statement with a letter to the Secretary General of the Organization of American States denouncing the Pact of Bogotá. The letter reads in pertinent part:

> "I have the honor to address Your Excellency pursuant to Article LVI of the American Treaty on Pacific Settlement in order to give notice to the General Secretariat of the Organization of American States, which you head, as the successor to the Pan American Union, that the Republic of Colombia denounces as of today the "American Treaty on Pacific Settlement", signed on April 30, 1948, whose instrument of ratification was deposited by Colombia on November 6, 1968."[41]

2.6 The following day, President Santos explained that Colombia's decision to denounce the Pact was in response to the Court's decision on delimitation:

Colombia", *Dialogo,* 21 November 2012 (NM, Annex 26) (http://dialogoamericas.com/en GB/articles/rmisa/features/regional news/2012/11I21/feature-ex-3687), or "Caribbean Crisis: Can Nicaragua Navigate Waters It Won from Colombia?", *Time World*, 28 November 2012 (NM, Annex 28) (http://world.time.com/2012/11/28/caribbean-crisis-can-nicaragua-navigate-waters-it-won-from-colombia/) or "Colombia pulls out of International Court over Nicaragua", *BBC United-Kingdom*, 28 November 2012 (NM, Annex 29) (http://www.bbc.co.uk/news/world-latin-america-20533659).

[39] *Ibid*, ("*Colombia –representada por su Jefe de Estado– rechaza enfáticamente ese aspecto del fallo que la Corte ha proferido en el día de hoy*".) (emphasis added)

[40] "The Colombian Foreign Minister Calls The Hague an Enemy", *El Nuevo Herald,* 28 November 2012 (NM, Annex 30) (http://www.elnuevoherald.com/20 1211112711353049/cancillercolombiana-califica.html). ("*El enemigo es la Corte que no falló en derecho, ese fallo está lleno de exabruptos, uno lo lee y no puede creer que los países que lo conforman hayan elegido esos jueces para un fallo tan importante*".)

[41] Letter from Colombia to Secretary General of the Organization of American States dated 27 November 2012 (GACIJ No.79357) (NM, Annex 19).

> "I have decided that the highest national interests demand that the territorial and maritime boundaries be fixed through treaties, as has been the legal tradition of Colombia, and not through judgments rendered by the International Court of Justice.
>
> …
>
> This is why yesterday Colombia denounced the Pact of Bogotá. Proper notice was given to the Secretary General of the Organization of American States. …
> Never again, never again will what happened through the International Court of Justice's Judgment of 19 November happen to us again.
>
> …
>
> The decision I have made obeys to a fundamental principle: the boundaries between states should be fixed by States themselves. Land borders and maritime boundaries between states should not be left to a Court, but rather must be fixed by States through treaties of mutual agreement".[42]

2.7 Nicaragua received this news with grave concern. Its President, Daniel Ortega Saavedra, responded by inviting President Santos to engage in a constructive dialogue over implementation of the 19 November Judgment. The meeting took place on 1 December 2012 in Mexico City. President Ortega stated Nicaragua's position that, while the Judgment of the Court had to be respected by both States, there was room for discussion in regard to the manner of its implementation, and at all events the matter had to be resolved peacefully and without confrontation.[43] President Santos, however, insisted that Colombia would

[42] "Declaration of President Juan Manuel Santos on the denunciation of the Pact of Bogota", 28 November 2012 (NM, Annex 2) (http://wsp.presidencia.gov.colPrensa/2012/NoviembrelPaginas/20121128 04.aspx).
[43] "Santos and Ortega will meet this Saturday in Mexico City", *La Republica,* 29 November 2012 (NM, Annex 31) (http://www.larepublica.co/economia/santos-y-ortega-se-reunir%C3%A1n-este-s%C3%A1bado-en-ciudad-de-m%C3%A9xico_26792).

not recognize the Judgment unless "Colombian rights which have been violated are reestablished and guaranteed in the future".[44]

2.8 In the two years since, Colombia has repeatedly made clear its rejection of the Judgment, and its determination to employ the Colombian navy to exercise alleged rights and jurisdiction in the maritime areas that were adjudged to belong to Nicaragua[45]. In September 2013, for example, President Santos ordered the high command of the Armed Forces to "defend with 'cloak and sword' the continental shelf that Colombia has in the Caribbean Sea".[46]

2.9 The Commander of the Colombian Navy, Vice Admiral Hernando Wills, responded that his forces will "comply with the order of the Head of State to exercise sovereignty throughout the Colombian Caribbean Sea".[47] He also declared that "the judgment of The Hague is inapplicable", and that Colombian frigates operating throughout the area to the east of the 82°W meridian would help him fulfill his "duty […] to defend all the Colombian maritime space".[48]

2.10 The Governor of San Andrés, Aury Guerrero Bowie, added that "the Caribbean waters over which The Hague gave economic rights to Nicaragua are and have always been Colombian waters".[49] She told President Santos: "The

[44] "Government of Colombia will not implement ICJ judgment until the rights of Colombians have been restored", *El Salvador Noticias.net*, 3 December 2012 (NM, Annex 32) (http://www.elsalvadornoticias.net/2012/12/03/gobierno-decolombia-no-aplicara-fallo-cij-mientras-no-se-restablezcan-derechos-de-colombianos/).

[45] Vice President of Colombia, Mr. Angelino Garzón has also insisted that "the judgment of the Court of The Hague is unenforceable in our country. It cannot apply now, in five years or ten years time". "World Court ruling on maritime borders unenforceable in Colombia: Vice President", *Colombia Reports, 23* August 2013 (NM, Annex 38) http://colombiareports.co/hague-judgment-unenforceable-colombia-vice-president/

[46] ''Santos orders defense of the continental shelf with cloak and sword", *El Espectador,* 19 September 2013 (NM, Annex 41) (http://www.elespectador.com/noticias/politica/santos-ordena-defender-plataforma-continental-capa-y-es-articulo-447445).

[47] *Ibid.*

[48] *Ibid.*

[49] *Ibid.*

whole territory, including the 82° [meridian], is yours and we count on its defense".[50]

B. PRESIDENTIAL DECREE 1946

2.11 Colombia transformed into national law its rejection and defiance of the November 2012 Judgment on 9 September 2013, when President Santos issued Decree 1946. The Decree purported to establish Colombia's rights and jurisdiction in parts of the Caribbean that indisputably belong to Nicaragua under the Court's Judgment. Specifically, the decree created a so-called "Integral Contiguous Zone" ("ICZ") that ostensibly unified the maritime "contiguous zones" of all of Colombia's islands, keys and other maritime features in the area.[51]

2.12 Article 5 of Decree 1946 describes the ICZ as follows:

> "**Contiguous Zone of the Western Caribbean Sea insular territories**
>
> 1. Without prejudice to that which is established in Number 2 of the present Article, the contiguous zone of the Western Caribbean Sea insular territories of Colombia extends to a distance of 24 nautical miles measured from the baselines referred to in Article 3 of this Decree.
>
> 2. The contiguous zones adjacent to the territorial sea of the islands that conform the Western Caribbean Sea insular territories of Colombia, except those of the Serranilla and Bajo Nuevo islands, upon intersecting create a continuous zone and uninterrupted zone of the whole of the San Andrés, Providencia and Santa Catalina Archipelago Department over which the competent national authorities shall exercise their powers which are recognized by International Law and the Colombian laws mentioned in Number 3 of the present article.

[50] *Ibid.*

[51] Presidential Decree 1946 of 9 September 2013 (NM, Annex 9) (http://wsp.presidencia.gov.co/Normativa/Decretos/2013/Documents/SEPTIEMBRE/09/DECRETO%201946%20DEL%2009%20DE%20SEPTIEMBRE%20DE%202013.pdf)

With the objective of ensuring the due administration and orderly management of the whole San Andrés, Providencia and Santa Catalina Archipelago, its islands, keys and other formations and their maritime areas and resources, as well as to avoid the existence of irregular shapes or contours that make difficult their practical implementation, the lines that indicate the outer limits of the contiguous zones shall be joined by geodesic lines. Similarly, these shall be joined at the contiguous zone of Serranilla Island by geodesic lines that shall follow the direction of parallel 14°59'08" N through to meridian 79°56'00" W, and from there to the north, thus conforming the Integral Contiguous Zone of the San Andrés, Providencia and Santa Catalina Archipelago Department.

3. In consistency with what is established in the above provision, the Colombian State shall exercise in the established Integral Contiguous Zone its sovereign authority and the powers for the implementation and the necessary control regarding:

a) Prevention and control of violations of laws and by-laws regarding integral security of the State, including piracy, drug trafficking, as well as behaviours that endanger security at sea and national maritime interests, customs, fiscal, immigration and health matters committed in its insular territories or in their territorial sea. Similarly, violations of laws and by-laws regarding environmental protection, cultural patrimony and the exercise of historic rights to fishing held by the State of Colombia, shall be prevented and controlled.

b) Punishment of violations of laws and by-laws regarding the matters enumerated in a) above and that were committed in the insular territories or their territorial sea."

2.13 In an address to the Colombian people on the day Decree 1946 was issued, President Santos presented the following map to depict the newly created ICZ:[52]

[52] Map presented by President Juan Manuel Santos, 09 September 2013 (NM, Annex 10) (http://www.cancilleria.gov.co/newsroom/video/alocucion-del-presidente-juan-manuel-santos-sobre-la-estrategia-integral-colombia)

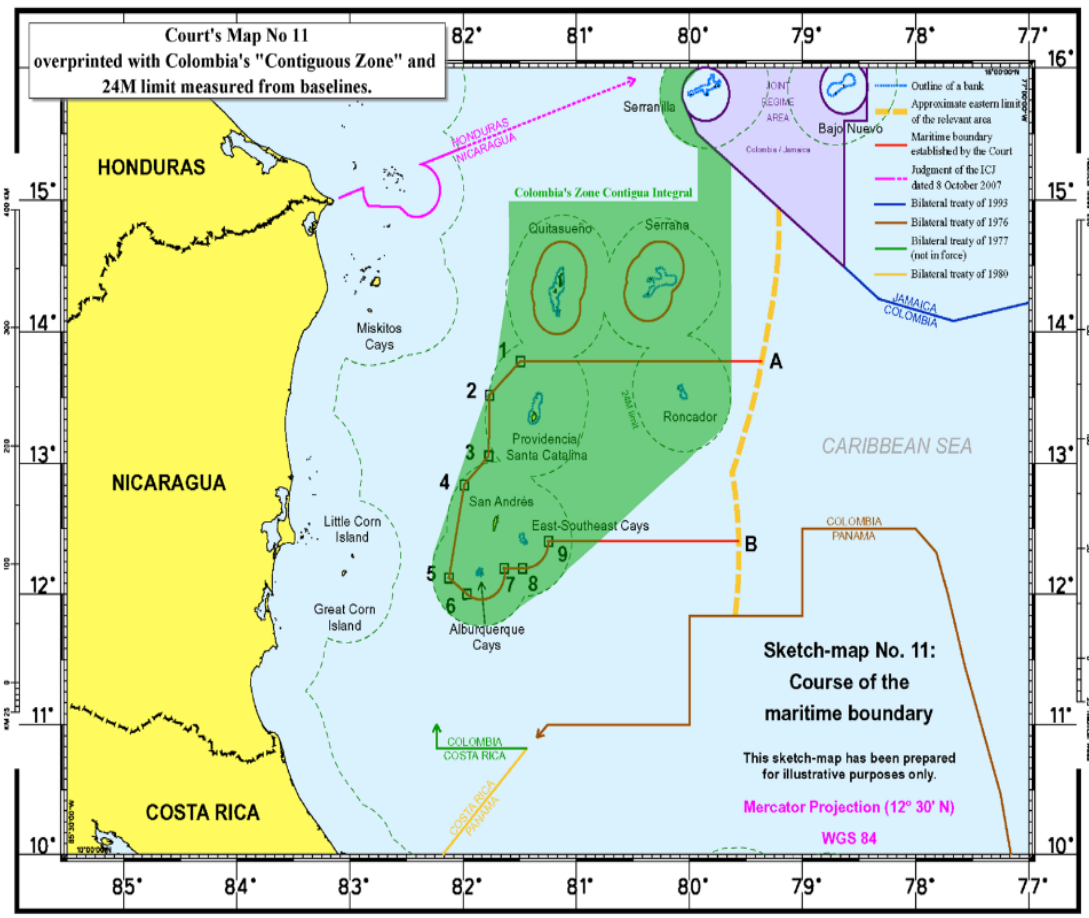
Figure 2.1.: Colombia's "Integral Contiguous Zone" Pursuant to Decree 1946

2.14 As is discussed in Chapter III, neither the size of the ICZ (which in many places extends substantially more than 24 M from Colombia's baselines), nor the nature of the rights and jurisdiction that Colombia claims within it, are consistent with the definition of contiguous zone recognized by international law.[53] But most egregiously, the ICZ blatantly attributes to Colombia maritime areas that the Court determined to belong to Nicaragua in its November 2012 Judgment. As shown in the figure below, in which Colombia's ICZ is superimposed on Sketch

[53] *See infra* Chapter III.

Map No. 11 from the Court's Judgment, the ICZ plainly infringes on Nicaragua's sovereign rights and jurisdiction, by extending beyond the maritime boundary determined by the Court in the north, west and south.

Figure 2.2.: **Colombia's ICZ Impinges on Nicaragua's Sovereign Rights and Jurisdiction**



2.15 In his speech announcing Decree 1946 and the newly-created ICZ, President Santos pledged that Colombia would exercise "full jurisdiction and control in this zone [over all the maritime areas that comprise the Integral Contiguous Zone]". He further asserted that, throughout the ICZ, Colombia would "exercise jurisdiction and control over all areas related to security and the struggle against delinquency, and over fiscal, customs, environmental, immigration and health matters and other areas as well".[54]

2.16 President Santos explained that the ICZ was just one element of a four-part strategy crafted to defeat Nicaragua's judicially-confirmed rights and jurisdiction.[55] The other three elements are: (1) the adoption of the position that the Court's 2012 Judgment cannot be implemented without a treaty; (2) the protection of Colombia's Seaflower Marine Biosphere Reserve, now partly situated within Nicaragua's waters; and (3) the halting of Nicaragua's allegedly "expansionist plans" by unifying the continental shelves of Colombia extending (a) southeast from San Andrés and Providencia, and (b) northwest from the Colombian mainland.[56]

2.17 In the same address, President Santos emphasized again that Colombia would not abide by the Court's November 2012 Judgment. He described as "clear and unyielding" his position that:

> "The Judgment of the International Court of Justice is not applicable – it is not and will not be applicable – until a treaty that protects the rights of Colombians has been celebrated, a treaty that will have to be approved in accordance with our Constitution.

[54] Declaration of President Juan Manuel Santos on the integral strategy of Colombia on the Judgment of the International Court of Justice", 9 September 2013 (NM, Annex 4) (http://wsp.presidencia.gov.co/Prensa/2013/Septiembre/Paginas/20130909_04-Palabras-Santos-Colombia-presenta-su-Estrategia-Integral-frente-al-fallo-de-La-Haya.aspx)
[55] *Ibid.*
[56] *Ibid.*

> I repeat the decision I have made: The judgment of the International Court IS NOT APPLICABLE without a treaty."[57]

2.18 On 13 September 2013, the Colombian President brought suit in the Constitutional Court of Colombia seeking to have the 52-year-old law approving the Pact of Bogotá, Law 37 of 1961, declared unconstitutional.[58] Specifically, President Santos asked the Court to declare Articles XXXI and L of the Pact (recognizing the jurisdiction of the Court as compulsory *ipso facto* and requiring the enforcement of decisions of the International Court of Justice) unconstitutional, and therefore unenforceable, on the ground that they permit a change of boundaries without following constitutional procedures, without the conclusion of an international treaty that is approved by the Congress, followed by the review of the treaty and law approving it by the Constitutional Court, and the final ratification by the President of the Republic.[59] President Santos argued, and asked the Constitutional Court to declare, that: "Colombia's borders with other States cannot be altered by a judgment handed down by the International Court of Justice, which does not represent the people of Colombia, or constitute an expression of the self-determination of the Colombian people, or is one of the means set forth in Article 101 [of the Colombian Constitution] for fixing or modifying Colombia's borders".[60]

2.19 The Constitutional Court issued its decision on 2 May 2014.[61] Of course, the ruling of a municipal court, even a State's highest court, cannot relieve it of its international legal obligations derived from treaty or customary international law, including its obligations under Article 94(1) of the United Nations Charter to

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[57] *Ibid.*(emphasis in original).
[58]President Juan Manuel Santos, Complaint against articles XXXI and L of the Pact of Bogotá, Constitutional Court, D-9907 (12 September 2013) (NM, Annex 15).
[59]*Ibid*.
[60] President Juan Manuel Santos, Complaint against articles XXXI and L of the Pact of Bogotá, Constitutional Court, D-9907 (12 September 2013), (NM, Annex 15).
[61] Republic of Colombia, Constitutional Court, File D-9852 AC- Sentence C-269/14 (2 May 2014) (NM, Annex 16).

comply with the Court's Judgments. Nevertheless, it is worth noting that the Colombian Constitutional Court refused to declare that the Pact of Bogotá was unconstitutional or unenforceable. Nor did the Constitutional Court declare the November 2012 Judgment unenforceable. To the contrary, it ruled that, as a matter of international law, decisions of the International Court of Justice are binding on Colombia and must be obeyed.[62] On this basis, it went on to declare that, under Colombian national law: "the decisions adopted by the International Court of Justice in relation to boundary disputes, should be incorporated to the national legal system through a duly approved and ratified treaty under the terms of Article 101 of the Political Constitution."[63] Of course, whatever Colombia's national laws may require in this regard, its international obligation to comply immediately with the Judgment of the Court is unaffected.

2.20 Notwithstanding this obligation, and in defiance of it, President Santos has continued to assert that "the Judgment of the Court of The Hague can only be applied after a new treaty" and that "as long as a new treaty is not signed – the limits of Colombia with Nicaragua continue to be those established in the Esguerra-Barcenas Treaty [of 1928, which Colombia regards as following the 82nd meridian]. That is to say, the limits previous to the International Court of Justice's judgment".[64]

2.21 President Santos reiterated this position on 17 June 2014, shortly after his reelection: "The Hague ruling is not applicable. The boundaries cannot be changed except through a treaty, that is how our Constitution defined it and we

[62] Republic of Colombia, Constitutional Court, File D-9852 AC- Sentence C-269/14 (2 May 2014), para. 8.2 (NM, Annex 16).
[63] *Ibid*. paras. 8.3.
[64] Presidency of the Republic of Colombia, Press Release, "The Limits of Colombia with Nicaragua continue to be those established in the Esguerra-Barcenas Treaty, affirmed the President of Colombia", 2 May 2014 (NM, Annex 7) (http://wsp.presidencia.gov.co/Prensa/2014/Mayo/Paginas/20140502_04-Los-limites-Colombia-Nicaragua-continuan-siendo-establecidos-tratado-Esguerra%E2%80%93Barcenas.aspx)

have to wait for that treaty to modify our boundaries".[65] This has remained Colombia's position up to date of the filing of this Memorial: that Colombia's national law – particularly its constitutional requirement that boundary changes should be effected by treaty – trumps its international legal obligations to comply with the Judgments of the International Court of Justice

C. COLOMBIA'S VIOLATIONS OF NICARAGUA'S SOVEREIGN RIGHTS AND JURISDICTION

2.22 In furtherance of its policy to enforce its claim to waters that have been specifically determined to belong to Nicaragua, Colombia has repeatedly interfered with Nicaragua's rights and jurisdiction in those waters. As the incidents described below demonstrate, Colombia has done so by directing its naval frigates and military aircraft to repeatedly obstruct the Nicaraguan Navy's legitimate exercise of its law enforcement mission in waters east of the 82nd meridian that have been adjudged by the Court to form part of Nicaragua's exclusive economic zone; to issue fishing licenses and marine research[66] authorizations to Colombians and nationals of third States operating in those Nicaraguan waters; and to harass and intimidate Nicaraguan licensed fishing vessels and prevent them from fishing in areas subject to exclusive Nicaraguan jurisdiction; thereby depriving Nicaragua of its right to benefit from the full enjoyment of its rich fishing areas.

2.23 A description of each incident can be found in the letter from the Nicaraguan Naval Force to the Ministry of Foreign Affairs[67], which includes

[65] "Santos Guarantees Continuity in his Foreign Policy with Latin America", *America Economica*, 17 June 2014 (NM, Annex 48) (http://www.americaeconomia.com/politica-sociedad/politica/santos-garantiza-continuidad-en-su-politica-exterior-con-latinoamerica?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+america-economia+(Am%C3%A9rica+Econom%C3%ADa).

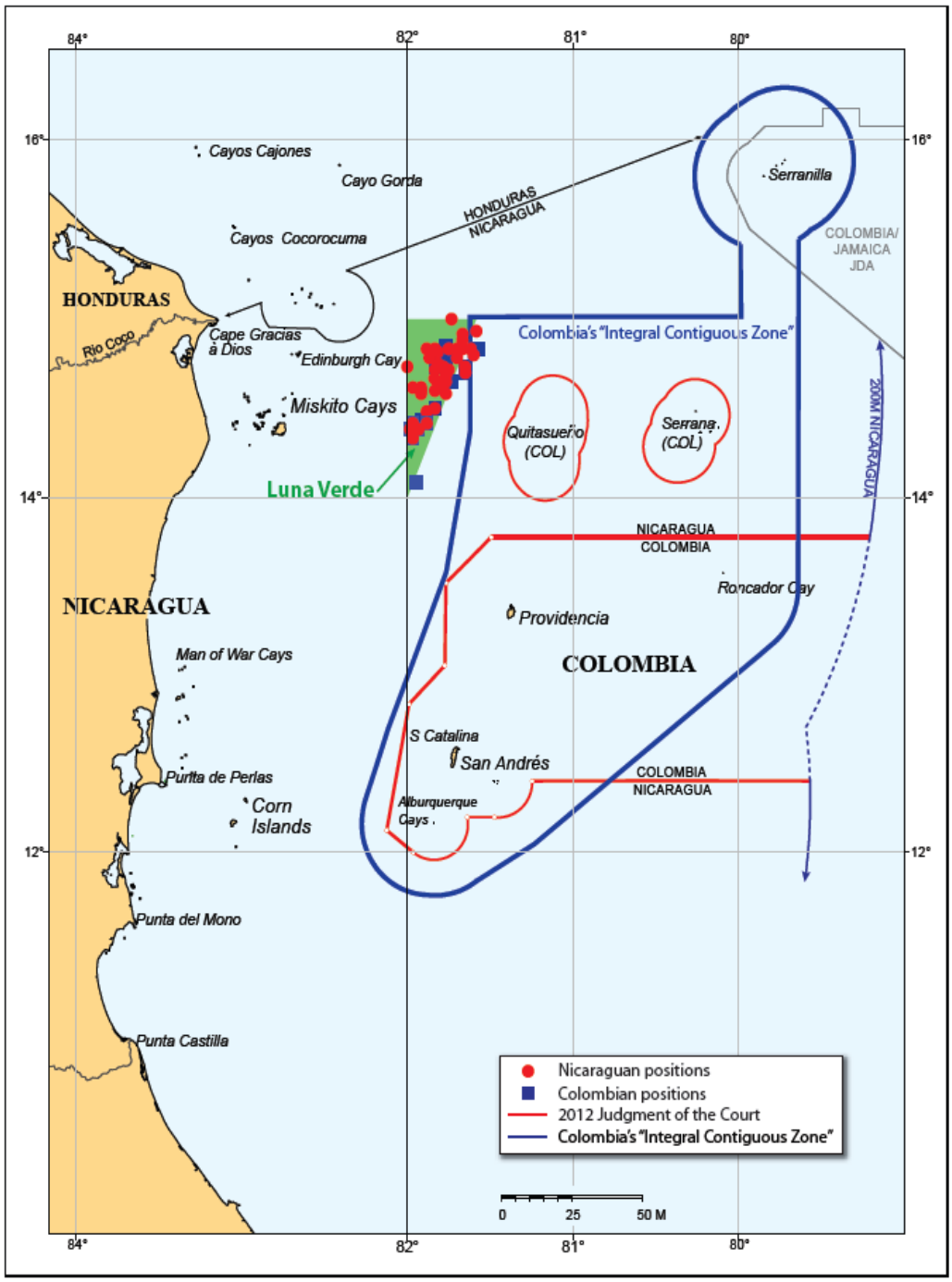
[66] Diplomatic Note from the Minister of Foreign Affairs of Nicaragua, to the Embassy of the United States of America, dated 13 September 2014 (NM, Annex 17).

[67] NM, Annex 23-A.

individual maps for each incident, showing precisely where the incident occurred and providing details about the incident. These maps were prepared contemporaneously with the incidents, and maintained in the logs of the Nicaraguan armed forces. The map that appears immediately below as Figure 2.3 is a composite, which shows the locations of all of the incidents described herein. As can be appreciated, most of the incidents have occurred in the rich fishing area known as *Luna Verde*. A blown up version of this area can also be appreciated in Figure 2.4[68] and its location in relation to the maritime boundary fixed by the Court can be seen in Figure 2.5.

[68] For the list of coordinates plotted in the map *see* NM, Annex 24.

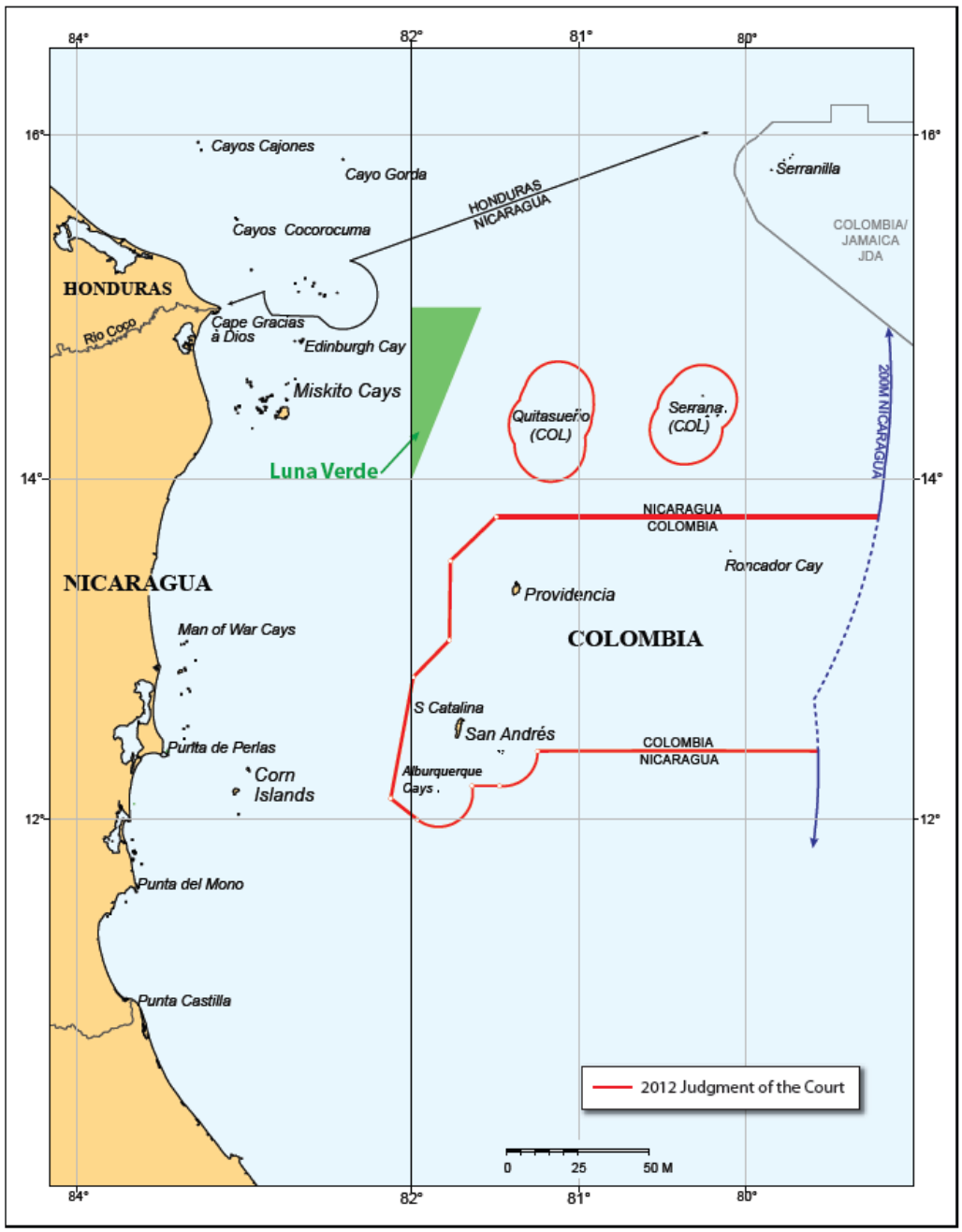
Figure 2.3 Location of reported incidents in the *Luna Verde* area



Location of Reported Incidents in the Luna Verde Area

Figure 2.4. Blown up of the location of reported incidents in the *Luna Verde* area

Figure 2.5 Location of *Luna Verde* in relation to the Maritime Boundary determined by the Court



Location of Luna Verde in relation to the Maritime Boundary Determined by the Court

2.24 As further described below, a disturbing number of the incidents have involved the threat of force by Colombian naval vessels, in clear breach of Colombia's legal obligations not only to comply with the Judgment of the Court but also to refrain from the threat or use of force under, *inter alia*, Article 2(4) of the UN Charter, Article 19 of the OAS Charter, Article I of the Pact of Bogotá and general international law.

2.25 Even before the issuance of Decree 1946, on 18 August 2013, the Governor of San Andrés, Aury Guerrero Bowie, and Chief of the San Andrés Specific Command, Rear Admiral Luis Hernan Espejo Segura, conducted military and surveillance maneuvers over the Caribbean Sea aboard an airplane in the service of the Colombia National Army in the area of 14°05'12"N - 081°56'50"W.[69] They informed the media that their purpose in so doing was to "exercise[e] sovereignty" over Colombia's maritime areas.[70]

2.26 The same month, San Andrés Governor Guerrero Bowie acknowledged that Colombia was actively patrolling the waters as far west as the 82ºW meridian with surface vessels for purposes of enforcing Colombia's sovereign rights and jurisdiction. She informed the media that Colombia had deployed twelve frigates, underscoring that Colombia was the only State to deploy warships in the area.[71]

2.27 The next month, on 18 September 2013, just nine days after the issuance of Decree 1946, the Colombian military conducted a "sovereignty exercise" off the coast of San Andrés, with the Commanders of the Military Forces, the

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[69] "Governess Participated during Patrol of the 82nd Meridian Area", 20 August 2013 (NM, Annex 37). (http://www.rcnradio.com/noticias/gobernadora-participo-en-patrullaje-en-el-area-del-meridiano-82-84486); "With patrolling aircraft of the Armada, Governor of San Andres makes an act of sovereignty in the 82° meridian", *Zonacero.info,* 19 August 2013 (NM, Annex 36). (http://zonacero.info/index.php/zona-caribe/40345-con-aviones-patrulleros-de-la-armada-gobernadora-de-san-andres-hizo-acto-de-soberania-en-meridiano-82) ; Video report of the Colombian Navy, "*Armada Nacional patrulla sobre el meridiano 82*", *availabel at* https://www.youtube.com/watch?v=-LE8UQ1wd2I .

[70] *Ibid.*

[71] *Ibid.*

Director of the Police, and the Minister of Justice and Law at his side, President Santos once again declared: "Colombia deems that the ruling by The Hague is not applicable, and we will not apply it, as we stated then, and I repeat today, until we have a new treaty".[72] Their patrol reached as far west as the 82ºW meridian, well into waters recognized to appertain to Nicaragua.

2.28 In furtherance of its assertions of "sovereignty", Colombia has regularly harassed Nicaraguan fishermen in Nicaraguan waters, particularly in the rich fishing ground known as "*Luna Verde*", located at the intersection of meridian 82° with parallel 15° (as depicted in Figure 2.5) in waters the Court declared to appertain to Nicaragua. Colombia has done so by directing Colombian navy frigates to chase away Nicaraguan fishing boats, as well as by commanding its military aircraft to harass Nicaraguan fishermen by air. On 19 October 2013, for example, two OV-10 Bronco aircraft of the Colombian Air Force flew at a threateningly low altitude over a Nicaraguan fishing boat named the *Camerón*, and a Honduran fishing boat operating with a Nicaraguan fishing license named the *Capitana*, several times while they were in the vicinity of 14°36'00"N - 081°50'00"W.[73]

2.29 On 7 November 2013, while fishing approximately 58 M northeast of the Miskito Keys at 14°50'00"N - 081°53'00"W, the Nicaraguan fishing boat *Lady Dee II* was approached by a Colombian frigate, the ARC Antioquia (FM-53), and told that it was in Colombian waters.[74]

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[72] "Declaration of President Juan Manuel Santos during the sovereignty exercises performed in the Caribbean Sea", 18 September 2013 (NM, Annex 5) (http://wsp.presidencia.gov.co/Prensa/2013/Septiembre/Paginas/20130918_09-Palabras-Presidente-Juan-Manuel-Santos-durante-ejercicio-soberania-que-cumplio-en-el-Mar-Caribe.aspx).

[73] Letter from the Nicaraguan Naval Force to the Ministry of Foreign Affairs reporting on incidents with the Colombian Navy in Nicaragua's Exclusive Economic Zone (26 August 2014), p. 1(NM, Annex 23-A); Letter from the President of the Nicaraguan Chamber of Fisheries to the Executive Chair of the Nicaraguan Institute of Fisheries (6 January 2014) (NM, Annex 20).

[74] *Ibid.* (NM, Annex 23-A).

Figure 2.6. ARC Antioquia (FM-53) [75]

2.30 Ten days later, another Colombian frigate, the ARC Almirante Padilla (FM-51), ordered a Nicaraguan lobster ship, the *Miss Sofía*, to withdraw from its position northeast of Quitasueño at 14°50'00"N - 081°45'00"W, again claiming the Nicaraguan vessel was in Colombian waters. When the Nicaraguan vessel refused to leave the area, the ARC Almirante Padilla sent a speedboat to chase it away.[76]

Figure 2.7. ARC Almirante Padilla (FM-51)

[75] Detailed descriptions of the capacities of the naval vessels Colombia has deployed in Nicaraguan waters are available in Annex 50, NM.
[76] *Ibid supra,* NM Annex 23-A, p. 2.

2.31 Several hours later, a Nicaraguan coast guard vessel at 14°45'00"N - 081°49'00"W, the *Río Escondido (CG-205)*, established communication with the Almirante Padilla and informed the Almirante Padilla that it was in Nicaraguan waters pursuant to the 2012 Judgment. The Almirante Padilla responded that the Government of Colombia did not recognize the Court's Judgment and refused to leave its location.[77]

GC 205 "Río Escondido

Almirante Padilla (FM-51)

2.32 Another incident occurred on 27 January 2014, when a Colombian frigate, the ARC Independiente (FM-54), informed a Nicaraguan lobster ship, the *Caribbean Star*, at 14°47'00"N - 081°52'00"W, that it was fishing illegally in Colombian waters. It added that vessels of the Colombian Navy would continue to exercise sovereignty and control in those waters because the Colombian government did not recognize the International Court of Justice Judgment.[78]

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[77] *Ibid.*

[78] Letter from the President of the Nicaraguan Chamber of Fisheries to the Executive Chair of the Nicaraguan Institute of Fisheries (1 July 2014) (NM, Annex 21); Letter from the Nicaraguan Naval Force to the Ministry of Foreign Affairs reporting on incidents with the Colombian Navy in Nicaragua's Exclusive Economic Zone (26 August 2014), p. 3 (NM, Annex 23-A). On the same day, the Independiente harassed another lobster ship with a Nicaraguan fishing license, the Al John, which was fishing at 14°44'00"N - 081°47'00"W. Letter from the Nicaraguan Naval Force to the Ministry of Foreign Affairs reporting on incidents with the Colombian Navy in Nicaragua's Exclusive Economic Zone (26 August 2014), p. 3 (NM, Annex 23-A). A few days later, on 1 February 2014, the same Colombian frigate, then at 14°44'00"N - 081°39'00"W informed the Maddox, a Honduran fishing boat with a Nicaraguan fishing license that it was conducting illegal fishing in Colombian waters and that the Colombian government has decided that the International Court of Justice Judgment is not applicable. Letter from the Nicaraguan Naval Force to the

Figure 2.8. ARC Independiente (FM-54)

2.33 A few days later, the same Colombian frigate demanded that a Nicaraguan fishing boat, the *Snyder*, then located 57 M northeast of the Miskito Keys at 14°30'00"N - 081°50'00"W, withdraw from what it called "Colombian waters".[79]

2.34 A Nicaraguan navy vessel, the *BL-405 Tayacán*, hailed the ARC Independiente and informed it that it was located in waters under Nicaragua's jurisdiction. Like the ARC Almirante Padilla before it, the Independiente responded that Colombia did not accept the 2012 Judgment. Given the Independiente's hostile posture, the *BL-405 Tayacán* withdrew in order to avoid confrontation.[80]

Buque Logístico BL-405 «Tayacán»

ARC Independiente (FM-54)

Ministry of Foreign Affairs reporting on incidents with the Colombian Navy in Nicaragua's Exclusive Economic Zone (26 August 2014), p. 4 (NM, Annex 23-A).

[79] *Ibid*, NM Annex 23-A, p. 3.

[80] *Ibid.*

2.35 A few days later, on 5 February 2014, the *BL-405 Tayacán* reported that another Colombian Frigate, the ARC 20 de Julio (PZE-46), informed it and twelve Nicaraguan fishing boats that were fishing in the vicinity of 14°44'01"N - 081°39'08"W to withdraw from Colombia's contiguous zone and territorial sea.[81]

Figure 2.9. ARC 20 de Julio (PZE-46)

2.36 On 12 March 2014, the same Colombian frigate harassed a Nicaraguan fishing boat, the *Al John*, located at approximately 14°44'00"N - 081°50'00"W, by ordering it to withdraw from the area and sending a speed boat to chase it

[81] *Ibid,* p. 4. Later that day, the same Colombian frigate intercepted a Nicaraguan fishing boat, the *Nica Fish*, while it was located at 14° 44' 00" N - 081° 39' 00" W and urged it to withdraw from "Colombian waters". *Ibid*; Letter from the President of the Nicaraguan Chamber of Fisheries to the Executive Chair of the Nicaraguan Institute of Fisheries (1 July 2014) (NM, Annex 21).

away.[82] The next day, the same Colombian frigate approached another Nicaraguan fishing boat, the *Marco Polo*, which was in the vicinity of 14°43'00"N - 081°45'00"W, and ordered it to leave the area in which it was fishing.[83]

2.37 Similarly, on 3 April 2014, a Colombian army ocean patrol ship, the ARC San Andrés (PO-25) harassed a Nicaraguan fishing boat, the *Mister Jim*, located at 14º44'00"N - 82º00'00"W, 50 M northeast of the Miskito Keys. The Colombian vessel ordered the Nicaraguan fishing boat to stop catching lobster and to leave the area.[84]

Figure 2.10. ARC San Andrés (PO-25)

2.38 More recently, on 20 July 2014, two Colombian Air Force planes harassed six Nicaraguan fishing boats (the *Miss Emilia*, the *Pescasa 35*, the *Marco Polo*, the *Miss Isabella*, the *Lucky Five-Lucky Six*, and the *Mister Kerry*) that were fishing in Nicaragua's *Luna Verde* marine area by repeatedly flying over them at low altitude. Concurrently, a Colombian frigate communicated with the

[82] Letter from the Nicaraguan Naval Force to the Ministry of Foreign Affairs reporting on incidents with the Colombian Navy in Nicaragua's Exclusive Economic Zone (26 August 2014), p. 6 (NM, Annex 23-A); Letter from the President of the Nicaraguan Chamber of Fisheries to the Executive Chair of the Nicaraguan Institute of Fisheries (1 July 2014) (NM, Annex 21).
[83] *Ibid.*
[84] *Ibid.*

Nicaraguan boats over radio and ordered them to withdraw from the area in a hostile tone. The Nicaraguan fishing boats responded by leaving the area.[85]

2.39 In addition to attempting to enforce fisheries jurisdiction where Colombia has none, Colombian military vessels and aircraft have actively impeded Nicaragua's efforts to enforce its own jurisdiction. In one such incident, on 19 February 2013, the ARC Almirante Padilla (FM-51) prevented a Nicaraguan naval vessel from inspecting a Colombian fishing boat that was operating in the *Luna Verde* area.[86] The Colombian commander of the ARC Almirante Padilla informed the commander of the Nicaraguan vessel to abstain from taking any action directed at Colombian fishing boats, warning: "Captain, you fulfill your mission, which is to protect the Nicaraguan fishermen…and don't take any risk, don't expose yourself or force a serious situation".[87]

2.40 Similarly, on 13 October 2013, a Colombian frigate, the ARC 20 de Julio (PZE-46), warned *the Río Escondido* (a Nicaraguan Coast Guard vessel), then at 14º50'00"N - 81º42'00"W, that it was sailing in Colombian waters.[88]

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[85] Letter from the President of the Nicaraguan Chamber of Fisheries to the Executive Chair of the Nicaraguan Institute of Fisheries (24 July 2014) (NM, Annex 22). The *Miss Emilia* was located at 14º23'00"N - 81º53'00"W, the Pescasa-35 at 14º25'00"N - 81º53'00"W, the *Marco Polo* at 14º23'00"N - 81º59'00"W, the *Miss Isabella* at 14º23'00"N - 81º58'00"W, the *Lucky Five-Lucky Six* at 14º20'00"N - 81º58'00"W, and the *Mister Kerry* at 14º25'00"N - 81º58'00"W. *Ibid*.

[86] "Colombia avoided boundary frictions with the Army of Nicaragua", *Caracol,* 19 February 2013 (NM, Annex 34) (http://www.caracol.com.co/noticias/actualidad/colombia-evito-roce-limitrofe-con-armada-de-nicaragua/20130219/nota/1845121.aspx)

[87] *Ibid.*

[88] Letter from the Nicaraguan Naval Force to the Ministry of Foreign Affairs reporting on incidents with the Colombian Navy in Nicaragua's Exclusive Economic Zone (26 August 2014), p. 1 (NM, Annex 23-A) .

GC 205 "Río Escondido

ARC 20 de Julio (PZE-46)

2.41 The ARC 20 de Julio (PZE-46) attempted again to obstruct a Nicaraguan coast guard vessel from performing its duties on 8 May 2014, when it intercepted the *Río Grande Matagalpa (GC-201)* while patrolling 56 M northeast of the Miskito Keys at 14°38'00"N - 81°48'00" W. After establishing communication with the commander of the Nicaraguan coast guard vessel, the commander of the Colombian frigate declared:

> "[Y]ou will be responsible of the consequences if you disregard this call. I recommend that you alter or change your course immediately and get away from the unit. I remind you that this is a unit of the Coast Guard of the Armada Republic of Colombia Navy, which is protecting the historical fishing rights of the Colombian State, providing security to all the vessels in the area, and developing operations against transnational crime. This communication is being recorded for legal purposes – at the moment your unit is two nautical miles away from my unit…"[89]

GC-201 "Río Grande Matagalpa

ARC 20 de Julio (PZE-46)

[89] 8 May 2014 Audio Transcript (NM, Annex 23-B).

2.42 The commander of the Nicaraguan vessel responded that he was exercising sovereignty over the waters that the Judgment of the International Court of Justice confirmed as belonging to Nicaragua by patrolling the waters, fighting against drug trafficking, and ensuring the safety of fishing boats. The Colombian commander responded by repeatedly ordering the Nicaraguan commander to immediately change the course of his vessel and warning him that a refusal to do so would be considered as a hostile act that would cause the Colombian vessel to have to defend itself. After reiterating that it was in Nicaraguan waters pursuant to the International Court of Justice Judgment, the commander of the Nicaraguan vessel decided to withdraw in order to avoid a more serious confrontation.[90]

2.43 On 2 January 2014, another Colombian frigate, the ARC Independiente (FM-54) intercepted a Nicaraguan coast guard vessel, the *BL-405 Tayacán*, on patrol in the vicinity of 14˚50'00"N - 081˚40'00"W. The Colombian commander asserted that the Nicaraguan vessel was operating in Colombian waters, and that Colombian navy vessels would continue exercising sovereignty over these waters because the Colombian State had established that the Judgment of the International Court of Justice was inapplicable. In response, the Nicaraguan commander explained that Nicaragua did recognize the Court's Judgment and that the ships were in Nicaraguan waters. The Colombian commander repeatedly insisted that the Nicaraguan coast guard vessel was in Colombia's "integral contiguous zone" and demanded that it withdraw from the area.[91]

2.44 Colombia has also resorted to aerial harassment to obstruct Nicaraguan coast guard vessels from performing their duties. On 19 October 2013, for

[90] *Ibid*, p. 6. On 3 March 2014, another Colombian frigate, the Almirante Padilla (ARC-51), was observed patrolling in Nicaraguan waters by the Nicaraguan coast guard vessel, the *Río Grande de Matagalpa (GC-201)*, located at 14°47'00"N - 082°42'00"W. The commander of the Nicaraguan vessel informed the Almirante Padilla that it was in Nicaraguan waters. The Colombian commander responded that they were located in the waters of San Andrés and Providencia. *Ibid,* p. 5.

[91] *Ibid*, p. 6; *see* 2 January 2014 Audio Transcript of the Nicaraguan Navy (NM, Annex 23-B).

instance, two Colombian Air Force OV-10 Broncos harassed the *Río Escondido* by buzzing it no fewer than six times in ten minutes while it was patrolling in the vicinity of 14˚36'00"N - 081˚50'00"W.[92]

GC 205 "Río Escondido

OV-10 Bronco

2.45 Similarly, on 29 October 2013, a Colombian Air Force aircraft buzzed the *Río Grande Matagalpa* and *the Río Escondido* at a height of just 200 feet while they were on patrol at 14˚36'00"N - 081˚55'00"W and 14˚37'00"N - 081˚58'00"W, respectively.[93] The following day, a Colombian Air Force helicopter returned to the *Río Grande Matalgalpa*, which had remained in the area, flying over it several times at an altitude of 200 feet.[94] The same happened again the next day, when a third Colombian Air Force helicopter flew over the *Río Grande Matalgalpa*.[95]

2.46 Additional overflights at low altitudes over the same Nicaraguan coast guard vessel occurred on 19 November (when the vessel was positioned at coordinates 14º35'00"N - 81º55'00"W), on 21 and 24 November (when the vessel was positioned at coordinates 15º00'00"N - 81º44'00"W),[96] on 25 November

[92] *Ibid*, p. 1; Letter from the President of the Nicaraguan Chamber of Fisheries to the Executive Chair of the Nicaraguan Institute of Fisheries (6 January 2014) (NM, Annex 20).
[93] *Ibid*, p. 1.
[94] Letter from the Nicaraguan Naval Force to the Ministry of Foreign Affairs reporting on incidents with the Colombian Navy in Nicaragua's Exclusive Economic Zone (26 August 2014), p. 1(NM, Annex 23-A).
[95] *Ibid*.
[96] *Ibid*, p. 2.

(when it was positioned at coordinates 14º50'00"N - 81º37'00"W),[97] and several months later, on 9 March 2014, when a Colombian twin-engine patrol aircraft repeatedly flew low over the *Río Grande Matalgalpa* while it was in the vicinity of 14°39'00"N - 081°46'00"W.[98]

2.47 Colombia has also "authorized" private vessels of its nationals and the nationals of third States to operate in Nicaraguan waters. On 7 January 2014, for instance, the Commander of the Nicaraguan coast guard vessel, *General José Dolores Estrada (GC-401)* reported that he detected a United States oceanographic vessel, the *Pathfinder*, 60 M northeast of the Miskito Keys at 14°42'00"N - 081°39'00"W. He established communication with the vessel in order to enquire into its motives and determine whether it was authorized to operate in Nicaragua's exclusive economic zone. The U.S. vessel responded that it was conducting routine military operation inspections in international waters. When the Nicaraguan commander informed it that they were in Nicaraguan waters and within Nicaragua's exclusive economic zone, a Colombian frigate intercepted the communication and stated that the Colombian government had authorized the *Pathfinder* to conduct research in Colombia's exclusive economic zone and demanded that the Nicaraguan coast guard vessel refrain from interfering with the activities of the *Pathfinder* in Colombian waters.[99]

2.48 Roughly two and a half weeks later, on 25 January 2014, the Commander of another Nicaraguan navy ship, the *BL-405 Tayacán*, reported that he detected the *Pathfinder* northeast of the Miskito Keys at 14°51'00"N - 081°46'00"W.

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[97] *Ibid*.

[98] *Ibid*, p. 5. Later that day, the same Colombian aircraft buzzed the Nicaraguan navy vessel, the *BL-405 Tayacán*, located at 14°53'00"N - 081°40'04"W in the same manner. *Ibid.* The following month, on 15 April 2014, a twin-engine Colombian aircraft flew over a Nicaraguan coast guard vessel, the *General José Santos Zelaya (CG-403)*, at an altitude of 300 feet when it was 60 M northeast of Miskito Keys, at 14°41'00"N - 081°46'00"W. *Ibid*, p. 6.

[99] Letter from the Nicaraguan Naval Force to the Ministry of Foreign Affairs reporting on incidents with the Colombian Navy in Nicaragua's Exclusive Economic Zone (26 August 2014), p. 2 (NM, Annex 23-A).

When the *BL-405 Tayacán* informed the U.S. vessel that it was conducting research in Nicaraguan waters, it responded that it was doing so pursuant to authorization by the Colombian government and sailed away toward San Andrés Island.[100]

2.49 Several weeks after that, on 20 February 2014, the *BL-405 Tayacán*, which was patrolling the area 65 M northeast of the Miskito Keys at 14°50'00"N - 081°50'00"W, reported seeing the *Pathfinder* again. It was accompanied by a Colombian frigate, the ARC Almirante Padilla (FM-51), which was located 1.8 M from the U.S. vessel.[101] The Nicaraguan navy ship reported sighting the Colombian frigate accompanying the U.S. vessel in the same area over a period of three days.[102]

2.50 On 13 February 2014, while on patrol at 14°48'00"N - 081°36'00"W, the *BL-405 Tayacán* (of the Nicaraguan navy) detected the ARC Almirante Padilla (of the Colombian navy) operating next to a Honduran-flagged fishing vessel, the *Blu Sky*. The Nicaraguan vessel watched as military personnel aboard the Colombian frigate approached and boarded the *Blu Sky*.[103] The next day, the Nicaraguan vessel, in the vicinity of 14°56'00"N - 081°35'00"W communicated with the *Blu Sky*. The captain of the *Blu Sky* informed the Nicaraguan commander that he had received authorization to fish there from Colombia. The Nicaraguan commander responded that the *Blu Sky* was fishing in Nicaraguan waters.[104]

2.51 Colombia's purported authorization of the *Blu Sky* to fish in Nicaraguan waters is not an isolated incident. Many other examples exist. On 22 October 2013, for example, the Governor of San Andrés authorized a Honduran boat, the *Captain KD*, to use the Integrated Commercial Industrial Fishing Permit that had

[100] *Ibid*, p. 3.
[101] *Ibid*, p. 5.
[102] *Ibid*.
[103] *Ibid*, p. 5.
[104] *Ibid.*

been awarded to Mr. Armando Basmagui Perez in September 2012. That permit authorizes the fishing fleet associated with Mr. Armando Basmagui Perez to fish in "[a]ll banks (Roncador, Serrana and Quitasueño, Serranilla) and Shallows (Alicia and Nuevo), and the area known as *La Esquina* or *Luna Verde*". "*Luna Verde*"[105], located at the intersection of meridian 82° with parallel 15°, is plainly under the jurisdiction of Nicaragua pursuant to the Court's 2012 Judgment.[106]

2.52 On 25 June 2014, the Colombian National Maritime Authority, DIMAR, issued a resolution renewing the permits of several Colombian, Honduran, and other fishing vessels that operate in Nicaraguan waters.[107] The resolution also granted those fishing vessels fee exemptions and other privileges to help alleviate the "negative economic and social effects" of the Court's 2012 Judgment.[108] In fact these fee exemptions and privileges are incentives for these vessels to fish in Nicaraguan waters.

D. NICARAGUA'S SELF-RESTRAINT

2.53 Nicaragua has consistently met Colombia's refusal to comply with the November 2012 Judgment and its provocative conduct within Nicaragua's waters with patience and restraint. President Daniel Ortega, has reached out to, and sought to cooperate with, President Santos in order to achieve an amicable solution respectful of the Court's Judgment immediately after Colombia's rejection of it.

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[105] *See* Figure 2.5. above.
[106] Governorship, Department of the San Andrés, Providencia and Santa Catalina, Resolution No. 005081, 22 October 2013 (NM, Annex 11).
[107] DIMAR Resolution Number 0305 of 2014, 25 June 2014 (NM, Annex 14). *See also* Comptroller General's Office of the Department Archipelago of San Andrés, Providencia and Santa Catalina, Report on the Status of the Natural Resources and the Environment 2013, pp. 40-41(identifying fishing vessels with Colombian fishing licenses that operated in Nicaraguan waters in 2013) (NM, Annex 12)
[108] *Ibid,* NM, Annex 14.

2.54 In November 2012, shortly after President Santos' denunciation of the Court's Judgment, President Ortega declared Nicaragua's willingness to permit native *Raizal* (Afro-Colombian) fishermen from the now Colombian islands, to fish in waters that have been recognized as belonging to Nicaragua, thereby addressing one of President Santos' principal concerns about the effects of the Court's Judgment. As President Ortega stated:

> "We must start coordinating these types of actions through the Ministry of Foreign Affairs, the Fisheries Authorities, with sister nations who perform fishing tasks in that area, who requested at the time, fishing permits from the Colombian authorities… What should we say to these sister nations, including the people of Colombia and the Raizal brethren [Afro-Colombians] that are in San Andres, what should we say? That Nicaragua will authorize their fisheries in that area….
>
> And I was telling you that a good portion of these Native Peoples found in the San Andres Archipelago are natives from the Caribbean Coast of Nicaragua; they have permanently connected, and regardless of the situation we had with the Sister Republic of Colombia… they have always communicated! …
>
> Therefore, we tell them that precisely being respectful of the Principle of the Native Peoples, we fully respect their right to fish, and to navigate those waters which they have historically navigated, and have also survived from the marine resources."[109]

2.55 As President Ortega explained in a national address on 22 February 2013, he met with President Santos on two different occasions shortly after the Court issued its Judgment. During those meetings, President Ortega had proposed that the two States undertake joint measures to enforce the Court's Judgment and to

[109] "Message from President Daniel to the People of Nicaragua", *El 19 Digital,* 26 November 2012, (NM, Annex 27) (http://www.el19digital.com/articulos/ver/titulo:7369-mensaje-del-presidente-daniel-al-pueblo-de-nicaragua)

work out cooperative arrangements on its basis.[110] In particular, he suggested that they form a commission that would ensure that fishermen from San Andrés, Providencia and Santa Catalina ("los pueblos raizales", the Raizal people) would be able to continue fishing in waters that have been recognized as pertaining to Nicaragua.[111]

2.56 In the meantime, President Ortega instructed the Nicaraguan Navy not to detain any Colombian fishermen during this transitional period.[112]

2.57 President Ortega also addressed President Santos' stated concern about the preservation of the Seaflower Marine Biosphere Reserve located in an area which now straddles the waters of both States following the 2012 Judgment. On 5 December 2012, President Ortega promised that Nicaragua would protect the areas of the original Seaflower Reserve, now located in Nicaragua's exclusive economic zone, as it would the rest of the areas that are now recognized as being part of the Nicaraguan maritime areas.[113]

2.58 Finally, in response to President Santos' insistence that a treaty was required to establish the new maritime boundary, President Ortega offered to conclude such a treaty. He first did so formally on 10 September 2013, the day after President Santos introduced Decree 1946 establishing the Colombian "ICZ".[114] President Ortega stated then that although he did not agree with

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[110] "Nicaragua asks Bogotá to form The Hague Commissions", *La Opinion,* 22 February 2013, (NM, Annex 35) http://laopinion.com.co/demo//index.php?option=com_content&task=view&id=414468&Itemid=29

[111] *Ibid.*

[112] "Nicaragua: no oil concessions in Seaflower", *Nicaragua Dispatch*, 6 December 2012 (NM, Annex 33) http://nicaraguadispatch.com/2012/12/nicaragua-no-oil-concessions-in-seaflower/

[113] "Nicaragua: no oil concessions in Seaflower", *Nicaragua Dispatch*, 6 December 2012 (NM, Annex 33) (http://nicaraguadispatch.com/2012/12/nicaragua-no-oil-concessions-in-seaflower/)

[114] "Daniel: 40 years from the martyrdom of Allende, peace must prevail", *El 19 Digital,* 11 September 2013 (NM, Annex 39) (http://www.el19digital.com/articulos/ver/titulo:13038-daniel-a-40-anos-del-martirio-de-allende-debe-prevalecer-la-paz)

President Santos' position, he was willing to conclude a treaty to ensure the implementation of the Judgment:

> "We understand the position taken by President Santos, but we cannot say that we agree with the position of President Santos...We do agree that it is necessary to dialogue, we do agree that it is necessary to look for some kind of agreement, treaty, whatever we want to call it, to put into practice in a harmonious way, like brother peoples, the Judgment of the International Court of Justice...."[115]

2.59 As President Ortega explained, although there is no legal requirement for a treaty in order to make the November 2012 Judgment effective or binding on the parties, Nicaragua is willing to accommodate Colombia's insistence on the need for a boundary treaty, provided that it recognizes and respects the rights and jurisdiction that belong to Nicaragua as a result of the Judgment. The day following President Ortega's remarks, the National Assembly of Nicaragua issued a declaration supporting the President's initiative.[116] It stated: "The National Assembly declares its full endorsement of the position of the Government of Nicaragua for a peaceful solution through a treaty implementing the Judgment".

2.60 President Ortega reiterated his invitation to Colombia to conclude a treaty implementing the Court's Judgment on 9 May 2014, stating: "We propose to the government of Colombia, to President Juan Manuel Santos, to work for a Colombian-Nicaraguan commission so a treaty can come out of it that will allow us to respect, and put in practice the judgment by the ICJ".[117]

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[115] *Ibid.*

[116] "Assembly of Nicaragua supports dialogue with Colombia", *El Universal*, 12 September 2013 (NM, Annex 40) http://www.eluniversal.com.co/colombia/asamblea-de-nicaragua-respalda-dialogo-con-colombia-134509

[117] "Nicaragua proposes to coordinate The Hague's sentence with Colombia", *AFP,* 9 May 2014 (NM, Annex 46) http://www.noticiasrcn.com/internacional-america/nicaragua-propone-coordinar-fallo-haya-colombia

2.61 As of the date of this Memorial, Colombia has not responded to any of these offers.

2.62 Notwithstanding Colombia's behavior and attitude, Nicaragua has consistently sought to avoid enmity and foster harmonious relations between the two States, and to avoid any hostility to Colombia at the popular level, by portraying Colombia's conduct in the best light possible. Its public statements have reflected Nicaragua's aspiration for, and commitment to, a peaceful and friendly settlement based on mutual acceptance and implementation of the Court's Judgment.

2.63 To date[118], however, neither Nicaragua's self-restraint nor its conciliatory statements or gestures have induced Colombia to accept or comply with the Court's Judgment, or to respect Nicaragua's rights and jurisdiction thereunder. The following Chapter addresses the legal consequences of Colombia's actions.

[118] *See* Diplomatic Note from the Minister of Foreign Affairs of Nicaragua, to the Minister of Foreign Affairs of Colombia, dated 13 September 2014. (NM, Annex 18). *See* also recent public declarations dated 24 September 2014, just a few days before printing this memorial, in which the Head of the Navy Command of the Archipelago of San Andres and Providencia, Almirant Luis Hernan Espejo, declared that "the fishermen do not have to ask for permission from anybody that is not the Republic of Colombia (to work east of the 82 [meridian]) it is for that reason that the Army is permanently there to guarantee that they can fish freely". ("*Los pescadores no tienen que pedir permiso a nadie diferente de la República de Colombia (para trabajar al este del paralelo 82) y para eso está la Armada ahí permanentemente para garantizarles que puedan hacer su pesca con total libertad*"). "Colombia garantiza actividad de pescadores en aguas disputadas con Nicaragua", *El Espectador*, 24 September 2014, *available at* (http://www.elespectador.com/noticias/actualidad/colombia-garantiza-actividad-de-pescadores-aguas-disput-articulo-518557).

CHAPTER III: COLOMBIA'S BREACHES OF ITS OBLIGATION NOT TO VIOLATE NICARAGUA'S SOVEREIGN RIGHTS AND JURISDICTION

3.1 This Chapter explains how the facts described in Chapter II constitute violations of Colombia's legal obligations. This Chapter has four main sections. Section A refers to the formal sources of the binding authority of the Court's judgment of 19 November 2012 and describes its legal effect. Sections B, C, and D identify the three main categories of legal obligations binding upon Colombia in the wake of that judgment, and point to the Colombian actions described in Chapter II that breach those obligations. The three categories are:

(i) Colombia's duties arising under the Statute of International Court of Justice and the UN Charter by virtue of the delivery of the judgment (Section B),

(ii) Colombia's duties arising under the international Law of the Sea, in accordance with which the Court's judgment identified the geographical extent of Nicaragua's rights (Section C); and

(iii) Colombia's duty under the UN Charter and customary international law not to threaten the use of force (Section D).

A. THE JUDGMENT OF 19 NOVEMBER 2012 HAS ESTABLISHED A DEFINITIVE MARITIME BOUNDARY BETWEEN THE PARTIES WITHIN 200 NAUTICAL MILES AND DETERMINED THE MARITIME SPACES OVER WHICH EACH PARTY CAN EXERCISE SOVEREIGN RIGHTS

3.2 The *dispositif* in paragraph 251 of the judgment in the case concerning the *Territorial and Maritime Dispute* (*Nicaragua* v. *Colombia*) recorded the unanimous decision of the Court as to the course that the single maritime boundary delimiting the continental shelf and the exclusive economic zones of the

Republic of Nicaragua and Republic of Colombia within 200 M of Nicaragua's baselines shall follow[119].

3.3 Specifically, Nicaragua has the right to treat the areas on the Nicaraguan side of the maritime boundary as areas of the Nicaraguan continental shelf and exclusive economic zone. Colombia has the correlative duty to respect Nicaragua's rights in relation to the maritime boundary. This duty has been flagrantly violated by Colombia, most notably through the declaration of its so-called 'Integrated Contiguous Zone'.[120]

3.4 The rights of the coastal State in respect of the continental shelf and the exclusive economic zone are set out in Parts V and VI the 1982 United Nations Convention on the Law of the Sea ('UNCLOS'), which represent customary international law in this respect. The most important Article for present purposes is Article 56, which reads as follows:

> "Article 56
> Rights, jurisdiction and duties of the coastal State in the exclusive economic zone
>
> 1. In the exclusive economic zone, the coastal State has:
>
> (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;
>
> (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:

[119] *See* Sketch-map No. 11, Judgment Territorial and Maritime Dispute (Nicaragua v. Colombia) 19 November 2012.
[120] *See* below, paras. 3.18 – 3.21.

(i) the establishment and use of artificial islands, installations and structures;

(ii) marine scientific research;

(iii) the protection and preservation of the marine environment;

(c) other rights and duties provided for in this Convention.

2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.

3. The rights set out in this article with respect to the sea-bed and subsoil shall be exercised in accordance with Part VI."

3.5 Among the rights under Article 56, the most relevant for present purposes is the sovereign right for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, within the exclusive economic zone and the right to authorize marine scientific research. It is those rights of Nicaragua that are the primary target of Colombia's unlawful actions.

B. COLOMBIA'S DUTIES ARISING UNDER THE INTERNATIONAL COURT OF JUSTICE STATUTE AND THE UN CHARTER

1. The Sources of the Duties

3.6 The judgment of 19 November 2012 established the boundary between the continental shelf and exclusive economic zone of the Republic of Nicaragua and the Republic of Colombia in the area that is the subject of the present case. The

judgment has the status of *res judicata*.[121] No further action was necessary to render the judgment effective on the plane of international law. Nicaragua and Colombia had and have the right and the duty to act in accordance with international law, on the basis of the maritime boundary determined by the Court, as from 19 November 2012.[122]

3.7 Article 94.2 of the Rules of Court identifies the moment at which the judgment and the obligations arising from it take effect. It provides that "The judgment shall be read at a public sitting of the Court and *shall become binding on the parties on the day of the reading*." (emphasis added). The Court read its judgment at the public sitting held on 19 November 2012.

3.8 Article 60 of the Statute of the Court provides that "The judgment is final and without appeal." Article 94(1) of the UN Charter provides that "Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."

3.9 The consequence of this obligation is that Colombia must, from the time that the judgment is issued, act in accordance with the terms of the judgment. In the present case, Colombia must treat the waters determined by the Court to appertain to Nicaragua as Nicaraguan waters (territorial sea or exclusive economic zone and continental shelf, as appropriate), and refrain from treating them as subject to Colombian jurisdiction.

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[121] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, at paragraphs 114 – 116.

[122] *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Tunisia v. Libyan Arab Jamahiriya), Judgment, I. C. J. Reports 1985*, p. 192, at paragraphs 46 – 49. Cf., *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning* Avena and Other Mexican Nationals (Mexico v. United States of America) *(Mexico v. United States of* America), Judgment, I.C.J. Reports 2009, p.3.

2. The Violations of the Duties

3.10 That obligation has been violated by Colombia. As was shown in Chapter II, on the day that the judgment was rendered, President Santos declared that "Colombia … emphatically rejects" the delimitation laid down by the Court.[123] That rejection was repeatedly asserted by Colombian Government officials.[124]

3.11 The Colombian Government adopted the position that the International Court of Justice's judgment is 'inapplicable' unless it is implemented within the Colombian domestic legal order by means of a treaty between Colombia and Nicaragua.[125]

3.12 Colombia cannot, however, avoid the effect of the International Court's judgment, as a matter of international law. The implementation of the International Court's judgment within the Colombian legal system, on the other hand, is a matter of Colombian law, and it is for Colombia to determine how that implementation is to take place. Nicaragua is not concerned with the requirements of Colombian law, which cannot excuse Colombia's failure to comply with its obligations under international law.[126] The effect of the International Court's judgment is immediate, and whatever the steps that Colombia might decide are necessary to give effect to the judgment within the Colombian legal system, Colombia is obliged by international law to act consistently with the International Court's judgment now, and has been under such an obligation since the day that the judgment was rendered.

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[123] *See* above, para. 2.4.
[124] *See* above, para. 2.5 – 2.10, 2.15 – 2.17.
[125] See above, para. 2.17-2.21.
[126] *See* Articles 3 and 12 of the International Law Commission's Articles on State Responsibility, 2001(http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf).

3.13 It is trite law that obligations under international law are not and cannot be made contingent upon a State taking the necessary steps to implement them.[127] Without prejudice to that point, Nicaragua recalls that it has made very clear its willingness, endorsed by a resolution of its National Assembly, to negotiate a treaty[128] with Colombia in order to implement the Court's judgment.[129] Colombia has not taken up that offer.

3.14 The repudiation of the Court's judgment was confirmed by the adoption by Colombia of a number of measures that assert Colombian rights, incompatible with Nicaragua's rights under international law, over waters that the Court has determined to belong to Nicaragua. These include both licences purporting to authorize fishing in Nicaraguan waters[130] and, most notably, Decrees 1946[131] and 1119. [132]

i. Decrees 1946 and 1119

3.15 Decree No 1946 was adopted on 9 September 2013; and it was amended by Decree No 1119 of 17 June 2014. Article 1(3) of Decree 1946 asserted that Colombia "exercises jurisdiction and sovereign rights over the maritime spaces" created by its insular territories, which are listed in Article 1. Those insular territories were all held by the Court to belong to Colombia.[133] Article 4 of Decree

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[127] *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Tunisia v. Libyan Arab Jamahiriya), Judgment, I. C. J. Reports 1985*, p. 192, at paragraphs 46 – 49. Cf., *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning* Avena and Other Mexican Nationals (Mexico v. United States of America) *(Mexico v. United States of* America), Judgment, I.C.J. Reports 2009, p.3.

[128] *See* para. 2.59 above.

[129] *See* "Assembly of Nicaragua Supports Dialogue with Colombia". September 12, 2013 (NM, Annex 40)

[130] *See* above, paragraphs 2.50-2.52.

[131] Presidential Decree 1946 of September 9, 2013 (NM, Annex 9). *See* above, paragraphs 2.11-2.13.

[132] Presidential Decree 1119 of June 17, 2014 (NM, Annex 13).

[133] *See Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 1985*, p.662, para.103.

1946 establishes a 12 nautical mile territorial sea around each of those insular territories. As long as the baselines from which the territorial sea is measured are drawn in accordance with international law, Nicaragua makes no complaint about the assertion of sovereignty over the islands and their adjacent territorial seas.

3.16 Article 5 of Decree 1946, however, is different. As was explained in below, it purports to establish what it calls an 'Integral Contiguous Zone', though it is not a contiguous zone in the normal sense of a contiguous zone under the Law of the Sea, as exemplified in Article 33 of the 1982 United Nations Convention on the Law of the Sea ('UNCLOS').

3.17 The text of Article 5 of Decree 1946 was set out above,[134] and is reproduced in Annex 9. UNCLOS Article 33 reads as follows:

> "Article 33
> *Contiguous zone*
>
> 1. In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to:
>
> (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;
>
> (b) punish infringement of the above laws and regulations committed within its territory or territorial sea.
>
> 2. The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured"

3.18 The ICZ departs in two main ways from a contiguous zone in the accepted meaning of that term. First, the ICZ extends beyond the areas in which Colombia is entitled to establish a contiguous zone. It ignores both (i) the obligation not to extend a contiguous zone beyond 24 nautical miles from the territorial sea

[134] Above, paragraph 2.12.

baseline, and also (ii) the Court's delimitation of the maritime zones of Nicaragua and Colombia.

3.19 The ICZ is said to be 'continuous and uninterrupted'[135] and to surround all of the insular territories, with the exception of Bajo Nuevo, which has its own, detached ICZ. The zones of the islands other than Serranilla and Bajo Nuevo coalesce, and are joined to the ICZ around Serranilla by a corridor defined in terms of geodesic lines. The ICZ is depicted in Figure 2.1, from which it is evident that the ICZ simply extends beyond the 24 nautical mile limit.

3.20 Furthermore, the Court has defined the location of Colombia's maritime boundary with Nicaragua, [136] and as is again evident from Figure 2.2, above, the ICZ extends well beyond that boundary into waters that are within the maritime jurisdiction of Nicaragua, and in which Colombia cannot claim rights as a coastal state.

3.21 Secondly, if Colombia were entitled to establish a contiguous zone beyond its maritime boundary with Nicaragua – *quod non* - the jurisdictional claims that Colombia makes in respect of the ICZ extend *ratione materiae* beyond those permissible in a contiguous zone established in accordance with customary international law. Customary international law, which is reflected in the provisions of Article 24(1) of the 1958 Convention on the Territorial Sea and Contiguous Zone[137] and in the materially identical UNCLOS Article 33(1), limits the jurisdiction of a coastal State in the contiguous zone to that necessary to prevent or punish infringement of its customs, fiscal, immigration or sanitary laws and regulations within the territory or territorial sea of that State.

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[135] *See* para. 2.12 above.

[136] *See See Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 1985*, p.718, para. 251 .

[137] *516 UNTS 205. Article 24 reads as follows: "1. In a zone of the high seas contiguous to its territorial sea, the coastal State may exercise the control necessary to: (a) Prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea; (b) Punish infringement of the above regulations committed within its territory or territorial sea."*

3.22 It will be recalled[138] that Article 5(3) of Decree 1946, as originally enacted, stipulated that:

> "[T]he Colombian State shall exercise in the established Integral Contiguous Zone, its sovereign authority and the powers for the implementation and the necessary control regarding:
>
> a) Prevention and control of violations of laws and by-laws regarding [the] integral security of the State, including piracy, drug trafficking, as well as behaviours that endanger security at sea and national maritime interests, customs, fiscal, immigration and health matters committed in its insular territories or in their territorial sea. Similarly, violations of laws and by-laws regarding environmental protection, cultural patrimony and the exercise of historic rights to fishing held by the State of Colombia, shall be prevented and controlled.
>
> b) Punishment of violations of laws and by-laws regarding the matters enumerated in a) above, and that were committed in the insular territories or their territorial sea."

3.23 Decree No 1119 of 17 June 2013 amended Decree No 1946 so that Article 1 of Decree No 1946 reads as follows:

> "The Republic of Colombia exercises full sovereignty over its insular territories and its territorial sea; jurisdiction and sovereign rights over the rest of the maritime spaces created by its insular territories under the terms prescribed by international law, the Political Constitution, Law 10 of 1978, Decree 1946 of 2013, and by this Decree, as it may correspond. Colombia exercises historical rights to fishery in such spaces, pursuant to international law."

3.24 Decree No 1119 of 17 June 2013 further amended Decree No 1946 so that Article 5(3) of Decree No 1946 now reads as follows:

> "3. With the purpose of protecting the sovereignty of its territory and territorial sea in the integral contiguous zone set forth in this Article, to implement the provisions set forth in the previous

[138] *See* paragraph 2.12 above.

> paragraph, the Colombian State will exercise the necessary powers to implement and control to:
>
> (a) Prevent and control the violations of the laws and regulations related to the comprehensive security of the State, including piracy and trafficking in narcotic drugs and psychotropic substances, as well as behaviors that attempt against the safety and security of the sea and national maritime interest, issues relating to customs, fiscal, immigration and sanitary matters carried out in its insular territories or their territorial sea. In the same manner, violations of laws and regulations related to the preservation of the environment and its cultural heritage will also be prevented and controlled."

3.25 Colombia thus asserts, in waters that the Court has determined belong to Nicaragua, jurisdiction over matters including fisheries and the preservation of the environment. Both of those are matters that fall within the sovereign rights and jurisdiction of Nicaragua in its exclusive economic zone and continental shelf, according to accepted principles of the Law of the Sea. Both of them are listed among the coastal State rights in the exclusive economic zone in Article 56 of the 1982 United Nations Convention on the Law of the Sea ('UNCLOS') and Article 77 of the same. In contrast, the rights claimed by Colombia are not included among the rights of other States in the exclusive economic zone, in UNCLOS Article 58, or the continental shelf, UNCLOS Article 78, nor even among the rights enjoyed in a contiguous zone in accordance with UNCLOS Article 33.

3.26 Moreover, given that the purpose of a contiguous zone is to enable a State to prevent and punish infringements of certain laws in its territory or territorial sea there is, on the face of it, no legitimate interest in such rocks and islands that could be protected by a contiguous zone even where it established on the Colombian exclusive economic zone. Its establishment in such locations, and on the Nicaraguan exclusive economic zone, appears to be a purported exercise of a right, not for the purpose of protecting any rights or interests of Colombia but for

the sole or dominant purpose of causing injury to Nicaragua. It is a clear example of an abuse of rights.[139]

3.27 Decrees 1946 and 1119 were adopted in defiance of the Court's judgment. They involve plain usurpations of rights that, as a matter of international law, belong to Nicaragua and only to Nicaragua. They stand on Colombia's statute book as a continuing repudiation of that judgment, and do so independently of any steps that are taken to implement the measures. The mere proclamation of a measure contradicting the judgment is incompatible with Colombia's obligations under the Court Statute and the UN Charter.

3.28 That is evident from the Opinion of the Court in the *Headquarters Agreement* case, where the Court was faced with the claim that the adoption by the US of measures providing for the closure of a PLO mission to the UN in New York did not give rise to a dispute between the US and the UN under the UN's Headquarters Agreement with the UN, because the US measures had not been implemented. The Court said that

> "While the existence of a dispute does presuppose a claim arising out of the behaviour of or a decision by one of the parties, it in no way requires that any contested decision must already have been carried into effect. What is more, a dispute may arise even if the party in question gives an assurance that no measure of execution will be taken until ordered by decision of the domestic courts."[140]

3.29 As is clear from the judgment of the Court in the *Headquarters Agreement* case, the assertion of a right to act in a manner incompatible with duties under a

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[139] *See* A. Kiss, 'Abuse of Rights', in the *Max Planck Encyclopedia of International Law.* Cf., Verbatim Record of the *Public Sitting held on 15 September 2011 at 10 a.m., in the case concerning* Jurisdictional Immunities of the State (Germany *v.* Italy; Greece intervening), paragraphs 31-35 (Gattini); A. Watts and R Jennings, *Oppenheim's International Law*, (9th ed., 1992), pp. 407-409; J Crawford (ed.), *Brownlie's Principles of International Law* (8th ed., 2012), pp. 562-563.

[140] *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988*, p. 12, at paragraph 42.

treaty is a repudiation of that treaty, and itself constitutes a dispute under that treaty. The fact that the asserted right has not yet been exercised does not mean that the dispute is merely a theoretical or potential dispute of which international law will take no notice. The repudiation of the treaty obligation creates an actual dispute under the treaty. Similarly, the assertion of a right to act contrary to a judgment of the International Court of Justice is an actual refusal to accept the legal obligation arising from the decision of the Court and to comply with it; and this refusal amounts to a breach of Article 94 of the UN Charter. Again, the repudiation of obligations amounts to an actual, and not merely to a theoretical or potential, breach of these obligations.

3.30 There is, however, ample evidence of the actual enforcement by Colombia of its unlawful claims to jurisdiction over waters that the Court has adjudged to pertain to Nicaragua. Chapter II summarized a large number of instances in which Colombian ships[141] and aircraft[142] have harassed Nicaraguan licensed vessels lawfully conducting activities such as fishing and policing in Nicaraguan waters. Several of those incidents[143] involved explicit statements and actions asserting Colombian rights over waters that the Court had determined appertained to Nicaraguan. These incidents, too, amount to breaches of Colombia's obligations to comply with the Court's judgment.

3.31 For these reasons, it is plain that Colombia is deliberately violating its obligations to comply with the Court's judgment of 19 November 2012.

[141] *See* above, paras. 2.24 – 2.50.
[142] *See* above, paras. 2.25, 2.28, 2.38 - 2.39, 2.44 - 2.46.
[143] *See* above, paras. 2.25- 2.26, 2.30, 2.32, 2.35, 2.40, 2.43, 2.47.

C. COLOMBIA'S DUTIES ARISING UNDER THE INTERNATIONAL LAW OF THE SEA

3.32 Colombia's conduct does not breach only its obligations under the Court Statute and the UN Charter. In treating Nicaraguan waters as its own, Colombia is violating the rights of Nicaragua under international law in respect of those maritime zones. Colombia is violating its obligations under the Law of the Sea. The violations are constituted by the same conduct as violates Colombia's obligations under the Court Statute and the UN Charter.

3.33 Two kinds of violation may be distinguished. First, there are actions that necessarily amount to a complete repudiation of Nicaragua's rights in the waters in question. The assertion of jurisdiction over Nicaraguan waters in Decrees 1946 and 1119 are instances of such 'repudiatory' breaches, as are the incidents in which vessels authorized by Nicaragua to fish have been ordered to cease doing so. Both were described in the preceding Section of this Chapter. These are actions that necessarily imply, in clear contradiction of the decision of the Court, that the waters are not part of Nicaragua's exclusive economic zone.

3.34 There is a second category of incidents which do not necessarily imply a complete repudiation of Nicaragua's rights in the waters in question, but which nonetheless violate Nicaragua's rights. For example, it is true in general terms that Colombian aircraft have the right to overfly Nicaragua's exclusive economic zone as long as they have due regard to the rights of the coastal State (including the sovereign right to license and manage fishing in the exclusive economic zone[144]) when doing so.[145] Accordingly, overflight by Colombian aircraft of fishing vessels in waters that are part of the Nicaraguan exclusive economic zone does not in itself imply a repudiation of Nicaragua's rights in those waters. However, if the

[144] UNCLOS Articles 56, 62.
[145] Cf., UNCLOS Article 58(1),(3).

right of overflight is carried out in a harassing manner, with the apparent aim of frightening off or 'dissuading' vessels authorized by Nicaragua from fishing in those waters, it would violate the duty to have due regard to the rights of Nicaragua as a coastal state. Even if overflight is in itself lawful, the harassment would violate Nicaragua's rights. Examples of harassment were set out in Chapter II.[146]

3.35 Moreover, for as long as Colombia maintains publicly that it is entitled to treat Nicaraguan waters as its own, that position has an actual effect *in terrorem* upon those who are entitled to engage in activities in Nicaraguan waters but fear that they will be accosted by Colombian vessels or aircraft if they do so. That, too, is an unlawful interference with Nicaragua's rights in its maritime zones that bears economic consequences.

3.36 For these reasons, Colombia's actions violate Nicaragua's sovereign rights and jurisdiction in its maritime zones as delimited in paragraph 251 of the Court Judgment of 19 November 2012.

D. COLOMBIA'S BREACHES OF ITS OBLIGATION NOT TO USE OR TO THREATEN TO USE FORCE

3.37 As shown above, following the Court's judgment of 19 November 2012, and in spite of it, Colombia has continued to deploy its naval forces in areas determined by the Court to form part of Nicaragua's Exclusive Economic Zone and continental shelf, and has used these forces to prevent Nicaragua from exercising its sovereign rights and jurisdiction in those areas. The specific actions by Colombia within Nicaragua's Exclusive Economic Zone are described at length in Chapter II.

[146] *See* above, paras. 2.24 – 2.50.

3.38 Several conclusions emerge from these events:

(i) The Republic of Colombia maintains naval units on a permanent basis in areas under the sovereignty and jurisdiction of Nicaragua, disregarding Nicaraguan rights, as recognized by the Court's Judgment of 19 November 2012.

(ii) The Colombian naval forces purport to exercise jurisdiction over the activities carried out in the Exclusive Economic Zone and continental shelf of Nicaragua: they protect the recipients of fishing licenses and marine research authorizations issued by Colombia in areas that do not belong to it; they prevent and obstruct the legitimate exercise by Nicaraguan naval forces of their policing and law enforcement mission; and they enjoin the fishing boats flagged or licensed by Nicaragua, harass them with inspections and overflights, and order them to leave or otherwise to face the consequences.

(iii) Colombian frigates, combat aircraft and helicopters have harassed Nicaraguan government and private vessels with warnings, approaches and overflights. Due to Colombia's naval and air superiority and Nicaragua's policy of restraint, Nicaraguan vessels have been obliged to restrict or abort the exercise of their functions in order to avoid confrontations.

3.39 This behaviour by Colombia flagrantly violates Nicaragua's sovereign rights, and transgresses its jurisdiction, as determined by the Court in its November 2012 Judgment. Moreover, in instructing Nicaraguan vessels to leave the area or face the consequences, and in dispatching its own vessels to chase those of Nicaragua out of the area, Colombia has breached its fundamental obligation under international law to refrain from the threat or use of force against the territorial integrity or political independence of another State, in violation of Article 2, paragraph 4, of the United Nations Charter[147]. In the Inter American realm, this principle is enshrined in the Charter of the Organization of American

[147] *See* "N. Schrijver, "Article 2, paragraphe 4", *La Charte des Nations Unies* (J.P.Cot, A. Pellet and M. Forteau, eds.), 3rd. ed., Economica, Paris, 2005, pp. 437-466 ; A. Randelzhofer and O. Dörr, "Article 2 (4)", *The Charter of the United Nations. A Commentary,* (B. Simma *et al.*, eds.), 3rd. ed., OUP, 2012, pp. 200-234.

States,[148] the Pact of Bogota,[149] and the Inter American Treaty of Reciprocal Assistance (Rio Treaty)[150].

3.40 The *Declaration on the Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations* (A/RES.2625 (XXV),of 24 October 1970), confirms the principle reflected in Article 2 paragraph 4, of the Charter, underscoring "the duty to refrain from the threat or use of force to violate the existing international boundaries of another State as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States"[151].

3.41 Colombia's threats to use force against Nicaraguan state and private vessels and third state flagged vessels licensed by Nicaragua are described, especially, in Chapter II Section C.

3.42 Under general international law, a State may not resort to or threaten force as a policing measure in areas under the sovereignty and jurisdiction of another State without the latter's consent[152]. To proceed in the absence of such consent is a serious violation of those sovereign rights. Nicaragua has never consented to Colombia's exercise of police or any other powers in Nicaragua's exclusive economic zone.

3.43 In circumstances where, as here, the agents of the State with lawful jurisdiction are impeded from exercising their functions, the offended State would be permitted to employ a necessary and reasonable use of force to neutralize and expel the naval forces of the transgressor State, should they ignore a demand that

[148] Articles 19-22.
[149] Article 1.
[150] Article 1.
[151] UN Doc. A/8082 (1970), *UN Official Records of the GA,* 25th session, Supp. Nº 28, at p. 121.
[152] It is a basic legal principle that jurisdiction cannot be exercised in the territory of another State without its consent (PCIJ, *S.S. Lotus (France v Turkey)*, Judgment of 7 September 1927, Series A, nº 10 (1927) p. 18).

they leave peacefully; resort to such force would also be permissible where the transgressor State purports to carry out "law enforcement" measures of its own. It goes without saying that a dynamic of this sort, set off by the transgressor State's unlawful attempt to enforce its "jurisdiction" in the waters of the offended State, could lead to a situation that threatens international peace and security. To avoid that scenario, Nicaragua has exercised self-restraint. But it should not be compelled to forever endure Colombia's continuous violation of its sovereign rights and jurisdiction.

3.44 In this case, we are not dealing with a one-time trespass, but a continuous non consented deployment of Colombian military forces in Nicaraguan waters, and the continuous exercise by those forces of the sovereign rights and jurisdiction that belong exclusively to Nicaragua. These actions, decided at the highest level of Colombia's Government, result neither from innocent error nor good faith misunderstanding. They reflect the Colombian Government's deliberate effort to maintain unilaterally, by way of coercion, the *de facto* situation that Colombia's military forces maintained prior to the Judgment of the Court, that is, maintaining the 82° W as a maritime border[153]. Colombia's naval deployment, and its actions against Nicaraguan vessels, plainly constitute, in the circumstances, a threat to use force forbidden by general norms of international law, the United Nations Charter, the OAS Charter, the Pact of Bogota, and the Rio Treaty, *inter alia.*

3.45 The *Oxford Dictionary of Law* defines a *threat* as "the expression of an intention to harm someone with the object of forcing them to do something"[154]. When applying this definition to inter State relations, a *threat* can be understood as a recourse substituting for -or preceding- the use of force by a State whose

[153] *See* Nicaragua's Reply in the case concerning *Territorial and Maritime Dispute (Nicaragua v. Colombia)* paras. 34-43, *see* also, Colombia's Rejoinder para. 9.2.
[154] *A Dictionary of Law* (E. A. Martin and J. Law, eds.), Oxford, OUP, 2006,p. 535.

purpose is to intimidate and coerce another State to act -or not to act- in a specific manner.

3.46 The *threat* may be explicit, derived from official declarations or statements made by agents of a State, or induced from the particular factual circumstances of the case. The *threat*, to be real, does not require an explicit formulation; it may be inferred from conduct perceived by the other as *threatening* to the extent that it will have *to face the consequences* if it takes the *wrong* decision. The plain and ordinary meaning of expressions like these in a highly tense context cannot be underestimated. The threat forbidden by Article 2, paragraph 4, of the Charter requires a coercive intent directed towards specific behavior on the part of another State. Prof. Ian Brownlie observed more than fifty years ago: "A threat of force consists in an express or implied promise by a government of a resort to force conditional on non-acceptance of certain demands of that government. If the promise is to resort to force in conditions in which no justification for the use of force exists, the threat itself is illegal"[155]. It has been observed that this view "has been repeated and endorsed in the sparse literature as an authoritative reading of the Charter text"[156].

3.47 The Court itself has embraced it. In its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons,* the Court observed: "If the envisaged use of force is itself unlawful, the stated readiness to use it would be a threat prohibited under Article 2, paragraph 4. Thus it would be illegal for a State to threaten force to secure territory from another State, or to cause it to follow or not follow certain political or economic paths. The notions of 'threat' and 'use' of force under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself in a given case is illegal –for whatever reason- the threat to

[155] I. Brownlie, *International Law and the Use of Force by States,* Oxford, Clarendon Press, 1963, p. 364.
[156] N. Stürchler, *The Threat of Force in International Law,* Cambridge Studies in International and Comparative Law, Cambridge University Press, 2007, p. 39

use such force will likewise be illegal. In short, if it is to be lawful, the declared readiness of a State to use force must be a use of force that is in conformity with the Charter"[157].

3.48 In the present case, Colombia's substantial deployment of heavily armed naval vessels in areas of undisputed Nicaraguan jurisdiction, under a claim of Colombian sovereignty, itself constitutes a threat to use force against Nicaragua. The threat is amplified, and made unmistakable, by the declarations of Colombia's President and its Naval Commander. In the words of President Santos, the Colombian High Command was ordered to "defend with 'cloak and sword' the continental shelf that Colombia has in the Caribbean Sea."[158] This was followed by the pledge of Vice Admiral Hernando Wills that his forces will "comply with the order of the Head of State to exercise sovereignty throughout the Colombian Caribbean Sea," and that he would carry out his "duty […] to defend all the Colombian maritime space."[159] In these circumstances, Colombia's naval deployment has intimidating purposes: 1) as a *deterrent*, inhibiting the exercise of Nicaraguan rights in those areas,; and, 2) as *coercion,* as Colombia attempts to force Nicaragua to accept Colombia's views on sovereign rights and jurisdiction, and acquiesce in its seizure of the maritime areas adjudged to be Nicaraguan by the Court.

3.49 In any event, in this case there is much more than the naval deployment itself. As set forth in Chapter II, the Colombian naval vessels deployed in Nicaragua's waters have repeatedly dispatched patrol boats to chase Nicaraguan State and private vessels and vessels licensed by Nicaragua out of areas that

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[157] *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, I.C.J. Reports 1996, p. 226, para. 47 (http://www.icj-cij.org).

[158] "Santos orders defense of the continental shelf with cloak and sword", *El Espectador,* 19 September 2013 (NM, Annex 41) (http://www.elespectador.com/noticias/politica/santos-ordena-defender-plataforma-continental-capa-y-es-articulo-447445)

[159] *Ibid.*

Colombia, in defiance of the November 2012 Judgment, continues to claim as its own.[160]

3.50 Colombia has also dispatched military aircraft for the same purpose, specifically to fly low over Nicaraguan vessels in a threatening manner.[161] Colombian ship commanders have ordered Nicaraguan coast guard vessels to depart the areas they were patrolling in order not to "expose yourself, or force a serious situation."[162] In one such incident, the commander of a Colombian frigate communicated to a Nicaraguan coast guard vessel that "you will be responsible of the consequences if you disregard this call."[163]

3.51 Such can only be regarded as a threat of force. The latter message echoes the one considered by the Arbitral Tribunal in the *Guyana/Suriname case.*[164] Two Surinamese naval vessels approached a drill ship, the *C.E. Thornton*, which was carrying out offshore exploratory activities under Guyana's license. They pointed their search lights on the rig, established radio contact, informed the ship's personnel that they were in Surinamese waters and ordered them to leave the area in 12 hours (extended to 24 afterwards) or "face the consequences". In response to this message, the recipients feared that force would be used against them and they decided that they had no alternative other than to stop their activities and evacuate the area.

3.52 Guyana claimed that Suriname violated its obligations under UNCLOS, the UN Charter and general international law because of its threat to use armed

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[160] *See* para. 2.20 above.
[161] *See* paras. 2.25, 2.28, 2.38, 2.39, 2.44-2.46 above.
[162] "Colombia avoided boundary frictions with the Army of Nicaragua", *Caracol*, 19 February 2013. (NM, II. Annex 34) (http://www.caracol.com.co/noticias/actualidad/colombia-evito-roce-limitrofe-con-armada-de-nicaragua/20130219/nota/1845121.aspx)
[163] Letter from the Nicaraguan Naval Force to the Ministry of Foreign Affairs reporting on incidents with the Colombian Navy in Nicaragua's Exclusive Economic Zone (26 August 2014), p. 6 (NM, Annex 23-A); 8 May 2014 Audio Transcript of the Nicaraguan Navy (NM, Annex 23-B).
[164] *International Legal Materials,* 2008, 166, para. 137-156, 425-447; *see* http://www.pca-cpa.org

force against the territorial integrity of Guyana and against its nationals, agents and other persons lawfully present in maritime areas within its sovereignty and jurisdiction. Suriname responded that it merely employed reasonable and proportionate law enforcement measures to preclude unauthorized drilling in a disputed area of the continental shelf. Suriname furnished evidence from its military commander on the scene that: "If the platform had not left our waters voluntarily, I would definitely not have used force. I had no instructions to that effect and anyhow I did not have the suitable weapons to do so. I even had no instructions to board the drilling platform and also I did not consider that".

3.53 Based on these facts, the Arbitral Tribunal determined "that the order given by [the Surinamese commanding officer] to the rig constituted an explicit threat that force might be used if the order was not complied with" and was so understood by the recipients[165]. According to the Tribunal, "in international law force may be used in law enforcement activities provided such force is unavoidable, reasonable and necessary", however, "in the circumstances of the present case…the action mounted by Suriname on 3 June 2000 seemed more akin to a threat of military action rather than a mere law enforcement activity…Suriname's action therefore constituted a threat of the use of force in contravention of the Convention, the UN Charter and general international law"[166].

3.54 Colombia's actions in the present case, unlike those of Suriname in the *Guyana v. Suriname case,* did not occur in areas legitimately claimed by both parties[167]. They occurred in the Exclusive Economic Zone and continental shelf

[165] *Guyana/Surinam Award*, para. 439.
[166] *Guyana/Surinam Award*, para. 445.
[167] In any case, be noted that the Award gave to Guyana undisputed title to the area where the incident occurred (*Guyana/Surinam Award* para. 451).

of Nicaragua, as delimited by the Court's Judgment of 19 November 2012[168]. They cannot, therefore, constitute lawful policing measures. To the contrary, they are prohibited by international law and constitute unlawful uses of force, or threats to use force, under the *Declaration on Principles* (A/RES. 2625(XXV), of 24 October 1970), Article 2, paragraph 4, of the UN Charter, the OAS Charter, the Pact of Bogota, and the Rio Treaty, *inter alia.*[169].

3.55 Nicaragua does not raise the infringement of the prohibition on the threat of force as an adjunct to the complaint of the violation of other rules of international law. The infringement has a particular importance that goes beyond the damage caused to Nicaragua. If it becomes apparent that a State can with impunity reject a Judgment of the Court and back its rejection with threats of the use of force, there is a grave risk to the international legal order, the credibility of the Court, and of peaceful dispute settlement procedures in general.

[168] In its Application of 6 December 2001 instituting proceedings against Colombia in the case *Territorial and Maritime Dispute,* Nicaragua stated that Colombia was interdicting and capturing Nicaraguan (or Nicaraguan licensed) fishing ships to back then its maritime claims, while "the Nicaraguan naval forces have no possibility of defending these vessels against the greatly more powerful Colombian navy" (para. 5). Nicaragua spoke then of a "use and threat of use of force by Colombia". Now, this characterization is more pertinent once the facts happen in an undisputed Nicaraguan area.

[169] Once a disputed territory is awarded to a State the other is under the obligation to withdraw its forces and administration from there expeditiously and without condition. *See Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea intervening), Judgment, ICJ Reports 2002*, para. 312-315, where the Court mentions also the *Temple of Preah Vihear* and the *Territorial Dispute (Libya/Chad)* as precedents.

CHAPTER IV: REMEDIES

4.1 Although the present case involves far-reaching problems of principle – including that of the authority of the Court's Judgments, Nicaragua is conscious that its submissions must stay within the framework of the bilateral dispute it has submitted to the Court. It does this claiming full reparation for Colombia's internationally wrongful conduct described in the previous Chapters of this Memorial.[170]

4.2 As the Permanent Court of International Justice put it, "[i]t is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form."[171] The adequate form of reparation "depend[s] upon the concrete circumstances surrounding each case and the precise nature and scope of the injury."[172]

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[170] *See* P.C.I.J., Judgment, 13 September 1928, *Factory at Chorzów*, Jurisdiction, Series A, No. 17, p. 47. *See* among the recent case law of the Court: I.C.J., Judgment, 25 September 1997, *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Reports* 1997, p. 80, para. 149; I.C.J., Judgment, 14 February 2002, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)*, *Reports 2002*, pp. 31-32, para. 76; I.C.J, Advisory Opinion, 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Reports 2004*, p. 198, para. 152; I.C.J., Judgment, 19 December 2005, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Reports 2005*, p. 257, para. 259; I.C.J., Judgment, 26 February 2007, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Reports 2007*, pp. 232-233, para. 460; I.C.J., Judgment, 20 April 2010, *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*, *Reports 2010*, p. 104, para. 274; I.C.J., Judgment, 30 November 2010, *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo)*, para. 161; I.C.J., Judgment, 3 February 2012, *Jurisdictional immunities of the State (Germany* v. *Italy: Greece intervening)*, *Reports 2012*, p. 153, para. 137.

[171] P.C.I.J., Judgment, 26 July 1927, *Factory at Chorzów, Jurisdiction*, Series A, No. 9, p. 21 and 13 September 1928, Series A, No. 17, p. 29. *See* also in the International Court of Justice most recent case law, Judgment, 27 June 2001, *LaGrand (Germany* v. *United States of America)*, *Reports 2001*, p. 485, para. 48; Judgment, 14 February 2002, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)*, *Reports 2002*, pp. 31-32, para. 76; Judgement, 31 March 2004, *Avena and Other Mexican Nationals (Mexico* v. *United States of America)*, *Reports 2004*, p. 59, para. 119; Judgment, 3 February 2012, *Jurisdictional immunities of the State (Germany* v. *Italy: Greece intervening)*, *Reports 2012*, p. 153, para. 136.

[172] *Avena and Other Mexican Nationals (Mexico* v. *United States of America)*, *Reports 2004*, p. 59, para. 119.

4.3 In a famous *dictum*, the PCIJ explained that:

> "The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed**.**"[173]

4.4 And the Permanent Court went on to say that:

> "Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law."[174]

4.5 These principles, which have been confirmed and reaffirmed on multiple occasions by the Court,[175] are reflected in Articles 31 (1) and 34 of the 2001 ILC Articles on of States responsibility for internationally wrongful acts:

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[173] P.C.I.J., Judgment, 13 September 1928, *Factory at Chorzów*, Jurisdiction, Series A, No. 17, p. 47.

[174] *Ibid.*

[175] *See* among the recent case law of the Court: I.C.J., Judgment, 25 September 1997, *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Reports* 1997, p. 80, para. 149; I.C.J., Judgment, 14 February 2002, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)*, *Reports 2002*, pp. 31-32, para. 76; I.C.J, Advisory Opinion, 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Reports 2004*, p. 198, para. 152; I.C.J., Judgment, 19 December 2005, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Reports 2005*, p. 257, para. 259; I.C.J., Judgment, 26 February 2007, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Reports 2007*, pp. 232-233, para. 460; I.C.J., Judgment, 20 April 2010, *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*, *Reports 2010*, p. 104, para. 274; I.C.J., Judgment, 30 November 2010, *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo)*, *Reports 2010*, p. 691, para. 161; I.C.J., Judgment, 3 February 2012, *Jurisdictional immunities of the State (Germany* v. *Italy: Greece intervening)*, *Reports 2012*, p. 153, para. 137. *See* also Article 34 of the Articles on responsibility of States for internationally wrongful acts, *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, p. 95.

> "Article 31
> *Reparation*
> 1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
>
> 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.
>
> Article 34
> *Forms of Reparation*
> Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter."

4.6 In the present case, the injury suffered by Nicaragua as a consequence of Colombia's internationally wrongful acts are both material and moral. The latter call for reparation as much as the former, even though the reparation can take a different form.

4.7 According to the definition given by the ILC, "'moral damage' to a State" is the affront or injury caused by a violation of rights not associated with actual damage to property or persons"[176]. While Nicaragua can claim compensation for material damages – as will be further discussed in Section C below, it has also endured most serious and considerable damages of a legal and moral nature.

4.8 It must be noted that, in the *Rainbow Warrior* arbitration the Parties agreed that

> "[u]nlawful action against non-material interests, such as acts affecting the honour, dignity or prestige of a State, entitle the victim State to receive adequate reparation, even if those acts have

[176] *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, p. 99, para. (1) of the commentary of Article 36.

not resulted in a pecuniary or material loss for the claimant State."[177]

4.9 The Tribunal held that the infringement by France "of the special regime designed by the Secretary-General to reconcile the conflicting views of the Parties has provoked indignation and public outrage in New Zealand and caused a new, additional non-material damage … of a moral, political and legal nature, resulting from the affront to the dignity and prestige not only of New Zealand as such, but of its highest judicial and executive authorities as well",[178] and declared that France had committed several material breaches of its obligations to New Zealand.[179] Although in a very different context, there is no doubt that, in the present case, Colombia has caused injuries of various kinds to Nicaragua – which call for reparations, equally of various nature in conformity with the usual practice, as reflected in the ILC Articles.

4.10 Besides the various "Forms of reparation" enumerated in Article 34 of the ILC Articles,[180] it must be kept in mind that the cessation of the unlawful act(s) "is the first requirement in eliminating the consequences of wrongful conduct"[181].

4.11 In the present case, the consequences stemming from the responsibility of Colombia for the injury caused to Nicaragua by its internationally wrongful acts include:

- the immediate cessation of Colombia's continuing internationally wrongful acts;
- the re-establishment of the situation which existed before the wrongful acts were committed (restitution);

[177] Arbitral Award, 30 April 1990, *Rainbow Warrior (New Zealand/France), UNRIAA*, vol. XX, p. 267, para. 109.
[178] *Ibid.*, p. 267, para. 110.
[179] *Ibid.*, p. 275.
[180] *See* above, para.4.5.
[181] Commentary on the Articles on responsibility of States for internationally wrongful acts, *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, p. 89, commentary on Article 30, para. 4.

- compensation for the harm caused by those acts; and
- guarantees of non-repetition by Colombia of its internationally wrongful acts.

4.12 Moreover, as noted by the ILC, "[i]n certain cases, satisfaction may be called for as an additional form of reparation."[182] In the present case, a considerable portion of the damage sustained by Nicaragua clearly is moral and hardly financially assessable. In such a case, the principle provided for in Article 36 of the ILC Articles applies:

> "1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation."

4.13 However, Nicaragua will not make formal submissions to that end. In effect, when a responsible State does not spontaneously express regrets or apologies for such moral or legal damages and the case is brought before an international court or tribunal, the most common form of satisfaction is a declaration by the Tribunal concerned. And, here again, the ILC commentary is enlightening:

> "One of the most common modalities of satisfaction provided in the case of moral or non-material injury to the State is a declaration of the wrongfulness of the act by a competent court or tribunal. The utility of declaratory relief as a form of satisfaction in the case of non-material injury to a State was affirmed by the International Court in the *Corfu Channel* case, where the Court, after finding unlawful a mine-sweeping operation (Operation Retail) carried out by the British Navy after the explosion, said:
>
> 'to ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a

[182] Commentary on the Articles on responsibility of States for internationally wrongful acts, *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, p. 95, commentary of Art. 34, para. (2).

> violation of Albanian sovereignty. This declaration is in accordance with the request made by Albania through her Counsel, and is in itself appropriate satisfaction.'[183]
>
> This has been followed in many subsequent cases.[184],,[185]

In the present case, the Judgment of the Court declaring that Colombia's behaviour constitutes a violation of Nicaragua's sovereignty and entails Colombia's responsibility, will constitute an appropriate satisfaction for the moral damages caused.

A. CESSATION OF COLOMBIA'S CONTINUING INTERNATIONALLY WRONGFUL ACTS

4.14 Under international law, "the State responsible for an internationally wrongful act is under an obligation to cease that act, if it is continuing."[186]

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[183] Fn 625: "*Corfu Channel, Merits, I.C.J. Reports 1949*, p. 4, at p. 35, repeated in the *dispositif* at p. 36."

[184] Fn 626: "E.g., *Rainbow Warrior*, *UNRIAA*, vol. XX, p. 217 (1990), at p. 273, para. 123." *See* also e.g.: I.C.J., Judgment, 27 June 1986, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, *Reports 1986*, p. 147, para. 292(6). *See* also I.C.J., Judgment, 19 December 2005, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, *Reports 2005*, p. 280, para. 345(1); I.C.J., Judgment, 19 January 2009, *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning* Avena and Other Mexican Nationals (Mexico *v.* United States of America) *(Mexico* v. *United States of America), Reports 2009*, p. 20, para. 60 and p. 21, para. 61(3); I.C.J., Judgment, 20 April 2010, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, *Reports 2010*, p. 106, para. 282(1) or I.C.J., Judgment, 5 December 2011, *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*, *Reports 2011*, p. 693, para 170(2).

[185] Commentary on the Articles on responsibility of States for internationally wrongful acts, *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, p. 106-107, para. (6) of the commentary.

[186] I.C.J., Judgment, 3 February 2012, *Jurisdictional immunities of the State (Germany* v. *Italy: Greece intervening)*, *Reports 2012*, p. 153, para. 137. *See* also I.C.J., Judgment, 20 July 2012, *Questions relating to the obligation to prosecute or extradite (Belgium* v. *Senegal)*, *Reports 2012*, p. 461, para. 121; I.C.J., Judgment, 31 March 2014, *Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening)*, paras. 245-246 or ILC, Article 30 of the Articles on responsibility of States for internationally wrongful acts and its commentary, *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, pp. 88-91.

4.15 As made clear in Article 29 of the ILC 2011 Articles on State Responsibility on "Continued duty of performance" the other "legal consequences of an internationally wrongful act … do not affect the continued duty of the responsible State to perform the obligation breached." Indeed,

> "a new set of legal relations is established between the responsible State and the State or States to whom the international obligation is owed. But this does not mean that the pre-existing legal relation established by the primary obligation disappears. Even if the responsible State complies with its obligations […] to cease the wrongful conduct and to make full reparation for the injury caused, it is not relieved thereby of the duty to perform the obligation breached. The continuing obligation to perform an international obligation, notwithstanding a breach, underlies the concept of a continuing wrongful act (see article 14) and the obligation of cessation (see article 30 (a))."[187]

4.16 In the present case, it is obvious that Colombia not only has not ceased its internationally wrongful act, but has decided not to in spite of Nicaragua's calls for discussions regarding the means to implement the Judgment[188]. And Colombia has made its refusal publicly clear.Thus, Colombia maintains its firm refusal to implement the 2012 Court's Judgment.

4.17 As early as 19 November 2012 the Colombian President explained that the Court:

> "rejected the claims of sovereignty of Nicaragua over our archipelago. It is a final and unappealable judgment on this issue."[189]

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[187] Commentary on the Articles on responsibility of States for internationally wrongful acts, *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, p. 88, commentary on Article 29, para. (2).

[188] *See:* "Nicaragua Asks Bogota to Form The Hague Commissions", *La Opinion*, 22 February 2013 (NM, Annex 35). (http://laopinion.com.co/demo//index.php?option=com_content&task=view&id=414468&Itemid=29). *See* also Footnote 116 *supra*.

[189] "Declaration of President Juan Manuel Santos on the judgment of the International Court of Justice", 19 November 2012 (NM, Annex

4.18 After emphasizing the "omissions, errors, excesses, inconsistencies" allegedly committed by the Court, President Santos added:

> "Taking into account the above, Colombia – represented by its Head of State – emphatically rejects that aspect of the judgment rendered by the Court today".

4.19 Then on 28 November 2012, the Colombian Head of State declared:

> "I have decided that the highest national interests demand that the territorial and maritime boundaries be fixed through treaties, as has been the legal tradition of Colombia, and not through judgments rendered by the International Court of Justice."[190]

4.20 In February 2013, President Santos made it crystal clear that he would use military means to defend alleged fishing rights of fishermen from San Andres Island and the *Raizal*, although President Ortega had proposed that both countries hold discussions to implement the Judgments while allowing the original *Raizal* population to continue fishing in waters that have been recognized as pertaining to Nicaragua.[191]

4.21 Again, on 9 September 2013, the day of the enactment of the Presidential Decree 1946 which establishes a "continuous and uninterrupted" "Integral

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1)(http://wsp.presidencia.gov.colPrensa/2012/NoviembrelPaginas/20121119 02.aspx) . *See also*: "ICJ ruling on San Andres a 'serious judgment error': Santos", *Colombia Reports*, 20 November 2012 (NM, Annex 25) (http://colombiareports.co/icj-ruling-on-san-andres-a-serious-judgement-error-santos/); "International Court Gives Nicaragua More Waters, Outlying Keys to Colombia", *Diálogo*, 21 November 2012 (NM, Annex 26) (http://dialogo-americas.com/en_GB/articles/rmisa/features/regional_news/2012/11/21/feature-ex-3687), or "Caribbean Crisis: Can Nicaragua Navigate Waters It Won from Colombia?", *Time World*, 28 November 2012 (NM, Annex 28) (http://world.time.com/2012/11/28/caribbean-crisis-can-nicaragua-navigate-waters-it-won-from-colombia/) or "Colombia pulls out of International Court over Nicaragua", *BBC United-Kingdom*, 28 November 2012 (NM, Annex 29) (http://www.bbc.co.uk/news/world-latin-america-20533659).

[190] "Declaration of the Colombian President, Juan Manuel Santos on the denunciation of the Pact of Bogota" , Bogota, 28 November 2012 (NM, Annex 2) (http://wsp.presidencia.gov.co/Prensa/2012/Noviembre/Paginas/20121128_04.aspx).

[191] *See*: "Nicaragua Asks Bogota to Form The Hague Commissions", *La Opinion*, 22 February 2013 (NM, Annex 35) (http://laopinion.com.co/demo//index.php?option=com_content&task=view&id=414468&Itemid=29).

Contiguous Zone"[192] encroaching on Nicaragua's exclusive economic zone as determined by the Court in its 2012 Judgment and in which Colombia claims the right to control and punish violations of laws,[193] he stated:

> "The Judgment of the International Court of Justice is not applicable – it is not and will not be applicable – until a treaty that protects the rights of Colombians has been celebrated, a treaty that will have to be approved in accordance with our Constitution.
>
> I repeat the decision I have made: The judgment of the International Court of Justice IS NOT APPLICABLE without a treaty."[194]

4.22 On 18 September 2013, President Santos declared:

> "Colombia deems that the ruling by The Hague is not applicable, and we will not apply it, as we stated then, and I repeat today, until we have a new treaty."[195]

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[192] *See* Article 5 of Presidential Decree 1946.

[193] *Ibid.*

[194] Declaration of President Juan Manuel Santos on the integral strategy of Colombia on the Judgment of the International Court of Justice" 9 September 2013 – capital letters in the text - (NM, Annex 4) (http://wsp.presidencia.gov.co/Prensa/2013/Septiembre/Paginas/20130909_04-Palabras-Santos-Colombia-presenta-su-Estrategia-Integral-frente-al-fallo-de-La-Haya.aspx or, for the video, http://wsp.presidencia.gov.co/Videos/2013/Septiembre/Paginas/Septiembre.aspx). *See* also "Declaration of President Juan Manuel Santos during the sovereignty exercises performed in the Caribbean Sea", 18 September 2013 (NM, Annex 5) (http://wsp.presidencia.gov.co/Prensa/2013/Septiembre/Paginas/20130918_09-Palabras-Presidente-Juan-Manuel-Santos-durante-ejercicio-soberania-que-cumplio-en-el-Mar-Caribe.aspx or, for the video, http://wsp.presidencia.gov.co/Videos/2013/Septiembre/Paginas/Septiembre.aspx); or "Declaration of the Colombian Minister of Foreign Affairs, María Ángela Holguín"- "The Hague's judgment is difficult to abide because the entire country is against it: Holguin", *El Colombiano*, 25 October 2013 (NM, Annex 6) (http://www.elcolombiano.com/BancoConocimiento/F/fallo_de_la_haya_es_dificil_de_acatar_porque_el_pais_entero_esta_en_contra_holguin/fallo_de_la_haya_es_dificil_de_acatar_porque_el_pais_entero_esta_en_contra_holguin.asp).

[195] *See* also "Declaration of President Juan Manuel Santos during the sovereignty exercises performed in the Caribbean Sea", 18 September 2013 (NM, Annex 5) (http://wsp.presidencia.gov.co/Prensa/2013/Septiembre/Paginas/20130918_09-Palabras-Presidente-Juan-Manuel-Santos-durante-ejercicio-soberania-que-cumplio-en-el-Mar-Caribe.aspx or, for the video, http://wsp.presidencia.gov.co/Videos/2013/Septiembre/Paginas/Septiembre.aspx).

4.23 On 2 May 2014, the Colombian Constitutional Court upheld President Santos' position; while admitting that "the decisions proffered by the International Court of Justice, based on the jurisdiction recognized by Colombia through Article XXXI to the Pact cannot be unheeded", it added that this is with

> "the understanding that the decisions adopted by the International Court of Justice in relation to boundary disputes, should be incorporated to the national legal system through a duly approved and ratified treaty under the terms of Article 101 of the Political Constitution."[196];

which amounts to subordinating the implementation of the Judgment to conditions extraneous to it.

4.24 That same day, President Santos confirmed that it will not implement the Court 2012 Judgment; he declared that, as decided by the Constitutional Court,

> "This afternoon the Constitutional Court has welcomed, after a rigorous and serious study, the thesis that we have been upholding from the same day that the judgment of The Hague was issued in November 2012 and that we ratified in September of last year, when I personally filed a complaint against the Pact of Bogota."[197]
>
> "the judgment of the Court of The Hague can only be applied after a new treaty.
>
> […]
>
> In consequence, for our country – as long as a new treaty is not signed – the limits of Colombia with Nicaragua continue to be those established in the Esguerra-Barcenas Treaty; that is to say,

[196] Republic of Colombia, Constitutional Court, File D-9852 AC- Sentence C-269/14 (2 May 2014) , paras. 8.3(NM, Annex 16)

[197] Presidency of the Republic of Colombia, Press Release, "The Limits of Colombia with Nicaragua continue to be those established in the Esguerra-Barcenas Treaty, affirmed the President of Colombia", 2 May 2014 (NM, Annex 7)
(http://wsp.presidencia.gov.co/Prensa/2014/Mayo/Paginas/20140502_04-Los-limites-Colombia-Nicaragua-continuan-siendo-establecidos-tratado-Esguerra%E2%80%93Barcenas.aspx.)

> the limits previous to the International Court of Justice's judgment."[198]

4.25 This was repeated by President Santos on 19 May 2014:

> "President Juan Manuel Santos said this Monday that Colombia cannot apply the ruling by the International Court of Justice in the conflict with Nicaragua over the maritime boundaries in the Caribbean because 'we can only modify our borders with international treaties'.
> […]
> The Colombian President insisted that the 'ruling is inapplicable; we can only modify the borders of Colombia through a new treaty; I have upheld that position and I continue to do so'. Santos emphasized that 'I would not accept the imposition of what is now precisely in the ruling' of the ICJ."[199]

4.26 As recently as 17 June 2014, shortly after his reelection, President Santos "announced that he will maintain the same policy":

> "Asked about his position in view of the application of the ruling by the International Court of Justice in The Hague (ICJ) on the maritime limits in the Caribbean with Nicaragua, one of the thorniest issues of Colombia's foreign policy in his Government, Santos announced that he will maintain the same policy.
>
> […]

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[198] "Nicaragua Fears Losing the Sea", *Taringa!*, 3 May 2014 (NM, Annex 49) (http://www.taringa.net/posts/info/17784410/Nicaragua-teme-perder-el-mar.html). *See* also "Devoid of a New Treaty, the Limits of Colombia and Nicaragua Continue to be the Same: Santos", *W. Radio*, 2 May 2014 (NM, Annex 43) (http://www.wradio.com.co/noticias/actualidad/sin-nuevo-tratado-limites-de-colombia-y-nicaragua-siguen-siendo-los-mismos-santos/20140502/nota/2205996.aspx). See also "'We Must Seek Agreements With Nicaragua to Apply the Ruling Without Disavowing the Constitution: Former Attorney General Carlos Arrieta'", RCN Radio, 3 May 2014 (NM, Annex 44) (http://www.rcnradio.com/noticias/debemos-buscar-acuerdos-con-nicaragua-para-aplicar-el-fallo-sin-desconocer-la-constitucion#ixzz30lU7zhIs). *See* also"A New Treaty with Nicaragua Should be Made Defining the Limits", *El Tiempo*, 3 May 2014 (NM, Annex 45) (http://www.prensaescrita.com/adiario.php?codigo=AME&pagina=http://www.eltiempo.com).

[199] "Santos Says that the Ruling by The Hague is Inapplicable", *El País*, 19 May 2014 (NM, Annex 47) (http://www.elpais.com.co/elpais/colombia/noticias/santos-afirma-fallo-haya-inaplicable).

> 'The Hague ruling is not applicable. The boundaries cannot be changed except through a treaty, that is how our Constitution defined it and we have to wait for that treaty to modify our boundaries', explained Santos."[200]

4.27 That same day was signed Decree 1119 amending and supplementing Decree 1946 of 9 September 2013, which states, with some irony, "[t]hat the Republic of Colombia exercises its rights over its maritime spaces in conformity with International Law", which it blatantly violates as shown in Chapter III above.

4.28 By way of consequence, Colombia has clearly stated that it would not recognize Nicaragua's right over the maritime areas to which it is entitled to the east of the 82nd meridian: Colombia maintains that its maritime boundaries must remain "unchanged":

> "…as long as a new treaty is not signed – the limits of Colombia with Nicaragua continue to be those established in the Esguerra-Barcenas Treaty; that is to say, the limits previous to the International Court of Justice's judgment."[201]

> "The whole territory, including the 82 [meridian], is yours and we count on its defense", said Guerrero to President Santos, addressing him as Head of State."[202]

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[200] "Santos Guarantees Continuity in his Foreign Policy with Latin America", *America Economica*, 17 June 2014 (NM, Annex 48) (http://www.americaeconomia.com/politica-sociedad/politica/santos-garantiza-continuidad-en-su-politica-exterior-con-latinoamerica?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+america-economia+(Am%C3%A9rica+Econom%C3%ADa).

[201] "Devoid of a New Treaty, the Limits of Colombia and Nicaragua Continue to be the Same: Santo", *W. Radio*, 2 May 2014 (NM, Annex 43) (http://www.wradio.com.co/noticias/actualidad/sin-nuevo-tratado-limites-de-colombia-y-nicaragua-siguen-siendo-los-mismos-santos/20140502/nota/2205996.aspx).

[202] "Santos orders to defend the continental shelf with cloak and sword", *El Espectador*, 19 September 2013, (NM, Annex 41).

4.29 Furthermore, as shown in Chapter II,[203] Colombia has "authorized" private vessels of its nationals and the nationals of third States to operate in the exclusive economic zone of Nicaragua.

4.30 Decree 1946 of 19 September 2013, which was adopted as a clear provocation against the Court's ruling, is still in force.

4.31 As was explained by President Santos when the Decree was issued:

> "In the decree we have emitted today, we are also reaffirming in juridical terms that the San Andrés continental seabed extending west 200 nautical miles, is unquestionably joined with Colombia's Caribbean coast continental seabed, which extends northwest toward San Andrés for at least 200 miles. This means we have a continuous and integrated continental seabed that extends from San Andrés to Cartagena, over which Colombia has and will exercise the sovereign rights extended by International Law. Thus, we clearly, firmly and unquestionably close the door to allowing Nicaragua's expansionist intentions."[204]

The extent of Colombia's claim has been depicted on Figures 2.1 and 2.2 above.

4.32 These claims are incompatible with the Court's Judgment and infringe upon Nicaragua's sovereign rights over its continental shelf and exclusive economic zone. The breach is continuous.

4.33 This is also the case of the continuous threat to use force to maintain this unlawful situation brandished by Colombia. Many examples of such unlawful threats to use force are given in Chapter II.[205]

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[203] *See* paras. 2.47-2.52.

[204] "Declaration of President Juan Manuel Santos on the integral strategy of Colombia on the Judgment of the International Court of Justice", 9 September 2013 (NM, Annex 4) (http://wsp.presidencia.gov.co/Prensa/2013/Septiembre/Paginas/20130909_04-Palabras-Santos-Colombia-presenta-su-Estrategia-Integral-frente-al-fallo-de-La-Haya.aspx or, for the video, http://wsp.presidencia.gov.co/Videos/2013/Septiembre/Paginas/Septiembre.aspx).

[205] *See* paras. 2.24-2.50 as well as the complete list of incidents, Annex 23A-B NM ; *See* also Annex 24 NM.

4.34 Moreover, it is to be noted that, up to now, Colombia has not only had recourse to the threat to use military force to impede Nicaragua from benefiting from its rights but it maintains its threat to continue to use force to that aim. Thus, the Governess of San Andres explained that "12 frigates [have been] deployed in the territorial sea [make] a straight line over Meridian 82" in order to exclude ships and platforms from "other country" (read Nicaragua…) from the area east of the 82nd meridian,[206] where the Court's Judgment has recognized the sovereign rights of Nicaragua.[207]

4.35 For his part, President Santos declared:

> " ... [it should be] absolutely and totally clear that: I have given peremptory and precise instructions to the Navy; the historical rights of our fishermen are going to be respected *no matter what*. No one has to request permission to anybody in order to fish where they have always fished ...";[208]

4.36 President Santos also "ordered to the high command of the Armed Forces to defend with 'cloak and sword' the continental shelf that Colombia has in the Caribbean Sea".[209]

4.37 Vice Admiral Hernando Wills "reiterated that his forces comply with the order of the Head of State to exercise sovereignty throughout the Colombian Caribbean Sea".[210]

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[206] "Governess Participated during Patrol of the 82nd Meridian Area", *RCN Radio*, 20 August 2013 (NM, Annex 37) (http://www.rcnradio.com/noticias/gobernadora-participo-en-patrullaje-en-el-area-del-meridiano-82-84486#ixzz32wGEwvTd).

[207] I.C.J., Judgment, 19 November 2012, *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, *Reports 2012*, p. 705, paras. 219-220..

[208] "Declaration of President Juan Manuel Santos during the Summit of Governors in San Andres", 18 February 2013 – italics added- (NM, Annex 3)
(http://wsp.presidencia.gov.colPrensa/2013/FebrerolPaginas/2013021809.aspx).

[209] "Santos orders to defend the continental shelf with cloak and sword", *El Espectador*, 19 September 2013 (NM, Annex 41) (http://www.elespectador.com/noticias/politica/santos-ordena-defender-plataforma-continental-capa-y-es-articulo-447445).

[210] *Ibid.*

4.38 The Commander of the Colombian Navy explained that "the presence of the *Armada* in the Archipelago is permanent, [that it] will watch over the rights of the fishermen that have been in the area historically, as well as over the biosphere reserve, and all other surrounding resources", and that "[s]urface ships, naval aviation and the coast guard will be present in the place uninterrupted, to safeguard protection of the territorial sea and of the population. He finally stated that '[w]e will continue to be guarantors of national security with strength and soundness'."[211]

4.39 All these instances make it crystal-clear that Nicaragua is facing continuing wrongful acts attributable to Colombia. As explained by the ILC, "[i]n essence a continuing wrongful act is one which has been commenced but has not been completed at the relevant time."[212]

4.40 There can be no doubt that the breaches briefly recalled above are all of a continuous character:

> - this is true regarding the continuous refusal, recently reaffirmed by Colombia, to unconditionally comply with the 2012 Judgment since as the ILC put it, "[c]essation is […] relevant to all wrongful acts extending in time 'regardless of whether the conduct of a State is an action or omission … since there may be cessation consisting in abstaining from certain actions …'."[213][214]; the

[211] "We Will Continue Being Guarantors of National Security With Strength and Soundness, Commander Wills in the Colombia Lectureship", 21 March 2014, (NM, Annex 42) (http://www.esdegue.mil.co/node/4083)

[212] Commentary on the Articles on responsibility of States for internationally wrongful acts, *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, p. 60, Commentary of Article 14, para. (5).

[213] Fn 456 : "*Rainbow Warrior, UNRIAA*, vol. XX, p. 217 (1990), at p. 270, para. 113."

[214] Commentary on the Articles on responsibility of States for internationally wrongful acts, *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, p. 88, Commentary of Article 30, para. (2).

refusal to comply with the Court Judgment falls under this definition;

- the same holds true concerning Colombia's refusal to recognize Nicaragua's maritime rights in its exclusive economic zone and continental shelf; among the examples of continuing breaches, the ILC mentions "the maintenance in effect of legislative provisions incompatible with treaty obligations of the enacting State"[215] – but this applies as well to the maintenance in effect of legislative provision incompatible with a customary rule, permits wrongfully granted or a judicial or arbitral pronouncement, a situation which is very directly illustrated by the adoption of the Decree 1946 and the continued enforcement of Law 10 of 1978 and Law 47 of 1993; and

- the threat to use force is *par excellence* an example of continuing wrongful act;[216] but it is also true since the notion of continuous breach as used in Article 30 of the ILC Articles "also encompasses situations where a State has violated an obligation on a series of occasions, implying the possibility of further repetitions."[217]

4.41 On those three grounds, Nicaragua requests that the Court decide that Colombia shall immediately cease its internationally unlawful conduct and refrain from any acts or threat of use of force contrary to its obligations resulting from the customary law of the sea as reaffirmed in the Court's Judgment.

4.42 This is in keeping with the recent case-law of the Court. In its Advisory Opinion of 9 July 2004 concerning *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* the Court considered:

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[215] *Ibid.*, para. (3).
[216] See e.g.: *ibid.*, p. 60, Commentary of Art. 14, para. (3); *ibid.*, para. (13) and fn. 265.
[217] *Ibid.*, p. 89, Commentary of Article 30, para. (3).

> "Israel is under *an obligation to terminate its breaches of international law*; it is under *an obligation to cease* forthwith the works of construction of the wall being built in the Occupied Palestinian Territory, including in and around East Jerusalem, to dismantle forthwith the structure therein situated, and to repeal or render ineffective forthwith."[218]

4.43 Similarly, in the present case, Colombia is under an obligation to terminate its on-going breaches of international law and Nicaragua formally requests the Court to decide in that sense.

B. COLOMBIA MUST RE-ESTABLISH THE *STATUS QUO ANTE*

4.44 "The question of cessation often arises in close connection with that of reparation, and particularly restitution."[219] The case-law cited above illustrates the difficulty to clearly distinguish between both consequences deriving from an internationally wrongful act.

4.45 As explained by the ILC, "[i]n accordance with article 34, restitution is the first of the forms of reparation available to a State injured by an internationally wrongful act."[220]

> Article 35
> *Restitution*
> A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

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[218] I.C.J., Advisory Opinion, 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Reports 2004*, p. 201, para. 163(3)(B) – italics added. *See* I.C.J., Judgment, 31 March 2014, *Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening)*, paras. 245 (quoted below, para.4.51) and 247 (7).
[219] Commentary on the Articles on responsibility of States for internationally wrongful acts, *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, p. 89, commentary on Article 30, para. (17).
[220] *Ibid.*, p. 96, para. (1) of the commentary of Article 35.

(a) Is not materially impossible;
(b) Does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation."

4.46 In so far as the damage endured by Nicaragua is of a moral or legal character, a *restitutio in integrum* can hardly be considered as an adequate full reparation. However, as explained by the ILC, "restitution is not impossible merely on grounds of legal or practical difficulties, even though the responsible State may have to make special efforts to overcome these. Under article 32 the wrongdoing State may not invoke the provisions of its internal law as justification for the failure to provide full reparation, and the mere fact of political or administrative obstacles to restitution does not amount to impossibility."[221]

4.47 This means that, in the present case, contrary to Colombia's mantra,[222] it cannot take shelter behind its domestic law in order to escape its responsibility: "From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts."[223] To the contrary, Colombia must revoke its national laws or regulations which are incompatible with the Court's ruling even it were to be the Constitution.[224]

4.48 Such a request is far from being unprecedented. In the *Legal Status of Eastern Greenland* case, the PCIJ decided that,

> "the declaration of occupation promulgated by the Norwegian Government on July 10th, 1931, and any steps taken in this respect

[221] *Ibid.*, p. 98, para. (8) of the commentary of Article 35.
[222] *See* para. 2.19 above.
[223] P.C.I.J., Judgment, 25 May 1926, *Case concerning certain German interests in Polish Upper Silesia (Merits)*, Series A, No. 7, p. 19; see also P.C.I.J., Judgment, 17 August 1923, *S.S. "Wimbledon"*, Series A, No. 1, pp. 29-30; P.C.I.J., Advisory Opinion, 31 July 1930, *Greco-Bulgarian "Communities"*, Series B, No. 17, p. 32 or I.C.J., Advisory Opinion, 26 April 1988, *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, *Reports 1988*, pp. 34-35.
[224] P.C.I.J., Advisory Opinion, 4 February 1932, *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, Series A/B, No. 44, p. 24. See also, Arbitral Award, 14 September 1872, *Alabama*, *UNRIAA*, vol. II, p. 889.

by that Government, constitute a violation of the existing legal situation and are accordingly unlawful and invalid."[225]

4.49 In the case of the *Free Zones of Upper Savoy and the District of Gex*, the Court decided that France

> "must withdraw its customs line in accordance with the provisions of the said treaties and instruments [establishing the customs and economic régime of the free zones of Upper Savoy and the Pays de Gex]; and that this régime must continue in force so long as it has not been modified by agreement between the Parties"[226]

4.50 The Award of 2 April 1940 in the case concerning the *Société Radio-Orient*:

> "2nd Orders, from 6 weeks after the date of this Award, the revocation of the instruction by which, on 16 April 1935, the Egyptian Telegraphs Administration prohibited the Egyptian telegraph offices from accepting telegraphs to be forwarded through the routes of the "Radio Orient" Company.[227]

4.51 In the *Whaling* case the present Court observed

> "that JARPA II [the research Japanese programme declared unlawful by the Court] is an ongoing programme. Under these circumstances, measures that go beyond declaratory relief are warranted. The Court therefore will order that Japan shall revoke any extant authorization, permit or licence to kill, take or treat whales in relation to JARPA II, and refrain from granting any further permits under Article VIII, paragraph 1, of the Convention, in pursuance of that programme."[228]

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[225] Judgment, 1933, Series A/B, No. 53, p. 75.

[226] P.C.I.J., Judgment, 7 June 1932, *Free Zones of Upper Savoy and the District of Gex*, Series A/B, No. 46, p. 172.

[227] *Affaire de la Société Radio-Orient (États du Levant sous mandat français* v. *Égypte)*, Award, 2 April 1940, *UNRIAA*, vol. III, p. 1881.(*2° Ordonne, à partir de 6 semaines après la date de la présente sentence, la révocation de l'instruction par laquelle l'Administration des Télégraphes égyptienne a, le 16 avril 1935, interdit aux bureaux télégraphiques égyptiens d'accepter des télégrammes à acheminer par les routes de la Société « Radio-Orient »*.")

[228] *See* I.C.J., Judgment, 31 March 2014, *Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening)*, para. 244; see also para. 247 (7). See also I.C.J., Advisory Opinion, 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Reports 2004*, p. 201, para. 163(3)(B), quoted above para. 4.42.

4.52 In all these cases, the Defendant State was ordered to revoke its laws and regulations, exactly as, in the present case, it is appropriate that Colombia be ordered to revoke all its laws, regulations and resolutions which are incompatible with the Court's Judgment, including the provisions in laws 10 of 1978 and 47 of 1993 and Decree 1946 and 1119[229], insofar as they apply to maritime areas which have been recognized as being under the jurisdiction or sovereign rights of Nicaragua.

4.53 The decision of the Colombian Constitutional Court of 2 May 2014 cannot permit Colombia to escape the consequences of its internationally wrongful acts. This judgment is part of Colombian internal law[230] and, therefore, "merely fact" "[f]rom the standpoint of International Law and of the Court which is its organ"[231]. Admitting such claims "would be attributing to a judgment of a municipal court power indirectly to invalidate a judgment of an international court, which is impossible."[232]

4.54 And it is noticeable that while international courts and tribunals have avoided invalidating domestic judicial decisions, they have not hesitated to order the interested States to themselves cancel such decisions when they have found that they constituted breaches of international law. Just to give some examples:

4.55 In the *Martini* case, the Arbitral Tribunal,

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[229] Concerning the illegality of these regulations, *see* above, Chapter III, Section B.
[230] As explained by the ILC: "As to terminology, in the English version the term 'internal law' is preferred to 'municipal law', because the latter is sometimes used in a narrower sense […while the former] covers all provisions of the internal legal order, whether written or unwritten and whether they take the form of constitutional or legislative rules, administrative decrees or judicial decisions." (Commentary on the Articles on responsibility of States for internationally wrongful acts, *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, p. 38, para. (9) of the commentary of Article 3).
[231] P.C.I.J., Judgment, 25 May 1926, *Case concerning certain German interests in Polish Upper Silesia (Merits)*, Series A, No. 7, p. 19.
[232] PCIJ, *Factory at Chorzow* (Germany/Poland), Merits, Series A, No. 17, p. 33.

> "3) Decides that due to the attitude thus taken by the Federal and Supreme Court and Supreme vis-à-vis the Martini & Cie House in the said trial, the Venezuelan Government is required to recognize as compensation, the cancellation of the payment obligations imposed on the Martini & Cie House."[233].

4.56 Two recent Court Judgments are also important precedents in the same line. In the case of the *Arrest Warrant* between the DRC and Belgium, the Court found (in the *dispositif* of its Judgment),

> "that the Kingdom of Belgium must, by means of its own choosing, cancel the arrest warrant of 11 April 2000 and so inform the authorities to whom that warrant was circulated."[234]

4.57 Similarly, in its Judgment of 3 February 2012 concerning the *Jurisdictional Immunities of the State* (and again in the *dispositif* itself), the Court found,

> "that the Italian Republic must, by enacting appropriate legislation, or by resorting to other methods of its choosing, ensure that the decisions of its courts and those of other judicial authorities infringing the immunity which the Federal Republic of Germany enjoys under international law cease to have effect."[235]

4.58 *Mutatis mutandis*, if Colombia were to invoke the decision of its Constitutional Court to thwart the application of the 2012 Court Judgment, it should be ordered to take all the necessary steps for overcoming or setting aside that decision, just as its internal legislation, including Decrees 1946 and 1119.

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[233] *Martini (Italy* v. *Venezuela)*, Award, 3 May 1930, *UNRIAA*, vol. II, p. 1002, Operative provisions. (*3) décide qu'en raison de l'attitude ainsi prise par la Cour Fédérale et de Cassation vis-à-vis de la Maison Martini & Cie dans ledit procès, le Gouvernement Vénézuélien est tenu de reconnaître, à titre de réparation, l'annulation des obligations de paiement, imposées à la Maison Martini & Cie...")*

[234] I.C.J., Judgment, 14 February 2002, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)*, *Reports 2002*, p. 33, para. 78(3).

[235] I.C.J., Judgment, 3 February 2012, *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)*, *Reports 2012*, p. 155, para. 139(4).

C. COLOMBIA HAS AN OBLIGATION TO COMPENSATE NICARAGUA FOR THE FINANCIALLY ASSESSABLE DAMAGE IT HAS SUFFERED

4.59 Article 34 of the ILC 2001 Articles[236] "makes it clear that full reparation may be achieved in particular cases by the combination of different forms of reparation. For example, re-establishment of the situation which existed before the breach may not be sufficient for full reparation because the wrongful act has caused additional material damage (e.g., injury flowing from the loss of the use of property wrongfully seized). Wiping out all the consequences of the wrongful act may thus require some or all forms of reparation to be provided, depending on the type and extent of the injury that has been caused."[237] This is so in the present case. Even if and when the *status quo ante* will have been re-established, Nicaragua and its citizens will nevertheless have endured material and moral damages which are not made good with the measures to be taken in order to re-establish a situation conforming to the Judgment. Restitution has "to be completed by compensation in order to ensure full reparation for the damage caused…"[238] The reparation for the moral and legal harm endured by Nicaragua has been dealt above in this Chapter.

4.60 Concerning the material harm, it results from Article 36 of the ILC Articles that:

> "1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
>
> 2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established."

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[236] *See* text at para. 4.5 above.
[237] Commentary on the Articles on responsibility of States for internationally wrongful acts, *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, p. 95, para. 2) of the commentary of Art. 34.
[238] *Ibid.*, p. 96, para. 2) of the commentary of Article 35.

4.61 In the present case, compensation is due for loss of profits from the threat or use of force by the Colombian Navy against Nicaraguan fishing boats and third state fishing boats licensed by Nicaragua as well as from the exploitation of Nicaraguan waters by fishing vessels unlawfully "authorized" by Colombia.

4.62 These are indisputably compensable harms as shown, for example by the case of the *M/V "Saiga"* decided by the ITLOS. In that case the Tribunal awarded compensation (with interest) to Saint Vincent and the Grenadines *inter alia* for the wrongful arrest and detention by Guinea of a Saint Vincent and the Grenadines' registered vessel, the *Saiga*, and its crew.[239] Similarly in its Judgment of 14 April 2014 in *The M/V "Virginia G"* case, the Tribunal took

> "the view that, in light of its findings and in conformity with its jurisprudence set out above, Panama in the present case is entitled to reparation for damage suffered by it. Panama is also entitled to reparation for damage or other loss suffered by the *M/V Virginia G*, including all persons and entities involved or interested in its operation, as a result of the confiscation of the vessel and its cargo."[240]

4.63 Compensation is due by Colombia to Nicaragua for the deterrent effect it has had and is having on investments in the area as a consequence of the public threats and claims of its highest civil authorities and of its naval forces. Compensation is thus due by Colombia to Nicaragua, among others, for the loss of revenue resulting from the use of force and threats by the Colombian Navy against Nicaraguan fishing boats and third state fishing boats licensed by Nicaragua, in particular – but not exhaustively – in relation with the incidents recalled in paragraph 5.18. As made clear in paragraph 2 of Article 36 of the ILC

[239] I.T.L.O.S., Judgment, 1 July 1999, *The M/V "Saiga" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, International Tribunal for the Law of the Sea, para. 183..
[240] I.T.L.O.S., Judgment, 14 April 2014, *The M/V "Virginia G" Case (Panama/Guinea-Bissau)*, para. 434. See also para. 452 (Operative provisions).

Articles,[241] it is admitted that the loss of probable profit is compensable[242] – this is the case for the actual losses endured by Nicaraguan fishermen and foreign fishermen licensed by Nicaragua in case not only of the confiscation of their catches, but also of the impossibility to reach the locations of fishery due to the Colombian threats, as well as the losses in revenue suffered by the Nicaraguan state. These are typically "claims for loss of profits due to the temporary loss of use and enjoyment of the income-producing asset.[243] In these cases there is no interference with title and hence in the relevant period the loss compensated is the income to which the claimant was entitled by virtue of undisturbed ownership."[244]

4.64 Nicaragua also requests the amount of the pecuniary compensation to be assessed in a separate phase of the proceedings, as is customary in these type of situations and cases.[245]

4.65 Compensation is distinct from restitution as well as from satisfaction:

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[241] See para. 5.36 above.

[242] See e.g.: Arbitral Award, 29 November 1920, *Affaire des navires Cape Horn Pigeon, James Hamilton Lewis, C. H. White et Kate and Anna*, *UNRIAA*, vol. IX, p. 65; or P.C.I.J., Judgment, 13 September 1928, *Factory at Chorzów*, Jurisdiction, Series A, No. 17, p. 53.

[243] Fn. 571: "Many of the early cases concern vessels seized and detained. In the *"Montijo"*, an American vessel seized in Panama, the Umpire allowed a sum of money per day for loss of the use of the vessel (see footnote 117 above). In the *"Betsey"*, compensation was awarded not only for the value of the cargo seized and detained, but also for demurrage for the period representing loss of use: Moore, *International Adjudications* (New York, Oxford University Press, 1933) vol. V, p. 47, at p. 113."

[244] Commentary on the Articles on responsibility of States for internationally wrongful acts, *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, p. 99 para. (27) of the commentary of Article 36.

[245] I.C.J., Judgment, 24 May 1980, *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980*, pp. 44-45, para. 6 of the *dispositif*. See also I.C.J., Judgment, 25 July 1974, *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Reports 1974*, pp. 204-206, paras. 76-77; I.C.J., Judgment, 27 June 1986, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, *Reports 1986*, pp. 142-143, para. 284 ; I.C.J., Judgment, 19 December 2005, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Reports 2005*, p. 257, para. 260; I.C.J., Judgment, 30 November 2010, *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo)*, *Reports 2010*, pp. 691-692, para. 164.

- "Even where restitution is made, it may be insufficient to ensure full reparation. The role of compensation is to fill in any gaps so as to ensure full reparation for damage suffered.[246],,[247]

- "As compared with satisfaction, the function of compensation is to address the actual losses incurred as a result of the internationally wrongful act. In other words, the function of article 36 is purely compensatory, as its title indicates. Compensation corresponds to the financially assessable damage suffered by the injured State or its nationals."[248]

D. NICARAGUA IS ENTITLED TO APPROPRIATE GUARANTEES OF NON-REPETITION BY COLOMBIA OF ITS INTERNATIONALLY WRONGFUL ACTS

4.66 In addition to the cessation of the internationally wrongful act and the performance of the obligations breached, the circumstances of the present case clearly require that Colombia "is under an obligation […] to offer appropriate assurances and guarantees of non-repetition, if circumstances so require."[249]

4.67 In its commentaries of Article 30 of its Draft Articles, the ILC explained that:

> "Assurances or guarantees of non-repetition may be sought by way of satisfaction (e.g. the repeal of the legislation which allowed the breach to occur) and there is thus some overlap between the two in practice. However, they are better treated as an aspect of the continuation and repair of the legal relationship affected by the breach. Where assurances and guarantees of non-repetition are

[246] Fn 546: "*Factory at Chorzów, Merits*, *1928, P.C.I.J., Series A, No. 17*, pp. 47-8."
[247] Commentary on the Articles on responsibility of States for internationally wrongful acts, *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, p. 99 para. (3) of the commentary of Article 36.
[248] *Ibid.*, p. 99, para. (4) of the commentary of Article 36.
[249] Article 30 of the Articles on responsibility of States for internationally wrongful acts, *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, p. 88.

> sought by an injured State, the question is essentially the reinforcement of a continuing legal relationship and the focus is on the future, not the past."[250]

4.68 Nicaragua is fully aware of "[t]he rather exceptional character of the measures"[251] requested. But the present case obviously lends itself to such an exceptional treatment. It is in sharp contrast with the circumstances of the *Avena* case, where the Court refused to grant the guarantees of non-repetition requested by Mexico because "the United States has been making considerable efforts to ensure that" the violation complained of by Mexico would not occur again.[252] In the same vein, in *DRC* v. *Uganda*, the Court explained that "the commitments assumed by Uganda under the Tripartite Agreement must be regarded as meeting the DRC's request for specific guarantees and assurances of non-repetition."[253]

4.69 In the present case on the contrary, Colombia has reiterated its firm intention to persist in its unlawful behaviour[254] in spite of vibrant condemnation by the international community.

4.70 Colombia's offenses are so extremely serious; the will expressed by Colombia to persevere so blatant, that specific guarantees and assurances of non-repetition are in order.

4.71 In the case concerning *Armed Activities*, the DRC had requested "from Uganda 'a solemn declaration that it will in future refrain from pursuing a policy

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[250] Commentary on the Articles on responsibility of States for internationally wrongful acts, *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, p. 90, commentary of Article 30, para. (11).
[251] *Ibid.*, p. 91, commentary of Article 30, para. (13).
[252] I.C.J., Judgement, 31 March 2004, *Avena and Other Mexican Nationals (Mexico v. United States of America)*, *I.C.J. Reports* 2004, pp. 68-69, para. 149.
[253] I.C.J., Judgment, 19 December 2005, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Reports 2005*, p. 26, para. 257; see also: I.C.J., Judgment, 27 June 2001, *LaGrand (Germany* v. *United States of America)*, *Reports 2001*, pp. 512-513, paras. 123-124.
[254] *See* paras. 2.15-2.21 above.

that violates the sovereignty of the Democratic Republic of the Congo and the rights of its population'; in addition, it 'demand[ed] that specific instructions to that effect be given by the Ugandan authorities to their agents'."[255] The Court dismissed these requests since it considered that

> "if a State assumes an obligation in an international agreement to respect the sovereignty and territorial integrity of the other States parties to that agreement (an obligation which exists also under general international law) and a commitment to cooperate with them in order to fulfil such obligation, this expresses a clear legally binding undertaking that it will not repeat any wrongful acts. In the Court's view, the commitments assumed by Uganda under the Tripartite Agreement must be regarded as meeting the DRC's request for specific guarantees and assurances of non-repetition. The Court expects and demands that the Parties will respect and adhere to their obligations under that Agreement and under general international law."[256]

4.72 But the present case is completely different – opposite in fact: Colombia has repeatedly declared that it would not comply with the Court's Judgment unless a new treaty is signed – which would put into question the decision of the Court.[257]

4.73 As stated before, it clearly results from the above that if a request of guarantees of non-repetition of international wrongful acts has any meaning, this should be applied in the present circumstances.

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[255] I.C.J., Judgment, 19 December 2005, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, *Reports 2005*, p. 255, para. 255.
[256] *Ibid.*, p. 256, para. 257.
[257] *See* paras. 2.17 above.

SUBMISSIONS

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

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

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

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

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

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

b. In as much as possible, restore the situation to the *status quo ante*, in

(i) revoking laws and regulations enacted by Colombia, which are incompatible with the Court's Judgment of 19 November 2012 including the provisions in the Decrees 1946 of 9 September 2013 and 1119 of 17 June 2014 to maritime areas which have been recognized as being under the jurisdiction or sovereign rights of Nicaragua;

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

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

c. Compensate for all damages caused insofar as they are not made good by restitution, including loss of profits resulting from the loss of investment caused by the threatening statements of Colombia's highest authorities, including the threat or use of force by the Colombian Navy against Nicaraguan fishing boats [or ships exploring and exploiting the soil and subsoil of Nicaragua's continental shelf] and third state fishing boats licensed by Nicaragua as well as from the exploitation of Nicaraguan waters by fishing vessels unlawfully "authorized" by Colombia, with the amount of the compensation to be determined in a subsequent phase of the case.

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

The Hague, 3 October 2014.

Carlos J. Argüello-Gómez

Agent of the Republic of Nicaragua

CERTIFICATION

I have the honour to certify that this Memorial and the documents annexed 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, 3 October 2014.

Carlos J. Argüello-Gómez

Agent of the Republic of Nicaragua

DISPUTE CONCERNING

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

(NICARAGUA V. COLOMBIA)

MEMORIAL

OF THE REPUBLIC OF NICARAGUA

ANNEXES

LIST OF ANNEXES

ANNEX No.	DECLARATIONS	PAGE
1.	Declaration of President Juan Manuel Santos on the judgment of the International Court of Justice, 19 November 2012.	119
2.	Declaration of President Juan Manuel Santos on the denunciation of the Pact of Bogota, 28 November 2012.	123
3.	Declaration of President Juan Manuel Santos during the Summit of Governors in San Andres, 18 February 2013.	127
4.	Declaration of President Juan Manuel Santos on the integral strategy of Colombia on the Judgment of the International Court of Justice, 9 September 2013.	131
5.	Declaration of President Juan Manuel Santos during the sovereignty exercises performed in the Caribbean Sea, 18 September 2013.	139
6.	Declaration of the Colombian Minister of Foreign Affairs, María Ángela Holguín - "The Hague's judgment is difficult to abide because the entire country is against it: Holguin", *El Colombiano,* 25 October 2013.	143
7.	Presidency of the Republic of Colombia, Press Release, "The Limits of Colombia with Nicaragua continue to be those established in the Esguerra-Barcenas Treaty, affirmed the President of Colombia", 2 May 2014.	147
	DECREES / RESOLUTIONS / LAW	
8.	Colombian Law No. 10 on Maritime Spaces, 4 August 1978, *Diario Oficial* No. 34077, 18 August 1978.	151
9.	Presidential Decree 1946 of 9 September 2013.	155
10.	Map presented by President Juan Manuel Santos, 09 September 2013.	165

11. Governorship, Department of the San Andrés, Providencia and Santa Catalina, Resolution No. 005081, 22 October 2013. 169

12. Comptroller General's Office of the Department Archipelago of San Andrés, Providencia and Santa Catalina, Report on the Status of the Natural Resources and the Environment 2013. 177

13. Presidential Decree 1119 of June 17, 2014. 197

14. DIMAR Resolution Number 0305 of 2014, 25 June 2014 203

15. President Juan Manuel Santos, Complaint against articles XXXI and L of the Pact of Bogotá, Constitutional Court, D-9907 (12 September 2013). 211

16. Republic of Colombia, Constitutional Court, File D-9852 AC- Sentence C-269/14 (2 May 2014). 235

DIPLOMATIC NOTES

17. Diplomatic Note from the Minister of Foreign Affairs of Nicaragua, to the Embassy of the United States of America, dated 13 September 2014. 249

18. Diplomatic Note from the Minister of Foreign Affairs of Nicaragua, to the Minister of Foreign Affairs of Colombia, dated 13 September 2014. 253

CORRESPONDECE

19. Letter from Colombia to Secretary General of the Organization of American States dated 27 November 2012 (GACIJ No.79357). 263

20. Letter from the President of the Nicaraguan Chamber of Fisheries to the Executive Chair of the Nicaraguan Institute of Fisheries, dated 6 January 2014. 267

21.	Letter from the President of the Nicaraguan Chamber of Fisheries to the Executive Chair of the Nicaraguan Institute of Fisheries, dated 1 July 2014.	271
22.	Letter from the President of the Nicaraguan Chamber of Fisheries to the Executive Chair of the Nicaraguan Institute of Fisheries, dated 24 July 2014.	275
23.	**A**-Letter from the Nicaraguan Naval Force to the Ministry of Foreign Affairs reporting on incidents with the Colombian Navy in Nicaragua's Exclusive Economic Zone, dated 26 August 2014.	279
	B- Audio Transcripts.	325
24.	Location of Reported incidents in the Luna Verde Area.	345

MEDIA REPORTS

25.	"ICJ ruling on San Andres a 'serious judgment error': Santos", *Colombia Reports*, 20 November 2012.	349
26.	"International Court Gives Nicaragua More Waters, Outlying Keys to Colombia", *Dialogo*, 21 November 2012.	353
27.	"Message from President Daniel to the People of Nicaragua", *El 19 Digital*, 26 November 2012.	357
28.	"Caribbean Crisis: Can Nicaragua Navigate Waters It Won from Colombia?", *Time World,* 28 November 2012.	363
29.	"Colombia pulls out of International Court over Nicaragua", *BBC,* United-Kingdom, 28 November 2012.	369
30.	"The Colombian Foreign Minister Calls The Hague an Enemy", *El Nuevo Herald*, 28 November 2012.	373
31.	"Santos and Ortega will meet this Saturday in Mexico City", *La República*, 29 November 2012.	377

32.	"Government of Colombia will not implement ICJ judgment until the rights of Colombians have been restored", *El Salvador Noticias.net*, 3 December 2012.	381
33.	"Nicaragua: no oil concessions in Seaflower", *Nicaragua Dispatch*, 6 December 2012.	385
34.	"Colombia avoided boundary frictions with the Army of Nicaragua", *Caracol*, 19 February 2013.	389
35.	"Nicaragua asks Bogotá to form The Hague Commissions", *La Opinion*, 22 February 2013.	393
36.	"With patrolling aircraft of the Armada, Governor of San Andres makes an act of sovereignty in the 82° meridian", *Zonacero.info*, 19 August 2013.	397
37.	"Governess Participated during Patrol of the 82nd Meridian Area", *RCN Radio*, 20 August 2013.	401
38.	"World Court ruling on maritime borders unenforceable in Colombia: Vice President", *Colombia Reports, 23* August 2013.	405
39.	"Daniel: 40 years from the martyrdom of Allende, peace must prevail" *El 19 Digital,* 11 September 2013.	409
40.	"Assembly of Nicaragua supports dialogue with Colombia", *El Universal*, 12 September 2013.	413
41.	"Santos orders defense of the continental shelf with cloak and sword", *El Espectador,* 19 September 2013.	417
42.	"We Will Continue Being Guarantors of National Security With Strength and Soundness, Commander Wills in the Colombia Lectureship", 21 March 2014.	421
43.	"Devoid of a New Treaty, the Limits of Colombia and Nicaragua Continue to be the Same: Santo", *W. Radio*, 2 May 2014.	425

44.	"We Must Seek Agreements With Nicaragua to Apply the Ruling Without Disavowing the Constitution: Former Attorney General Carlos Arrieta'", *RCN Radio*, 3 May 2014.	429
45.	"A New Treaty with Nicaragua Should be Made Defining the Limits", *El Tiempo*, 3 May 2014.	433
46.	"Nicaragua proposes to coordinate The Hague's sentence with Colombia", AFP, 9 May 2014.	439
47.	"Santos Says that the Ruling by The Hague is Inapplicable", *El País*, 19 May 2014.	443
48.	"Santos Guarantees Continuity in his Foreign Policy with Latin America", *America Economica*, 17 June 2014.	447
49.	"Nicaragua Fears Losing the Sea", available at http://www.taringa.net/posts/info/17784410/Nicaragua-teme-perder-el-mar.html	451
50.	"This is the outline Security of the National Armada and the Colombian Air Force Implemented in San Andres", *Webinfomil.com,* 23 November 2012.	455