INTERNATIONAL COURT OF JUSTICE

DISPUTE CONCERNING

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

(NICARAGUA V. COLOMBIA)

REPLY

OF THE REPUBLIC OF NICARAGUA

15 May 2018

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LIST OF ACRONYMS

ARC (Spanish acronym)	Armada de la República de Colombia
ANH (Spanish acronym)	Colombia's National Hydrocarbon Agency
BL (Spanish acronym)	Logistic Boat
CCM	Colombia's Counter Memorial
CG	Coast Guard
CWO	Written Observations on the Admissibility of its Counter-Claims
CEACR	Committee of Experts on the Application of Conventions and Recommendations
DIMAR (Spanish acronym)	General Maritime Directorate of the Ministry of National Defense
EEZ	Exclusive Economic Zone
ICJ	International Court of Justice
ICZ	Integral Contiguous Zone
ILC	International Law Commission
ILO	International Labour Organization
ITLOS	International Tribunal for the Law of the Sea
NM	Nicaragua's Memorial
NR	Nicaragua's Reply
PCIJ	Permanent Court of International Justice
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea

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PART I

CHAPTER I: INTRODUCTION

1.1 Nicaragua submits this Reply in accordance with the Court's Order of 15 November 2017.[1] Since Nicaragua filed its Memorial, the Court rendered a Judgment on the preliminary objections raised by Colombia[2] and an Order on the admissibility of Colombia's counter-claims.[3] Nicaragua's Reply draws the appropriate consequences from these two decisions and does not address claims that are outside the Court's jurisdiction nor counter-claims that have been declared inadmissible.

1.2 After a summary of the procedure in the present case (**A.**), this Introduction will recall the real subject matter of the dispute, from which Colombia seeks to divert the Court's attention by invoking irrelevant considerations (**B.**) and set out the outline of the present Reply (**C.**).

A. Procedure

1.3 The present proceedings were instituted by an Application filed by Nicaragua on 26 November 2013. On 3 October 2014, Nicaragua filed its Memorial. In its Memorial, Nicaragua put forward two main claims: (1) that Colombia violated Nicaragua's maritime zones as delimited in the Court's

[1] I.C.J., Order, 15 November 2017, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Counter-Claims.*
[2] I.C.J., Judgment, 17 March 2016, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Reports 2016*, p. 3.
[3] I.C.J., Order, 15 November 2017, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Counter-Claims*.

Judgment of 19 November 2012 and its sovereign rights and jurisdiction in these zones and (2) that Colombia violated the obligation not to use or threaten to use force[4].

1.4 On 19 December 2014, Colombia raised preliminary objections. In its Judgment of 17 March 2016, the Court found that it has jurisdiction over the first of Nicaragua's claims,[5] and also that the dispute that existed at the date on which Nicaragua filed its Application did not concern Colombia's violation of the prohibition of the use or threat of use of force.[6] Nicaragua will therefore not engage in further discussion with respect to this second claim. However, contrary to Colombia's assertion,[7] this does not mean that the facts invoked by Nicaragua in support of this claim have become irrelevant to the dispute between the Parties.[8]

1.5 On 17 November 2016, Colombia filed its Counter-Memorial together with four counter-claims.[9] Colombia counter-claimed that Nicaragua breached

(1) "Its duty of due diligence to protect and preserve the marine environment of the Southwestern Caribbean Sea";[10]

(2) "Its duty of due diligence to protect the right of the inhabitants of the San Andrés Archipelago, in particular the Raizales, to benefit from a healthy, sound and sustainable environment";[11]

(3) "The artisanal fishing right to access and exploit the traditional banks";[12] and

[4] *See* in particular NM, Chapters II and III.
[5] I.C.J., Judgment, 17 March 2016, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Reports 2016*, p. 33, para. 74, and p. 43, para. 111(2).
[6] *Ibid.*, p. 33, para. 78 and p. 42, para. 111(1)(c).
[7] CCM, para. 1.14.
[8] *See* Chapter IV below.
[9] *See* CCM, Chapters 7-10.
[10] CCM, para. 8.2.
[11] *Ibid*.

(4) Colombia's sovereign rights and maritime zones by enacting its straight baselines Decree No. 33-2013 of 19 August 2013.[13]

1.6 On 15 November 2017, the Court decided that only the third and fourth counter-claims were admissible.[14] The first and second counter-claims were declared inadmissible[15]. Therefore, Nicaragua will refrain from discussing the latter two counter-claims.

B. The Subject Matter Of The Dispute

1.7 Nicaragua was obliged to bring this case before the Court after Colombia's rejection of the Judgment of 19 November 2012[16].This rejection has been constantly confirmed thereafter by Colombian authorities.[17]

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[12] *Ibid.*, Chapter 9.
[13] *Ibid.*, Chapter 10.
[14] I.C.J., Order, 15 November 2017, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Counter-Claims*, paras. 82(A)(3) and (4).
[15] *Ibid.*, paras. 82(A)(1) and (2).
[16] "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 De02.aspx). More recently, Colombia's Foreign Minister criticized the Court for "contradict[ing] its own ruling of 2012" in its Judgment of 17 March 2016 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 (Nicaragua* v. *Colombia)* (The ICJ Was Not Made to Create New Controversies, *El Tiempo*, 19 March 2016, NR-Annex 29)
[17] *See* NM, paras. 2.2-2.10. *See* also Colombia United to Defend Sovereignty in Litigation with Nicaragua, *20minutos.com.mx*, 18 March 2016 (NR, Annex 28) and "The Burden Falls on Nicaragua", *El Espectador*, 19 March 2016 (NR, Annex 30). Colombia adopted the same attitude towards the Court's Judgment of 17 March 2016 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 (Nicaragua* v. *Colombia)*. To the question "Is the Court 'setting-up' Colombia?", the Respondent's Agent declared that "I think so. I do not see any reason to justify that decision, there is no legal reason or anything in the background that suggests that the court has grounds for what it did. It seems to me that it is a determination that does not conform at all to the rules that govern the matter. I feel that yes, here rather it would seem that there was a desire to favor one of the parties" ("The ICJ is not a Trustworthy Court': Arrieta The Colombian Agent Said that There Seems to be a Desire to Favor One of the Parties", *El Tiempo*, 18 March 2016 NR-Annex 27)

1.8 In this respect, it is daring for Colombia to argue that "Nicaragua relies on a number of statements and declarations made by high-ranking Colombian officials […] issued in the immediate aftermath of the 2012 Judgment [but] chooses to ignore subsequent official statements which clarify Colombia's considered position."[18] The only "subsequent official statement" referred to by Colombia is a passage of the speech of the Agent of Colombia during the hearings on preliminary objections held in 2015. This passage barely clarifies anything. The Agent of the Respondent merely said that Colombia and its Constitutional Court now recognize the 2012 Judgment as binding and it is available and open to dialogue.[19]

1.9 Pursuant to Articles 59 and 60 of the ICJ Statute, the 2012 Judgment is unconditionally binding. It is by no means necessary for Colombia, let alone its Constitutional Court, to "confirm"[20] the binding character of that Judgment. Similarly, pursuant to Article 94 of the UN Charter, the Parties must comply with the Court's decision and cannot hide behind their constitutional rules[21]. The central issue in the present case is precisely that Colombia not only refused to comply with the 2012 Judgment but breached Nicaragua's sovereign rights stemming from it, repeatedly, as Nicaragua has shown in its Memorial.

[18] CCM, para. 5.6 – footnotes omitted.
[19] CR 2015/22, 28 September 2015, p. 17, para. 13.
[20] *Ibid*.
[21] *See* "Colombian Ambassador Reasoned Refusal to Abide by ICJ Ruling", *El Nuevo Diario*, 4 September 2015 (NR, Annex 25) in which the Colombian Ambassador in Nicaragua declared that "[w]hat Colombia has said is that the ruling is temporarily inapplicable due to constitutional situations that must be solved." *See* also "'It is possible to negotiate with Nicaragua in The Hague': Carlos Gustavo Arrieta Colombia's agent to The Hague says there is bilateral disposition", *El Tiempo*, 22 November 2014 (NR, Annex 23) and "Thus, the National Navy Protects the Waters of the Caribbean", *Noticias Caracol*, 3 April 2015 (NR, Annex 24).

1.10 As the Court held in its 2016 Judgment on Colombia's preliminary objections, "the dispute before it in the present proceedings concerns the alleged violations by Colombia of Nicaragua's rights in the maritime zones which, according to Nicaragua, the Court declared in its 2012 Judgment appertain to Nicaragua."[22]

1.11 In its Counter-Memorial, Colombia seeks to distract the Court's attention from these issues. It asserts that:

> "Nicaragua's claims must be assessed in the light of the rights and obligations of *both* Parties in the Southwestern Caribbean Sea, the special characteristics of that part of the sea including the political unity of the Archipelago of San Andrés, Providencia and Santa Catalina, the freedom of navigation and over flight that Colombia and all other States are entitled to exercise, and the duty that each Party has to protect and preserve the marine environment and respect the habitat of the local population."[23]

1.12 Neither the so-called "special characteristics" of the relevant part of the Caribbean Sea (**1.**) nor the rights and duties of the Parties with respect to the preservation and protection of the environment (**2.**) are relevant to the present case.

[22] I.C.J., Judgment, 17 March 2016, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Reports 2016*, p. 41, para. 109.
[23] CCM, para. 1.5.

1. Irrelevance of the so-called "special characteristics"of the Southwestern Caribbean Sea

1.13 Colombia devotes more than 70 pages of its Counter-Memorial to what it describes as the "Special Circumstances of the Caribbean Sea."[24] These so-called special circumstances would include the semi-enclosed character of the Caribbean Sea, the "inter-related nature of the area" and of its marine environment, the geography and inhabitants of the San Andrés Archipelago, and security matters in the region.[25] According to the Respondent, Nicaragua's claims should be assessed in light of these special circumstances.[26]

If these so-called "special characteristics" could have any legal relevance, it was in the proceedings concerning the delimitation of the maritime zones up to 200 nautical miles between Nicaragua and Colombia. In effect, in the *Territorial and Maritime Dispute*, the Parties have discussed the context within which the delimitation was to be carried out, including the geography of the area,[27] the alleged unity of the San Andrés Archipelago,[28] the access to marine resources,[29] and security matters.[30] To the extent that it considered them relevant, the Court duly took the Parties' views on these issues into account in the delimitation process.[31]

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[24] CCM, Chapter 2.
[25] CCM, para. 2.2.
[26] CCM, paras. 1.5, 1.28 and 2.1.
[27] *See* Counter-Memorial of Colombia, 11 November 2008, Chapters 8(B)(2) and 9(D)(1) and Rejoinder of Colombia, 18 June 2010, Chapter 8(E).
[28] *See* Counter-Memorial of Colombia, 11 November 2008, Chapter 2 and Rejoinder of Colombia, 18 June 2010, Chapter 7(B)(1).
[29] *See* Counter-Memorial of Colombia, 11 November 2008, Chapter 9(D)(4) and Rejoinder of Colombia, 18 June 2010, Chapter 8(D)(1).
[30] *See* Counter-Memorial of Colombia, 11 November 2008, Chapter 9(D)(5) and Rejoinder of Colombia, 18 June 2010, Chapter 8(D)(2).
[31] *See* I.C.J, Judgment, 19 November 2012, *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, *Reports 2012*, in particular pp. 700-706, paras. 208-223.

1.14 However, whatever significance these "special characteristics" might have been given in the *Territorial and Maritime Dispute* case, it is difficult to grasp their relevance in the present case. This case concerns the violation by a State, Colombia, of the sovereign rights and jurisdiction in maritime areas of another State, Nicaragua, in its maritime zones. These sovereign rights have been determined by a Judgment of the ICJ, as *res judicata*, in the previous proceedings.

1.15 The so-called "special characteristics" have no bearing on the present case and more specifically on Nicaragua's claims or on Colombia's international responsibility. They do not relieve Colombia from its obligations to comply with the Court's 2012 Judgment and to respect Nicaragua's sovereign rights and jurisdiction in its maritime zones as determined in that Judgment. Unless Colombia wishes to invoke these circumstances as precluding the wrongfulness of its conduct – which it does not do in its Counter-Memorial – there is no reason to further discuss them.

1.16 Equally irrelevant is the catalogue of measures adopted – and treaties signed – by Colombia since the 1970s in order to protect the environment[32] and fight transnational crime[33] in the southwestern Caribbean Sea. Nicaragua shares Colombia's concerns regarding law enforcement, security and the protection of the marine environment.[34] However, this is completely unrelated to the present case. What is at stake is Colombia's conduct *since* and *in relation to* the Court's Judgment of 19 November 2012 in the areas appertaining to Nicaragua, in accordance with that Judgment.

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[32] *See* CCM, paras. 2.25-2.60.
[33] *See ibid.*, paras. 2.93-2.109.
[34] *See* e.g. "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/).

1.17 Colombia claims that it is

> "the only State with the ability to monitor and control this illegal activity from its bases on the Island of San Andrés and its outposts on other of the islands. It is also the only State to have a genuine interest in protecting the natural habitat of the population of the islands."[35]

and that

> "It is only by maintaining this presence that Colombia can monitor activities which threaten an area that is critical to its own people, Caribbean coastal States, and the wider international community."[36]

1.18 Whether this is true or not – and Nicaragua submits that it very clearly is not – it is simply not relevant to the settlement of the respective claims of the Parties in the present dispute. Colombia has no right to exercise Nicaragua's sovereign rights and jurisdiction in Nicaragua's maritime zones. As already explained in the Memorial,[37] Nicaragua has always been and remains open to discuss the common concerns of the Parties and to agree on common solutions. But Colombia has no right to act unilaterally or apply its laws and regulations in areas in which it has no sovereign rights or jurisdiction.

2. Irrelevance of the rights and duties concerning the preservation and protection of the environment

1.19 In Chapter 3 of its Counter-Memorial, Colombia sets out a list of rights and obligations which are said to be relevant to the present case. This list includes "the rights and obligations of the Parties to protect and preserve the marine environment, including the environment of the local inhabitants of the

[35] *See* CCM., para. 2.11.
[36] *Ibid.*, para. 2.13.
[37] NM, paras. 2.53-2.58.

Archipelago."[38] These rights and obligations are not pertinent, insofar as Colombia pretends to exercise them in areas in which Nicaragua has exclusive sovereign rights and jurisdiction.

1.20 *First*, these rights and obligations are unrelated to Nicaragua's claims. Colombia has failed to show a link between them and the harassment and intimidation of Nicaragua's fishing vessels, or the prevention of Nicaragua's authorities from exercising their law enforcement mission and from issuing fishing licences to Colombia's nationals and foreign boats in zones appertaining to Nicaragua.

1.21 *Second*, in its 2017 Order on the admissibility of Colombia's Counter-Claims, the Court declared inadmissible the first and second counter-claims, which concerned the preservation and protection of the environment:

> "there is no direct legal connection between Colombia's first and second counter-claims, and Nicaragua's principal claims. First, the legal principles relied upon by the Parties are different. In its first two counter-claims, Colombia invokes rules of customary international law and international instruments relating essentially to the preservation and protection of the environment; by contrast, in its principal claims, Nicaragua refers to customary rules of the international law of the sea relating to the sovereign rights, jurisdiction and duties of a coastal State within its maritime areas, as reflected in Parts V and VI of UNCLOS. Secondly, the Parties are not pursuing the same legal aim by their respective claims. While Colombia seeks to establish that Nicaragua has failed to comply with its obligation to protect and preserve the marine environment in the south-western Caribbean Sea, Nicaragua seeks to demonstrate that Colombia has violated Nicaragua's sovereign rights and jurisdiction within its maritime areas."[39]

[38] CCM, para. 3.23. *See* paras. 3.23-3.85.
[39] I.C.J., Order, 15 November 2017, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Counter-Claims*, para. 38.

1.22 The issue of the preservation and protection of the environment is therefore outside the scope of the present proceedings.

C. Outline Of The Reply

1.23 The structure of the Reply is as follows. In Chapters II to V, Nicaragua reasserts the merits of its claims.

- in **Chapter II**, Nicaragua establishes, as a general proposition, that Colombia's activities in Nicaragua's exclusive economic zone have no legal basis in customary international law; then, more specifically,

- **Chapter III** sets out the reasons why Colombia's Integral Contiguous Zone is inconsistent with international law; and

- in **Chapter IV**, Nicaragua addresses the many other violations by Colombia of Nicaragua's sovereign rights and jurisdiction since the Court rendered its Judgment on 19 November 2012; finally,

- **Chapter V** answers the very few arguments raised by Colombia on the remedies requested by Nicaragua;

1.24 In the last two chapters, Nicaragua establishes that Colombia's admissible counter-claims are without merit:

- in **Chapter VI**, Nicaragua demonstrates that Colombia has no traditional or historic rights and that, even if these rights existed, *quod non*, Nicaragua has not infringed them; and finally

- in **Chapter VII**, Nicaragua shows that its straight baselines are fully consistent with international law.

CHAPTER II:THE RIGHTS AND DUTIES OF THE PARTIES IN THE EXCLUSIVE ECONOMIC ZONE

2.1. Chapter 3 of the Counter-Memorial argues that in addition to Nicaragua, "Colombia also possesses rights and duties under international law that are relevant to and require its presence and conduct in the Southwestern Caribbean" and that "Nicaragua, as a corollary to its rights, also has important legal obligations in the relevant area [which it] has fundamentally breached."[40] The essence of its argument is that following its repudiation of the Court's 2012 Judgment, Colombia's policy in relation to its conduct in the Southwestern Caribbean has been guided by no more than the aim of securing compliance with international law, and that if Colombia is acting to fulfil its international obligations it cannot be violating Nicaragua's rights.

2.2. In broad terms, Nicaragua's Application in this case concerns (i) the violation by Colombia of Nicaragua's rights and the usurpation of Nicaragua's jurisdiction in its maritime zones as delimited in the Judgment of 19 November 2012, and (ii) a request for compensation for Colombia's interference with vessels fishing with the permission of Nicaragua in Nicaragua's EEZ.

2.3. Colombia bases its defence in Chapter 3 of its Counter-Memorial on what it calls "three central propositions that are at the heart of Colombia's case."[41] They will be addressed in turn. In doing so, this Chapter will set out Nicaragua's submission that Colombia has no right whatever to engage in the activities of which Nicaragua complains in this case. There is also a second, distinct submission:[42] that even if there were a legal basis for Colombia's claimed rights

[40] CCM para. 3.2.
[41] CCM para. 3.6.
[42] *See* para. 2.61, below.

in Nicaragua's EEZ *quod non*, the manner in which Colombia has in fact acted could not constitute a lawful exercise of any such rights.

A. Colombia Has No Right To Engage In The Contested Activities In Nicaragua's Maritime Zones.

1. The EEZ is a zone *sui generis* and rights of States within it are determined by the specific legal regime established for the EEZ under international law.

2.4. Colombia's first 'central proposition' is that

> "Nicaragua's rights and jurisdiction within its EEZ are enumerated exclusive rights that are carved out from waters that otherwise form part of the high seas. They do not preclude other States, Colombia included, from exercising their own rights and duties in such areas"[43]

2.5. That proposition is inexact. It is correct that "Nicaragua's rights and jurisdiction within its EEZ …do not preclude other States, Colombia included, from exercising their own rights and duties in such areas." Nicaragua has never questioned this proposition. As is evident from UNCLOS Article 58, considered below,[44] other States undoubtedly have certain rights in Nicaragua's EEZ. It is also correct that the EEZs are established by States in areas of the sea that were historically high seas. But it is wrong to suggest that an EEZ is now "carved out from waters that otherwise form part of the high seas" in the non-historical, juridical sense that the rights of the coastal State over its EEZ are strictly limited to rights expressly accorded by the provisions of UNCLOS (for its States Parties) or by customary international law, in the same way that States might be given specific, limited rights over foreign ships on the high seas.

[43] CCM para. 3.6.
[44] Paragraph 2.30, below.

2.6. It is made plain in the express provisions of UNCLOS itself that the EEZ is not a set of exceptional rights superimposed on or carved out of the high seas. The EEZ is a maritime zone *sui generis*.

2.7. UNCLOS Article 55 stipulates that

> "The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention."

2.8. UNCLOS Article 59 then makes clear that the high seas does not have the status of a 'residual regime' in relation to the EEZ so that in the event of doubt as to the existence or scope of coastal State rights in the EEZ the 'high seas presumption' against the existence of coastal State jurisdiction over foreign-flag ships would operate. Article 59 provides that

> "In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole."

2.9. Colombia does not argue that the regime of the EEZ under customary international law differs from the regime under UNCLOS in this (or any other) respect. Acceptance of the provisions on the EEZ were an essential part of the 'package deal' that secured the international acceptance of UNCLOS; and Nicaragua submits that because the EEZ as an institution of customary

international law[45] emerged from State practice focused on and inspired by the successive drafts of what became UNCLOS, the regimes under UNCLOS and under customary international law are, at least in so far as is material in this context, the same.

2.10. Accordingly, Colombia cannot rely on the argument that in the absence of a specific prohibition in the regime of the EEZ it can do as it chooses in Nicaragua's EEZ because those waters are basically 'high seas' subject only to limited rights granted to the coastal State. Colombia must establish that the rights that it claims in Nicaragua's EEZ are 'attributed' to it, and not to Nicaragua, by the regime of the EEZ. Colombia has not done so. Neither has it made out any argument of the kind envisaged by UNCLOS Article 59.

2.11. Colombia's rights in Nicaragua's EEZ are therefore those defined by UNCLOS Article 58(1): they are "the freedoms referred to in article 87 of navigation and over flight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms."

2.12. Colombia, however, claims further rights in Nicaragua's EEZ that "stem from principles and rules of international law."[46] These relate to the obligation to preserve and protect the marine environment, and to historic fishing rights.

[45] *See*, e.g., *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984,* p. 246, para. 94; *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I. C.J. Reports 1985,* p. 13, 33: "the institution of the exclusive economic zone, with its rule on entitlement by reason of distance, is shown by the practice of States to have become a part of customary law.". Cf., S N Nandan and S Rosenne, *United Nations Convention on the Law of the Sea 1982. A Commentary.* Vol. II (1993), 496–510; D R Rothwell and T Stephens, *The International Law of the Sea* (2d ed., 2016), p. 87; G Andreone, 'The Exclusive Economic Zone', in D R Rothwell, A Oude Elferink, K Scott and T Stephens, *The Oxford Handbook of the Law of the Sea* (2015), 159, 162-163.

[46] CCM para. 3.5.

(a) Environmental regulation in Nicaragua's EEZ

2.13. Colombia claims that it has a right (or something similar) to act in Nicaragua's EEZ in order to fulfil its 'general environmental obligations' if Nicaragua "fails to fulfil its own special and general obligations."[47] This claim fails on factual and logical grounds.

2.14. There is certainly an obligation on all States to "respect the environment", and all States have an interest in the fulfilment of that obligation.[48] Both Nicaragua and Colombia, along with all other States, have a legal obligation to protect and preserve the environment; and Nicaragua has never questioned that obligation.[49]

2.15. The Counter-Memorial summarizes a range of specific environmental obligations,[50] and professes astonishment[51] that Nicaragua does not address "these important legal objectives" and "totally ignore(s)" its duty of due diligence[52] in its Memorial. The explanation, reflected in the Court's ruling that Colombia's counter-claims relating to the preservation and protection of the environment are inadmissible, is that they fall outside the "legal aim" of Nicaragua's case. They are not relevant to Nicaragua's case.

2.16. The factual flaw in Colombia's argument is that Colombia has never suggested to Nicaragua that Nicaragua's discharge of its responsibilities for the environment is deficient. Colombia does not spell out its conception of a residual

[47] CCM para 3.6.
[48] CCM para 3.27.
[49] CCM 3.34.
[50] CCM paras 3.35–3.76.
[51] CCM para. 3.48.
[52] CCM para. 3.55.

right to act to protect the environment if another State fails in its duty to do so, but it is difficult to believe that Colombia intends to put forward an argument that a State has a general right under customary international law to act unilaterally to discharge another State's duties without first informing the other State that it considers that its fulfilment of its obligations is unacceptably deficient. Colombia has never done that.

2.17. The logical flaw in Colombia's argument is that even if Nicaragua had failed to fulfil one or other of its duties relating to the environment under international law that would not generate a right for Colombia to act. Nothing in UNCLOS gives such a right, nor does anything in the environmental law instruments cited by Colombia. Nothing in the law of State responsibility indicates the existence of such a right. There is no right of self-help in international law.[53]

2.18. UNCLOS is, on the other hand, clear in allocating to coastal and to flag States jurisdiction in relation to the protection and preservation of the marine environment.[54] It gives no role to neighbouring States. Colombia has no right to take measures to ensure the protection and preservation of the marine environment in Nicaragua's waters, let alone to "invite" Nicaraguan flagged vessels to cease fishing in Nicaragua's own waters. Its actions in that respect are plainly without any legal basis and are internationally wrongful.

[53] *Corfu Channel case, Judgment of April 9th 1949, ICJ Rep 1949,* p. 4, 35.
[54] UCLOS Articles 56(1)(b)(iii) and 192–237.

(b) Fishing rights in Nicaragua's EEZ

2.19. Colombia also asserts, on behalf of the Raizales, "customary artisanal fishing rights to access and exploit the traditional banks".[55] That is to say, the artisanal fishermen of the Archipelago have the right to fish in Nicaragua's own maritime zones without having to request an authorization.[56]

2.20. No such right is proved by Colombia to exist. Indeed, it tries to pre-empt any criticism on this ground by asserting that

> "where both parties have recognized a long-standing practice the State that has tolerated the conduct taking place under its jurisdiction cannot hide behind the argument that it is for the State relying on the customary norm to demonstrate the *opinio juris sive necessitatis.*"[57]

The proposition is illogical. If the 'long-standing practice' was pursued on certain terms and within certain limitations, it could not give rise to an entitlement to engage in fishing as of right and without any such limitations. Moreover, there is no basis for Colombia's suggestion, which runs against one of the axioms of customary international law,[58] that a legal right can be generated by a practice without any need to establish that it was accompanied by *opinio juris.*

2.21. Colombia asserts that Nicaragua recognized the "traditional fishing rights of the Raizales to artisanal fishing in waters that now fall within Nicaragua's EEZ.[59] What Nicaragua said was as follows:

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[55] CCM para 3.5 and p. 140.
[56] CCM para. 3.87.
[57] CCM para 3.90.
[58] *See*, e.g., *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985,* p. 29, para.27; *Military and Paramilitary Activities (Nicaragua v USA), Merits, Judgment of 27 June 1986, ICJ Rep. 1986,* 14, 97-98, 100, 531 (D.O. Jennings); *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Rep. 1996*, 226, paras 64–67; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), Judgment of 14 February 2002,* D.O Van den Wyngaert, para. 13.
[59] CCM para 3.93.

> "That Nicaragua will authorize their fisheries in that area, where they have historically practiced fisheries, both artisanal and industrial fisheries, in that maritime area, in that maritime space, where even before the ruling by the Court, the permit was granted by Colombia and now, the permit is granted by Nicaragua."[60]

2.22. Colombia refers to the fact that later statements did not all expressly spell out the fact that such fishing in Nicaragua's EEZ would proceed by permission of Nicaragua,[61] and purports to infer from it an intention on the part of Nicaragua to abandon its right to regulate fishing in its EEZ. No such inference can properly be drawn. The Court has said, "proof may be drawn from inferences of fact, provided that they leave *no room* for reasonable doubt" (emphasis in original).[62] That is particularly appropriate in cases where an attempt is made to infer an abandonment of legal rights. The standard is plainly not met in this case.

2.23. This conclusion is reinforced by the position under UNCLOS. UNCLOS Article 56 gives the coastal State sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources of its EEZ. It contains no exception or qualification that would give or preserve traditional fishing rights of artisanal fishermen.

2.24. The unavoidable conclusion is that Colombia cannot establish that it has a legal right for the Raizales to fish in Nicaragua's EEZ independently of an authorization by Nicaragua.

2.25. Neither in relation to the environment nor in relation to 'historic fishing rights' does Colombia have rights to act in Nicaragua's EEZ in addition to those rights that it has under UNCLOS Article 58.

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[60] Message from President Daniel to the People of Nicaragua, 26 November 2012, NM, Annex 27, p 359, 360.
[61] CCM para. 3.94.
[62] *Corfu Channel case, Judgment of April 9th 1949, ICJ Rep 1949,* p. 4, 18.

2. Colombia has no general right to engage in policing activities in Nicaragua's EEZ.

2.26. Colombia's second central proposition is that "Colombia has the right to be present in Nicaragua's EEZ for monitoring and tracking activities that prejudice the marine environment, constitute suspicious trafficking of drugs and other forms of transnational crime, or threaten the habitat and livelihood of the inhabitants of the Archipelago who have traditional fishing rights in the area."[63]

2.27. Nowhere in the Counter-Memorial does Colombia explain the basis or the extent of this supposed right, or how Colombia infers it from the provisions in UNCLOS or their analogues in customary international law.

2.28. The main UNCLOS provision concerning the rights of a State to engage in policing activities beyond its own territorial sea is Article 33 on the contiguous zone. It reads as follows:

> "*Article33*
> *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."

[63] CCM para. 3.6.

2.29. That provision permits action in respect of specific violations of a State's *own* laws: it provides no warrant for the organization of general law enforcement patrols beyond the territorial sea to secure compliance with other States' laws or with international rules and standards generally. The provision applies, moreover, only in relation to customs, fiscal, immigration or sanitary laws and regulations. It provides no warrant for action in respect of fishery or environmental laws, for the obvious reason that the coastal State would be able to claim this competence by virtue of its entitlement to establish an EEZ. Colombia could not, and rightly does not rely, on UNCLOS Article 33.[64]

2.30. UNCLOS contains another provision, on which Colombia does rely. That provision is UNCLOS Article 58, which reads as follows:

> "*Article 58*
> *Rights and duties of other States in the exclusive economic zone*
> 1. In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and over flight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.
> 2. Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.
> 3. In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part."

[64] Colombia's attempt to make out a case on the basis of customary international law is considered in Chapter VI.

2.31. As can be seen, the rights enjoyed by other States in Nicaragua's EEZ are "the freedoms referred to in article 87 of navigation and over flight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms". Article 87 reads as follows:

> "*Article 87*
>
> *Freedom of the high seas*
>
> 1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States:
>
> (a) freedom of navigation;
>
> (b) freedom of over flight;
>
> (c) freedom to lay submarine cables and pipelines, subject to Part VI;
>
> (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
>
> (e) freedom of fishing, subject to the conditions laid down in section 2;
>
> (f) freedom of scientific research, subject to Parts VI and XIII.
>
> 2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area."

2.32. Thus, 'other States' such as Colombia have in Nicaragua's EEZ the rights listed in Article 87(1)(a), (b) and (c), and other internationally lawful uses of the sea related to these freedoms, but not the rights listed in Article 87(1) (d), and (e).

2.33. At the outset, Nicaragua wishes to make clear that it does not question the right of Colombia to take action against *Colombian* vessels in Nicaragua's EEZ, so long as Colombia does so in accordance with international law and, in

particular, with due regard for the rights and interests of Nicaragua in that zone. The question here concerns Colombia's claim to a right to police the activities of *non*-Colombian vessels in Nicaragua's EEZ.

2.34. Nicaragua does not contest Colombia's right to take action in Nicaragua's EEZ if it happens to encounter a ship suspected of the illegal transportation of narcotics, or to search for such a ship if it has reason to suspect that it is there. Nicaragua's complaint is that Colombia has erected and implemented a regime of surveillance and enforcement that treats Nicaragua's EEZ as if it were Colombian national waters. In this regard, Colombia is deliberately maintaining a continuing demonstration of its repudiation of the Court's Judgment and violating Nicaragua's sovereign rights and maritime spaces. Nicaragua does not question the rights of other States to navigation and over flight in its EEZ. But it does contest the right of other States to install a naval presence to occupy Nicaragua's waters and treat them as their own, and to usurp the regulatory powers that UNCLOS Article 56 so plainly gives to Nicaragua in its exclusive economic zone.

2.35. The question is whether the creation and implementation of a policy of systematic "monitoring and tracking" by Colombia's policing vessels of foreign (non-Colombian) vessels and their activities in Nicaragua's EEZ is included within the 'freedom of navigation' enjoyed by those Colombian policing vessels in Nicaragua's EEZ under the rules of customary international law reflected in UNCLOS Articles 58 and 87. The same question arises *mutatis mutandis* in respect of the creation and implementation of a policy of systematic "monitoring and tracking" by Colombia's aircraft. Colombia does not address this question.

2.36. The question is one of treaty interpretation.[65] One begins, in accordance with the familiar requirements of Article 31 of the Vienna Convention on the Law of Treaties, with the ordinary meaning of the word "navigation". That ordinary meaning refers to the passage of ships or the movement of ships on water;[66] but it cannot be claimed that the ordinary meaning of navigation includes systematic acts of "monitoring" and "tracking".

2.37. There are more precise indications elsewhere in UNCLOS of the meaning of "navigation".UNCLOS Article 18 appears in the section concerned with innocent passage. It provides that

> " *Article 18 Meaning of passage*
> 1. Passage means navigation through the territorial sea for the purpose of:
> (a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or
> (b) proceeding to or from internal waters or a call at such roadstead or port facility.
> 2. Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress

2.38. In Article 18(1) "passage" is defined as "navigation" performed for a particular purpose. Article 18(2) then proceeds to stipulate that in certain circumstances stopping and anchoring are included in the notion of passage. The implication is that ordinarily navigation does not consist in stopping or anchoring.

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[65] On the relationship between UNCLOS and customary international law *see* para.2.9, above.
[66] *See*, e.g., < https://en.oxforddictionaries.com/definition/navigation >, < https://www.merriam-webster.com/dictionary/navigation >,
< https://dictionary.cambridge.org/dictionary/english/navigation >,
< https://www.collinsdictionary.com/dictionary/english/navigation >.

That is consistent with the ordinary meaning of 'navigation' as 'the movement of ships on water'.[67]

2.39. So, too, are the provisions in UNCLOS Article 22(3), which refers to "any channels customarily used for international navigation" and Articles 34, 36, 41, and 45 ("straits used for international navigation")[68], and Article 53(12) ("routes normally used for international navigation"), and Article 60(7) "sea lanes essential to international navigation"), and also Articles 24(4) and 44, which obliges coastal States to give appropriate publicity to "any danger to navigation" of which it has knowledge.

2.40. All of these uses of the term point to the meaning of 'navigation' as being the movement of ships over water. None of these references gives any support to the idea that the 'freedom of navigation' in another State's EEZ includes the freedom to organize and conduct policing patrols – "monitoring and tracking" – in that EEZ.

2.41. There are further indications in UNCLOS. Article 58(2) stipulates, "Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part." Articles 88 to 115 include provisions on the status of ships and duties of flag States, and on the protection of submarine cables and pipelines, and, most significantly in the present context, on the exceptional circumstances in which ships of one State may exercise what might broadly be called law-enforcement functions against foreign ships on the high seas (Articles 100 – 111).

[67] Cf., UNCLOS Article 38.
[68] Cf Article 37 ("straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone").

2.42. Those functions extend only to the right to seize pirate ships on the high seas (Article 105), and the right of visit under Article 110. Article 110 reads as follows:

> "Article 110
> *Right of visit*
> 1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that:
> (a) the ship is engaged in piracy;
> (b) the ship is engaged in the slave trade;
> (c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under article 109;
> (d) the ship is without nationality; or
> (e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.
> 2. In the cases provided for in paragraph 1, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.
> 3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.
> 4. These provisions apply mutatis mutandis to military aircraft.
> 5. These provisions also apply to any other duly authorized ships or aircraft clearly marked and identifiable as being on government service."

2.43. Plainly, the right to 'monitoring and tracking' claimed by Colombia cannot extend to the visiting and boarding of foreign ships. No such right is given by Article 111 for environmental or general crime-prevention purposes or the protection of traditional fishing rights. That narrows down the question. It is whether Colombia's right of navigation and overflight in Nicaragua's EEZ

includes the right to 'monitor and track' foreign (non-Colombian) ships without visiting and boarding them.

2.44. It will also be observed that while UNCLOS imposes a general duty on States to cooperate in the repression of piracy (Article 100) and the suppression of illicit traffic in narcotic drugs and psychotropic substances (Article 108) and unauthorized broadcasting from the high seas (Article 109), there is no analogous provision in Articles 88 – 115 concerning the suppression of unlawful fishing or pollution. Colombia cannot rely on any indication in UNCLOS to support its claim that its right to navigate includes a right to police Nicaragua's EEZ.

2.45. It is true that there is a 'high seas' duty to cooperate in respect of fishing regulations, in UNCLOS Article 118. But that is a duty "to take, or to co-operate with other States in taking, such measures *for their respective nationals* as may be necessary for the conservation of the living resources of the high seas" (emphasis added). It does not extend to the policing of foreign-flag ships. Furthermore, UNCLOS does not make that duty applicable at all in the EEZ,[69] for the very good reason that fishing in the EEZ is under the exclusive control of the coastal State. In fact, exclusive control of offshore fishing was the very *raison d'être* of the EEZ.[70]

2.46. If States wish to have each other's vessels policing their EEZs, they make an agreement to do so. One such agreement is the 2010 Nauru Agreement Concerning Cooperation in the Management of Fisheries of Common Interest,[71]

[69] It is not included among the provisions of Articles 88 – 115, which alone are applied by Article 58 to the EEZ.
[70] *See* S N Nandan and S Rosenne, *United Nations Convention on the Law of the Sea 1982. A Commentary*. Vol. II (1993), 493–500.
[71] *See* < https://www.pnatuna.com/content/nauru-agreement > (Article VII). *See* also the 2010 Palau Arrangement for the Management of the Western Pacific Fishery As Amended, <

Article VII of which provides that "[t]he Parties shall seek to develop cooperative and coordinated procedures to facilitate the enforcement of their fisheries laws and shall in particular examine the various means by which a regime of reciprocal enforcement may be established." That commitment is made against the background, recalled in the Preamble, that:

> "in accordance with the relevant principles of international law each of the Parties has established an exclusive economic zone or fisheries zone (hereinafter respectively called the "Fisheries Zones") which may extend 200 nautical miles from the baselines from which their respective territorial seas are measured and within which they respectively and separately exercise sovereign rights for the purpose of exploring exploiting conserving and managing all living marine resources."

2.47. Nothing points to any belief that reciprocal policing is a right that could be exercised unilaterally.

2.48. The same is true for the repression of the illegal narcotics trade. The 2003 Agreement Concerning Co-operation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area[72] is an example. It provides for boarding of ships by agreement "seaward of the territorial sea",[73] and indicates what are considered to be the possible legal

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https://www.pnatuna.com/sites/default/files/The%20Palau%20Arrangement%20%28amended%2011-sep-2010%29.pdf > (Article 3(2)).

[72] *See* < https://www.state.gov/s/l/2005/87198.htm>. In force since 18 September 2008, *see* https://www.rree.go.cr/?sec=servicios&cat=prensa&cont=593&id=3734

[73] *See* Articles 16 and 17. "ARTICLE 16 – BOARDING

1. When law enforcement officials of one Party encounter a suspect vessel claiming the nationality of another Party, located seaward of any State's territorial sea, this Agreement constitutes the authorisation by the claimed flag State Party to board and search the suspect vessel, its cargo and question the persons found on board by such officials in order to determine if the vessel is engaged in illicit traffic, except where a Party has notified the Depositary that it will apply the provisions of paragraph 2 or 3 of this Article.

ARTICLE 17 - OTHER BOARDINGS UNDER INTERNATIONAL LAW

Except as expressly provided herein, this Agreement does not apply to or limit boarding of vessels, conducted by any Party in accordance with international law, seaward of any State's territorial sea, whether based, *inter alia*, on the right of visit, the rendering of assistance to

bases of such action: "the right of visit, the rendering of assistance to persons, vessels, and property in distress or peril, or an authorisation from the flag State to take law enforcement action."[74] It also provides for cooperation in policing:

> "ARTICLE 19 - MARITIME LAW ENFORCEMENT CO-OPERATION AND CO-ORDINATION PROGRAMMES FOR THE CARIBBEAN AREA
>
> 1. The Parties shall establish regional and sub-regional maritime law enforcement co-operation and co-ordination programmes among their law enforcement authorities. Each Party shall designate a co-ordinator to organise its participation and to identify the vessels, aircraft and law enforcement officials involved in the programme to the other Parties.
>
> 2. The Parties shall endeavour to conduct scheduled bilateral, sub-regional and regional operations to exercise the rights and obligations under this Agreement.
>
> …
>
> ARTICLE 21 - ASSISTANCE BY VESSELS
>
> 1. Each Party may request another Party to make available one or more of its law enforcement vessels to assist the requesting Party effectively to patrol and conduct surveillance with a view to the detection and prevention of illicit traffic by sea and air in the Caribbean area. ...."

2.49. Again, the focus is on cooperation by agreement. No role, and no recognition, is given to unilateral attempts to police the EEZs of other States.

2.50. Examples of such agreements providing for the exercise of policing functions by one State in the maritime zones of another abound.[75] They illustrate the fact that when States wish to engage in policing outside their own waters they

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persons, vessels, and property in distress or peril, or an authorisation from the flag State to take law enforcement action."

[74] Article 17 (quoted above).

[75] *See*, e.g., H Jessen, 'United States' Bilateral Shipboarding Agreements–Upholding Law of the Sea Principles while Updating State Practice', in H Ringbom (ed), *Jurisdiction over Ships* (2015), 50; R Geiss and C J Tams, 'Non-Flag States as Guardians of the Maritime Order: Creeping Jurisdiction of a Different Kind', ibid., 19.

normally do so by concluding an international agreement, as UNCLOS itself contemplates.[76]

2.51. Conversely, international agreements are drafted on the assumption that it is for the coastal State to authorize fisheries surveillance and law enforcement activities within the EEZ. Thus, for example, the 2013 US-Palau Agreement concerning Operational Cooperation to Suppress Illicit Transnational Maritime Activity provides for US vessels in the Palau EEZ to have Palau law enforcement officers embarked upon them. Article 3 of that Agreement reads as follows:

> "Article 3
> Combined and Joint Maritime and Air Operations
>
> 1. Law enforcement officials of the Republic of Palau may be embarked on selected United States law enforcement vessels or aircraft. When embarked on United States law enforcement vessels, the United States shall facilitate regular communications between the embarked law enforcement officials and their headquarters in the Republic of Palau, and shall provide messing and quarters for the embarked law enforcement officials aboard United States law enforcement vessels in a manner consistent with United States personnel of the same rank.
>
> 2. The embarked law enforcement officials shall be empowered to grant United States law enforcement vessels and aircraft, on behalf of the Government of the Republic of Palau, authority to:
>
> (a) enter the Republic of Palau territorial sea to assist the embarked law enforcement officials to stop, board, and search vessels suspected of violating the Republic of Palau laws or regulations, and to assist in the arrest of the persons on board and the seizure of contraband and vessels;
>
> (b) assist the embarked law enforcement officials in performing fisheries surveillance and law enforcement activities in the Exclusive Economic Zone of the Republic of Palau, including stopping,

[76] *See, e.g.*, UNCLOS Articles 27(1)(c), 51, 92(1), 110(1), 311.

> inspecting, detaining, directing to port and seizing fishing vessels in accordance with the national laws and regulations of the Republic of Palau;
>
> (c) stop, board, and search vessels located seaward of any State's territorial sea and claiming registry or nationality in the Republic of Palau to assist the embarked law enforcement officials in the enforcement of applicable laws and regulations of the Republic of Palau; and
>
> (d) employ reasonable force to stop non-compliant vessels subject to the jurisdiction of the Republic of Palau.
>
> 3. The embarked law enforcement officials may assist United States law enforcement officials in the conduct of boardings undertaken pursuant to the authority of the United States, including right of visit boardings and boardings authorized by other flag and coastal States, as appropriate."[77]

2.52. Nothing in the structure of UNCLOS supports Colombia's contention that the 'freedom of navigation' in the EEZ under Article 58 creates a licence for a State to maintain a systematic monitoring, surveillance and policing operation in its neighbour's EEZ in relation to fishing and environmental interests and regulations and general crime prevention. Nothing points to 'other States' having the right to engage in any other activities apart from navigating in or flying over the EEZ.

2.53. Indeed, the structure of UNCLOS clearly indicates, if anything, the opposite conclusion. To recall the terms of UNCLOS, policing the EEZ is not an instance where "[UNCLOS] does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone." [78] UNCLOS makes very clear provision for the competences of Nicaragua as the coastal State.

[77] *See* https://www.state.gov/documents/organization/226362.pdf .
[78] UNCLOS Article 59.

2.54. UNCLOS Article 56 attributes "sovereign rights" to the coastal State in its EEZ "for the purpose of "conserving and managing [its] natural resources". Articles 60 and 61 spell out duties of the coastal State in relation to the conservation and management of those resources, and Article 73 sets out the rights of the coastal State to "take such measures, including boarding, inspection, arrest, and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention." No provisions in UNCLOS attribute any rights to 'other States' to police – to 'monitor' or 'track' vessels – in the EEZ of another State for the purposes of fishery protection.

2.55. Similarly, UNCLOS Article 56(1)(b)(iii) gives the coastal State jurisdiction "with regard to … the protection and preservation of the marine environment" in its EEZ. Further, UNCLOS provides, in relation to the EEZ, for the exercise of jurisdiction by flag[79] and coastal States[80] and port States. It also provides, in Article 118, for the exercise of jurisdiction by port States in respect of offences committed in the EEZ of another State, but only at the request of that other State, or the flag State of the vessel, or a State damaged or threatened by the discharge violation.[81] If it had been contemplated that States might exercise a general policing function in each other's EEZs, Article 218 would be expected to allow port State proceedings at the instance of any UNCLOS State Party reporting an incident. But there is no such provision. The rights rest essentially with flag States and coastal States with rights over the EEZ.

[79] Articles 211, 217.
[80] Articles 207 – 208, 210, 220.
[81] *See* Article 218(2).

2.56. As is evident from this examination of UNCLOS, it provides no support for the view that third States were intended to have the right to organize policing patrols in the EEZs of other States. There is no basis for Colombia's second 'central proposition', that it "has the right to be present in Nicaragua's EEZ for monitoring and tracking activities that prejudice the marine environment, constitute suspicious trafficking of drugs and other forms of transnational crime, or threaten the habitat and livelihood of the inhabitants of the Archipelago who have traditional fishing rights in the area."

3. Colombia has no right to enforce or police environmental standards in Nicaragua's EEZ.

2.57. Colombia's third "central proposition" is that:

> "in addition to a coastal State's environmental obligations with respect to its maritime zones (special environmental obligations), all State users of the residual high seas freedoms have general environmental obligations. If Nicaragua fails to fulfill its own special and general obligations, it is not in a position to object to others fulfilling their general environmental obligations so long as this does not infringe on Nicaragua's sovereign rights (which Colombia's activities have not done)"[82]

2.58. Colombia develops the point in a manner that appears to be designed to portray Colombia as a responsible international citizen and upholder of international law and Nicaragua as a delinquent. Colombia states that it "attaches the utmost importance to the need to preserve the environment of the Caribbean Sea and has conducted itself to this end",[83] and goes on to explain that

> "Colombia has the right to monitor any practices that contravene the obligation to preserve and protect the marine environment, and to

[82] CCM para. 3.6.
[83] CCM, para. 3.28.

> urge that such activities cease. This is particularly so when they are undertaken in ecologically sensitive areas such as the Seaflower Biosphere Reserve and the Seaflower Marine Protected Area, which surround the San Andrés Archipelago".[84]

2.59. Equally, there is no basis for Colombia's arrogation to itself of the right to engage in Nicaragua's EEZ in other policing activities. Those activities were summarized in Chapter III of Nicaragua's Memorial. They include the assertion of jurisdiction for purposes including the regulation of fishing and the preservation of the environment and the control of drug trafficking, by the adoption in 2013 of Decree 1946 (amended in 2014 by Decree 1119), which purported to establish Colombia's so-called "Integral Contiguous Zone."[85]

2.60. If Colombia felt that Nicaragua's EEZ stood in need of additional regulation or policing in fisheries or environmental or other matters, Colombia could and should have raised the matter with Nicaragua. Any deficiency in that respect – and Nicaragua emphatically denies that its regulation or policing of its EEZ is in any way deficient – is a Nicaraguan responsibility, not a responsibility of Colombia.

B. Colombia Has Acted Without Due Regard For Other Users Of The Seas

2.61. Nicaragua makes a second and distinct submission relating to the manner in which Colombia has acted to enforce its usurpation of Nicaragua's rights. In Chapter III of its Memorial Nicaragua identified the evidence of concrete

[84] CCM, para. 3.31. The Seaflower Biosphere Reserve was declared as such in November 2000, well after Nicaragua had announced it would be bringing a case against Colombia in order to recover the maritime areas precisely covered by that Reserve. This is the extent of the importance Colombia attaches to the preservation of the environment.
[85] *See* NM paras 2.12, 3.14 – 3.29.

unlawful actions by Colombia – "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," as it was put.[86] That evidence includes examples of the harassment of vessels authorized by Nicaragua to fish in Nicaraguan waters. Not only has Colombia acted without any legal basis, it has acted in a manner that would in any event have violated international law

2.62. Colombia does not and cannot deny that any rights that it does possess in Nicaragua's EEZ must be exercised in accordance with international law. In relation to the freedoms of navigation and overflight in and over the EEZ of other States, on which Colombia's case rests, UNCLOS Article 58(3) specifically requires that the rights be with "due regard to the rights and duties of the coastal State". Further, as exercises under Art 58 of high seas freedoms in the EEZ, they are subject also to UNCLOS Article 87(2), which requires that the rights be "exercised with due regard for the interests of other States in their exercise of the freedom of the high seas."

2.63. While there is no explicit stipulation to this effect in UNCLOS, Nicaragua submits that there is an implicit obligation under Article 58 to exercise the high seas freedoms of navigation and overflight in the EEZ with due regard for other users of the EEZ exercising their lawful rights therein, including by fishing under licence from the coastal State.[87]

2.64. Harassment, in the sense of action unnecessary for the normal conduct of navigation or over flight, carried out with the intention of intimidating other ships or aircraft in the EEZ, is patently outside the scope of any proper exercise of any

[86] NM para 3.30.
[87] Colombia appears to accept this point. *See* CCM paras. 3.16–3.20.

rights that Colombia has in Nicaragua's EEZ. It is, almost by definition, incompatible with due regard.

2.65. Neither 'due regard' nor 'harassment' is defined in UNCLOS. The Terms 'due regard is used in several places, including the following Articles: 27(4), in relation to territorial sea passage; 39(3)(a), in relation to transit passage through international straits; 56(3) and 58(3), in relation to the EEZ; 60(3) in relation to the removal of offshore installations; 66(3), in relation to the exploitation of anadromous fish stocks; 79, in relation to the laying of submarine cables and pipelines; 87, in relation to high seas freedoms; 142(1), 148, 161(4), 162(2)(d), 163(2), and 167(2), in relation to various aspects of the regime for the International Sea-Bed Area; 234, in relation to the regulation of pollution in ice-covered areas; and 267, in relation to the transfer of marine technology.

2.66. The repeated use of the concept is significant for two reasons. First, because its ubiquity suggests that it is a general principle applicable to the use of the seas; and second because it means that the concept must have a meaning sufficiently broad and flexible to be capable of sensible application in a wide range of different contexts.

2.67. The *Virginia Commentary* on UNCLOS offers a definition of the 'due regard' in Article 87(2), which is applicable as a matter of law to the activities of one State in another's EEZ and is thus applicable in the present case:

> "The standard of 'due regard' requires all States, in exercising their high seas freedoms, to be aware of and consider the interests of other States in using the high seas, and to refrain from activities that interfere with the exercise by other States of the freedoms of the high seas."[88]

[88] *See* S N Nandan and S Rosenne, *United Nations Convention on the Law of the Sea 1982. A Commentary.* Vol. III (1995), 86 [para. 87.9(l)]. See also G K Walker (ed), *Definitions for the Law of the Sea. Terms Not Defined by the 1982 Convention*, (2012), 179–188.

2.68. To return again to the third "central proposition", Colombia cannot claim that it is entitled to engage in harassment or any other conduct in Nicaragua's EEZ that falls outside an exercise of its rights in good faith and with due regard for the interests of other States. Nicaragua categorically rejects the submission that any of Colombia's obligations in relation to fisheries or the environment or drug trafficking or the repression of other kinds of crime warrant the kind of activities that are in issue in this case.

2.69. Nicaragua's Memorial sets out details of some of these incidents,[89] and they are further examined in Chapter IV of this Reply. For example, Colombia has deployed twelve frigates and conducted a 'sovereignty exercise' – a demonstration of Colombia's naval force – in the area,[90] and has directed its warships to chase Nicaraguan vessels away.[91] It has directed its military aircraft to harass Nicaraguan vessels, buzzing them at heights of around 200 feet.[92] and it has done so while explicitly repudiating the Court's Judgment. [93]

2.70. Thus far, Nicaragua has focused on the "three central propositions that are at the heart of Colombia's case."[94] It has shown them to be flawed and incapable of carrying Colombia's case. The remainder of Chapter 3 of Colombia's Counter-Memorial consists largely of assertions of Colombia's long-standing commitment to the preservation of the environment and the repression of crime[95] and of uncontroversial general propositions concerning legal duties to protect the biosphere and repress crime.

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[89] NM 2.22–2.52.
[90] NM 2.26–2.27.
[91] NM 2.28.
[92] NM 2.44-2.46.
[93] *See*, *e.g.*, NM 2.29–2.35, 2.40, 2.42–2.43.
[94] CCM para. 3.6.
[95] *See e.g.*, CCM paras 3.40 to 3.51.

2.71. This *tour d'horizon* in Chapter 3 appears to be no more than a catalogue of considerations that Colombia might plausibly be said to have had at the back of its mind when preparing to engage in the conduct that violates Nicaragua's rights. There is no evidence that it was taken into account by those responsible; no evidence that the actions of which Nicaragua complains were a considered and rational response to those considerations; and no evidence of any belief in Colombia that the actions in issue here were legally justified. This material, of no more than marginal relevance, has added nothing to Colombia's case.

2.72. The whole of Colombia's argument suffers from the same fundamental error. The error is neatly exemplified by paragraphs 3.51 and 3.52 of the Counter-Memorial:

> "3.51. The Seaflower Biosphere Reserve, the Seaflower Marine Protected Area and the ICZ all facilitate the development of in-situ conservation of the ecosystems. They constitute a fulfilment by Colombia of the duty to protect and preserve the biodiversity of the Caribbean Sea and the fragile ecosystems encompassing the San Andrés Archipelago. In doing so, Colombia is complying with another fundamental duty under international law, namely, the duty to exercise due diligence.
>
> 3.52. These initiatives cannot be seen, therefore, as an impediment to the exercise by Nicaragua of its sovereign rights – rights which, in any event, are not unfettered, and must be exercised while fulfilling the obligation to protect and preserve the marine environment."

2.73. The argument is that Colombia is acting to fulfil its legal obligations; therefore it cannot be infringing Nicaragua's sovereign rights. The fallacy is obvious. No one doubts that Colombia and Nicaragua are under duties to protect the biosphere and to take action against activities such as illegal fishing that threaten it. No one doubts that many of these duties can be found set out in treaties to which both Colombia and Nicaragua are parties, and which require

them to take appropriate action "individually or jointly". But it is entirely wrong to suggest that in consequence anything that Colombia claims to have done in the name of the fulfilment of these duties cannot amount to an infringement of Nicaragua's rights.

CHAPTER III : COLOMBIA'S INTEGRAL CONTIGUOUS ZONE

3.1 As a reaction to the Court's 2012 Judgment,[96] Colombia enacted Decree No. 1946 of 9 September 2013 establishing what it called an "Integral Contiguous Zone",[97] around Colombian islands in the Western Caribbean Sea, except Bajo Nuevo.[98] As explained by the President of Colombia, the enactment of the integral contiguous zone was part of the Respondent's "Integral Strategy regarding the Judgment of the International Court of Justice"[99] in the *Territorial and Maritime Dispute*.

3.2 In its Counter-Memorial, Colombia depicts its integral contiguous zone on a map (Figure 3.1(b)).[100] This map differs from the map presented by the President of Colombia on 9 September 2013, the day of the enactment of the Decree (Figure 3.1(a)). Contrary to the original map, the Counter-Memorial version shows the contiguous zone around Serranilla disconnected from the contiguous zones around the other Colombian islands in the Western Caribbean Sea. However, the original map constitutes a more accurate depiction of Colombia's integral contiguous zone, when one refers to the text of Decree No. 1946.

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[96] *See* NM, paras. 2.16-2.17 and "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).

[97] *See* Article 5(3) of Decree No. 1946 (NM, Annex 9 and CCM, Annex 7) and "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). For the sake of readability, Nicaragua will not use inverted commas when mentioning the Colombian "integral contiguous zone"; they are implied: this appellation is abusive: it corresponds to no accepted notion in international law.

[98] *See* Article 5(2) of Decree No. 1946 (NM, Annex 9 and CCM, Annex 7).

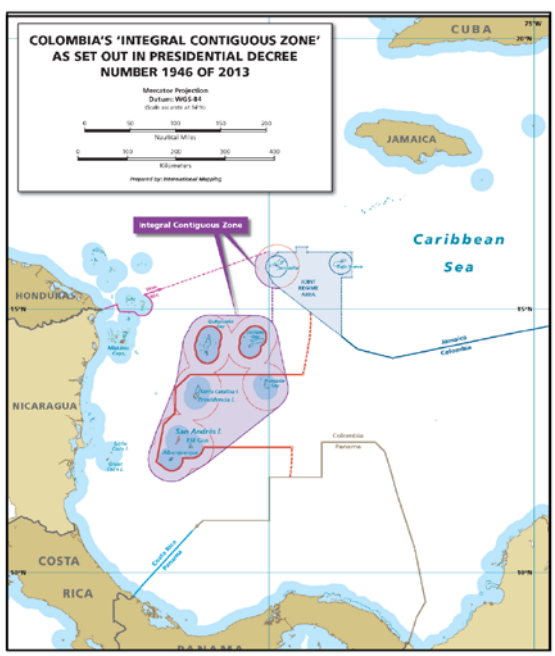
[99] "Declaration of President Juan Manuel Santos on the integral strategy of Colombia on the Judgment of the International Court of Justice", 9 September 2013 (NM, Annex 4).

[100] CCM, Figure 5.1.

Figure 3.1 (a) Map presented by President of Colombia on 9 September 2013

(a) Map presented by President Juan Manuel Santos, 09 September 2013 (NM, Annex 10 and Figure 2.1)

Figure 3.1 (b) Map presented in Colombia's Counter Memorial on 17 November 2016



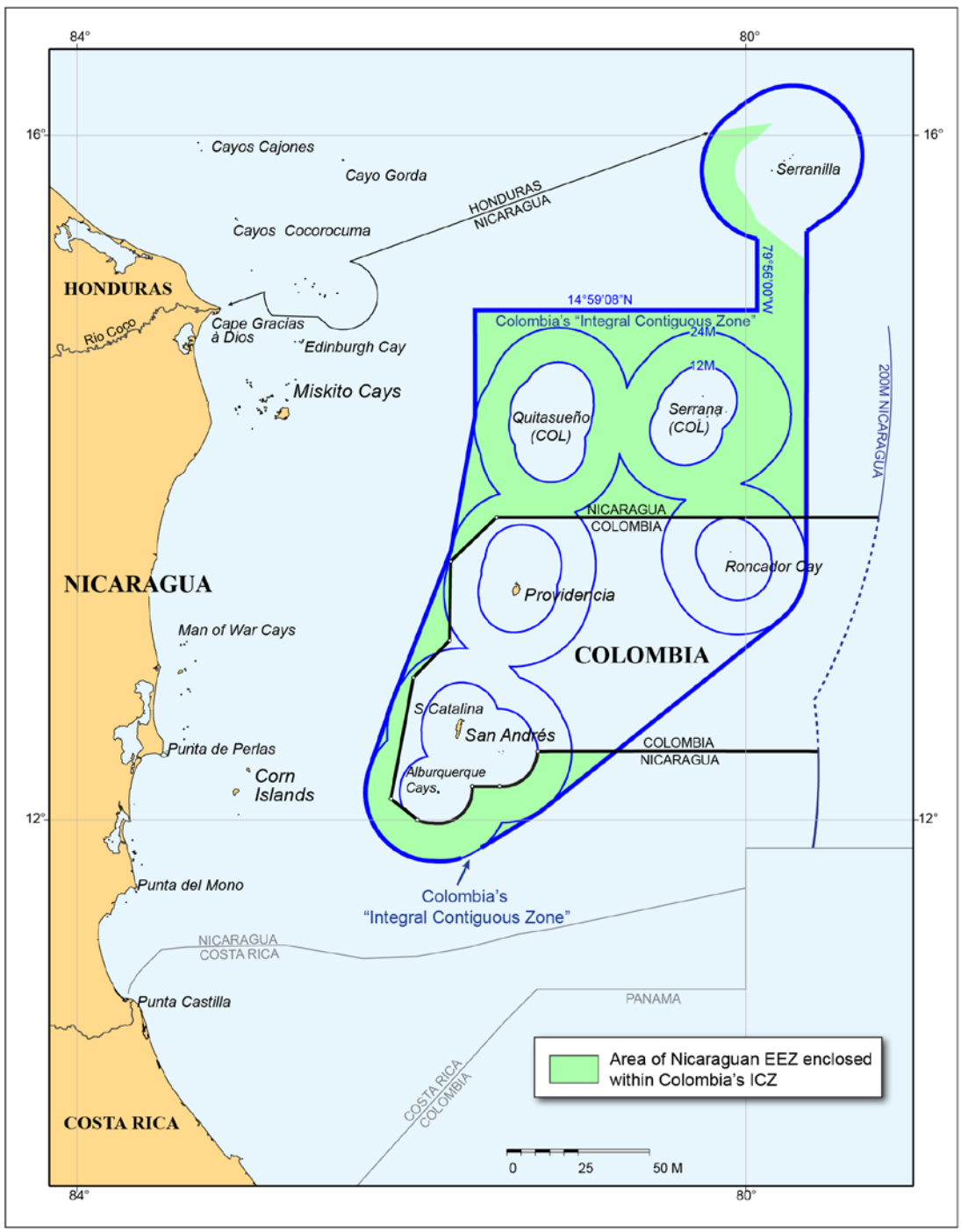
(b) CCM, Figure 5.1 (excerpt)

3.3 According to the Decree, the contiguous zones of *all* islands covered by the Decree, including Serranilla, are connected. Article 5(2) provides that, "where they intersect", the contiguous zones around the islands of the Archipelago of San Andrés, Providencia and Santa Catalina "generate a continuous and uninterrupted Contiguous Zone". Then it specifies that

> "the lines indicated for the outer limits of the contiguous zones will be joined to each other through geodetic lines. In the same fashion, these will be linked to the contiguous zone of the island of Serranilla by geodetic lines which maintain the direction of parallel 14° 59′ 08"N, and to Meridian 79° 56′ 00" W, and thence to the North, thus forming an Integral Contiguous Zone."

3.4 An accurate depiction of Colombia's integral contiguous zone is provided in Figure 3.2. As a result, Colombia's integral contiguous zone encroaches substantially in Nicaragua's exclusive economic zone, where Nicaragua alone has exclusive sovereign rights and jurisdiction.

Figure 3.2 Depiction of the text of Decree No. 1946



3.5 Colombia's defence of its integral contiguous zone is peculiar as it has no legal basis whatsoever. According to the Respondent, its integral contiguous zone is justified because it is a "manifestation of the cultural, administrative and political unity of the Archipelago," [101] which is an "inescapable factual consequence" [102] of the geography of the southwestern Caribbean Sea, and because it ensures "the 'proper administration and orderly management of the entire Archipelago of San Andrés, Providencia and Santa Catalina'."[103] In other words, Colombia says that it had no choice but to declare the integral contiguous zone as declared in Decree No. 1946.

3.6 There is hardly any attempt at legal argument in Colombia's defence. According to the Respondent, neither Article 24 of the 1958 Convention on the Territorial Sea and the Contiguous Zone nor Article 33 of UNCLOS reflect customary international law.[104] Despite Colombia's use of the words "customary international law,"[105] what it really argues is that there simply is no customary international law with respect to the contiguous zone. As Colombia puts it, "both the spatial conception of the contiguous zone and the powers which the contiguous State may exercise therein are to be determined by reference to context, function and consideration."[106] Nicaragua is said to have misunderstood this "historic adaptability of the law of the sea to idiosyncratic geographical situations."[107]

[101] CCM, para. 5.12.
[102] *Ibid.*
[103] *Ibid.*, para. 5.32.
[104] *Ibid.*, para. 5.39.
[105] *See e.g. ibid.*, and 5.54.
[106] *Ibid.*, para. 5.54. *See* also paras. 5.37 and 5.40.
[107] *Ibid.*, para. 5.2.

3.7 Since Colombia also claims that its contiguous zone is not limited by the maritime boundary established by the Court in its 2012 Judgment,[108] and that the contiguous zone may be declared over another State's EEZ,[109] Colombia in fact claims that it could potentially extend its contiguous zone over the whole Caribbean Sea (or even further), should Colombia consider that the "context" requires such an extension.

3.8 Contrary to what Colombia argues, customary international law prescribes geographical and material limits to the contiguous zone. Both types of limitation have been exceeded by the Respondent in its Decree No. 1946 (**A.**), the enactment of which constitutes an internationally wrongful act entailing Colombia's international responsibility (**B.**).

A. Colombia's Integral Contiguous Zone Is Not Consistent With International Law

3.9 The Parties agree that, since Colombia is not a Party to UNCLOS, customary international law is applicable in the present case.[110] As shown below, the geographical extension of Colombia's integral contiguous zone (**1.**) and the powers it claims to exercise in it (**2.**) exceed the limits allowed by customary international.

[108] *Ibid.*, paras. 5.16-5.17.
[109] *Ibid.*, paras. 5.22-5.24.
[110] I.C.J, Judgment, 19 November 2012, *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, *Reports 2012*, p. 666, para. 114 and p. 673, para. 137.

1. The Limits of Colombia's Integral Contiguous Zone Exceed the Maximum Breadth Allowed by International Law

3.10 Decree No. 1946 describes the geographical limits of Colombia's integral contiguous zone as follows:

> "1. Without prejudice to the terms of Section 2 of this Article, the Contiguous Zone of the island territories of Colombia in the Western Caribbean Sea extends up to a distance of 24 nautical miles measured from the baselines referred to in Article 3 above.
>
> 2. The Contiguous Zones adjacent to the territorial sea of the islands which form the island territories of Colombia in the Western Caribbean Sea, except for the islands Serranilla and Bajo Nuevo, where they intersect, generate a continuous and uninterrupted Contiguous Zone, across the whole of the Department of the Archipelago of San Andrés, Providencia and Santa Catalina […].
>
> In order to secure the proper administration and orderly management of the entire Archipelago of San Andrés, Providencia and Santa Catalina, and of their islands, cays and other formations and their maritime areas and resources, and in order to avoid the existence of irregular figures or contours which would make practical application difficult, the lines indicated for the outer limits of the contiguous zones will be joined to each other through geodetic lines. In the same fashion, these will be linked to the contiguous zone of the island of Serranilla by geodetic lines which maintain the direction of parallel 14° 59′ 08" N, and to Meridian 79° 56′ 00" W, and thence to the North, thus forming an Integral Contiguous Zone of the Department Archipelago of San Andrés, Providencia and Santa Catalina."[111]

3.11 As appears clearly from Figure 5.1 of Colombia's Counter-Memorial, parts of the Respondent's integral contiguous zone are located "beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is

[111] Presidential Decree No. 1946 of 9 September 2013, Article 5(1) and (2) (NM, Annex 9 and CCM, Annex 7).

measured."[112] Colombia does not deny this. It argues that customary international law does not prescribe a maximum breadth for the contiguous zone.[113]

3.12 State practice flatly contradicts Colombia's position. As of March 2018, 94 States, including non-parties to UNCLOS, have declared a contiguous zone. 88 of these 94 States have declared a 24-mile contiguous zone,[114] and 6 have declared a zone of between 14 and 18 nautical miles.[115] *None* has declared a zone extending beyond 24 nautical miles. Several States amended their previous contiguous zone legislation to conform to the 24-mile limit prescribed in UNCLOS Article 33. For instance, Namibia did so in 1991.[116] Even a non-party to UNCLOS, Syria, has recently reduced the breadth of its contiguous zone from 35 to 24 nautical miles.[117]

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[112] Article 33 of UNCLOS.
[113] CCM, para. 5.39.
[114] Algeria, Angola, Antigua and Barbuda, Argentina, Australia, Bahrain, Belgium, Brazil, Bulgaria, Cambodia, Canada, Cape Verde, Chile, China, Congo, Cuba, Cyprus, Democratic Republic of the Congo, Denmark, Djibouti, Dominica, Dominican Republic, Egypt, France, Gabon, Georgia, Ghana, Haiti, Honduras, India, Iran, Ireland, Jamaica, Japan, Liberia, Lithuania, Madagascar, Maldives, Malta, Marshall Islands, Mauritania, Mauritius, Mexico, Morocco, Mozambique, Myanmar, Namibia, Nauru, Netherlands, New Zealand, Nicaragua, Norway, Oman, Pakistan, Palau, Panama, Portugal, Qatar, Republic of Korea, Romania, Russian Federation, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, Senegal, Seychelles, Sierra Leone, South Africa, Spain, Sri Lanka, Syrian Arab Republic, Thailand, Timor-Leste, Trinidad and Tobago, Tunisia, Tuvalu, United Arab Emirates, United States of America, Uruguay, Vanuatu, Viet Nam and Yemen (http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/table_summary_of_claims.pdf) and Guinea (*Law of the Sea Bulletin*, n° 89, 2016, p. 16), Kiribati (*Law of the Sea Bulletin*, n° 87, 2015, p. 27)), Kuwait (*Law of the Sea Bulletin*, n° 89, 2016, p. 22), Niue (*Law of the Sea Bulletin*, n° 84, 2014, p. 36) and Palestine (*Law of the Sea Bulletin*, n° 89, 2016, p. 18).
[115] Bangladesh (18 nm), Finland (14 nm), Gambia (18 nm), Saudi Arabia (18 nm), Sudan (18 nm) and Venezuela (15 nm),See also M. J. Aznar, "La zone contiguë", in M. Forteau & J.-M. Thouvenin (eds.), *Droit international de la mer*, Paris, Pedone, 2017, p. 378.
[116] Territorial Sea and Exclusive Economic Zone of Namibia Amendment Act, 1991, *Government Gazette* No. 332, 30 December 1991, p. 2, reprinted in *L.O.S. Bull.*, No. 21, August 1992, p. 64.
[117] M. J. Aznar, "La zone contiguë", in M. Forteau & J.-M. Thouvenin (eds.), *Droit international de la mer*, Paris, Pedone, 2017, note 1529.

3.13 State practice is therefore not merely general, it is practically unanimous: a contiguous zone cannot extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured. This practice is reflected in Article 33(2) of UNCLOS, which provides that: "The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured." And the consolidation of this provision into a customary rule certainly explains the above-mentioned decisions of several States that had previously not complied with the norm to reduce the width of their contiguous zone to 24 nautical miles.

3.14 The customary status of Article 33(2) of UNCLOS is confirmed by doctrinal writings.[118]

3.15 Colombia puts forward a subsidiary argument concerning the breadth of its integral contiguous zone:

> "Should, however, the Court find that the 24-mile limit of the contiguous zone reflects customary international law, Colombia's ICZ is, nonetheless, lawful, pursuant to the customary exemption to such a numerical rule. As discussed above in Section 3(A), under customary international law, in unique geographical circumstances, the techniques according to which the external limit of a maritime zone is determined, if reasonable in context, may depart from the general rules in order to create a viable contiguous zone that enables the achievement of its purposes."[119]

[118] *See e.g*. F. Pardo Segovia, "Zonas maritimas previstas en la Convención sobre el Derecho del Mar: los casos del mar territorial, zona contigua, plataforma continental y zona económica exclusiva", Derecho del Mar, Análisis de la Convención de 1982, IDEI, 2001, pp. 122 *et seq*; C. Economides, "The Contiguous Zone Today and Tomorrow", in C. Rozakis and C.A. Stephanou (eds), *The New Law of the Sea,* Elsevier, Oxford, 1983, p. 72; V.L. Gutiérrez Castillo, "La zone contiguë dans la Convention des Nations Unies sur le droit de la mer de 1982", *Annuaire du droit de la mer*, Vol. 7, 2002, p. 155 and M. J. Aznar, "La zone contiguë", in M. Forteau and J.-M. Thouvenin (eds.), *Droit international de la mer*, Paris, Pedone, 2017, p. 383.
[119] CCM, para. 5.55.

3.16 In the absence of any Section 3(A) in Chapter 5 of the Counter-Memorial, Colombia might be referring to Section D(1) of Chapter 5. In that Section, Colombia invokes two cases in support of the proposition that "in unique geographical circumstances, the techniques according to which the external limit of a maritime zone is determined, if reasonable in context, may depart from the general rules":[120] the *Anglo-Norwegian Fisheries* case and the *Territorial and Maritime Dispute*. Neither of these cases is relevant to Colombia's argument.

3.17 The problem in the *Anglo-Norwegian Fisheries* was to identify the low-water mark in circumstances where the relevant coasts were "deeply indented and cut into."[121] In the present case, there is no such difficulty. As shown on Figure 5.1 of its Counter-Memorial, Colombia is perfectly able to determine the 24-nautical-mile limits from its islands, including in areas which do not encroach upon Nicaragua's EEZ; and it does not assert the contrary. It only invokes a few practical difficulties of implementation, without further explanation.[122]

3.18 As regards the *Territorial and Maritime Dispute*, it has simply no link whatsoever with what Colombia is arguing. The passage quoted by Colombia concerns the simplification of a common maritime boundary between two States and not the unilateral extension by a State of one of its maritime zones beyond the maximum limit authorized by customary international law.[123]

3.19 Colombia tries to further extend the geographical limits of its integral contiguous zone by disregarding the 2012 Judgment:

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[120] *Ibid*.
[121] I.C.J., Judgment, 18 December 1951, *Fisheries case*, *Reports 1951*, pp. 128-129.
[122] CCM, para. 5.30 quoting its own Decree No. 1946 in support.
[123] I.C.J, Judgment, 19 November 2012, *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, *Reports 2012*, p. 710, para. 235.

> "Because the Court in its 2012 Judgment did not address the contiguous zone or questions relating to Colombia's contiguous zone rights, there is no legal basis for denying the entitlement to a contiguous zone of the islands of the Archipelago."[124]

3.20 Nicaragua has never denied the entitlement of Colombia to a contiguous zone. However, this entitlement is limited by international law in two ways:

- as shown above, under customary international law, a contiguous zone has a maximum extent of 24 nautical miles;[125] and

- in the present case, the Parties' entitlements are limited by the maritime boundary established by the Court in its 2012 Judgment.

3.21 The Court's 2012 Judgment divided the relevant maritime areas between Nicaragua and Colombia. On the Nicaraguan side of the maritime boundary lie Nicaragua's exclusive economic zone and continental shelf. Articles 56 and 58 of UNCLOS, which reflect customary international law, provide a complete set of rights and obligations for the coastal State in its EEZ and for other States. In the area concerned, Colombia is such a third State. The rights of third States in the exclusive economic zone are set out in Article 58, and are limited to navigation, overflight, and the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms. It does not encompass contiguous zone rights.

3.22 Consequently, the fact that this Judgment does not expressly mention the contiguous zone is not decisive. As the recent Proelss Commentary explains: "the drafters of UNCLOS III, guided by the desire to streamline the voluminous text of the Convention, simply considered Arts. 74 and 75 a sufficient substitute for

[124] CCM., para. 5.17.
[125] *See* paras. 3.12-3.14 above.

the deleted paragraph [concerning the contiguous zone]."[126] The method for delimiting the exclusive economic zone is thus considered as also applicable for the delimitation of the contiguous zone of the parties and, "in fact, the delimitation of the EEZ routinely includes delimitation of the contiguous zone, if only implicitly."[127]

3.23 As Colombia rightly noted, the Parties discussed the issue of the contiguous zone during the *Territorial and Maritime Dispute*[128] and, significantly, a number of maps presented by Colombia to the Court depicted contiguous zones around the features over it claimed to have sovereignty.[129] Therefore, the maritime boundary fixed in that case must be considered as also applying to the contiguous zone.

3.24 It is telling that Colombia appears to believe that its contiguous zone is limited by the maritime boundary between Nicaragua and Honduras to the north of Serranilla and by its maritime boundary with Jamaica to the east of that island.[130] In its Figure 5.1, the contiguous zone around Serranilla is bounded in the north by the maritime frontier with Honduras and to the east by the joint regime area the Respondent established with Jamaica. It is equally revealing that Colombia does not claim a contiguous zone around Bajo Nuevo, which is entirely located in the Colombia-Jamaica joint regime area. The maritime boundary between Nicaragua and Colombia established in the 2012 Judgment constitutes a similar geographical limit.

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[126] A. Proelss (ed.), *United Nations Convention on the Law of the Sea. A Commentary*, Beck/Hart/Nomos, 2017, p. 263. See also S.P. Jagota, "Maritime Boundary", *R.C.A.D.I.*, Vol. 171, 1981, p. 179.
[127] *Ibid.*
[128] CCM, para. 5.4.
[129] *See* Rejoinder of Colombia in the *Territorial and Maritime Dispute*, 18 June 2010, Figures R-7.1 (p. 239) et R-8.3 (p. 307) and CCM, Figure 5.1 (p. 204).
[130] *See ibid.*, Figure 5.1.

3.25 Colombia's integral contiguous zone is not consistent with international law not only because it, purportedly, extends beyond 24 nautical miles from the Colombian baselines, and because it extends into maritime space that falls on the Nicaraguan side of the boundary delimited by the Court, but also because the powers the Respondent claims to exercise therein exceed what international law authorizes.

2. The Powers Colombia Granted itself in the Contiguous Zone Exceed What International Law Allows

3.26 The powers Colombia claims to exercise in its integral contiguous zone are set out in Article 5 of Decree No. 1946. Paragraph 2 of Article 5 specifies that the integral contiguous zone is established "to secure the proper administration and orderly management of the entire Archipelago of San Andrés, Providencia and Santa Catalina, and of their islands, cays and other formations and their maritime areas and resources" and paragraph 3 stipulates that, in this contiguous zone, Colombia "exercises the faculties of enforcement and control necessary to"

> "a) Prevent and control the infractions of the laws and regulations related with the integral security of the State, including piracy and trafficking of drugs and psychotropic substances, as well as conduct contrary to the security in the sea and the national maritime interests, the customs, fiscal, migration and sanitary matters which take place in its insular territories or in their territorial sea. In the same manner, violations against the laws and regulations related with the preservation of the maritime environment and the cultural heritage will be prevented and controlled.

> b) Punish violations of laws and regulations related to the matters indicated in section a) above, committed in its island territories or in their territorial sea"[131]

3.27 Nicaragua submits that Article 5 of Decree No. 1946 is inconsistent with customary international law (**b.**) which is reflected in Article 33 of UNCLOS (**a.**).

(a) Article 33(1) of UNCLOS reflects customary international law

3.28 Article 33(1) of UNCLOS reads as follows:

> "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."

3.29 The text of this provision is almost identical to the article drafted in 1956 by the ILC This draft article read 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 or sanitary regulations within its territory or territorial sea;
> *(b)* Punish infringement of the above regulations committed within its territory or territorial sea."[132]

[131] Presidential Decree No. 1946 of 9 September 2013, Article 5(3) (NM, Annex 9 and CCM, Annex 7).
[132] *ILC Yearbook 1956*, Vol II, p. 294.

3.30 The matters listed in this draft article reflect State practice contemporary with its adoption.[133] In its comment on the work of the ILC, the United Kingdom, confirmed that:

> "on the basis of established practice, the article proposed by the Commission is acceptable provided that:
>
> (i) Jurisdiction within the contiguous zone is restricted to customs, fiscal or sanitary regulations *only*."[134]

3.31 During the Geneva Conference, the discussion focused on the interests that a State could protect in its contiguous zone. As Colombia notes, in addition to those matters listed in the ILC Draft Article, Ceylon proposed to add immigration matters, and Poland to add security issues.[135] A text incorporating both proposals was sent to the Plenary Meeting but did not obtain the necessary majority.[136] This text was then replaced by another, which included the reference to immigration *but not* to security.[137] This text was adopted without a single vote against.[138] Article 24(1) of the Geneva Convention on the Territorial Sea and the Contiguous Zone thus provides that:

> "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. […]"

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[133] Paragraph 2 of the Commentary to Draft Article 66, *ibid.*, p. 294.
[134] "Comments by Governments on the Draft Provisional Articles Concerning the Regime of the Territorial Sea Adopted by the International Law Commission at its Sixth Session" (Doc. A/CN.4/90 and Add.1-6), *ILC Yearbook 1955*, Vol II, p. 57 – italics added.
[135] CCM, para. 5.43.
[136] *Official Records*, Vol. 2, p. 40.
[137] *See* Doc. A/CONF.13/L.31, *ibid.*, p. 126.
[138] 60 votes to none, 13 abstentions. See *Official Records*, Vol. 2, p. 40. *See* also A. Proelss (ed.), *United Nations Convention on the Law of the Sea. A Commentary*, Beck/Hart/Nomos, 2017, p. 261.

3.32 Colombia's reference to Judge Oda's position, according to which Article 24 does not "not truly represent the opinion of the majority of the States at the Conference,"[139] is irrelevant. Judge Oda was not addressing the matters listed in Article 24, but rather the nature of the powers States may exercise in their contiguous zone. In his article, Judge Oda discussed Sir Gerald Fitzmaurice's argument that in the contiguous zone, States exercise control and not jurisdiction[140]. Judge Oda disagreed and argued that, in the contiguous zone, States exercise "authority as exercisable in the territorial sea."[141] However, he took no position on the customary law nature of the list of matters in Article 24. It is interesting to note that Judge Oda was even more restrictive than the participants to the Geneva Conference as regards the list of matters to be covered. He indeed proposed to include only "customs or sanitary control."[142]

3.33 The Third United Nations Conference on the Law of the Sea was another opportunity for the participants to broaden the list of matters in respect of which the powers provided in the contiguous zone might be exercised, or to adopt a non-exhaustive list. They chose not to do so. The contiguous zone did not generate much discussion during this Conference,[143] and as early as 1975 the Informal Single Negotiating Text embodied a provision almost identical to that of Article 33 of UNCLOS:[144]

[139] S. Oda, "The Concept of the Contiguous Zone", *Int'l & Comp. L. Q.*, Vol. 1, 1962, p. 153.
[140] *Ibid.*, p. 131
[141] *Ibid.*, p. 153.
[142] *Ibid*.
[143] *See* M. J. Aznar, "La zone contiguë", in M. Forteau & J.-M. Thouvenin (eds.), *Droit international de la mer*, Paris, Pedone, 2017, p. 373.
[144] *See* Doc. A/CONF.62/WP.8/Part II, Official Records of the Third United Nations Conference on the Law of the Sea, Vol. IV, p. 157.

> "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 regulations within its territory or territorial sea;
> *(b)* Punish infringement of the above regulations committed within its territory or territorial sea."[145]

3.34 Thus, since the ILC 1956 Draft Article, two diplomatic conferences have been held, and the participants in these conferences have chosen to add only immigration to the list of matters in respect of which States may exercise powers in their contiguous zone.

3.35 Colombia then refers to two old U.S. domestic courts' decisions.[146] Not only do domestic law judgments have very little weight in the interpretation of a treaty provision or of customary international law, but the ones quoted by Colombia are directly contradicted by the more recent proclamation of the President of the United States. On 2 September 1999, referring to "international law, reflected in the applicable provisions of the 1982 Convention on the Law of the Sea", President Clinton proclaimed that

> "The contiguous zone of the United States is a zone contiguous to the territorial sea of the United States, in which the United States may exercise the control necessary to prevent infringement of its customs, fiscal, immigration, or sanitary laws and regulations within its territory or territorial sea, and to punish infringement of the above laws and regulations committed within its territory or territorial sea."[147]

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[145] The only difference is the addition of the word "laws" in paragraphs 1(a) and (b) of Article 33 of UNCLOS.
[146] *See* CCM, paras. 5.47 referring to a 1975 judgment of a district court of Maine and 5.51-5.52 referring to an 1804 Opinion of Chief Justice John Marshall.
[147] Available at: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/USA_1999_Proclamation.pdf.

3.36 This proclamation appears in sharp contrast with the opinion of the Chief Justice Marshall in 1804 calling for a "flexible contiguous zone."[148] President Clinton's proclamation reflects the evolution of international law towards a restricted and clearly regulated contiguous zone. As explained above,[149] a review of the codification process shows that the ILC, on the basis of State practice, and States during the successive law of the sea diplomatic conferences, adopted a restrictive approach. They were mindful of the risk of abuse, and decided to strictly fix both the geographical and the material limits of the contiguous zone. The regrets of Professors McDougal and Burke concerning this codification process confirm that it did not unfold in the way they professed, i.e. a flexible contiguous zone.[150]

3.37 Finally, in support of its integral contiguous zone claim, Colombia refers to what it calls "extensive State practice."[151] Appendix B to its Counter-Memorial lists 41 States, the national legislation of which is said to address the same concerns as Colombian Decree No. 1946.[152]

3.38 This misleading presentation of the State practice invoked by Colombia calls for numerous comments:

- Burma and Myanmar being two different names for the same country, Appendix B contains 40 and not 41 examples;

- 10 of these 40 examples are irrelevant to the present dispute[153];

[148] *See* CCM, para. 5.51.
[149] *See* paras. 3.28-3.34 above.
[150] *See* CCM, para. 5.53.
[151] CCM, para. 5.48.
[152] *Ibid*.
[153] Cameroun and Israel have not yet declared a contiguous zone. The legislations referred to in Appendix B of Djibouti, Kiribati, Palau, Romania and the United States do not address security,

- Of the 30 remaining national laws, only 11 have been enacted *after* the signature of UNCLOS;[154] and, most importantly,

- Of these 30 laws, none has the same scope as Decree No. 1946. Only 18 grant control over security issues,[155] 9 over environmental issues,[156] 4 over cultural heritage protection,[157] 1 over the fight against drug trafficking,[158] 1 one over the State's national interests[159] and none over the fight against piracy.

3.39 A careful review of Colombia's Appendix B therefore shows that the State practice from which the Respondent seeks support is, at best, uncertain and does not reflect a general practice. Therefore, it cannot form the content of customary international law.[160] The reference to a passage in the Court's 2009 Judgment in the *Dispute Regarding Navigational and Related Rights* on the evolutive interpretation of treaties does not help Colombia's case.[161] Colombia has not been able to establish that State practice points to the evolution for which it argues. The practice it lists is both scarce and rather old.

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environmental, drug trafficking, piracy or national maritime interests issues. The legislation of Gambia is old and unclear as it refers to "any law or right of The Gambia." Italy's ecological protection zone is linked to the concept of contiguous zone but derives from the State's jurisdiction in its EEZ, in accordance with Article 56 of UNCLOS. Finally, the legislation of Vietnam mentions only the obligation for third States' military ships to give notice when passing through the contiguous zone.

[154] 16 have been adopted before 10 December 1982, 3 of these 16 examples even pre-dates the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone. Finally, 2 examples are not dated.

[155] Albania, Bangladesh, Burma/Myanmar, Cambodia, China, Cuba, Egypt, Haiti, India, Iran, Pakistan, Saudi Arabia, Sudan, Syria, United Arab Emirates, Venezuela, People's Democratic Republic of Yemen and Yemen Arab Republic.

[156] China, Iran, Jamaica, Malta, Samoa, Saudi Arabia, Sierra Leone, Syria and Taiwan. It is to be noted that Malta's legislation is restricted to "pollution".

[157] Cyprus, France, Mauritius and Norway.

[158] Spain.

[159] Venezuela.

[160] *See* J.E. Noyes, "The Territorial Sea and Contiguous Zone", *in* D.R. Rothwell, A.G. Oude Elferink, K.N. Scott and T. Stephens, The Oxford Handbook of the Law of the Sea, O.U.P., 2015, p. 111.

[161] CCM, para. 5.49.

3.40 To conclude, none of the elements put forward by Colombia supports its argument, according to which customary international law authorises States to exercise control, in their contiguous zone, over matters other than those listed in Article 33 of UNCLOS.

(b) Article 5 of Decree No. 1946 is inconsistent with international law

3.41 Considering that State powers in the contiguous zone are limited by customary international law as reflected in Article 33 of UNCLOS, Article 5 of Decree No. 1946 is inconsistent with international law because it asserts Colombia's right to manage the maritime resources and to exercise control to prevent infringements of the laws and regulations related to the preservation of the maritime environment (i.), security and Colombia's national maritime interests (ii.) and the protection of the cultural heritage (iii.).

i. Management of maritime resources and preservation of the marine environment

3.42 The powers to manage maritime resources and to prevent and control the application of "laws and regulations related with the preservation of the maritime environment"[162] that Colombia grants itself in its integral contiguous zone are not only absent from the list set out in Article 33 of UNCLOS, they cannot be reconciled with Nicaragua's sovereign rights and jurisdiction in its EEZ.

3.43 Contrary to what Colombia asserts, a coastal State has more than a "limited number of enumerated economic rights" in its EEZ.[163] Customary

[162] Presidential Decree No. 1946 of 9 September 2013, Article 5(3) (NM, Annex 9 and CCM, Annex 7).
[163] CCM, para. 5.23.

international law applicable to the EEZ is reflected in Article 56 of UNCLOS, as Colombia recognizes.[164] Article 56 grants the coastal State sovereign rights "for the purpose of […] conserving and managing the natural resources"[165] and jurisdiction with regard to "the protection and preservation of the marine environment"[166] in its *exclusive* economic zone. Colombia basically grants to itself some of the exclusive sovereign rights that Nicaragua enjoys in its exclusive economic zone.

3.44 Colombia's interpretation of Article 33 does not help its case. It asks the Court to read "the 'laws for the protection of the environment', in Article 5 of the Presidential Decree No 1946 […] to qualify as 'sanitary laws and regulations'."[167] Colombia refers only to very general statements of the Court made in very different contexts and with no link whatsoever to the concept of contiguous zone or the term 'sanitary'. The words 'sanitary' and 'environment' are not synonyms. The expression "sanitary laws and regulations" cannot be interpreted to encompass all laws and regulations relating to the protection of the environment.

ii. Security and national maritime interests

3.45 Article 5 of Decree No. 1946 provides that Colombia may "[p]revent and control the infractions of the laws and regulations related with the integral security of the State […] as well as conduct contrary to the security in the sea and the national maritime interests." Neither of these matters is covered by customary international law.

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[164] *Ibid*., para. 5.22.
[165] Article 56(1)(a).
[166] Article 56(1)(b)(iii).
[167] CCM, para. 5.50.

3.46 Colombia accepts that the ILC excluded security from the list of matters covered by Draft Article 66. Indeed,

> "[t]he Commission did not recognize special security rights in the contiguous zone. It considered that the extreme vagueness of the term 'security' would open the way for abuses and that the granting of such rights was not necessary. The enforcement of customs and sanitary regulations will be sufficient in most cases to safeguard the security of the State. In so far as measures of self-defence against an imminent and direct threat to the security of the State are concerned, the Commission refers to the general principles of international law and the Charter of the United Nations."[168]

3.47 The absence of reference to security has been said to be the "most important similarity" between Article 24 of the 1958 Geneva Convention and Article 33 of UNCLOS.[169] Moreover, as noted in the recent *Proelss* commentary on UNCLOS, claims concerning security issues are "widely and consistently protested against, so that these States cannot invoke an authorization under customary international law."[170] In their important survey, Roach and Smith refer to numerous protests *vis-à-vis* claims concerning security matters;[171] these protests clearly evidence the absence of any *opinio juris* in support of the norm alleged by Colombia. The authors also point to the example of Chile, which, in 1986, specifically discussed and abandoned the idea of adding security issues within its powers in its contiguous zone.[172]

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[168] *ILC Yearbook 1956*, Vol II, p. 295.
[169] S. Ghosh, *Law of the Territorial Sea: Evolution and Development*, 1988, p. 276 (CCM, Annex 82).
[170] A. Proelss (ed.), *United Nations Convention on the Law of the Sea. A Commentary*, Beck/Hart/Nomos, 2017, p. 271. See also T. Treves, "Codification du droit international et pratique des États dans le droit de la mer", *R.C.A.D.I.*, Vol. 23, 1990, pp. 137-138 and V.L. Gutiérrez Castillo, "La zone contiguë dans la Convention des Nations Unies sur le droit de la mer de 1982", *Annuaire du droit de la mer*, Vol. 7, 2002, p. 153.
[171] J.A. Roach and R.W. Smith, *Excessive Maritime Claims*, Martinus Nijhoff, 3rd ed., 2012, pp. 154-157.
[172] *Ibid.*, p. 159.

3.48 The expression "national maritime interests" is even more vague than the term "security." It is absent from UNCLOS Article 33(1) and can by no means be read into it. Only one other State has referred to this notion in its legislation concerning its contiguous zone.[173] This shows a clear lack of practice, which excludes any possibility of its crystallization into a rule of customary international law.

3.49 The exclusion of security and national interests from the scope of States' powers in the contiguous zone under positive international law may be explained by the vagueness of these notions and the risk of interference with the freedom of navigation they create.[174]

iii. Cultural heritage

3.50 Colombia also claims that in its integral contiguous zone "violations against the laws and regulations related with […] the cultural heritage will be prevented and controlled."[175]

3.51 Like environmental, security and national interest matters, Colombia's claim with respect to cultural heritage is not recognized by customary international law, as reflected in Article 33 of UNCLOS. Only a State Party to UNCLOS may "presume that the[] removal [of archaeological and historical objects] from the seabed in the [contiguous] zone without its approval would

[173] *See* para. 3.38 above.
[174] *See* e.g. L.B. Sohn, J.E. Noyes, E. Franckx, and K.G. Juras, *Cases and Materials on the Law of the Sea*, Leiden/Boston, Brill/Nijhoff, 2nd ed., 2014, pp. 427-428 and J.E. Noyes, "The Territorial Sea and Contiguous Zone", *in* D.R. Rothwell, A.G. Oude Elferink, K.N. Scott and T. Stephens, The Oxford Handbook of the Law of the Sea, O.U.P., 2015, p. 110.
[175] Presidential Decree No. 1946 of 9 September 2013, Article 5(3)(a) (NM, Annex 9 and CCM, Annex 7).

result in an infringement within its territory or territorial sea of the laws and regulations," in accordance with Article 303 of UNCLOS. Colombia has not demonstrated that Article 303 of UNCLOS reflects customary international. The State practice listed by Colombia is insignificant in this regard.[176] In any case, the vagueness of the concept of "cultural heritage" goes beyond the scope of Article 303 of UNCLOS.

3.52 Moreover, Colombia itself considers that States have sovereign rights and jurisdiction over cultural heritage in their exclusive economic zone. Indeed, the Respondent recently enacted legislation, which provides that the cultural heritage found in its exclusive economic zone appertains to Colombia.[177] Law No. 1675 of 2013 and Decree No. 1698 set out a system of authorizations and contracts for all activities related to cultural heritage found in Colombia's maritime zones, including its exclusive economic zone and continental shelf.[178] Colombia cannot reserve to itself an exclusive right of control over the cultural (including archaeological) heritage lying in its own EEZ and deny the same right to Nicaragua.

B. Colombia's Enactment Of Decree No. 1946 Entails Its Responsibility

3.53 According to Colombia, whether or not its integral contiguous zone is consistent with international law would, in a sense, be irrelevant because "the

[176] *See* para. 3.38 above.
[177] *See* Article 2 of Law No. 1675 of 30 July 2013 (NR, Annex 8) and Articles 3 and 41 of Decree No. 1698 of 5 September 2014 (NR, Annex 10).
[178] *See* Article 10 of Law No. 1675 of 30 July 2013 (NR, Annex 8) and Articles 14 and 26 of Decree No. 1698 of 5 September 2014 (NR, Annex 10).

critical point is that Nicaragua fails to demonstrate an actual injury suffered by it, as the result of specific actions or measures taken by Colombia in its ICZ."[179]

3.54 Colombia however omits two important legal points.

3.55 *First*, it is a well-established principle that the responsibility of a State for an international wrongful act is not dependent on an injury that this act may have caused. This principle is reflected in Articles 1 and 2 of the ILC Articles on responsibility of States for internationally wrongful acts:

> "Article 1
>
> Every internationally wrongful act of a State entails the international responsibility of that State."[180]
>
> "Article 2
>
> There is an internationally wrongful act of a State when conduct consisting of an action or omission:
>
> (*a*) is attributable to the State under international law; and
> (*b*) constitutes a breach of an international obligation of the State."**[181]**

3.56 As made clear in the Commentary to Article 2:

> "there is no exception to the principle stated in article 2 that there are two necessary conditions for an internationally wrongful act–conduct attributable to the State under international law and the breach by that conduct of an international obligation of the State. The question is whether those two necessary conditions are also sufficient. It is sometimes said that international responsibility is not engaged by conduct of a State in disregard of its obligations unless some further element exists, in particular, 'damage' to another State. But whether

[179] CCM, para. 5.57.
[180] *ILC Yearbook 2001*, Vol. II, Part. 2, p. 54.
[181] *Ibid.*, p. 34.

> such elements are required depends on the content of the primary obligation, and there is no general rule in this respect."[182]

In the present case, the primary obligation consists in the preservation of the *exclusive* sovereign rights belonging to Nicaragua in its EEZ in accordance with Articles 56 and 58 of the UNCLOS. By appropriating such rights to itself, Colombia has clearly entailed its international responsibility.

3.57 Incidentally and *second*, the mere enactment of national legislation may constitute an internationally wrongful act. The ILC made it clear in the Commentary of Article 12 of its Articles on Responsibility of States for internationally wrongful acts:[183]

> "Conduct proscribed by an international obligation may involve an act or an omission or a combination of acts and omissions; *it may involve the passage of legislation*, or specific administrative or other action in a given case, or even a threat of such action, whether or not the threat is carried out, or a final judicial decision. It may require the provision of facilities, or the taking of precautions or the enforcement of a prohibition […]"[184]

And that

> The question often arises whether an obligation is breached by the enactment of legislation by a State, in cases where the content of the legislation *prima facie* conflicts with what is required by the international obligation, or whether the legislation has to be implemented in the given case before the breach can be said to have occurred. Again, no general rule can be laid down that is applicable to all cases. *Certain obligations may be breached by the mere passage of incompatible legislation*"[185].

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[182] Paragraph 9 of the Commentary to Article 2, *ibid.*, p. 36.
[183] Article 12 provides: "There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character" (*ILC Yearbook 2001*, Vol. II, Part. 2, p. 54).
[184] Paragraph 2 of the Commentary to Article 12, *ibid.*, p. 55 – emphasis added.
[185] Paragraph 12 of the Commentary to Article 12, *ibid.*, p. 57 – emphasis added.

3.58 This proposition received application as soon as 1926 in the *Case concerning certain German interests in Polish Upper Silesia*. In this case, the P.C.I.J. reviewed the conformity of a Polish statute with a 1922 German-Polish treaty.[186] The ILC has given numerous other examples to this effect in the Commentary to its Article 12.[187]

3.59 Recent law-of-the-sea cases are even more compelling. In the *"Virginia G"* case, the ITLOS. made clear that "it is called upon to determine whether, in enacting or implementing its law, a State Party has acted in conformity with the Convention."[188] In that case, the Tribunal examined "whether the legislation of Guinea-Bissau concerning bunkering of fishing vessels conforms to articles 56 and 62 of the Convention."[189] This is precisely what Nicaragua requests the Court to do in the present case: to examine whether Decree No. 1946 is in conformity with Article 33 of UNCLOS.

3.60 Therefore, it is unquestionable that the adoption of a national law or regulation entails the international responsibility of the enacting State. In reality, Colombia appears to agree with this proposition. The Respondent indeed counter-

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[186] P.C.I.J., 25 May 1926, *Case concerning certain German interests in Polish Upper Silesia*, *Series A, No. 7*, pp. 18-19.

[187] See *ILC Yearbook 2001*, Vol. II (Part. 2), p. 57, note 216: "the findings of the European Court of Human Rights in *Norris* v. *Ireland*, *Eur. Court H.R., Series A, No. 142*, para. 31 (1988), citing *Klass and Others* v. *Germany, ibid., No. 28*, para. 33 (1978); *Marckx* v. *Belgium, ibid., No. 31*, para. 27 (1979); *Johnston and Others* v. *Ireland, ibid., No. 112*, para. 42 (1986); *Dudgeon* v. *the United Kingdom, ibid., No. 45*, para. 41 (1981); and *Modinos* v. *Cyprus, ibid., No. 259*, para. 24 (1993). See also *International responsibility for the promulgation and enforcement of laws in violation of the Convention (arts. 1 and 2 American Convention on Human Rights)*, Advisory Opinion OC–14/94, Inter-American Court of Human Rights, Series A, No. 14 (1994). The Inter-American Court also considered it possible to determine whether draft legislation was compatible with the provisions of human rights treaties: *Restrictions to the Death Penalty (arts. 4(2) and 4(4) American Convention on Human Rights)*, Advisory Opinion OC–3/83, Series A, No. 3 (1983)."

[188] I.T.L.O.S., Judgment, 14 April 2014, *M/V "Virginia G" (Panama/Guinea-Bissau)*, *Reports 2014*, p. 71, para. 227, referring to I.T.L.O.S., Judgment, 1 July 1999, *M/V "SAIGA" (No. 2)* (*Saint Vincent and the Grenadines* v. *Guinea*), *Reports 1999*, pp. 52-53, para. 121.

[189] *Ibid.*, para. 225.

claims that "Nicaragua's Presidential Decree No 33-2013 of 19 August 2013 is in violation of international law and of Colombia's sovereign rights and maritime spaces, and therefore, must be adjusted in order that it complies with the rules of international law."[190]

3.61 In any event, as shown in the Memorial[191] and in Chapter IV below, Colombia has infringed and is infringing upon Nicaragua's maritime zone while implementing its integral contiguous zone. Colombia threatens, hinders and even precludes ships with Nicaraguan fishing licences from fishing in its contiguous zone.[192]

3.62 To summarize, Colombia's integral contiguous zone violates international law in two ways.

- *First*, it extends beyond the 24-mile limit prescribed by customary international law and the maritime boundary between Nicaragua and Colombia, as established by the Court in its 2012 Judgment; and

- *Second*, it purportedly grants Colombia powers that customary international law does not authorize it to exercise.

[190] CCM, para. 10.65.
[191] *See* NM, paras. 2.32 (note 78), 2.35, 2.43, and Annex 23B (Vol. 1, p. 336).
[192] *See* Chapter VI, sections C and D below.

CHAPTER IV: COLOMBIA HAS VIOLATED NICARAGUA'S SOVEREIGN RIGHTS AND JURISDICTION

4.1. The previous Chapter of this Reply showed that Colombia's enactment of the so-called "Integral Contiguous Zone" itself constitutes a serious violation of Nicaragua's sovereign rights and jurisdiction as adjudged by the Court in 2012. This Chapter discusses many other violations of Nicaragua's rights and jurisdiction that have occurred in the five and a half years since that Judgment.

4.2. **Section A** addresses and refutes Colombia's argument that, as a matter of law, the Court does not have jurisdiction to consider incidents that occurred *after* the date the Pact of Bogotá ceased to be in force for it (27 November 2013). Colombia's argument is contradicted by the Court's March 2016 Judgment on Preliminary Objections in which it ruled that it has jurisdiction over two of Colombia's counter-claims, notwithstanding the fact that those claims were submitted more than three years after the title of jurisdiction lapsed. If the Court has jurisdiction to hear new claims submitted after the Pact of Bogotá ceased to be in force between the Parties, *a fortiori* it has jurisdiction to consider facts relevant to the claim that was the subject of Nicaragua's Application even when those facts occurred after the lapse in the title of jurisdiction.

4.3. **Section B** addresses Colombia's baseless assertion that Nicaragua's claims are not serious. In fact, the opposite is true. Colombia's violations constitute an on-going course of conduct in flagrant disregard of Nicaragua's sovereign rights and jurisdiction as determined by the Court in 2012. The mere fact that Nicaraguan authorities have acted responsibly to try to minimize public tension between the Parties does not mitigate the serious nature of Colombia's violations.

4.4. **Section C** rebuts Colombia's attempt to present innocent explanations for the incidents recounted in Nicaragua's Memorial that occurred *before* 27 November 2013. The heart of Colombia's argument in this respect is that its personnel were merely exercising their right of navigation and overflight under international law. Nicaragua will show that this argument does not withstand scrutiny, especially against the backdrop of Colombia's repeated statements rejecting the 2012 Judgment—statements that continue to this day. In any event, the facts show that Colombia's conduct was plainly in violation of Nicaragua's rights.

4.5. **Section D** will address Colombia's violations of Nicaragua's rights *after* 27 November 2013. Nicaragua recounted some of these incidents in its September 2016 Memorial. Aside from its erroneous legal argument that the Court does not have jurisdiction to consider these events, Colombia makes no effort to dispute that they occurred exactly as described in Nicaragua's Memorial. The facts therefore can and should be deemed admitted. Moreover, Colombia's violations of Nicaragua's sovereign rights and jurisdiction have continued to this day. Nicaragua will therefore supplement the record by presenting evidence of additional incidents that have occurred since it submitted its Memorial.

4.6. Finally, **Section E** demonstrates that Colombia also continues to violate Nicaragua's sovereign rights and jurisdiction by offering oil blocks that encroach, in whole or in part, on Nicaragua's EEZ.

A. The Court May Consider Incidents That Occurred After 26 November 2013

4.7. In its Memorial, Nicaragua recounted the details of 36 incidents in which Colombia had violated Nicaragua's rights and jurisdiction.[193] Colombia attempts

[193] NM, paras. 2.22-2.52.

to provide innocent explanations for the 13 incidents that took place *before* 26 November 2013. In contrast, it makes no effort to excuse the other 23 that took place *after* that date. It confines itself to the (erroneous) legal argument that "the evidence relating to these events is not admissible because the Court has no jurisdiction over alleged violations that occurred after [26 November 2013],"[194] the date when the Pact of Bogotá ceased to be in force for Colombia.

4.8. This argument is easily rejected. Colombia devotes only one paragraph of the Counter-Memorial to an attempt to justify it. That paragraph, in its entirety, reads as follows:

> "However, the situation is different when it comes to post-critical date events. Pursuant to Colombia's denunciation of the Pact of Bogotá on 27 November 2012, the Pact, including its dispute resolution provisions, ceased to be in force for Colombia as of 27 November 2013, the day after Nicaragua's Application was filed. Given that Colombia's consent to the Court's jurisdiction lapsed as of that date, the Court has no jurisdiction *ratione temporis* to consider any alleged violations that occurred afterwards. Stated another way, any facts on which Nicaragua relies in support of its claims that post-date 26 November 2013 are not apposite or subject to judicial review. Had those facts been adduced in connection with a separate claim or a new case introduced by Nicaragua against Colombia after 26 November 2013, there clearly would have been no jurisdiction. Nor do such facts amount to a continuing pattern of allegedly illegal conduct on the part of Colombia."[195]

4.9. Colombia cites no precedent or other authority to support its contention. The reason is simple: there is none. In fact, the Court's jurisprudence makes clear that jurisdiction over the dispute vested as of the date of Nicaragua's Application. That being the case, the Court retains jurisdiction over the dispute in all its

[194] CCM, paras. 4.16. Although Colombia awkwardly conflates issues of admissibility and jurisdiction, its argument is actually addressed to issues of jurisdiction, not admissibility.
[195] CCM, para. 4.21.

aspects, including violations that occurred after 26 November 2013, notwithstanding the subsequent lapse in the title of jurisdiction.

4.10. The Court's Judgment on Colombia's counter-claims is conclusive on this point. The Court will recall that Nicaragua resisted Colombia's counter-claims by arguing that they fell outside the Court's jurisdiction because they were submitted nearly three years after the Pact of Bogotá ceased to be in force for Colombia. The Court rejected Nicaragua's argument, ruling:

> "*Once the Court has established jurisdiction to entertain a case, it has jurisdiction to deal with all its phases; the subsequent lapse of the title cannot deprive the Court of its jurisdiction*. As the Court stated in the *Nottebohm* case, in the context of the lapse, after the filing of the application, of the respondent's declaration of acceptance of the compulsory jurisdiction of the Court:
>
> > 'When an Application is filed at a time when the law in force between the parties entails the compulsory jurisdiction of the Court . . . the filing of the Application is merely the condition required to enable the clause of compulsory jurisdiction to produce its effects in respect of the claim advanced in the Application. *Once this condition has been satisfied, the Court must deal with the claim; it has jurisdiction to deal with all its aspects*, whether they relate to jurisdiction, to admissibility or to the merits. An extrinsic fact such as the subsequent lapse of the Declaration, by reason of the expiry of the period or by denunciation, cannot deprive the Court of the jurisdiction already established.'"[196]

4.12. If the *Nottebohm* rule applies to autonomous legal acts like counter-claims,[197] *a fortiori* it applies with even greater force to violations that

[196] Order on Counter-claims, para. 67 (emphases added).

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

represent the continuation of a dispute over which the Court already has jurisdiction. The incidents over which Colombia seeks to deprive the Court of jurisdiction are of exactly the same nature as the incidents that occurred before 27 November 2016. They are therefore aspects of "the same dispute that" Nicaragua submitted to the Court in its Application.

4.13. Returning to first principles, the jurisdictional title in this case is, as stated, Article XXXI of the Pact of Bogotá. Article XXXI provides:

> "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."[198]

4.14. Article XXXI, like Articles 36(2) (and 38(1)) of the Court's Statute, thus confers jurisdiction over "disputes", not individual "violations" (as Colombia would have it).

4.15. In determining whether it may consider incidents post-dating an application, the Court has consistently examined whether those events are connected to matters already within its jurisdiction. In *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, for example, the Court observed:

Rica along the San Juan River (Nicaragua v. Costa Rica), Counter-Claims, Order of 18 April 2013, I.C.J. Reports 2013, pp. 207-208, para. 19.

[198] Pact of Bogotá, Art. XXXI (emphasis added)

> "When the Court has examined its jurisdiction over facts or events subsequent to the filing of the application, it has emphasized the need to determine whether those facts or events were connected to the facts or events already falling within the Court's jurisdiction and whether consideration of those later facts or events would transform the 'nature of the dispute' …."[199]

4.16. The Court has considered claims based on facts that occurred after the filing of the Application on multiple occasions. In *Fisheries Jurisdiction (Germany v. Iceland)*, Germany raised claims based on acts that post-dated its Application. The Court had no difficulty holding that it had jurisdiction over these claims, explaining:

> "The Court cannot accept the view that it would lack jurisdiction to deal with this submission. The matter raised therein is part of the controversy between the Parties, and constitutes a dispute relating to Iceland's extension of its fisheries jurisdiction. The submission is one based on facts subsequent to the filing of the Application, but arising directly out of the question which is the subject-matter of that Application. As such it falls within the scope of the Court's jurisdiction defined in the compromissory clause of the Exchange of Notes of 19 July 1961."[200]

4.17. Similarly, in *LaGrand (Germany v. United States)*, Germany made a submission based entirely on facts that occurred after the filing of its Application. The Court once again held that it had jurisdiction over the submission:

> "The third submission of Germany concerns issues that arise directly out of the dispute between the Parties before the Court over which the Court has already held that it has jurisdiction (see paragraph 42 above), and which are thus covered by Article 1 of the Optional Protocol. The Court reaffirms, in this connection, what it said in its Judgment in the *Fisheries Jurisdiction* case, where it declared that in order to consider the dispute in a11 its aspects it may also deal with a

[199] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, para. 87.
[200] *Fisheries Jurisdiction (Germany v. Iceland)*, Merits, Judgment, para. 72.

> submission that 'is one based on facts subsequent to the filing of the Application, but *arising directly out of the question which is the subject-matter of that Application. As such it falls within the scope of the Court's jurisdiction ...*' (*Fisheries Jurisdiction (Federal Republic of Germany v. Iceland, Merits, Judgment, I.C.J. Reports 1974*, p. 203, para. 72)."[201]

4.18. The appropriate test for determining the existence of jurisdiction over facts occurring after the filing of an application is therefore whether the facts "aris[e] directly out of the question which is the subject-matter of [the] Application". [202] In the present case, the incidents that occurred after 26 November 2013, like those that occurred before that date, arose directly out of the question which is the subject-matter of the dispute: Colombia's violations of Nicaragua's sovereign rights and jurisdiction. Since the Court has jurisdiction over "the dispute in all its aspects", that includes the incidents that occurred after 26 November 2013.

4.19. It makes no difference that the title of jurisdiction lapsed after Nicaragua submitted its Application. An analogous issue arose in *Legality of Use of Force (Yugoslavia v. Belgium)*, a case that concerned NATO's bombing of Yugoslavia. Upon Yugoslavia's request for the indication of provisional measures, Belgium argued that the Court did not have jurisdiction *ratione temporis* because of an express temporal limitation contained in Yugoslavia's Article 36(2) declaration. That declaration provided:

> "[T]he Government of the Federal Republic of Yugoslavia recognizes, in accordance with Article 36, paragraph 2, of the Statute of the International Court of Justice, as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, that is on condition of reciprocity, the

[201] *LaGrand (Germany v. United States)*, Judgment, para. 45.
[202] *Fisheries Jurisdiction (Germany v. Iceland)*, Merits, Judgment, para. 72; *LaGrand (Germany v. United States)*, Judgment, para. 45 (quoting *Fisheries Jurisdiction (Germany v. Iceland)*, Merits, Judgment, para. 72).

> jurisdiction of the said Court in all *disputes arising or which may arise after the signature of the present Declaration,* with regard to the situations or facts subsequent to this signature, except in cases where the parties have agreed or shall agree to have recourse to another procedure or to another method of pacific settlement."[203]

4.20. Yugoslavia declaration was dated 25 April 1999. NATO's bombing began a month earlier "on 24 March 1999 and [had] been conducted continuously over a period extending beyond 25 April 1999".[204] The question before the Court was thus whether the dispute arose *before* 25 April 1999, such that there was no jurisdiction, or *after* 25 April 1999, such that there was jurisdiction.[205]

4.21. Much like Colombia here, Yugoslavia attempted to slice the dispute in discrete pieces. It argued that each bombing incident gave rise to a new dispute distinct from the original one. The result, according to Yugoslavia, was that the disputes concerning the bombings after 25 April 1999 were within the jurisdiction of the Court notwithstanding the fact that the NATO bombing campaign began before that date.

4.22. The Court rejected Yugoslavia's dispute-slicing theory, holding:

> "Whereas the fact that the bombings have continued after 25 April 1999 and that the dispute concerning them has persisted since that date is not such as to alter the date on which the dispute arose; whereas each individual air attack could not have given rise to a separate subsequent dispute; and whereas, at this stage of the proceedings, Yugoslavia has not established that new disputes, distinct from the initial one, have arisen between the Parties since 25 April 1999 in respect of subsequent situations or facts attributable to Belgium;

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[203] *Legality of Use of Force (Yugoslavia v. Belgium)*, Provisional Measures, Order, para. 23 (emphasis added).
[204] *Ibid.*, para. 28.
[205] *Ibid.*, para. 26.

> … [I]t follows from the foregoing that the declarations made by the Parties under Article 36, paragraph 2, of the Statute do not constitute a basis on which the jurisdiction of the Court could *prima facie* be founded in this case[.]"[206]

4.23. The Court's ruling is all the more significant insofar as it was issued in response to Yugoslavia's request for the indication of provisional measures, where the question was whether the Court's *prima facie* jurisdiction was established. The Court found that Yugoslavia's dispute-slicing theory failed even to satisfy this lower jurisdictional threshold.

4.24. The situation is very similar, albeit the inverse, in this case. *Yugoslavia v. Belgium* was a dispute involving a series of similar incidents that started *before* the title of jurisdiction came into force and continued thereafter. Because jurisdiction did not exist when the dispute arose, the continuation of the same pattern of conduct (i.e., bombings) after the title of jurisdiction came into force did not alter the legal situation.

4.25. This case concerns a dispute involving a series of similar incidents continuing *after* the title of jurisdiction lapsed. The critical difference with *Yugoslavia v. Belgium* is that jurisdiction unquestionably did exist as of the date the dispute arose and was submitted to the Court. Colombia's subsequent withdrawal from the Pact of Bogotá can no more change the legal situation in this case than the entry into force of Yugoslavia's Article 36(2) Declaration did in that one. Jurisdiction having vested, the Court retains the power to consider the dispute in all its aspects.

4.26. Simply put, the dispute before the Court cannot be carved into a series of disparate incidents. Just as in *Yugoslavia v. Belgium*, the only relevant question is whether the "dispute" rose within the temporal limitations of the jurisdictional

[206] *Ibid.*, paras. 29-30.

title. In this case, the Court has already affirmed that it did in its Judgment on Preliminary Objections. The Court therefore has jurisdiction to consider and determine the legal situation with respect to incidents occurring after 26 November 2013 that are part of the same dispute.

B. Colombia's Argument That Nicaragua's Claims Are Not Serious Is Meritless

4.27. Chapter 4 of the Counter-Memorial is devoted to showing the alleged "ill-founded nature" of Nicaragua's claims that Colombia has violated Nicaragua's sovereign right and jurisdiction. Colombia's first argument is that Nicaragua's claims are characterized by what it calls a "lack of seriousness".[207] According to the Counter-Memorial: "While Nicaragua now tries to paint a picture of systematic harassment of its vessels by Colombia and violations of its maritime spaces, at the relevant time Nicaragua made no complaint."[208]

4.28. This aspect of Colombia's argument is an obvious rehashing of the argument Colombia made in its arguments on Preliminary Objections that there was no cognizable "dispute" between the Parties because Nicaragua had at all times acted to downplay public tensions.[209] The Court rejected that argument and found there was plainly a dispute in light of the Parties' clear opposition of views concerning the facts and law.[210]

4.29. In any event, it is not for Colombia to say whether Nicaragua's claims are serious or not. The facts are the facts. Nicaragua trusts that when the Court makes its own assessment of the record as more fully described later in this Chapter, it will appreciate the gravity of Colombia's conduct.

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[207] CCM, para. 4.2.
[208] CCM, para. 4.2.
[209] Preliminary Objections of the Republic of Colombia, paras. 4.48-4.58.
[210] Judgment on Preliminary Objections, para. 74.

4.30. Colombia asserts that "[i]n its application, Nicaragua did not refer to a single 'incident' that had occurred at sea that gave rise to a violation of its maritime rights".[211] In other words, Colombia argues that since Nicaragua discussed specific incidents only in its Memorial, not in its Application, Nicaragua's claims cannot be considered serious.

4.31. This is, however, both wrong as a matter of fact and legally irrelevant. On the facts, Nicaragua expressly stated in its Application that:

> "Prior and especially subsequent to the enactment of Decree 1946, the threatening declarations by Colombian Authorities and *the hostile treatment given by Colombian naval forces to Nicaraguan vessels* have *seriously affected* the possibilities of Nicaragua for exploiting the living and non-living resources in its Caribbean exclusive economic zone and continental shelf. When even Nicaraguan fishermen are reluctant to enter certain areas that are patrolled by Colombian naval vessels, the effect on vital foreign investment is extremely damaging."[212]

4.32. These passages reveal the error of Colombia's position. Nicaragua expressly stated that the incidents—"the hostile treatment given by Colombian naval forces to Nicaraguan vessels"—"have seriously affected" Nicaragua's sovereign rights. It is thus disingenuous for Colombia to claim that Nicaragua somehow does not consider the incidents serious.

4.33. On the law, Article 38 of the Rules of Court makes clear that the submitting party does not need to provide extensive factual details in an application. Article 38 provides in relevant part:

> "1. When proceedings before the Court are instituted by means of an application addressed as specified in Article 40, paragraph 1, of the

[211] CCM, para. 4.6.
[212] Application, para. 15.

> Statute, the application shall indicate the party making it, the State against which the claim is brought, and the subject of the dispute.
>
> 2. The application shall specify as far as possible the legal grounds upon which the jurisdiction of the Court is said to be based; it shall also specify the precise nature of the claim*, together with a succinct statement of the facts* and grounds on which the claim is based."[213]

4.34. The Application thus only needs to indicate "the subject of the dispute", and contain " a *succinct* statement of the facts". Nicaragua's Application fulfilled these requirements; Colombia makes no argument to the contrary. Nicaragua's Application notably also stated: "These matters [i.e., Colombia's violations] will be documented and detailed in the course of these proceedings.[214] No inference can therefore be drawn from the fact that Nicaragua's Application did not provide details of specific incidents.

4.35. Colombia further argues that "Nicaragua's own officials were on record as repeatedly saying that there were no problems involving the Colombian Navy, no confrontations and no incidents".[215] Colombia then cites four such statements: one by General Avilés on 5 December 2012; one by President Ortega on 14 August 2013; one by Admiral Rodríguez on 18 November 2013; and another one by General Avilés on 18 March 2014.

4.36. All of the statements reflect a deliberate policy of restraint on Nicaragua's part intended to avoid inflaming the delicate political situation created by Colombia's rejection of the 2012 Judgment. Nicaragua was (and is) intent on addressing the matter peacefully, with minimal harm to bilateral relations. As Nicaragua explained in its Written Statement on Preliminary Objections:

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[213] Rules of Court, arts. 38(1)-(2) (emphasis added).
[214] Application, para. 15 (emphasis added).
[215] CCM, para. 4.7.

> "Nicaragua's decision to hold to a conciliatory, non-escalatory position as regards Colombia's reaction against the 2012 Judgment, and the professional conduct of the Nicaraguan Navy, have thankfully avoided any serious armed clash; but that restraint has in no way reduced the disagreement or made the dispute go away …".[216]

4.37. In any case, an examination of statements shows that they do not support Colombia's argument. With respect to General Avilés's Statement of 5 December 2012, for example, Colombia claims that General Avilés "stated ... that the Naval Forces of Colombia had not approached Nicaraguan fishing vessels".[217] This, however, is not at all what the news article Colombia relies on says. As reported, what General Avilés actually said was:

> "We are in communication with the Colombian authorities; there should not be any kind of harassment, there has been no *boarding* to fishing vessels. The declarations we heard from business fishermen are clearly saying that *they have been going around but not boarding, which is serious*."[218]

4.38. Thus, General Avilés merely stated that the Colombian authorities had not "boarded" any fishing vessels; he did not state that Colombian authorities had not "approached" Nicaraguan fishing vessels, as Colombia would have it. General Avilés notably also stated that he considers the situation "serious", exactly the opposite of what Colombia wants the Court to believe.

4.39. With respect to the other three statements, President Ortega's, Admiral Rodríguez's and General Avilés's reported comments are limited in essence to

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[216] Written Statements of the Republic of Nicaragua to the Preliminary Objections of the Republic of Colombia, para. 3.12.
[217] CCM, para. 4.8 (citing Colombia's Preliminary Objections, Annex 36).
[218] Colombia's Preliminary Objections, Annex 36, p. 1 (translation by Colombia) (emphasis added). The word "boarding" here is a translation of the word "*abordaje*" in Spanish. In other contexts, it may be possible for the verb "*abordar*" to be translated as "to approach". But in the present context, the word "*abordaje*" can only be translated as "boarding". Indeed, Colombia itself translates the word as "boarding" in Annex 36.

stating there had been no "confrontation[s] between the Colombian and Nicaraguan Navy" (in the case of President Ortega),[219] that "we have not had any conflicts [with the Colombian navy] in those waters" (in the case of Admiral Rodríguez)[220] and that there "are no incidents" (in the case of General Avíles).[221] In other words, the three statements read most naturally stand only for the proposition that there had been "conflicts" or "confrontations" between Nicaraguan naval vessels and Colombian naval vessels.

4.40. This, of course, is true but is in no way inconsistent with the fact that Colombia had been engaged in actions against other Nicaraguan vessels that otherwise constituted serious violations of Nicaragua's sovereign rights and jurisdiction.

4.41. For these reasons, Colombia's assertion that Nicaragua's claims are not serious is entirely without merit.

C. Colombia Violated Nicaragua's Sovereign Rights And Jurisdiction Before November 2013

4.42. In its Memorial, Nicaragua detailed a long list of incidents whereby Colombia violated Nicaragua's sovereign rights and jurisdiction as adjudged by the Court in 2012.[222] Thirteen of these incidents occurred before 26 November 2013; 23 occurred after that date. In this section, Nicaragua will respond to Colombia's efforts to explain away the 13 incidents that took place on the one-year period following the Court's November 2012 Judgment.

4.43. The Counter-Memorial addresses those 13 violations "on an incident-by-incident basis". For the sake of clarity, Nicaragua will follow Colombia's

[219] CCM, para. 4.8 (citing Colombia's Preliminary Objections, Annex 11).
[220] CCM, para. 4.8 (citing Colombia's Preliminary Objections, Annex 43).
[221] CCM, para. 4.8 (citing Colombia's Preliminary Objections, Annex 46).
[222] *See* NM, Section II.C.

"incident-by-incident" approach and explain why Colombia's counter-arguments with respect to each incident are unavailing. Before doing so, however, two preliminary observations are in order.

4.44. First, Colombia's "incident-by-incident" approach tends to obscure the critical context that must inform the Court's evaluation of the facts. The incidents in question did not occur in a vacuum. To the contrary, they occurred against the backdrop of Colombia's rejection of the 2012 Judgment and its adoption of the so-called "Integral Contiguous Zone".[223] Colombia also publicly and repeatedly announced that it would deploy its Navy to defend the supposed right of Colombian fishermen to fish in Nicaragua's EEZ.[224] Colombia's actions must therefore be assessed in the context of these declared policies, which is how Nicaraguan officials, and fishermen understood it.

4.45. Put another way, each individual incident represents an example[225] of Colombia's implementation of a considered policy. Each incident is thus just a piece of a larger pattern that, viewed as a whole, demonstrates Colombia's disregard for Nicaragua's sovereign rights and jurisdiction.

4.46. Second, Colombia's attempts to justify its actions effectively constitute admissions that it is exercising sovereign rights and jurisdiction in Nicaragua's EEZ that it does not have.

4.47. For example, Chapter 3, Section C of Colombia's Counter-Memorial presents a discussion of Colombia's ostensible rights and duties to preserve and protect the marine environment. As part of its discussion—which appears

[223] *See* NM, Section II.B.
[224] *See* NM, para. 2.9 (citing NM, Annex 41); Fishermen had 3 incidents with Nicaragua, *El Nuevo Siglo*, 19 February 2013(NR, Annex 20) ; Nicaragua's Memorial, Annex 34.
[225] The incidents Nicaragua presented in its Memorial and presents in this Reply are not intended to be an exhaustive recounting of each and every time that Colombia has violated Nicaragua's sovereign rights and jurisdiction since November 2012. They are offered as examples sufficient to engage Colombia's international legal responsibility.

designed to portray Colombia as a responsible international citizen—Colombia states that it "attaches the utmost importance to the need to preserve the environment of the Caribbean Sea and has conducted itself to this end".[226] It then goes on to explain that

> "Colombia has the right to monitor any practices that contravene the obligation to preserve and protect the marine environment, and to urge that such activities cease. This is particularly so when they are undertaken in ecologically sensitive areas such as the Seaflower Biosphere Reserve and the Seaflower Marine Protected Area, which surround the San Andrés Archipelago".[227]

4.48. Elsewhere, Colombia asserts:

> "Both Nicaragua and Colombia are thus under a reinforced duty of due diligence to prevent harmful fishing practices, predatory fishing and harvesting of endangered species that would damage the living resources of the Caribbean Sea and threaten their sustainability".[228]

4.49. Therefore, according to the Counter-Memorial: "By inviting Nicaraguan flagged and authorized vessels to cease predatory activities that would have a detrimental effect on those species, Colombia is complying with its duty of due diligence".[229]

4.50. By Colombia's own admission, it is thus engaging in conduct to preserve and protect the living resources in maritime areas that appertain to Nicaragua, including interfering with Nicaraguan flagged vessels exploiting the resources in those areas. The problem for Colombia is that it has no right to undertake the activities it admits to, even if they were truly undertaken for the laudable

[226] CCM, para. 3.28.
[227] CCM, para. 3.31.
[228] CCM, para. 3.65.
[229] CCM, para. 3.70.

purposes it pretends to be serving. As discussed in Chapter II, Colombia has no jurisdiction to take measures to ensure the protection and preservation of the marine environment in Nicaragua's waters, let alone to "invite" Nicaraguan flagged vessels to cease fishing in their own waters. Its actions in that respect are internationally wrongful.

1. Incident 1

4.51. The first incident occurred when the Colombian frigate, the *ARC "Almirante Padilla"*, prevented a Nicaraguan naval vessel from inspecting a Colombian-flagged fishing vessel that was operating in Nicaragua's waters in the *Luna Verde* area.[230] The source for this incident is a Colombian news article, dated 19 February 2013, which reported a statement made by Roberto García Márquez, a commander in the Colombian Navy.[231] The article does not clarify exactly when the incident took place.[232] It suggests, however, that some time had passed since the incident, insofar as it states that "[a]fter the incident, the Colombian Navy strengthened the number of ships and maritime patrol boats in the *Luna Verde* area".[233]

4.52. Colombia's Counter-Memorial disputes that the incident took place, notwithstanding Commander García's statements to the Colombian press. According to Colombia, "it is not possible that this 'incident' actually occurred" because "[t]he Navigation Log of the A.R.C. 'Almirante Padilla' indicates that on 19 February 2013, the frigate was docked at the pier of BN1" in Cartagena.[234]

[230] *See* NM, para. 2.39 (citing NM, Annex 34).
[231] NM, Annex 34.
[232] *See* NM, Annex 34.
[233] NM, Annex 34.
[234] CCM, para. 4.23.

4.53. But 19 February was the date of the news article,[235] not the incident, which, as stated, plainly occurred at an unspecified earlier date. It is thus irrelevant that the frigate was docked in Cartagena on 19 February 2013. In light of Colombia's misunderstanding as to the date on which the incident occurred and Commander García's clear public statements that it did occur, Colombia's challenge to the incident fails.

2. Incident 2

4.54. The second incident occurred on 18 August 2013, when the Governor of San Andrés, Aury Guerrero Bowie, and the Chief of the San Andrés Specific Command, Rear Admiral Luis Hernan Espejo Segura, participated in military and surveillance manoeuvres over Nicaragua's EEZ aboard an airplane in the service of the Colombian Navy.[236] All three news sources that reported on the incident referred to it as an exercise of sovereignty.[237]

4.55. Colombia does not deny that this incident occurred.[238] Rather, Colombia claims that it merely represented an exercise of the "freedom of navigation and overflight", not an exercise of "sovereignty".[239] In pressing this view, Colombia notes that it was only "the media [that] reported that Colombia's purpose in so doing was to 'exercis[e] sovereignty' over Colombia's maritime areas".[240]

4.56. While that is literally true, Colombia's attempt to characterize this incident as a benign exercise of its "freedom of navigation and overflight" is not credible. Considering the numerous statements of Colombian officials rejecting

[235] *See* CCM, para. 4.23.
[236] NM, para. 2.25 (citing Nicaragua's Memorial, Annex 37; NM, Annex 36; and Video Report of the Colombian Navy, "*Armada Nacional patrulla sobre el meridiano 82*", available at https://www.youtube.com/watch?v=-LE8UQ1wd2I).
[237] NM, Annex 37; NM, Annex 36; and Video Report of the Colombian Navy, "*Armada Nacional patrulla sobre el meridiano 82*", available at https://www.youtube.com/watch?v=-LE8UQ1wd2I .
[238] CCM, para. 4.24.
[239] CCM, para. 4.24.
[240] CCM, para. 4.24.

the 2012 Judgment before and after this event, it would be naïve to consider these incidents mere exercises of a non-coastal State's "freedom of navigation and overflight". It would also completely contradict Colombia's intentions in undertaking these aerial and naval manoeuvres.

4.57. After the flight, Governor Guerrero Bowie expressly noted that "in the area of the 82°W meridian there are only frigates of the National Navy and no boats of other countries".[241] There would have been no reason for her to make this statement if he thought that Colombia was merely exercising the freedom of overflight in Nicaragua's EEZ. Indeed, the following month she asserted that "the Caribbean waters over which The Hague gave economic rights to Nicaragua are and have always been Colombian waters".[242] It is therefore not credible for Colombia now to argue that it is pure coincidence that all three news sources that reported on the incident referred to it as an exercise of sovereignty.[243]

4.58. Moreover, even if Colombia's conduct on this one occasion viewed in isolation were not considered to have violated international law, the incident must be understood in the larger context as a part of the pattern of Colombia's persistent and insistent disregard for Nicaragua's sovereign rights and jurisdiction.

3. Incident 3

4.59. The third incident occurred on 18 September 2013, just nine days after the issuance of Decree 1946, when President Santos, the Minister of Justice and Law, the Minister of Defence, the Commanders of the Military Forces, and the Director of Police, among others, conducted a "sovereignty exercise" off the coast of San

[241] NM, Annex 37.
[242] NM, Annex 41.
[243] NM, Annex 37; NM, Annex 36; and Video Report of the Colombian Navy, "*Armada Nacional patrulla sobre el meridiano 82*", available at https://www.youtube.com/watch?v=-LE8UQ1wd2I .

Andrés, reaching as far west as the 82°W meridian, well into waters recognized to appertain to Nicaragua.[244] During this exercise, President Santos expressly stated: "We find ourselves patrolling and *exercising sovereignty* over Colombian waters ...."[245]

4.60. Despite this express statement by Colombia's President, the Counter-Memorial argues that there was no violation of Nicaragua's rights because, "[r]egardless of how it is described", it merely "involved the exercise by Colombian vessels of their right of freedom of navigation".[246] Recognizing that its characterization of events directly contradicts President Santos's statement, Colombia then immediately changes the subject by noting how President Santos in that same statement "emphasized Colombia's commitment to 'continue to protect the Seaflower Reserve'".[247] This, of course, is a *non sequitur*. President Santos and his colleagues should be taken at their word. They were expressly "exercising sovereignty" over Nicaragua's EEZ.

4. Incident 4

4.61. The fourth incident occurred on 13 October 2013, when a Colombian frigate, the *ARC "20 de Julio"*, warned a Nicaraguan coast guard vessel, the *CG-205 "Río Escondido"*, that it was sailing towards Colombian waters.[248] Colombia responds on two principal grounds.

4.62. *First*, Colombia challenges the factual basis of this incident by noting that "[t]he fourth 'incident' is said to have occurred on 13 October 2013 at 08:55 hours" but "[a]t that time, [the *ARC "20 de Julio"*] was conducting exercises with

[244] NM, para. 2.27 (citing NM, Annex 5).
[245] NM, Annex 5 ("Nos encontramos patrullando y ejerciendo soberanía sobre aguas colombianas ...") (emphasis added).
[246] CCM, para. 4.25.
[247] CCM, para. 4.25.
[248] NM, para. 2.40 (citing NM, Annex 23-A, pp. 268, 275).

the helicopter A.R.C. 201 in another area".[249] Even were Colombia's assertions about the location of the *"20 de Julio"* accepted as true, they suggest, at most, that the crew of the *"Río Escondido"* may have misidentified the Colombian ship that issued the warning. That does not, however, change the fact that the incident occurred.

4.63. *Second*, Colombia argues that "simply drawing attention to the fact that a vessel is heading toward another State's waters causes no prejudice whatsoever and can scarcely be equated with a violation of Nicaragua's maritime rights".[250] Nicaragua disagrees. When this incident occurred, the *"Río Escondido"* was far from any waters that were genuinely Colombian. The Colombian frigate was plainly trying to impede the Nicaraguan vessel from continuing its patrol in Nicaraguan waters and therefore interfered with the free exercise of its rights within those waters.

5. Incident 5

4.64. The fifth incident occurred on 19 October 2013, when two Colombian Air Force planes flew at a threateningly low altitude over the same Nicaraguan coast guard vessel involved in the previous incident, the *"Río Escondido"*, and then flew over a Nicaraguan-flagged fishing boat, the *Capitán Camerón*, as well as over a Honduran-flagged fishing boat named the *La Capitana* which was operating with a Nicaraguan fishing license.[251]

4.65. The Counter-Memorial offers four arguments. *First*, citing the Maritime Travel Report of the *ARC "Independiente"*, Colombia says that the Colombian aircraft "were flying at an altitude of 4600 feet".[252] Even if true, this is irrelevant.

[249] CCM, para. 4.26.
[250] CCM, para. 4.26.
[251] NM, para. 2.28 (citing NM, Annex 23-A, pp. 268, 276; NM, Annex 20, p. 2).
[252] CCM, para. 4.29 (citing Colombia's Counter-Memorial, Annex 49).

The Maritime Travel Report states that the aircrafts' altitude was 4600 feet *at 11:00 hours*.[253] Yet, the incident occurred more than an hour earlier at 09:50 hours.[254]

4.66. *Second*, Colombia argues that the aircraft "were exercising their freedom of overflight in the EEZ", but once again the context in which this and the other incidents occurred suggest that the aircraft were not innocently exercising their freedom of overflight, but rather were behaving in a manner consistent with Colombia's stated position that the 2012 Judgment was "inapplicable" by impermissibly conducting military and/or law enforcement patrols.

4.67. Moreover, even if the aircraft might be said to have been exercising their freedom of overflight, they had the obligation to "have due regard to the rights and duties of the coastal State".[255] Flying over a Nicaraguan coast guard vessel and two fishing vessels at a threateningly low altitude is plainly inconsistent with Colombia's duty to have due regard to Nicaragua's rights as the coastal State.

4.68. *Third*, Colombia argues that "neither the Nicaraguan naval unit nor the fishing vessels were *prevented* from continuing their activities in the area".[256] Although they may not have been "prevented" from continuing their activities, Colombia's actions were clearly intended to send a signal that Nicaragua and Nicaraguan flagged and licensed vessels should proceed with caution in exercising their rights. In other words, the aircraft were, at very least, discouraging Nicaragua's exercise of its EEZ rights and therefore acting in violation thereof.

[253] CCM, Annex 49.
[254] NM, Annex 23-A, pp. 268, 276.
[255] UNCLOS, Art. 58(3).
[256] CCM, para. 4.29 (emphasis added).

4.69. Fourth and finally, Colombia argues "the alleged location of Incident 5 is in an area which covers one of the air and maritime routes most widely-used for the transportation of narcotics".[257] This, however, is beside the point. As explained in Chapter II, Colombia has no general law enforcement jurisdiction in Nicaragua's EEZ. Even if it had a right of approach to verify the identity of the Nicaraguan ships, that right neither necessitates nor justifies buzzing the Nicaraguan vessels at a dangerously low altitude.

4.70. In this respect, Nicaragua observes that the "*Río Escondido*" (pictured below) bears the distinctive grey colouring of a vessel in government service. It is easily identified as such from a safe altitude and distance.

CG-205 "Río Escondido"

6. Incidents 6, 7, and 8

4.71. The sixth, seventh, and eighth incidents occurred from 29 to 31 October 2013. On 29 October, a Colombian Air Force plane buzzed two Nicaraguan coast guard vessels, the *CG-201 "Río Grande Matagalpa"* and the *CG-205 "Río Escondido"*, at a height of just 200 feet while they were on patrol in Nicaragua's

[257] CCM, para. 4.30.

EEZ ("Incident 6").[258] The following day, a Colombian Air Force helicopter flew over the *"Río Grande Matagalpa"* at an altitude of 200 feet and over the *"Río Escondido"* at an altitude of 400 feet ("Incident 7").[259] And the same happened again the next day, when a Colombian Air Force helicopter flew low over the *"Río Grande Matagalpa"* ("Incident 8").[260]

4.72. Colombia does not deny that the sixth incident occurred.[261] Instead, Colombia suggests that the aircraft may have been on a drug and contraband reconnaissance mission thus indicating that Colombia claims a general law enforcement jurisdiction in Nicaragua's EEZ that it does not have.[262] Colombia's argument also does not explain why the aircraft flew at a height of just 200 feet above the Nicaraguan vessels. Nor does it explain why, over the next two days, Colombian helicopters continued to harass the coast guard vessels in the same area ("Incidents 7 and 8").

4.73. Concerning the sixth incident, Colombia also argues "there is no evidence of any hostile activity against Nicaragua's Naval Units".[263] This is not credible. Flying a mere 200 feet above Nicaraguan coast guard vessels is a clear sign of disregard of Nicaragua's rights and Colombia's own documents prove it. Colombia's Counter-Memorial observes that in the case of helicopters: "The order of operations issued by the Specific Command of San Andrés and Providencia states that '… [i]t is forbidden to fly above any military-type vessel at a lower height of 3500 feet, taking into account that these acts may be considered as hostile by the respective vessel ...'."[264]

[258] NM, para. 2.45 (citing NM, Annex 23-A, pp. 268, 277).
[259] NM, para. 2.45 (citing NM, Annex 23-A, pp. 268, 278).
[260] NM, para. 2.45 (citing NM, Annex 23-A, p. 268).
[261] *See* CCM, para. 4.31.
[262] CCM, para. 4.31.
[263] CCM, para. 4.31.
[264] CCM, para. 4.33.

4.74. If flying above a military-type vessel in a helicopter at an altitude of 3500 feet may be considered as hostile, then flying at an altitude of just 200 feet in an airplane must certainly be considered hostile.

4.75. Colombia finally argues that it had freedom of over flight in Nicaragua's EEZ, and its flight did not interfere with Nicaragua's ability to exercise its maritime rights.[265] As with Incident 5, it is simply not credible that the aircraft was merely exercising the freedom of over flight; and even if it were, it still carried the obligation to "have due regard to the rights and duties of the coastal State".[266] Repeatedly buzzing Nicaraguan Navy ships in a hostile manner is inconsistent with having due regard to Nicaragua's rights and duties, and constitutes an interference with Nicaragua's ability to exercise its maritime rights.

4.76. With respect to the seventh incident, Colombia challenges its basis in fact.[267] In particular, Colombia relies on the Maritime Travel Report of the *ARC "Independiente"*, which states that at 16:54 hours on 30 October 2013, the helicopter in question was flying at 6400 feet, not 200 to 400 feet.[268] Even if accepted as true, this is not inconsistent with the report of the Nicaraguan Navy, which states that the seventh incident occurred 14 minutes earlier, at 16:40 hours.[269] Helicopters can easily increase their altitude from 200 to 6400 feet in 14 minutes. Indeed, the very fact that the Maritime Travel Report of the *"Independiente"* reveals that the helicopter in question was in the air at the time tends to corroborate the report of the Nicaraguan Navy.

4.77. As for the eighth incident, Colombia does not challenge the facts, but instead argues: "On Colombia's records, the helicopter A.R.C. 201 took off at

[265] CCM, para. 4.31.
[266] UNCLOS, art. 58(3).
[267] CCM, para. 4.33.
[268] CCM, para. 4.33 (citing CM, Annex 49).
[269] NM, para. 2.45 (citing NM, Annex 23-A, pp. 268, 278).

09:42, but had to return to land on the A.R.C. 'Independiente' at 10:23 due to loss of communication. This could not possibly have prejudiced Nicaragua in any way."[270]

4.78. Nicaragua does not understand how the fact that the helicopter had communications problems might disprove that it flew over the Nicaraguan vessel at a menacingly low altitude. The helicopter was in the air for more than 40 minutes, during which time it plainly could have impermissibly harassed the Nicaraguan vessel, as Nicaragua's evidence demonstrates.

7. Incident 9

4.79. The ninth incident occurred when a Colombian frigate, the *ARC "Antioquia"*, approached a Nicaraguan flagged fishing boat, the *Lucky Lady*, and informed it that it was in Colombian waters.[271] The captain of the *Lucky Lady* informed the head of the Puerto Cabezas Naval Base of the incident who, in turn, reported the incident on 7 November 2013.[272]

4.80. Colombia asserts that the incident did not occur because the Navigation Log of the *"Antioquia"* reveals that on 7 November 2013 the frigate was docked at the pier of Malaga's Naval Base in the Pacific Ocean.[273] As stated above, however, the incident itself did not occur on 7 November 2013; rather, it was reported on 7 November 2013. As a result, the presence of the *"Antioquia"* at Malaga's Naval Base on 7 November 2013, even if true, does not call into question the fact that the incident occurred as described in Nicaragua's Memorial.

[270] CCM, para. 4.34.
[271] NM, para. 2.29 (citing NM, Annex 23-A, pp. 268-269, 280).
[272] NM, Annex 23-A, pp. 268-269, 280.
[273] CCM, para. 4.37 (citing CCM, Annex 50).

8. Incident 10

4.81. The tenth incident occurred when another Colombian frigate, the *ARC "Almirante Padilla"*, ordered a Nicaraguan lobster ship, the *Miss Sofia*, to withdraw from its position in Nicaragua's EEZ, claiming that the vessel was actually in Colombian waters.[274] When the Nicaraguan vessel refused to leave the area, the *"Almirante Padilla"* sent a speedboat to chase it away.[275]

4.82. The captain of the *Miss Sofia* informed a Nicaraguan coast guard vessel, the *CG-205 "Rio Escondido"*, of this incident by marine channel 16, and the *"Río Escondido"* reported the incident at 10:50 hours on 17 November 2013.

4.83. At 15:18 hours, the *"Río Escondido"* reported that it had informed the *"Almirante Padilla"* that it was in Nicaraguan waters pursuant to the 2012 Judgment, but the *"Almirante Padilla"* replied that the Government of Colombia did not recognize the Court's Judgment and refused to leave its location.[276]

4.84. Colombia does not deny that an incident occurred on 17 November 2013 between the *"Almirante Padilla"* and the *Miss Sofia*, but its narrative differs significantly. Colombia alleges that the *"Almirante Padilla"* never ordered the *Miss Sofia* to withdraw from its position and did not send a speedboat to chase the *Miss Sofia* away, but rather unsuccessfully attempted to contact the fishing vessel and even rescued two of its fishermen.[277]

4.85. The would-be evidence that Colombia offers only concern the alleged rescue operation, which, according to Colombia's own reports, occurred at 17:10

[274] NM, para. 2.30 (citing NM, Annex 23-A, pp. 269, 281).
[275] NM, para. 2.30 (citing NM, Annex 23-A, pp. 269, 281).
[276] NM, para. 2.31 (citing NM, Annex 23-A, pp. 269, 281).
[277] CCM, paras. 4.39-4.40 (citing CCM, Annex 50; CCM, Appendix A, Event No. 7; CCM, Annex 112).

hours. The rescue story, even if true, is not inconsistent with the reported actions of the Colombian Navy much earlier in the day.

9. Incidents 11, 12, and 13

4.86. The last three incidents occurred on 19, 21, and 24 November 2013 and all concerned over flights above the *CG-201 "Río Grande Matagalpa"* (pictured below).[278] On 19 November, a Colombian Navy aircraft flew over the *"Río Grande Matagalpa"* at an unspecified altitude;[279] on 21 November, a Colombian Air Force helicopter overflew her at an altitude of just 200 feet;[280] and on 24 November a Colombian Air Force helicopter flew over her at an altitude of just 500 feet.[281]

CG-205 "Río Grande Matagalpa"

4.87. Similar to Incident 6, Colombia argues that there was no hostile conduct, that the helicopter's mission was to identify any suspicious drug trafficking

[278] NM, para. 2.46 (citing NM, Annex 23-A, pp. 269, 282-284).
[279] NM, Annex 23-A, p. 282.
[280] NM, Annex 23-A, p. 283.
[281] NM, Annex 23-A, p. 284.

activity, that the helicopter was exercising its freedom of over flight, and Nicaragua was not impeded from exercising its sovereign rights.[282] Nevertheless, for the same reasons as mentioned above for Incident 6, these arguments are all without merit.

D. Colombia Has Continued To Violate Nicaragua's Sovereign Rights And Jurisdiction Since The Date Of Nicaragua's Memorial

4.88. Since Nicaragua submitted its Memorial on 3 October 2014, Colombia has continued to violate Nicaragua's sovereign rights and jurisdiction, and act in a manner wholly incompatible with the 2012 Judgment. As with the violations occurring before that date, the violations since October 2014 have primarily occurred in and around the *Luna Verde* area shown in Figure 4.1 below. A map of the area with the location of all the incidents can be seen in Figure 4.2.

[282] CCM, para. 4.44.

Figure 4.1 Location of Luna Verde in relation to the Maritime Boundary determined by the Court

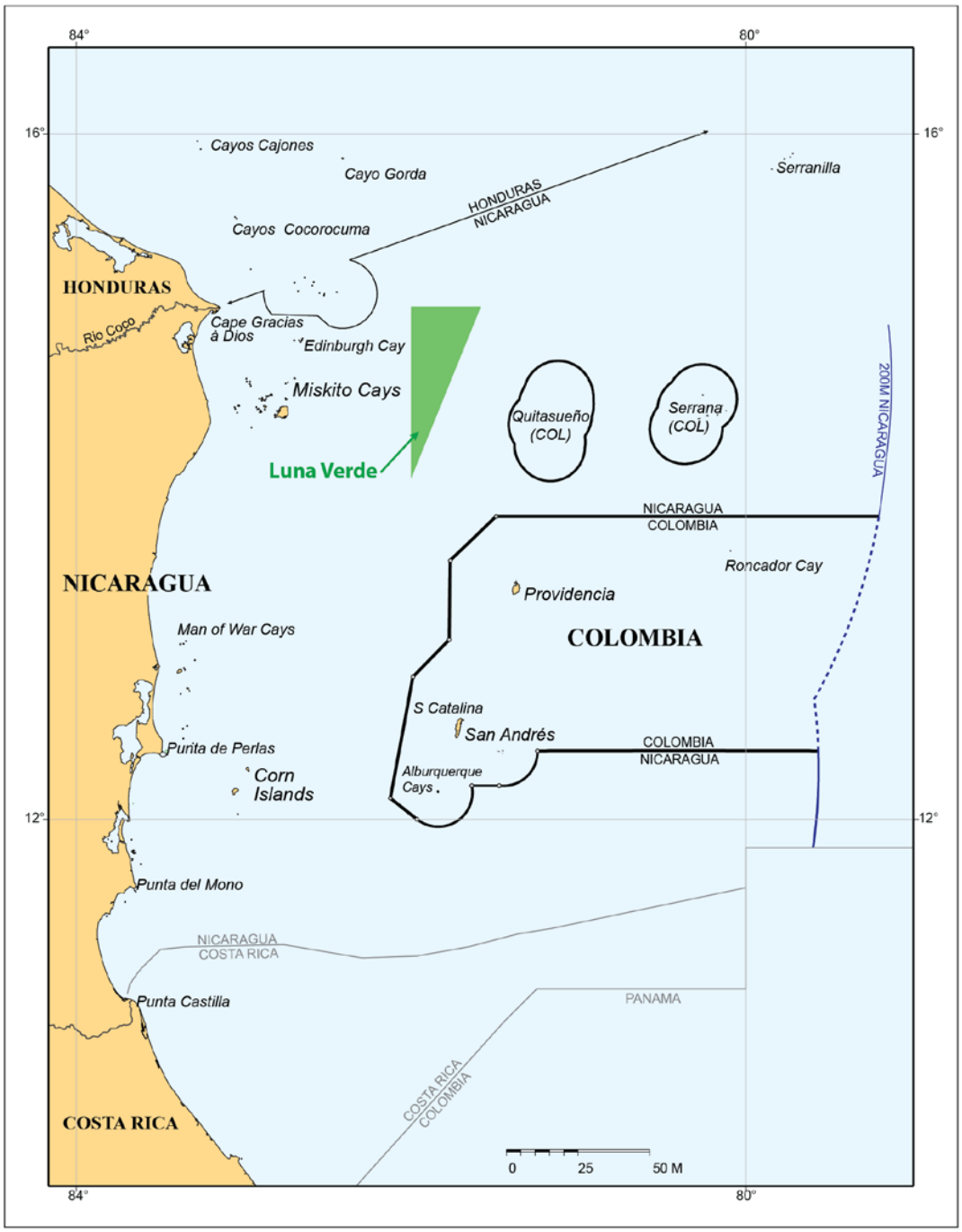
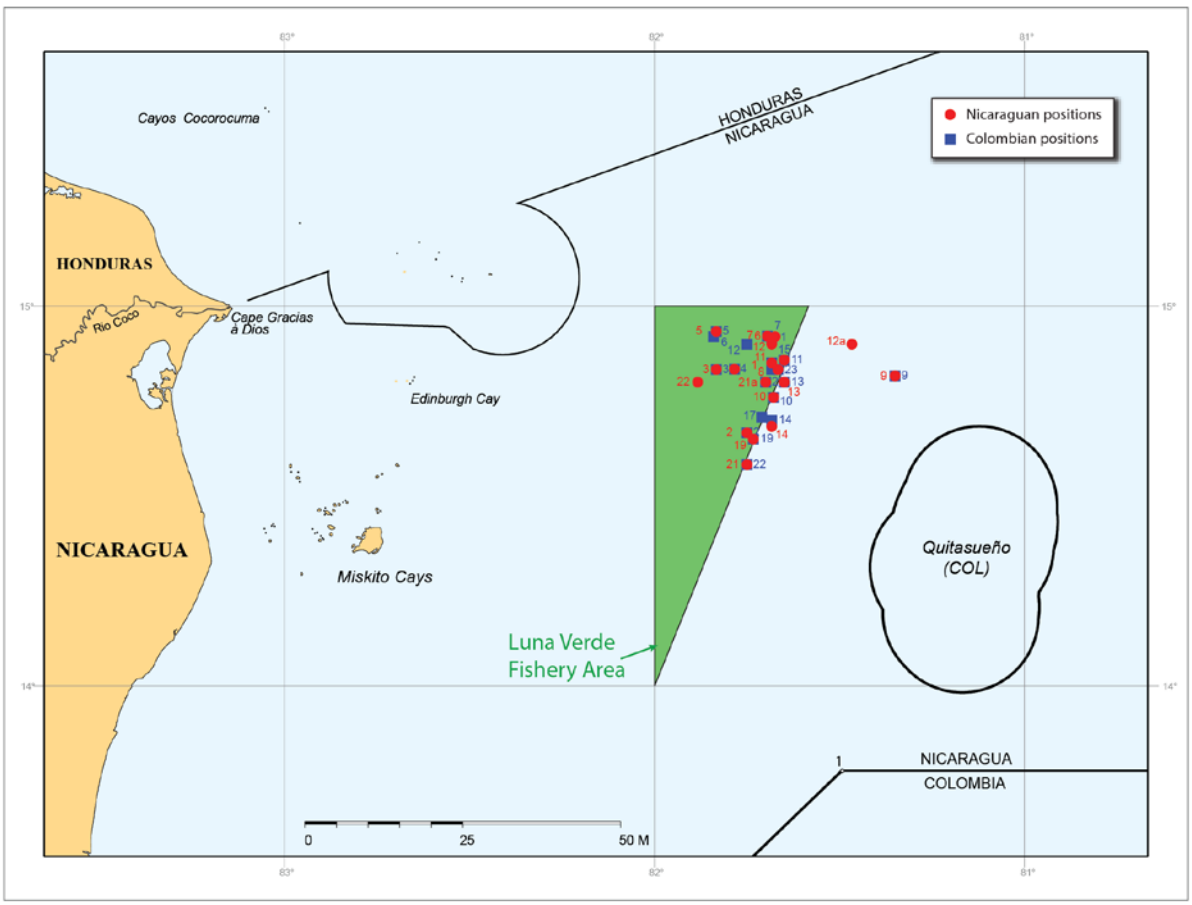


Figure 4.2 Location of reported incidents 2015-2017



4.89. The incidents generally fall into three categories: the Colombian Navy's express rejection of the 2012 Judgment ; Colombia's authorization, encouragement, and protection of industrial fishing in Nicaragua's EEZ ; and the Colombian Navy's harassment of Nicaraguan fishing in Nicaragua's EEZ. The relevant incidents are described chronologically within each category.

4.90. Before turning to a description of each of these incidents, however, Nicaragua once again emphasizes that context is key. None of the incidents described below occurred in a vacuum. Rather, they occurred against the

backdrop of Colombia's continuing rejection of the 2012 Judgment. These incidents therefore comprises further parts of the larger pattern evidencing Colombia's wilful disregard for Nicaragua's sovereign rights and jurisdiction. Even if Colombia might try to excuse some of these actions, it cannot avoid the conclusion that its behaviour, viewed as a whole, is internationally wrongful.

1. The Colombian Navy's Express Rejection of the 2012 Judgment

4.91. Underlying all of the incidents is Colombia's express, continuing rejection of the 2012 Judgment, and its Navy's actions to give practical effect to that rejection.

4.92. This can be seen, for example, in an incident that took place on 18 March 2015, when a Nicaraguan coast guard vessel, the *CG-401 "José Santos Zelaya"* (pictured below), asked a Colombian Navy frigate, the *ARC "Independiente"*, to state its objective in navigating in Nicaragua's jurisdictional waters.[283] The *"Independiente"* responded: "I inform you that you are in Colombian jurisdictional waters. The Colombian state has established that the ruling of The Hague is not applicable; therefore, the units of the Navy of the Republic of Colombia will continue to exercise sovereignty of these waters."[284] The *"Independiente"* was therefore not simply exercising the freedom of navigation, as Colombia has argued concerning other incidents. To the contrary, it expressly rejected the 2012 Judgment as "not applicable", and considered itself to be "exercis[ing] sovereignty" in what the Court determined to be Nicaragua's jurisdictional waters.

[283] Audio Transcription of 18.03.2015) (NR, Annex 32).
[284] Audio Transcription of 18.03.2015) (NR, Annex 32).

CG-401 "José Santos Zelaya"

4.93. A similar incident occurred on 26 March 2015, when the *"José Santos Zelaya"* informed another Colombian Navy frigate, the *ARC "11 de Noviembre"*, that it was navigating in the jurisdictional waters of Nicaragua.[285] The *"11 de Noviembre"* replied: "I inform you that I am in the Colombian Archipelago of San Andrés and Providencia, protecting the historic fishing rights of the Colombian State, guaranteeing the security of all vessels present in the area and implementing operations against transnational crimes."[286] It furthermore added: "[A]ccording to the Colombian government, the ruling of The Hague is inapplicable, ... and I invite you to maintain the caution required in these cases."[287]

[285] Audio Transcription of 26.03.2015 (NR, Annex 32).
[286] Audio Transcription of 26.03.2015 (NR, Annex 32).
[287] Audio Transcription of 26.03.2015 (NR, Annex 32).

4.94. Two days later, the *"José Santos Zelaya"* once again encountered the *"11 de Noviembre"* navigating in Nicaragua's EEZ,[288] and after informing it of this fact,[289] the *"11 de Noviembre"* repeated the now-familiar words: "I inform you that I am in the Colombian Archipelago of San Andrés and Providencia, protecting the historic fishing rights of the Colombian State, guaranteeing the security of all vessels present in the area and implementing operations against transnational crimes."[290] When the commander of the *"José Santos Zelaya"* mentioned the Judgment of the Court, the *"11 de Noviembre"* stated once again: "[A]ccording to the Colombian government, the ruling of The Hague is not applicable; in the same manner, I invite you to maintain the caution required in these cases …."[291]

4.95. Other Colombian ships employed the same settled script. On 5 April 2015, another Colombian Navy frigate, the *ARC "San Andrés"*, was navigating in Nicaragua's EEZ.[292] After a Nicaraguan coast guard vessel, the *BL-405 "Tayacán"*, initiated communication, the *"San Andrés"* stated: "I inform you that I am in the Colombian Archipelago of San Andrés and Providencia, protecting the historic fishing rights of the Colombian State and guaranteeing the security of all vessels present in the area and implementing operations against transnational crimes".[293]

4.96. After the *"Tayacán"* informed it that it was actually in Nicaragua's jurisdictional waters according to the Judgment of the Court, the *"San Andrés"* replied: "I reiterate that we are in Colombian waters of the Archipelago of San

[288] *See* Daily Navy reports 2015-2017 (NR, Annex 2).
[289] Audio Transcription of 28.03.2015 (NR, Annex 32).
[290] Audio Transcription of 28.03.2015 (NR, Annex 32).
[291] Audio Transcription of 28.03.2015 (NR, Annex 32).
[292] *See* Daily Navy reports 2015-2017 (NR, Annex 2).
[293] Audio Transcription of 5.04.2015 (NR, Annex 32).

Andrés and Providencia protecting historic fishing rights. I receive your proclamation and invite you to maintain the caution required in these cases."[294]

4.97. These incidents threatened to go beyond mere words. On 7 April 2015, the *ARC "San Andrés"* was once again in communication with the *BL-405 "Tayacán"* in Nicaragua's EEZ.[295] This time, the Colombian frigate stated: "I remind you that you are navigating with drum lights within the vital circle of a warship … this represents a navigation hazard and you are within the San Andres and Providencia Archipelago. I invite you to stay calm and move away from my unit or you will be retained."[296] After the *"Tayacán"* explained that it did not represent a threat, the *"San Andrés"* repeated: "I request … that you move away from my unit or it will be considered a threat ...."[297]

4.98. An hour later, the *"San Andrés"* reverted to script, stating: "I inform you that I am in the Colombian Archipelago of San Andrés and Providencia, defending the historic fishing rights of the Colombian State, guaranteeing the security of all vessels present in the area and implementing operations against transnational crimes."[298] After the *"Tayacán"* invoked the 2012 Judgment, the *"San Andrés"* repeated its prior statement and added: "I invite you to maintain the caution required in these cases."[299]

4.99. The scene was repeated again on 17 April 2017 by a Colombian coast guard vessel navigating in Nicaragua's EEZ.[300] Once again, it informed the *CG-401 "José Santos Zelaya"*: "I am in the Colombian Archipelago of San Andrés and Providencia, protecting the historic fishing rights of the Colombian State and

[294] Audio Transcription of 5.04.2015 (NR, Annex 32).
[295] *See* Daily Navy reports 2015-2017 (NR, Annex 2).
[296] Audio Transcription of 7.04.2015 (NR, Annex 32).
[297] Audio Transcription of 7.04.2015 (NR, Annex 32).
[298] Audio Transcription of 7.04.2015 (NR, Annex 32).
[299] Audio Transcription of 7.04.2015 (NR, Annex 32).
[300] *See* Daily Navy reports 2015-2017 (NR, Annex 2).

guaranteeing the security of all vessels present in the area and implementing operations against transnational crimes."[301]

4.100. In a recent incident, a Colombian frigate went beyond just menacing words. On 16 May 2017, the *"José Santos Zelaya"* reported that, while navigating in Nicaragua's EEZ, a Colombian frigate harassed it and interfered with its navigation by positioning itself just off the prow of the *"José Santos Zelaya"*.[302]

2. Colombia's Authorization, Encouragement, and Protection of Industrial Fishing in Nicaragua's EEZ

4.101. Colombia has also continued to violate Nicaragua's sovereign rights and jurisdiction by authorizing, encouraging and protecting industrial fishing in Nicaragua's EEZ.

4.102. This is evidenced by a series of resolutions issued by the General Maritime Directorate of the Ministry of National Defence of Colombia, and by the Governor of the Department of the Archipelago of San Andrés, Providencia and Santa Catalina.

4.103. Since the 2012 Judgment, the General Maritime Directorate has issued annual resolutions granting foreign-flagged industrial fishing vessels permission to fish in Nicaragua's EEZ.[303] Each resolution lists anywhere from six to nineteen foreign-flagged industrial fishing vessels,[304] and states that these vessels "shall

[301] Audio Transcription of 17.04.2017 (NR, Annex 32).
[302] *See* Daily Navy reports 2015-2017 (NR, Annex 2).
[303] General Maritime Directorate, Resolution No. 0311 of 2013 (26 June 2013)(NR, Annex 7); General Maritime Directorate, Resolution No. 305 of 2014 (25 June 2014)(NR, Annex 9); General Maritime Directorate, Resolution No. 0437 of 2015 (27 July 2015) (NR, Annex 12); General Maritime Directorate, Resolution No. 0459 of 2016 (27 July 2016)(NR, Annex 16); General Maritime Directorate, Resolution No. 550 of 2017 (15 August 2017) (NR, Annex 17).
[304] General Maritime Directorate, Resolution No. 0311 of 2013 (26 June 2013), art. 2(2) (NR, Annex 7); Maritime Directorate, Resolution No. 305 of 2014 (25 June 2014), art. 2(2) (NR,

automatically be granted a permit to stay and operate in the jurisdiction of the San Andrés and Providencia Harbour Master's Offices for the term of one year".[305] (The jurisdiction of the San Andrés and Providencia Harbour Master's Offices is defined in the Directorate's Resolution No. 0825 of 1994 and extends into areas adjudged by the Court to be Nicaragua's EEZ.[306])

4.104. These annual resolutions not only authorize industrial fishing in Nicaragua's EEZ, but also encourage such fishing through financial incentives. The first of the resolutions (issued in June 2013) exempted the listed industrial fishing vessels from making payments to the Directorate for lighthouse and buoy fees for the period of one year.[307] And the subsequent four resolutions (issued in 2014, 2015, 2016, and 2017) exempted the listed vessels from making payments to the Directorate for its provision of maritime security services.[308]

4.105. The Governor of the Department of the Archipelago of San Andrés, Providencia and Santa Catalina has also issued resolutions post-dating the 2012 Judgment concerning the applicability of Colombian fishing permits in Nicaragua's EEZ. For example, Resolution No. 4997 of 2014 recognized that a

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Annex 9); General Maritime Directorate, Resolution No. 0437 of 2015 (27 July 2015), art. 2(2) (NR, Annex 12); General Maritime Directorate, Resolution No. 0459 of 2016 (27 July 2016), art. 2(2) (NR, Annex 16); General Maritime Directorate, Resolution No. 550 of 2017 (August 2017), art. 2(B) (NR, Annex 17).

[305] General Maritime Directorate, Resolution No. 0311 of 2013 (26 June 2013), art. 4 (NR, Annex 7); General Maritime Directorate, Resolution No. 305 of 2014 (25 June 2014), art. 4 (NR, Annex 9); General Maritime Directorate, Resolution No. 0437 of 2015 (27 July 2015), art. 4 (NR, Annex 12); General Maritime Directorate, Resolution No. 0459 of 2016 (27 July 2016), art. 4 (NR, Annex 16); General Maritime Directorate, Resolution No. 550 of 2017 (15 August 2017), art. 4 (NR, Annex 17).

[306] General Maritime Directorate, Resolution No. 0825 of 1994 (27 December 1994), arts. 1(h), 1(i) (NR, Annex 5). *See* also the Maps of the Jurisdiction of the San Andres and Providencia Harbour Master's Office (NR, Annex 18).

[307] General Maritime Directorate, Resolution No. 0311 of 2013 (26 June 2013), art. 3 (NR, Annex 7).

[308] General Maritime Directorate, Resolution No. 305 of 2014 (25 June 2014), art. 3 (NR, Annex 9); General Maritime Directorate, Resolution No. 0437 of 2015 (27 July 2015), art. 3 (NR, Annex 12); General Maritime Directorate, Resolution No. 0459 of 2016 (27 July 2016), art. 3 (NR, Annex 16); General Maritime Directorate, Resolution No. 550 of 2017 (15 August 2017), art. 3. (NR, Annex 17).

Colombian fishing permit granted to the Colombian company *Comercializadora Internacional Antillana S.A.* (whose fishing fleet comprises 17 foreign-flagged fishing vessels[309]) is applicable in "all of the banks … , Shoals … and in the fishing zones where permitted by the laws, fishing regulations and system of Protected Marine Areas that apply in the Department for –Industrial Fishing".[310] And Resolution No. 4356 of 2015 recognized that the permit is applicable in "all the banks … and Shoals …, and the zone where fishing is permitted by the laws, which includes our island territory and authorized fishing zones".[311]

4.106. More explicitly, just like Resolution No. 5081 of 2013, which was discussed in Nicaragua's Memorial,[312] Resolution No. 4780 of 2015 recognized that an "Industrial Commercial Fishing Permit"[313] granted to the owner of the company *Pesquera Serranilla* is applicable in "all the banks … and Shoals …–, and the area known as the "*la esquina*" or "*luna verde*", which includes our insular territory and fishing zones".[314] It is undisputed between the parties that the *Luna Verde* area lies on Nicaragua's side of the Court's delimitation line, as shown in Figure 4.1 above.

4.107. And most recently, Resolution No. 2465 of 2016 grants "Traditional Commercial Fisherm[e]n" the right to engage in traditional fishing "within the maritime jurisdiction of the Department of the Archipelago of San Andrés,

[309] General Maritime Directorate, Resolution No. 4997, art. 4. (NR, Annex 11).
[310] General Maritime Directorate Resolution No. 4997, Preamble, Clause 5.2. (NR, Annex 11).
[311] General Maritime Directorate, Resolution No. 4356 of 2015(1 September 2015), Preamble, Clause 5.2. (NR, Annex 13).
[312] Nicaragua's Memorial, para. 2.51; Nicaragua's Memorial, Annex 11.
[313] General Maritime Directorate, Resolution No. 4780 of 2015 (24 September 2015), Preamble, Recital 1 (NR, Annex 14).
[314] General Maritime Directorate, Resolution No. 4780 of 2015 (24 September 2015), Preamble, Clause 5 (NR, Annex 14).

Providencia and Santa Catalina", [315] which includes maritime areas within Nicaragua's EEZ.[316]

4.108. The Colombian Navy has also taken active measures to protect the fishing vessels that Colombia authorized and encouraged to operate in Nicaragua's EEZ. For example, on 23 March 2015, the *Lucky Lady* was fishing in Nicaragua's EEZ approximately 300 metres from a Colombian frigate, the *ARC "Independiente"*, [317] when Nicaragua's *CG-401* approached the Honduran-flagged *Lucky Lady* and asked it for the authority under which it was fishing.[318] The *ARC "Independiente"* intervened and stated: "I inform you that the Lucky Lady is under the protection of the government of Colombia. ... I inform you that the Colombian government has not abided by the ruling in The Hague .... I invite you to maintain caution in these cases, keep the caution captain to avoid situations that you might regret later."[319]

4.109. A similar incident occurred on 12 September 2015. On that day, the Tanzanian-flagged *Miss Dolores* was fishing in Nicaragua's EEZ.[320] Nicaragua's *BL-405 "Tayacán"* hailed her but the *Miss Dolores* did not respond.[321] Instead, a nearby Colombian Navy frigate answered: "[Y]ou have not been authorized by the Colombian government to exercise visitation rights on the Miss Dolores flagship of Tanzania, which is fishing for the Colombian government, I ask you

[315] General Maritime Directorate, Resolution No. 2465 of 2016 (30 June 2016), art. 4; *see also ibid.*, art. 8. (NR. Annex 15).
[316] *See* Government of the Department of the Archipelago of San Andrés, Providencia and Santa Catalina, *Territorio*, http://www.sanandres.gov.co/index.php?option=com_content&view=article&id=125&Itemid=84; Government of the Department of the Archipelago of San Andrés, Providencia and Santa Catalina, *Mapa Geografico*, http://www.sanandres.gov.co/index.php?option=com_content&view=article&id=126&Itemid=142 .
[317] *See* Daily Navy Reports 2015-2017 (NR, Annex 2).
[318] Audio Transcription of 23.03.2015 (NR, Annex 32).
[319] Audio Transcription of 23.03.2015 (NR, Annex 32).
[320] *See* Daily Navy Reports 2015-2017 (NR, Annex 2).
[321] *See* Audio Transcription of 12.09.2015(NR, Annex 32).

to stay away from the boat, we will remain in the area to guarantee its protection. I invite you to maintain the caution required in these cases ….”[322]

4.110. The Colombian frigate then hailed the *Miss Dolores* to ask whether it was doing well, and informed it: “[W]e are here for you. We will remain on contact channel 16, if you have any need, do not hesitate to call us, this is the CG from Colombia ….”[323]

4.111. Similarly, on 29 September 2015, the *Miss Dolores* was once again operating in Nicaragua’s EEZ when a Colombian airplane flew over the area and informed it that a Colombian Navy frigate was heading toward its location for protection.[324]

4.112. The conduct of the Colombian Navy is plainly part of a larger policy. On 3 December 2015, a Colombian news website reported that the representative of the Colombian Navy in San Andrés, Providencia and San Catalina, Rear Admiral Andrés Vásquez Villegas, stated, in deliberate non-recognition of the Court’s 2012 Judgment: “There are no vetoed areas for our fishermen. We continue to exercise national sovereignty and defending our sovereignty in the jurisdictional waters of Colombia.”[325] He added that, in these waters, Colombian Navy vessels would be responsible for “the safety of our fishermen”.[326]

4.113. On 12 January 2016, the Honduran-flagged *Observer* was observed operating in Nicaragua’s EEZ[327] by a Nicaraguan coast guard vessel, the *CG-403 “Jose Dolores Estrada”*, which informed it that it was in Nicaraguan waters and

[322] *See* Audio Transcription of 12.09.2015(NR, Annex 32).
[323] *See* Audio Transcription of 12.09.2015(NR, Annex 32).
[324] *See* Daily Navy Reports 2015-2017 (NR, Annex 2).
[325] There are no vetoed zones for the fishermen in San Andres: National Navy, *El Pais.com.co*, 3 December 2015 (NR, Annex 26).
[326] There are no vetoed zones for the fishermen in San Andres: National Navy, *El Pais.com.co*, 3 December 2015 (NR, Annex 26).
[327] *See* Daily Navy Reports 2015-2017 (NR, Annex 2).

that in order to fish there it would need to be authorized by Nicaragua.[328] The *Observer* replied: "Right, well, now we understand. So, I did not know because the Colombian authorities allowed us to come and fish. They ordered us to come and work here."[329]

4.114. A few hours later, *CG-403* spotted the *Observer* fishing in the same area, only now with the protection of a Colombian Navy frigate.[330] The *CG-403* attempted to hail the *Observer* again, but it did not respond.[331] Instead, the frigate intervened, stating: "I inform you that the motorboat Observer is authorized to fish in this area by the Colombian maritime authority, according to the historic fishing rights of the State of Colombia."[332]

4.115. After the *CG-403* explained that the waters were Nicaraguan, the frigate responded: "I inform you that the Observer and all Colombian vessels that are in the area are authorized by the Colombian General Maritime Directorate to carry out fishing activities in the area."[333]

4.116. The next day, the *CG-403* initiated contact with the Colombian frigate, which replied: "I inform you that I am in the Colombian Archipelago of San Andrés and Providencia, protecting the historic fishing rights of the Colombian State, guaranteeing the security of all vessels present in the area and implementing operations against transnational crimes."[334]

4.117. A few hours later, the *CG-403* informed the Colombian frigate that it needed the *Observer* to leave the area because it was engaging in illegal

[328] *See* Audio Transcription of 12.01.2016 (NR, Annex 32).
[329] *See* Audio Transcription of 12.01.2016 (NR, Annex 32).
[330] *See* Daily Navy Reports 2015-2017 (NR, Annex 2).
[331] *See* Audio Transcription of 12.01.2016 (NR, Annex 32).
[332] *See* Audio Transcription of 12.01.2016 (NR, Annex 32).
[333] *See* Audio Transcription of 12.01.2016 (NR, Annex 32).
[334] *See* Audio Transcription of 13.01.2016 (NR, Annex 32).

fishing.[335] The frigate again asserted: "The motorboat Observer is authorized by the Colombian General Maritime Directorate to carry out fishing manoeuvres in the area."[336]

4.118. On 6 January 2017, the Colombian Navy was found protecting another industrial fishing vessel, the Honduran-flagged *Capitán Geovanie*, which was fishing in Nicaragua's EEZ.[337] After asking a few questions, the *CG-405 "Tayacán"* informed it of the Judgment of the Court and ordered it to leave the area.[338] The *Capitán Geovanie* refused.[339] At that moment, a Colombian Navy frigate arrived, announcing that it was in the Archipelago of San Andrés and Providencia to guarantee the security of all vessels present in the area.[340]

4.119. The Colombia frigate asked the *Capitán Geovanie* whether the *"Tayacán"* was interfering with its fishing, and told it: "[P]roceed and continue your fishing task, you are in historically Colombian waters and our duty is to protect your task."[341] The frigate then told the *"Tayacán"*: "[P]roceed to abort any attempt to board and any attempt to abort the fishing of the Captain Geovanie motorboat …"[342] The frigate added: "The Capitán Geovanie is authorized by the Colombian maritime authority, fishing in historically Colombian waters."[343]

[335] *See* Audio Transcription of 13.01.2016 (NR, Annex 32).
[336] *See* Audio Transcription of 13.01.2016 (NR, Annex 32).
[337] *See* Daily Navy Reports 2015-2016 (NR, Annex 2).
[338] *See* Audio Transcription of 06.01.2017 (NR, Annex 32).
[339] *See* Audio Transcription of 06.01.2017 (NR, Annex 32).
[340] *See* Audio Transcription of 06.01.2017 (NR, Annex 32).
[341] *See* Audio Transcription of 06.01.2017 (NR, Annex 32).
[342] *See* Audio Transcription of 06.01.2017 (NR, Annex 32).
[343] *See* Audio Transcription of 06.01.2017 (NR, Annex 32).

4.120. The frigate then informed two other Colombian authorized fishing vessels in Nicaragua's EEZ, the *Observer* and the Honduran-flagged *Amex I*, that it would remain in the area for their safety.[344]

4.121. The fact that all these incidents have occurred in or near the *Luna Verde* area is particularly significant. As the incidents just described reveal, *Luna Verde* is an area for commercial fishing, not artisanal fishing.[345] Moreover, the *Lucky Lady*, *Miss Dolores*, *Observer*, *Capitán Geovanie*, and *Amex* are all industrial fishing vessels.[346] They were not engaged in small-scale artisanal fishing, and they are not even Colombian, much less operated by the Raizales. Colombia therefore cannot even argue that it was acting to protect the (non-existent) historical, artisanal fishing rights of the Raizales. Colombia's conduct has therefore been in wilful disregard of its international obligations, including the obligation to have due regard for Nicaragua's exclusive sovereign rights to the natural resources of its EEZ.

3. The Colombian Navy's Harassment of Nicaraguan Fishing in Nicaragua's EEZ

4.122. In addition to authorizing, encouraging, and protecting industrial fishing in Nicaragua's EEZ, Colombia has also consistently harassed Nicaraguan fishing vessels operating in Nicaragua's own waters. For example, on 26 March 2015, the *ARC "11 de Noviembre"* informed a Nicaraguan-flagged fishing vessel in

[344] *See* Daily Navy Reports 2015-2016 (NR, Annex 2); Audio Transcription of 06.01.2017 (NR, Annex 32).
[345] *See* Julio Londoño Paredes, Presentation to the Colombian Academy of History, 19 March 2013 (NR, Annex 21); Despite The Hague, fishermen increased in San Andres, *ape.com.co*,3 September 2013 (NR, Annex 22).
[346] General Maritime Directorate, Resolution No. 0311 of 2013 (26 June 2013), art. 2(2) (NR, Annex 7); General Maritime Directorate, Resolution No. 305 of 2014 (25 June 2014), art. 2(2) (NR, Annex 9); General Maritime Directorate, Resolution No. 0437 of 2015 (27 July 2015), art. 2(2) (NR Annex 12); General Maritime Directorate, Resolution No. 0459 of 2016 (27 July 2016), art. 2(2) (NR, Annex 16); General Maritime Directorate, Resolution No. 550 of 2017 (15 August 2017),art. 2(B) (NR, Annex 17).

Nicaragua's EEZ, the *Doña Emilia*, that it was engaging in "predator fishing" and asked it to stop this practice.[347]

4.123. On 10 May 2015, the Nicaraguan fishing vessel *Al-John* reported to the Nicaraguan Coast Guard that it was interrogated extensively by a Colombian frigate about its fishing activities in Nicaragua's EEZ.[348]

4.124. On 13 July 2015, a Colombian frigate similarly interrogated a Nicaraguan-flagged fishing boat in the Nicaraguan EEZ.[349] The frigate asked the fishing boat for its name, flag nationality, identification number, port of departure, type of fishing performed, and whether it had seen a Nicaraguan Coast Guard vessel in its fishing zone.[350] The frigate similarly interrogated the fishing boat *Snyder*, also located in Nicaragua's EEZ.[351]

4.125. On 21 August 2016, the captain of the Nicaraguan fishing vessel *Marco Polo* reported that, when it was fishing in Nicaragua's EEZ, the Colombian frigate, the *ARC "Almirante Padilla"*, informed it via radio that its fishing activities were illegal.[352] The Colombian frigate then proceeded to emit an acute sound in the water, which obstructed the *Marco Polo*'s fishing for lobster, thereby forcing it to leave the area.[353]

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[347] Daily Navy Reports 2015-2016 (NR, Annex 2); Audio Transcription of 26.03.2015 (NR, Annex 32).
[348] *See* Daily Navy Reports 2015-2016 (NR, Annex 2).
[349] *See* Daily Navy Reports 2015-2016 (NR, Annex 2).
[350] *See* Daily Navy Reports 2015-2016 (NR, Annex 2); Audio Transcription of 13.07.2015 (NR, Annex 32).
[351] *See* Daily Navy Reports 2015-2016 (NR, Annex 2), Audio Transcription of 13.07.2015 (NR, Annex 2).
[352] *See* Letter from the Navy to the Commander in Chief of the Army JFN-523-2016, 29 August 2016 (NR, Annex 3);
[353] *See* Nicaragua's Reply, Annex 3 Letter from the Navy to the Commander in Chief of the Army JFN-523-2016, 29 August 2016.

E. Colombia Also Continues To Offer Hydrocarbon Blocks In Nicaragua's EEZ

4.126. In addition to all the above, Colombia's National Hydrocarbon Agency ("ANH") also continues to act in direct contravention of the 2012 Judgment by offering hydrocarbon blocks in areas within Nicaragua's EEZ.

4.127. In particular, the ANH continues to hold out 11 blocks that include areas that, at least in part, encroach upon Nicaragua's EEZ.[354] The relevant blocks are numbers 3050-3057 and 3059-3061, and are named CAYOS 1-3, 5-7, and 10-14.[355] The location of these blocks in relation to the boundary determined by the Court in 2012 is depicted in Figure 4.3 on the following page.

4.128. ANH offered all eleven blocks for licensing in 2010,[356] and awarded two of them (nos. 3050 and 3059) to a consortium of Ecopetrol (Colombia), Repsol (Spain), and YPF (Argentina),[357] although the signature of the relevant contracts remains outstanding.[358] As for the remaining nine blocks, ANH's current list and

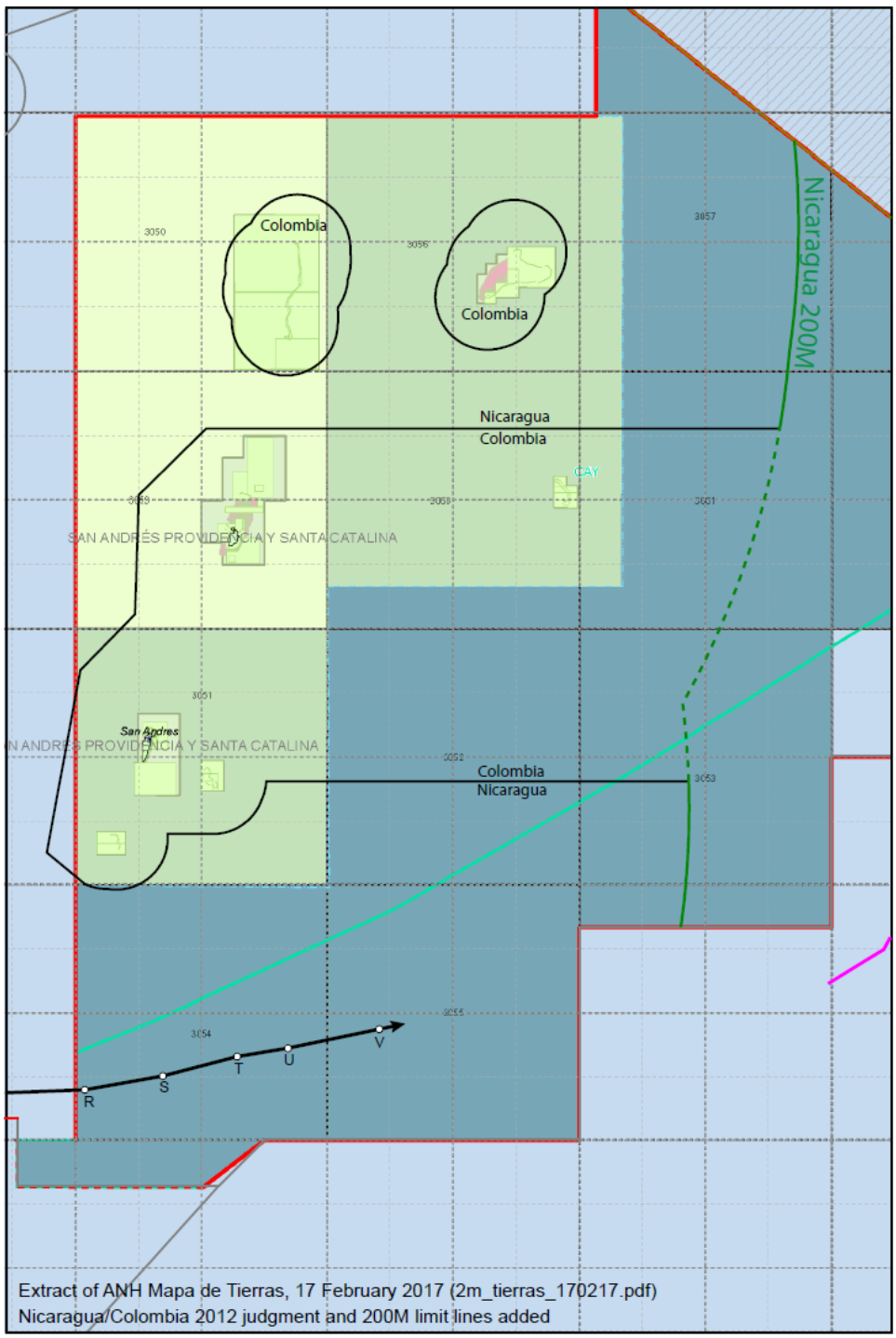
[354] *See* ANH, Colombia Hydrocarbon 2017 Map (available at: http://www.anh.gov.co/Asignacion-de-areas/Documents/2m_tierras_170217.pdf).
[355] *See ibid*.
[356] ANH, Colombia Hydrocarbon 2010 Round Map (available at: http://ronda2010.anh.gov.co/imagenes/docs2/136Mapa_Tierras_210510.pdf).
[357] ANH, Colombia Hydrocarbon 2010 Round List of Awardees. (available at: http://www.anh.gov.co/Asignacion-de-areas/Procedimientos-de-Seleccion/Procesos%20Anteriores/Ronda%20Colombia%202010/Listado%20definitivo%20para%20adjudicación%20de%20bloques.%20Agosto%206%20de%202010.pdf).
[358] ANH, Colombia Hydrocarbon 2010 Round Conclusion (available at: http://www.anh.gov.co/Asignacion-de-areas/Procedimientos-de-Seleccion/Procesos%20Anteriores/Ronda%20Colombia%202010/Comunicado%20de%20Prensa%20-%20%20Finaliza%20Ronda%20Colombia%202010%20%20(Open%20Round%20Colombia%202010).pdf); ANH, Colombia Hydrocarbon 2010 Round San Andrés Press Release (available at: http://www.anh.gov.co/Asignacion-de-areas/Procedimientos-de-Seleccion/Procesos%20Anteriores/Ronda%20Colombia%202010/Comunicado%20de%20Prensa%20-%20exploración%20de%20hidrocarburos%20en%20la%20plataforma%20marina%20del%20archipiélago%20de%20San%20Andrés.pdf).

map of hydrocarbon blocks continue to indicate that they are "available" for licensing.[359]

4.129. Offering and awarding hydrocarbon blocks encompassing parts of Nicaragua's EEZ is not only inconsistent with Colombia's obligation to "have due regard to the rights and duties of [Nicaragua]", but also directly violates Nicaragua's exclusive sovereign right to explore for and exploit the natural resources in its EEZ.

[359] *See* ANH, Colombia Hydrocarbon 2017 Map; ANH, Colombia Hydrocarbon 2017 Listed Blocks.

Figure 4.3 Hydrocarbon blocks offered by Colombia in Nicaragua's EEZ



4.130. In sum, the Court may consider Colombia's violations of Nicaragua's sovereign rights and jurisdiction in their entirety, including violations that occurred after the Pact of Bogotá ceased to be in force for Colombia. The evidence shows that Colombia's violations have been serious and persistent, and that they continue to this day. Colombia's conduct, undertaken pursuant to clear policy directives from the highest authorities, unmistakably engages its international responsibility.

CHAPTER V: REMEDIES

5.1 In the present Chapter, Nicaragua will answer Colombia's argument on remedies.

5.2 As is traditionally the case when the responsibility of a State is invoked, Colombia argues that it has done nothing wrong and that, therefore, no question of remedies arises.[360] Nicaragua has shown that Colombia has committed and is still committing several internationally wrongful acts. As Nicaragua has established in the present Reply, Colombia still refuses to comply with the Court's 2012 Judgment and to respect Nicaragua's rights in its exclusive economic zone. Colombia continues to harass and threaten Nicaraguan ships and fishermen and to actively protect and encourage Colombian ships, and foreign-flagged vessels authorized by Colombia, to fish in Nicaragua's EEZ. Also, it has not repealed its Decree No. 1946 establishing its Integral Contiguous Zone. As Nicaragua has explained in its Memorial and in this Reply, a series of legal consequences flow from these acts.[361]

5.3 *First*, the Respondent has an obligation to cease all ongoing internationally wrongful acts.[362] *Second*, Colombia must re-establish the *status quo ante*.[363] *Third*, it must compensate Nicaragua for the harm endured by itself and its nationals.[364] *Fourth*, the Respondent must give Nicaragua appropriate guarantees of non-repetition[365].

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[360] CCM, para. 6.2.
[361] NM, Chapter 4.
[362] *See* NM, paras. 4.14-4.43.
[363] *Ibid.*, paras. 4.44-4.58.
[364] *Ibid.*, paras. 4.59-4.65.
[365] *Ibid.*, paras. 4.66-4.73.

5.4 The only legal consequence that Colombia questions in its Counter-Memorial is the duty to pay compensation. Colombia merely claims that no injury has been suffered as a result of unlawful acts it has committed.[366] In support of its claim, Colombia refers to two reports.[367] These reports indeed show that Nicaraguan fishing in Nicaraguan waters is increasing after the 2012 Judgment. That is not surprising. The 2012 Judgment settled an important and difficult boundary dispute. Before this Judgment, there was a vast undelimited area of more than 200.000 km²,[368] into which Nicaragua was *de facto* prohibited from entering. Now that this dispute has been settled by the Court's Judgment of 2012, Nicaragua and Nicaraguan fishermen can at last exercise their rights, even with the limitations imposed by Colombia, in the maritime areas unlawfully claimed by Colombia prior to that date. It is therefore only logical that Nicaragua's fishing activities have increased since 2012, but not at the level they might attain if they were not constrained by the Colombian Navy.

5.5 Furthermore, if the catch from Nicaragua's fisheries in the Caribbean has indeed increased since 2012, it does not mean that Nicaragua has suffered no injury. As already explained in the Memorial[369], injury includes both sustained losses and loss of expected profits.[370] In the present case, the loss of expected profits is evident:

- Colombia's threatening actions towards Nicaraguan fishing boats prevent these boats from accessing substantial portions of Nicaragua's exclusive economic zone; and

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[366] CCM, paras. 6.5-6.8.
[367] *Ibid*.
[368] *See* I.C.J., Judgment, 19 November 2012, *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Reports*, p. 686, para. 166.
[369] *See* NM, paras. 4.61-4.64.
[370] *See* Article 36 of the Articles on responsibility of States for internationally wrongful acts, *Yearbook of the International Law Commission*, 2001, Vol. II, Part Two, p. 98, also annexed to A/RES/56/83, 12 Dec 2001.

- Nicaragua has shown that Colombia has actively protected and encouraged fishing by its own vessels, and those of other States, in Nicaragua's exclusive economic zone.[371] This has caused a substantial loss of profits for Nicaragua and its licensed fishermen. Any resources caught by vessels with a licence granted by Colombia are no longer available for exploitation by Nicaraguan fishermen. This also deprives Nicaragua of revenue related to the granting of licenses and of fishing-related taxes. For instance, Colombia's financial incentives have led ships possessing a licence granted by Nicaragua to apply for a Colombian fishing licence in Nicaragua's exclusive economic zone.

5.6 For these reasons, Nicaragua is entitled to receive compensation from Colombia.

5.7 Nicaragua requests that, as is customary in such circumstances, the amount of compensation payable to it by Colombia be determined in a subsequent phase of the case.

[371] See Chapter IV, Section D above.

PART II

COUNTER-CLAIMS

1. On 17 November 2016, Colombia filed its Counter-Memorial together with four counter-claims.[372] Colombia counter-claimed that Nicaragua breached

> (1) "Its duty of due diligence to protect and preserve the marine environment of the Southwestern Caribbean Sea";[373]
> (2) "Its duty of due diligence to protect the right of the inhabitants of the San Andrés Archipelago, in particular the Raizales, to benefit from a healthy, sound and sustainable environment";[374]
> (3) "The artisanal fishing right to access and exploit the traditional banks";[375] and
> (4) Colombia's sovereign rights and maritime zones by enacting its straight baselines Decree No. 33-2013 of 19 August 2013.[376]

2. On 15 November 2017, the Court decided that only the third and fourth counter-claims were admissible.[377] The first and second counter-claims were declared inadmissible[378].

3. Accordingly, in Part II of its Reply, Nicaragua will only discuss Colombia's counter-claims 3 and 4.

4. In Chapter VI, Nicaragua will demonstrate that the inhabitants of one State cannot have traditional fishing rights in the EEZ of another State; and that

[372] *See* CCM, Chapters 7-10.
[373] CCM, para. 8.2.
[374] *Ibid*.
[375] *Ibid.*, Chapter 9.
[376] *Ibid.*, Chapter 10.
[377] I.C.J., Order, 15 November 2017, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Counter-Claims*, paras. 82(A)(3) and (4).
[378] *Ibid.*, paras. 82(A)(1) and (2).

even if they could, Colombia has not discharged its burden of proving either that its fishermen truly had such rights or that Nicaragua has infringed them.

5. Chapter VII addresses Colombia's fourth counter-claim and will prove that Nicaragua's legislation on straight baselines is consistent with both customary law and the relevant provisions of UNCLOS.

CHAPTER VI: NICARAGUA HAS NOT INFRINGED COLOMBIA'S NON-EXISTENT ARTISANAL FISHING RIGHTS

6.1 Colombia's first remaining counter-claim (the third presented in its Counter-Memorial) relates to Nicaragua's alleged infringement of the traditional artisanal fishing rights of the inhabitants of the San Andrés Archipelago, including the indigenous Raizal people. This Chapter shows that this counter-claim is untenable in law and fact, and only serves to provide further proof of Colombia's violations of Nicaragua's sovereign rights and jurisdiction.

6.2 Section A demonstrates that the counter-claim fails as a matter of law. The inhabitants of one State cannot have traditional fishing rights in the EEZ of another State. Section B shows that even if they could, Colombia has not discharged its burden of proving either that its fishermen truly had such rights or that Nicaragua has infringed them.

A. Any Artisanal Fishing Rights The Inhabitants Of The San Andrés Archipelago May Have Had Were Extinguished By The Regime Of The EEZ

6.3 Colombia devotes about twenty pages of its Counter-Memorial to a narrative concerning the alleged fishing practices of the inhabitants of the San Andrés Archipelago, including the Raizal people.[379] Colombia then goes on to argue that the 2012 Judgment "has had a chilling effect on the artisanal fishermen's resolve to reach the areas where they, and their ancestors, have always fished"[380] because, according to Colombia, "many traditional fishing banks of the inhabitants of the Archipelago are now located in the maritime zones under the jurisdiction of Nicaragua, while others are situated in those of

[379] CCM, pp. 55-74, paras. 2.61-2.86.
[380] CCM, p. 76, para. 2.92.

Colombia … but can only be accessed by navigating through waters belonging to Nicaragua's exclusive economic zone".[381]

6.4 Colombia adds another fifteen pages to argue that there is a local customary right of the artisanal fishermen of the Archipelago to access and exploit their traditional fishing grounds,[382] which right, Colombia says, survives the 2012 Judgment.[383]

6.5 Nicaragua rejects this claim in the first instance because it is based on a false legal premise. Whatever the historical fishing practices of the local inhabitants may have been, they do not and cannot enjoy artisanal fishing rights in Nicaragua's EEZ. Such rights, even if they could be said to have existed in the past (*quod non*), were extinguished with the creation of the EEZ regime.

6.6 Nicaragua observes as a preliminary matter that the EEZ regime as codified in Part V of UNCLOS is fully applicable between the Parties as customary international law. As early as 1984, in *Gulf of Maine (Canada/United States)*, a Chamber of the Court concluded that the EEZ regime "may … be regarded as consonant at present with general international law".[384] Less than one year later, in *Continental Shelf (Libya/Malta)*, the entire Court held: "It is in the Court's view incontestable that … the institution of the exclusive economic zone … is shown by the practice of States to have become a part of customary law".[385] Part V of UNCLOS therefore reflects customary international law binding on both Nicaragua and Colombia.

[381] CCM, p. 75, para. 2.90; *see also ibid.*, p. 76, para. 2.91.
[382] CCM, pp. 139-146, paras. 3.86-3.97.
[383] CCM, pp. 146-154, paras. 3.98-3.111.
[384] *Gulf of Maine (Canada/United States)*, para. 94.
[385] *Continental Shelf (Libya/Malta)*, para. 34.

6.7 An examination of the text, context, and preparatory works of Part V, as well as the jurisprudence, makes clear that the coastal State—and only the coastal State—can have any rights to exploit the living resources of the EEZ. UNCLOS leaves no room for the recognition of other States' or peoples' traditional fishing rights in a coastal State's EEZ.

1. The Text of UNCLOS, Part V

6.8 Article 56(1)(a) of UNCLOS provides that the coastal State in its EEZ has, *inter alia*, "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 seabed and of the seabed and its subsoil".[386] UNCLOS does not grant any other State or non-State actor such rights in the coastal State's EEZ.

6.9 In other words, a coastal State's right over the living resources are exclusive, exactly as the term "*exclusive* economic zone" implies. As the *Virginia Commentary* notes: "The importance of the concept of exclusivity is that the coastal State, *to the exclusion of other States and entities*, has sole jurisdiction as regards the resources of the zone, and has the right to exercise its discretion in respect of those resources."[387]

6.10 The exclusivity of the coastal State's rights is buttressed by other provisions of Part V, which vests a coastal State with the exclusive right to establish allowable catch limits in its EEZ (Article 61(1)), and to establish its own harvesting capacity (Article 62(2)). It is only when the coastal State does not have the capacity to harvest the resources up to the allowable limit (which it has set)

[386] UNCLOS, Art. 56(1)(a).
[387] Satya N. Nanda & Shabtai Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. II (1993), p. 519.

that it must give other States access to the surplus (Article 62(2)), and only then under the terms and conditions that it establishes (Article 62(4)).

6.11 Only in this circumstance is a coastal State obligated to take into account, among other factors, "the need to minimize economic dislocation in States whose nationals have habitually fished in the zone or which have made substantial efforts in research and identification of stocks" (Article 62(3)).

6.12 Pursuant to the maxim *expressio unius est exclusio alterius*, recognizing any other fishing rights in a coastal State's EEZ would be plainly incompatible with these provisions of the Convention.

2. The Context

6.13 This conclusion is further reinforced by comparing the provisions of UNCLOS relating to the EEZ with those relating to other maritime zones. In contrast to Part V, other portions of UNCLOS contain express carve-outs for traditional fishing rights or the application of other rules of international law.

6.14 For example, with respect to archipelagic waters, Article 51(1) provides that "an archipelagic State … shall recognize traditional fishing rights … in certain areas falling within archipelagic waters".[388] The fact that there is no analogous provision in Part V can only mean that traditional fishing rights do not exist in the EEZ.

6.15 The fact that claims to "historic rights" under general international law are superseded by subsequent treaty provisions that conflict with and do not expressly preserve such claims was recognized as far back as 1958. In reference to the 29 April 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, the U.N. Secretariat prepared a study at the request of the

[388] UNCLOS, Art. 51(1).

International Law Commission entitled *Juridical Regime of Historic Waters, including Historic Bays*. That study concluded:

> "[I]f the provisions of an article should be found to conflict with an historic title to a maritime area, and no clause is included in the article safeguarding the historic title, the provisions of the article must prevail as between the parties to the Convention. This seems to follow *a contrario* from the fact that articles 7 and 12 [which are the equivalents of Articles 10 and 15, respectively] have express clauses reserving historic rights; articles without such a clause must be considered not to admit an exception in favour of such rights."[389]

6.16 This reasoning applies *mutatis mutandis* to the EEZ regime. None of the articles in Part V expressly or impliedly preserves historic rights in the EEZ. The only very limited exception is, as stated, in Article 62(3) providing that "[i]n giving access to other States to its exclusive economic zone under this article, the coastal State shall take into account all relevant factors, including, *inter alia*, … the need to minimize economic dislocation in States whose nationals have habitually fished in the zone …"[390]

6.17 This provision clearly indicates that the drafters of the Convention considered the significance of historic fishing practices in the EEZ but decided to relegate them to the status only of a "relevant factor" in the coastal State's decision to give other States access to its EEZ. The absence of a provision preserving traditional fishing rights was plainly intentional.

[389] United Nations, Secretary General, Juridical Regime of Historic Waters, Including Historic Bays, U.N. Doc No. A/CN.4/143 (9 Mar. 1962), para. 75.
[390] UNCLOS, Art. 62(3).

3. The Preparatory Works

6.18 The preparatory works of UNCLOS further confirm that the EEZ regime extinguished any traditional fishing rights that may previously have existed.[391] During UNCLOS III, a number of States took the position that the new convention should protect their historic fishing practices in waters that were in the process of being transformed from high seas open to all into other States' EEZs.

6.19 For example:

- Japan and the Soviet Union advocated against granting coastal States exclusive rights in the EEZ, proposing instead that coastal States should enjoy only preferential rights, which would entitle them to an allocation of resources subject to "duly [taking] into account ... the interests of traditionally established fisheries of other States";[392]
- Australia and New Zealand proposed granting historic fishing rights to States that "carried on fishing in the fishery resources zone on a substantial scale for a period of [ten] years", even if the zone fell within the EEZ of another State;[393]
- Malta and Zaire proposed that historic fishing rights should be preserved in the EEZ;[394] and

[391] Leonardo Bernard, "The Effect of Historic Fishing Rights In Maritime Boundaries Delimitation", Law of the Sea Institute Conference Papers, Securing the Ocean for the Next Generation (Harry N. Scheiber, ed., May 2012), pp. 7-8 ("It is clear from the discussions undertaken during the negotiation of the EEZ provisions in the LOS Convention that any claims of historic/traditional fishing rights made by non coastal States are not compatible with the concept of EEZ".).

[392] Japan, Proposals for a régime of fisheries on the high seas, U.N. Doc. A/AC.138/SC.II/L.12 (1972); USSR, Draft article on fishing (basic provisions and explanatory note), U.N. Doc. A/AC.138/SC.II/L.6 (1972).

[393] Australia and New Zealand, Working Paper: Principles for a Fisheries Regime, U.N. Doc. A/AC.138/SC.II/L.ll (1972), p. 186.

[394] Leonardo Bernard, "The Effect of Historic Fishing Rights In Maritime Boundaries Delimitation", Law of the Sea Institute Conference Papers, Securing the Ocean for the Next Generation (Harry N. Scheiber, ed., May 2012).

- The United States proposed that a State's historic fishing rights should be preserved initially but phased out over time.[395]

6.20 At the other end of the spectrum, a larger number of States, particularly developing States, strenuously objected to the protection of historic fishing rights in the waters adjacent to their coasts.[396] In some cases, these rights had been exercised at their expense, due to their former colonial status, or lack of means to exploit the resources of their coastal waters.

6.21 This latter position received widespread support at the 1974 Caracas Session[397] and ultimately prevailed. The Main Trends Working Paper produced that year recognized the exclusive sovereign rights and jurisdiction of a coastal State over the natural resources in the EEZ.[398] This principle was subsequently embodied in Article 56 of the Convention.

4. The Jurisprudence

6.22 The jurisprudence also supports the conclusion that UNCLOS extinguished traditional fishing rights, including artisanal fishing rights, in the EEZ. In *Gulf of Maine*, the United States argued that the delimitation of Georges

[395] Canada and the United States jointly offered two proposals that would have established a transition period during which distant-fishing nations, whose traditional fishing rights were to be eliminated, could adjust their fishing activities to the new jurisdictional order. Canada and the United States of America, Proposal, U.N. Doc. A/CONF.19/C.1/L.10 (8 Apr. 1960).
[396] *See e.g.*, Declaration of Latin American States on the Law of the Sea (8 Aug. 1970). l Montevideo Declaration on the Law of the Sea (8 May 1970), in American Journal of International Law, Vol. 64, No. 5 (1970); Declaration of Santo Domingo, U.N. Doc. A/AC.138/80 (7 June 1972); Conclusions in the General Report of the African States Regional Seminar on the Law of the Sea, Yaoundé, 20-30 June 1972, U.N. Doc. A/AC.138/79 (20 July 1972).
[397] J. Stevenson and B. Oxman, "The Third United Nations Convention on the Law of the Sea: The 1974 Caracas Session", American Journal of International Law, Vol. 69, No. 1 (1975), p. 2 (in which the authors observe that during the 1974 Caracas Session, there was widespread support for coastal States' sovereign and exclusive rights for the purpose of exploration and exploitation of living resources within the 200 M economic zone.).
[398] U.N. Conference on the Law of the Sea III, "Working Paper of the Second Committee: Main Trends", U.N. Doc. A/CONF.62/L.8/Rev. 1, Annex II, Appendix I (1974), p. 120.

Bank should take account of the longstanding use of the bank by U.S. fishermen. A Chamber of the Court rejected the argument, holding that the adoption by the United States and Canada of exclusive fisheries zones extinguished any existing historic fishing rights.

6.23 It ruled:

> "Until very recently … these expanses were part of the high seas and as such freely open to the fishermen not only of the United States and Canada but also of other countries, and they were indeed fished by very many nationals of the latter. … But after the coastal States had set up exclusive 200-mile fishery zones, the situation radically altered. *Third States and their nationals found themselves deprived of any right of access to the sea areas within those zones and of any position of advantage they might have been able to achieve within them*. As for the United States, any mere factual predominance which it had been able to secure in the area was transformed into a situation of legal monopoly to the extent that the localities in question became legally part of its own exclusive fishery zone. Conversely, to the extent that they had become part of the exclusive fishery zone of the neighbouring State, no reliance could any longer be placed on that predominance."[399]

6.24 The only case that has recognized historic fishing rights in the EEZ of another State is the *Eritrea/Yemen* arbitration. Yet the tribunal's decision in that case has no bearing on the issues in this one.

6.25 The circumstances of the *Eritrea/Yemen* dispute were unique. The parties agreed to a two-stage arbitration. In the first stage, they asked the tribunal to determine which State had sovereignty over disputed islands in the Red Sea based on "historic titles"; that is, under general international law.[400]

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[399] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States)*, Judgment, ICJ Reports 1984, p. 246 at pp. 341-342, para. 235 (emphasis added).
[400] *Eritrea v. Yemen*, First Stage of the Proceedings (Territorial Sovereignty and Scope of the Dispute), Award (9 Oct. 1998), para. 114.

6.26 In that first stage, the tribunal awarded certain islands to Yemen, but, based on its concern that this would have a devastating impact on the livelihoods of Eritrean fishermen who had anchored at the islands and fished in their adjacent waters "since times immemorial", it ruled: "Yemen shall ensure that the traditional fishing regime of free access and enjoyment for the fishermen of both Eritrea and Yemen shall be preserved for the benefit of the lives and livelihoods of this poor and industrious order of men".[401]

6.27 In the second stage of the arbitration, the parties asked the tribunal to delimit their maritime boundary, "taking into account the opinion that it will have formed on questions of territorial sovereignty, the United Nations Convention on the Law of the Sea, and any other pertinent factor".[402] Thus, by express agreement of the parties, the tribunal was empowered to look beyond the terms of UNCLOS in delimiting the maritime boundary, and specifically to take into account its award in the first stage and other "pertinent factors".

6.28 Under these special rules, in its second award, the tribunal took into account "the historic … tradition of joint use of the islands' waters by fishermen from both sides of the Red Sea" whose activities "were carried out for centuries without any need to obtain any authorizations from the rulers on either the Asian or the African side of the Red Sea and in the absence of restrictions or regulations exercised by public authorities".[403] Relying on these "pertinent factors", as agreed by the parties, the tribunal found that they included "all important elements capable of creating certain 'historic rights' which ... provide a sufficient legal

[401] *Ibid.*, para. 526.
[402] *Eritrea v. Yemen*, First Stage of the Proceedings (Territorial Sovereignty and Scope of the Dispute), Award (9 Oct. 1998), para. 7.
[403] *Eritrea v. Yemen*, First Stage of the Proceedings (Territorial Sovereignty and Scope of the Dispute), Award (9 Oct. 1998), paras. 118, 127.

basis for maintaining certain aspects of a *res communis* that has existed for centuries for the benefit of the populations on both sides of the Red Sea".[404]

6.29 Because the arbitral tribunal did not rely on UNCLOS in rendering its decision on historic fishing rights, but instead was tasked with considering "historic titles" and other "pertinent factors", including its first award, the *Eritrea/Yemen* award has no application to the present dispute.

6.30 In sum, the text and context of the relevant provisions of UNCLOS, the preparatory works, and the jurisprudence all make clear that historic fishing rights, including artisanal fishing rights, did not survive the creation of the EEZ regime. Whatever the historic fishing practices of the inhabitants of the San Andrés Archipelago may have been, they therefore cannot have such rights in Nicaragua's EEZ.

B. In Any Event, Colombia Has Not Discharged Its Burden Of Proving Either That The Traditional Fishing Rights It Claims Exist, Or That Nicaragua Has Infringed Them

6.31 Even if the traditional fishing rights of the inhabitants of the San Andrés Archipelago could have survived the creation of the EEZ regime as a matter of law (*quod non*), Colombia's counter-claim would still fail on the facts. Colombia has not discharged its burden of proving either that its fishermen actually had such rights or that Nicaragua has infringed them.

[404] *Eritrea v. Yemen*, First Stage of the Proceedings (Territorial Sovereignty and Scope of the Dispute), Award (9 Oct. 1998), para. 126.

1. Colombia Has Not Proven the Existence of the Artisanal Fishing Rights It Claims

(a). Colombia's Arguments Are Inconsistent with Its Prior Admissions

6.32 Colombia attempts to prove that the inhabitants of the San Andrés Archipelago, including the Raizales, have a long-standing practice of artisanal fishing in the waters around the archipelago, including in waters that in 2012 the Court adjudged to be Nicaragua's EEZ. According to Colombia, "history demonstrates that artisanal fishing by the inhabitants of the Archipelago was carried out throughout the Southwestern Caribbean Sea", including in what is now Nicaragua's undisputed EEZ.[405]

6.33 Colombia's assertions are, however, refuted by its own words. In particular, Colombia has expressly represented that the "traditional fishing sites are precisely located in the vicinity of areas *not* affected by the ICJ judgment *since it is a question of territorial sea*".[406]

6.34 Colombia made this statement in a communication to the ILO Committee of Experts on the Application of Conventions and Recommendations ("CEACR"), in the context of the Committee's evaluation of Colombia's application of the ILO Indigenous and Tribal Peoples Convention. On behalf of the Raizal Small-Scale Fishers' Associations and Groups of the Department of San Andrés, Providencia and Santa Catalina, a Colombian labour syndicate had

[405] CCM, para. 2.81.
[406] ILO, Committee of Experts on the Application of Conventions and Recommendations, *Observation (CEACR) - adopted 2013, published 103rd ILC session (2014), Indigenous and Tribal Peoples Convention, 1989 (No. 169) - Colombia (Ratification: 1991)*, *available at* <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:3141200>.

complained to the CEACR that the 2012 Judgment had negative implications for traditional fishing.[407]

6.35 Colombia deflected the complaint with the statement quoted above; that is, that the "traditional fishing sites are precisely located in the vicinity of areas *not affected by the ICJ judgment since it is a question of territorial sea*". This admission to the CEACR is wholly inconsistent with the arguments Colombia now presents to the Court.

6.36 Colombia's admission before the CEACR was not a one-off statement. After the labour syndicate restated its complaint to the Committee in 2014, Colombia reiterated:

> "With regard to the right of the inhabitants of San Andrés to have access to traditional fishing areas, … such fishing areas are located precisely around the keys and that *these areas were not affected by the ICJ ruling, as they consisted of territorial waters awarded to Colombia*, together with the sovereignty of the islands and the seven keys".[408]

6.37 Nicaragua considers these two statements to be significant statements against interest that, by themselves, disprove Colombia's case. Colombia has twice represented to the CEACR that the traditional fishing grounds of the inhabitants of the San Andrés Archipelago were located in the territorial seas around the islands and cays of the archipelago, and that such areas were not

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[407] ILO, Committee of Experts on the Application of Conventions and Recommendations, *Observation (CEACR) - adopted 2013, published 103rd ILC session (2014), Indigenous and Tribal Peoples Convention, 1989 (No. 169) - Colombia (Ratification: 1991)*, *available at* <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:3141200>.

[408] ILO, Committee of Experts on the Application of Conventions and Recommendations, *Observation (CEACR) - adopted 2014, published 104th ILC session (2015), Indigenous and Tribal Peoples Convention, 1989 (No. 169) - Colombia (Ratification: 1991)*, *available at* <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:3141200>.

affected by the 2012 Judgment. For it now to claim that the traditional fishing grounds extend into Nicaragua's EEZ is plainly inconsistent with its prior, officially expressed opinion.

6.38 The Court needs no reminding that such statements against interest have long been regarded as a highly probative form of evidence in inter-State proceedings. As the Court explained in its Judgment on the merits in *DRC v. Uganda*, such official statements "are of particular probative value when they acknowledge facts or conduct unfavourable to the State represented by the person who made them"[409]. Colombia should therefore not be heard now to take a completely different view as to the areas where the inhabitants of the archipelago traditionally fished.

6.39 Other Colombian official acts have been equally inconsistent with the existence of the traditional fishing rights Colombia now asserts. For example, in 2004, Resolution No. 0121 of Colombia's General Maritime Directorate placed tight limits on the areas where artisanal fishermen were permitted to fish.[410] Specifically, artisanal fishing was limited to a distance of just 12 M from the islands of San Andrés and Providencia, except only that fishing was also allowed in the areas of Alburquerque and Bolivár Cays due to their proximity to the main Island of San Andres. If Colombia truly considered that the inhabitants of the archipelago had the non-derogable rights it now claims, it would not have prevented the Raizales' exercise of those rights.

6.40 Colombia's views as expressed to the CEACR are also entirely consistent with the positions it espoused—or rather, did not espouse—during proceedings in the *Territorial and Maritime Dispute (Nicaragua v. Colombia)* case. As the

[409] *DRC v. Uganda*, para. 78 (quoting *Nicaragua v. United States*, Merits, Judgment, para. 64).
[410] General Maritime Directorate, Resolution No. 121 of 2004 (28 April 2004), art. 4 (NR, Annex 6); Dimar regulated artisanal fisheries, *El Tiempo*, 13 April 2004 (NR, Annex 19).

Agent of Nicaragua observed during the oral hearings on Colombia's preliminary objection in this case, "there was no mention of ancestral fishing rights of the Raizales" during proceedings in the previous case.[411]

6.41 Colombia does not dispute this uncomfortable fact. Rather, it says it is irrelevant because "the existence of traditional fishing rights is to be distinguished from the question of the relevant circumstances justifying the shifting of a maritime delimitation line".[412] Even if that were true, Nicaragua nevertheless considers it revealing that Colombia did not see fit during the previous case to even advert to the existence of the rights it now claims.

6.42 In a diplomatic note addressed to the Secretary General of the United Nations in the wake of the 2012 Judgment, Colombia's Minister of Foreign Affairs, María Angela Holguín, wrote:

> "The Court's decision awakens a deep sense of dread and anguish that their identity, indelibly linked to their inheritance which includes the waters from whence they have historically drawn their sustenance, will be irrevocably undermined …. *A decision cannot ignore the need to guarantee that ethnic communities will be enabled to continue their traditional livelihoods, and that their cultural identity, social structure, economic system, and their distinctive customs, beliefs and traditions will be respected and protected*"[413].

6.43 If Colombia had genuinely considered that the Court's decision needed to be mindful of "the need to guarantee that ethnic communities will be enabled to continue their traditional livelihoods", it would have made that argument at the time. It did not.

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[411] CR 2015/23, 29 September 2015, para. 24 (Argüello).

[412] CCM, para. 9.13

[413] Diplomatic Note DM No. 94331 from the Minister of Foreign Affairs of Colombia to the Secretary General of the United Nations, 23 November 2012 (CCM, Annex 19).

6.44 Nicaragua considers this omission all the more significant because Colombia *did* make arguments concerning the relevance of "access to resources" in regard to the delimitation then before the Court. Specifically, Colombia argued: "A median line boundary … would result in no adverse effects to Nicaragua regarding its access to such [living] resources. In contrast, east of the median line, the fishing potential of the area is limited".[414] Surely, if Colombia thought that there was a risk that the delimitation might "adversely affect" its own citizens' access to resources, particularly their ability "to continue their traditional livelihoods", it would have said so.

6.45 Equally significant, the portion of Colombia's Memorial in the *Territorial and Maritime Dispute* discussing the issue of "access to resources" contains another telling admission concerning the location of the traditional fishing grounds of its fisherman. In 2008, five years before Nicaragua filed its Application in this case, and eight years before Colombia submitted its counter-claims, Colombia told the Court:

> "it is important to point out that since mid-nineteen [sic] century the population of San Andrés and Providencia have relied for their subsistence on the fisheries, turtle hunting, guano exploitation and other food resources *in Roncador, Quitasueño, Serrana, Serranilla and Bajo Nuevo*".[415]

6.46 None of Roncador, Quitasueño, Serrana, Serranilla or Bajo Nuevo is located in Nicaragua's EEZ. Colombia therefore cannot now credibly claim that the areas on which "the population of San Andrés and Providencia have relied for their subsistence" are somewhere other than where it previously told the Court they were.

[414] Memorial of Colombia, para. 9.76.
[415] Memorial of Colombia, para. 9.78.

(b) Colombia's Own Evidence Disproves Its Claim

6.47 The evidence that Colombia relies on to establish the historic nature of artisanal fishing in the San Andrés Archipelago further confirm that such fishing did not historically occur in Nicaragua's EEZ. Specifically, in Section C of Chapter 2 to its Counter-Memorial, Colombia relies on eleven affidavits obtained from local fishermen[416] to show how artisanal fishing in the area has been taking place for a long period of time.

6.48 It bears emphasis first that the Court has consistently treated affidavits with caution. In *DRC v. Uganda*, the Court held that "[w]hile a notarized affidavit is entitled to a certain respect, the Court must observe that it is provided by a party in the case and provides at best indirect 'information' that is unverified".[417]

6.49 In *Nicaragua v. Honduras*, the Court elaborated:

> "The Court notes … that witness statements produced in the form of affidavits should be treated with caution. In assessing such affidavits the Court must take into account a number of factors. These would include whether they were made by State officials or by private persons not interested in the outcome of the proceedings and whether a particular affidavit attests to the existence of facts or represents only an opinion as regards certain events. The Court notes that in some cases evidence which is contemporaneous with the period concerned may be of special value. Affidavits sworn later by a State official for purposes of litigation as to earlier facts will carry less weight than affidavits sworn at the time when the relevant facts occurred. In other circumstances, where there would have been no reason for private persons to offer testimony earlier, affidavits prepared even for the purposes of litigation will be scrutinized by the Court both to see whether what has been testified to has been

[416] CCM, Vol. II, pp. 373-427, Annexes 62-72.
[417] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment (19 December 2005), 2005 ICJ Rep. 168, p. 219, para. 129.

> influenced by those taking the deposition and for the utility of what is said."[418]

6.50 Caution appears particularly appropriate in this case for at least two reasons. First, the affidavits were made "by private persons … interested in the outcome of the proceedings"; that is, by fishermen whose interests are aligned with those of Colombia. Second, the affidavits were "sworn later … for purposes of litigation as to earlier facts [rather than] when the relevant facts occurred". Indeed, the eleven affidavits were all prepared during a fourteen-day period between 18 to 31 October 2016, less than a month before the submission of Colombia's Counter-Memorial on 17 November 2016. They were, in short, prepared in haste for purposes of this litigation.

6.51 Relying on these eleven affidavits, Colombia asserts that *"[s]ince time immemorial*, [the Raizales] have navigated *all of the Southwestern Caribbean* in search of resources, such as fish and turtles."[419] The affidavits Colombia submits stand for no such proposition, however. They reveal instead that any historic fishing took place largely in the vicinity of Colombia's islands, not in waters that the Court determined to be part of Nicaragua's EEZ (exactly as Colombia previously represented to CEACR).

6.52 Take, for example, the most elderly affiant, Mr Jonathan Archbold Robinson.[420] In his affidavit, Mr Robinson recounts that he has been fishing since he was just 18 years old (circa 1946), and that his father had also been a

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[418] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment (8 October 2007), 2007 ICJ Rep. 659, pp. 731-732, paras. 243-244; *see also Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Merits, Judgment (3 February 2015), 2015 ICJ Rep. 3, pp. 77-78, paras. 196-197.
[419] CCM, para. 2.64 (emphasis added); *see also* CCM, para. 3.102 ("The artisanal fishermen of the Archipelago have been fishing in their traditional fishing grounds since time immemorial ….").
[420] CCM, Annex 66.

fisherman.[421] When describing where he fished, Mr Robinson states that he "fished most of [his] life in Serrana, Roncador and Quitasueño",[422] which, of course, are all Colombian features. Although he asserts that he "fished in Nicaraguan waters", he provides no detail other than to state that he fished in "Quenna", a reference to Quitasueño, which is also Colombia's.

6.53 The second oldest affiant, Mr Alfredo Rafael Howard Newball (born circa 1930), tells a similar story.[423] In his affidavit, he mentions how since his childhood he would accompany his father on fishing expeditions.[424] Nevertheless, he notes that "[i]n those old days, we would go to the North Cays to do artisanal fishing".[425] As other affiants specify, the "North Cays" refers to Serranilla, Serrana, Roncador, Quitasueño, and Bajo Nuevo,[426] all of which are Colombian insular features.

6.54 Other affidavits are to the same effect. Mr Orlando Francis Powell explains how his fishermen's association "promoted a project in 2004 to take artisanal fishermen to the North Cays (Serranilla, Serrana, Roncador, Quitasueño, Bajo Nuevo)" in order to "fish[] in the territories that have ancestrally belonged to the indigenous Raizal population".[427] Similarly, Mr Eduardo Steele Martinez notes that "for over 40 years I have fished in the cays appertaining to the Archipelago (Serrannilla, Serrana, Roncador, Quitasueño, Bajo Nuevo)".[428] And Mr Wallingford Gonzalez Steele Borden states that "[w]e artisanal fishermen always fished in Roncador, Quitasueño, Serrana and in the area of the 82° west of

[421] CCM, Annex 66.
[422] CCM, Annex 66.
[423] CCM, Annex 67.
[424] CCM, Annex 67.
[425] CCM, Annex 67.
[426] *See, e.g.*, CCM, Annexes 64, 68, 69.
[427] CCM, Annex 68.
[428] CCM, Annex 70.

Providencia".[429] Even this vague reference to "the area of the 82° west of Providencia" does not support Colombia's case. To the west of Providencia, the maritime boundary drawn by the Court in 2012 comes very close to the 82° W meridian at approximately 81° 46' W.

6.55 Some of the younger affiants do assert that they have fished in Nicaraguan waters. But the clear story that emerges from these affidavits is that Colombian fishermen started venturing further from shore only in recent decades as a result of improving technology and the depletion of fish stocks in their traditional, near-shore fishing sites.

6.56 Mr Alfredo Rafael Howard Newball states, for example: "Fish are more scarce nowadays. Artisanal fishermen have to go farther more often to survive."[430] Mr Landel Robinson Archbold likewise observes: "Fish [are] becom[ing] scarce and more expensive. You have to go in deeper waters to find something."[431] And Mr Wallingford Gonzalez Steele Borden asserts: "We artisanal fisherman always fished in Roncador, Quitasueño, Serrana and in the area of the 82° west of Providencia. We would even go further and reach Bobel Cays close to Cape Gracias a Dios. But at that time the expeditions occurred less frequently because in the sixties we had a lot of fish also around Providencia."[432]

6.57 It thus appears that, at the earliest, artisanal fishermen began venturing into deeper waters closer to Nicaragua only in the 1970s. Colombia's assertion that its fishermen have fished in Nicaragua's EEZ "since time immemorial" is thus profound overstatement.

[429] CCM, Annex 63.
[430] CCM, Annex 67.
[431] CCM, Annex 62.
[432] CCM, Annex 63.

6.58 Even if accepted as true, a few decades of fishing is not nearly enough to establish historic rights or a local custom under international law.[433]

6.59 The formation of "historic rights" in international law requires "the continuous exercise of the claimed right by the State asserting the claim and acquiescence on the part of other affected States".[434] In the present case, Colombia has not met its burden of showing the continuous exercise of the claimed right,[435] as the affiants note that their primary fishing activities occurred around Colombian maritime features, not in Nicaragua's EEZ. There is also no evidence of acquiescence on the part of Nicaragua, particularly as—supposing the alleged "historic rights" emerged in the 1970s— the dispute with Nicaragua over the maritime spaces had already arisen and, furthermore, UNCLOS and the EEZ regime were being negotiated during that time period.

6.60 Moreover, before the crystallization of Part V of UNCLOS into customary international law, it was not unlawful for fishermen from Colombia (or any other State) to fish in, for example, *Luna Verde*, as it was not yet a part of Nicaragua's

[433] For the burden of proof for historic rights, see Secretariat of the United Nations, *Juridical regime of Historic Waters, Including Historic Bays* (9 March 1962), p. 25, para. 188 ("The burden of proof of title to 'historic waters' is on the State claiming such title …."), *available at* <http://legal.un.org/ilc/documentation/english/a_cn4_143.pdf>. For the burden of proof for local custom, see *Asylum (Colombia/Peru)*, Judgment (20 November 1950), 1950 ICJ Rep. 266, p. 276 ("The Party which relies on a [local custom] must prove that this custom is established in such a manner that it has become binding on the other Party.").

[434] *South China Sea (Philippines v. China)*, para. 265; *see also* Secretariat of the United Nations, *Juridical regime of Historic Waters, Including Historic Bays* (9 March 1962), p. 25, para. 185.

[435] For the burden of proof for historic rights, see Secretariat of the United Nations, *Juridical regime of Historic Waters, Including Historic Bays* (9 March 1962), p. 25, para. 188 ("The burden of proof of title to 'historic waters' is on the State claiming such title …."), *available at* <http://legal.un.org/ilc/documentation/english/a_cn4_143.pdf>. For the burden of proof for local custom, see *Asylum (Colombia/Peru)*, Judgment (20 November 1950), 1950 ICJ Rep. 266, p. 276 ("The Party which relies on a [local custom] must prove that this custom is established in such a manner that it has become binding on the other Party.").

EEZ. The exercise of freedoms permitted under international law cannot give rise to a historic right.[436]

6.61 Neither have the standards for "local custom" been met. In *Right of Passage (Portugal v. India)*, the Court held that a local custom arises when there is a "constant and uniform practice",[437] and this practice is "accepted as law by the Parties".[438] As mentioned above, given the irregular nature of the fishermen's ventures beyond Colombia's islands, this limited practice is far from "constant and uniform". Colombia also points to no evidence—because there is none—that Nicaragua has accepted this practice as law.

6.62 In conclusion, a careful examination of Colombia's affidavits actually disproves Colombia's argument that the historic fishing activities of its fishermen occurred in Nicaragua's EEZ. And even if they had, those activities were too infrequent and of too recent standing to establish either historic rights or a local custom under international law.

(c) President Ortega's Attempts to Strike a Conciliatory Tone Cannot Change the Legal Situation

6.63 Colombia attempts to bolster its claim concerning the existence of traditional, artisanal fishing rights by pointing to several statements made by President Ortega. According to Colombia, these statements "constitute explicit recognitions when it comes to the traditional fishing rights of the Raizales to

[436] *See South China Sea (Philippines v. China)*, para. 268.
[437] *Right of Passage over Indian Territory (Portugal v. India)*, Merits, Judgment, 1960 ICJ Rep. 6 (12 April 1960), p. 40; *see also Asylum (Colombia/Peru)*, Judgment, 1950 ICJ Rep. 266 (20 November 1950), p. 276 ("a constant and uniform usage practised by the States in question").
[438] *Right of Passage over Indian Territory (Portugal v. India)*, Merits, Judgment, 1960 ICJ Rep. 6 (12 April 1960), p. 40; *see also ibid.*, p. 39 ("long continued practice between two States accepted by them"); *ibid.*, p. 43 ("established a practice, well understood between the Parties"); *ibid.*, p. 44 ("a practice clearly established between two states which was accepted by the Parties as governing the relations between them"); *Asylum (Colombia/Peru)*, Judgment, 1950 ICJ Rep. 266 (20 November 1950), p. 276 ("this usage is the expression of a right").

artisanal fishing in waters that now fall within Nicaragua's EEZ".[439] Nicaragua disagrees.

6.64 None of the statements on which Colombia relies constitutes the "explicit recognitions" it claims. In the first instance, the statements cited must be understood in the particularly delicate context in which they were made. As the Court well knows, the 2012 Judgment was met with fury and rejection in Bogotá.[440] To this day, Colombia continues to treat the Court's Judgment as "inapplicable" until such time as an agreement with Nicaragua may be reached.

6.65 Confronted with this hostile response, not to mention Colombia's greater naval power, President Ortega opted for a conciliatory tone. Rather than inflame the situation, he sought to deescalate it and nudge Colombia in the direction of respecting the Court's Judgment by indicating that there was room to accommodate Colombia's concerns. That is the background against which President Ortega's statements must be understood.

6.66 President Santos's own statements reflect this reality. Following the meeting of the two presidents in Mexico City in December 2012, for example, President Santos stated:

> "'We will continue seeking for the rights of Colombians to be restored, that The Hague judgment seriously affected. We met with President Ortega. We explained our position very clearly: we want that the rights of Colombians and the Raizal population, not only in terms of artisanal fishermen rights but other rights, be guaranteed and restored. *He understood.* We told him that we need to handle this situation with cold head, in a diplomatic and friendly fashion, as this kind of issues should be handled to avoid incidents. *He also*

[439] CCM, para. 3.93.
[440] *See e.g.* Chapter IV, Section C.

> *understood.* We agreed to establish communication channels to address all these points'".[441]

6.67 In any event, even if they are read ignoring this critical diplomatic context, the statements that Colombia invokes fall far short of "explicit recognitions" of the Raizales' traditional fishing rights in Nicaragua's EEZ.

6.68 Colombia first cites a 26 November 2012 statement in which President Ortega stated that Nicaragua would respect the rights of the inhabitants "to fish and navigate those waters, which they ha[d] historically navigated".[442] But in that same statement President Ortega also "suggested that artisanal fishermen would require an authorization from the relevant Nicaraguan authorities".[443]

6.69 Colombia itself rightly acknowledges: "Such a requirement would have deprived the recognition of the Raizales' historic rights of any meaning".[444] The statement therefore does not constitute a recognition of a genuine "right" to fish.

6.70 Colombia next cites a statement by President Ortega several days later, on 1 December 2012, in which he said that Nicaragua would "respect the ancestral rights of the Raizales".[445] This statement, like the first one, does not purport to recognize a right to fish without authorization. In fact, as Colombia itself acknowledges, President Ortega in the same statement also noted that "mechanisms" would have to be established in order to "ensure the right of the Raizal people to fish".[446] Here again, taken as a whole, the statement indicates that artisanal fishing "rights" do not exist independently of "mechanisms" to be approved by Nicaragua.

6.71 The third statement Colombia cites is from February 2013, when President Ortega expressed openness to working with Colombia, and proposed to create a bilateral commission and "work on an agreement between Colombia and

[441] CCM, Annex 74 (emphases added).
[442] CCM, para. 3.93 (quoting El 19 Digital, Message from the President Daniel to the People of Nicaragua, 26 November 2012 (Memorial of Nicaragua, Annex 27)).
[443] CCM, para. 3.94 (citing El 19 Digital, Message from the President Daniel to the People of Nicaragua, 26 November 2012 (Memorial of Nicaragua, Annex 27)).
[444] CCM, para. 3.93
[445] CCM, para. 3.94.
[446] CCM, para. 3.94.

Nicaragua to regulate this situation …".[447] Once more, the statement indicates that artisanal fishing "rights" do not exist absent an appropriate agreement with Nicaragua.[448]

6.72 In the same statement, President Ortega also indicated that pending such an agreement Nicaragua would "allow Raizales to continue fishing".[449] By stating that Nicaragua would "allow" such fishing, President Ortega made clear that the granting of such permission constituted an *exercise* of Nicaragua's sovereign right and jurisdiction, not the fulfilment of an obligation in *derogation* of Nicaragua's rights.

6.73 The fourth statement Colombia cites dates to November 2014. According to the Counter-Memorial, President Ortega stated that "while the 2012 delimitation will have to be implemented, guarantees to the Raizal communities of the Archipelago will also have to be included in the agreement to be negotiated with Colombia".[450] Thus by Colombia's own admission, the statement stands only for the unremarkable proposition that continued fishing in Nicaragua's EEZ by the Raizales would have the be the subject of an agreement.

6.74 The fifth and final statement Colombia relies on is from November 2015. As recounted in the annex submitted with Colombia's Counter-Memorial, President Ortega stated:

> "In Nicaragua we already fulfilled the National Assembly procedure for enacting the Court's Judgment as a law … Colombia has to go through this formality. We understand this perfectly. And we understand the contradictions that Domestic Politics impose in each one of our Countries. And we understand that patience is necessary in order to finally reach the conditions for the Court's Judgment to be ratified by the Colombian Parliament. And there we have engagements, as I said, with the Raizales Brothers regarding their Fishing Rights, which will have to be arranged later. I discussed that

[447] CCM, Annex 76.
[448] This statement also makes clear the delicate political context in which it was made, and Nicargua's commitment to deescalating the situation. The opening lines of the press report read: "President Daniel Ortega denounced on Thursday that powerful interests are fuelling chauvinism in Colombian people in order to incite a confrontation between Colombia and Nicaragua with a conflict at sea. (…) President Ortega ratified that Nicaragua does not want or looks for a confrontation with Colombia". Colombia, Counter-Memorial, Annex 76.
[449] CCM, Annex 76
[450] Colombia, Counter-Memorial, para. 3.94.

> with President Santos because he was telling me: And the rights of the Raizal People? Of course we need to arrange those Rights there."[451]

6.75 This statement stands only for two propositions: (1) that Nicaragua continued to be sensitive to the political realities in Colombia and was willing to be patient, and (2) fishing by the Raizales in Nicaragua's EEZ would have to be the subject of an agreement "to be arranged later". Neither proposition is consistent with an "explicit recognition" of the traditional fishing rights Colombia now claims.

6.76 In concluding on this point, Nicaragua wishes to make clear that while it denies that the inhabitants of the San Andrés Archipelago have a vested "right" to conduct artisanal fishing in Nicaragua's EEZ as a matter of law, it remains open, in the spirit of brotherhood and good neighbourly relations, to work with Colombia to reach a bilateral agreement that takes account of Colombia's and Nicaragua's concerns, including the fishing needs of the Raizales.

2. Colombia Has Not Proven that Nicaragua Has Infringed the Artisanal Fishing Rights It Claims

6.77 Colombia's allegations concerning Nicaragua's alleged violations of the Raizales' traditional fishing rights is set out in Chapter 9 of the Counter-Memorial. That chapter begins by asserting that "as early as February 2013, the President of Colombia, Juan Manuel Santos, was informed of incidents between the Nicaraguan Naval Force and the artisanal fishermen of the Archipelago".[452] It then quotes a declaration made by President Santos on 18 February 2013 in San Andrés.

[451] Colombia, Counter-Memorial, Annex 78.
[452] CCM, p. 287, para. 9.1

6.78 Nicaragua agrees that President Santos's declaration is significant. As quoted by Colombia, he stated:

> "I have heard that some people have complained that there have been problems with certain Nicaraguan authorities, which threaten them, or they say they have to ask permission to be able to fish here ….
>
> "On this point, I will say the following so that it will be absolutely and totally clear: I have given peremptory and precise instructions to the Navy; the historical fishing rights of fishermen will be made respected, whatever happens. Nobody will have to ask permission from anybody to go fishing where they had been fishing before.
>
> "This type of incident should not occur again, and the Navy indeed will increase its presence or the number of vessels that it has, so that no such incident will occur again."[453]

6.79 In regard to alleged violations by Nicaragua, President Santos' declaration hardly constitutes evidence. The President only claims to have "heard" that "some people" had complained. This is pure hearsay. No reports, no inquiries, no dates, no communications and no specific facts are provided.

6.80 In Nicaragua's view, what makes President Santos's declaration significant is its remarkable admission of Colombia's adoption of a deliberate policy to violate Nicaragua's sovereign rights and jurisdiction. President Santos's "peremptory and precise instructions" to the Colombian navy to ensure respect for the "historical fishing rights of fishermen … whatever happens" are plainly inconsistent with Nicaragua's rights and jurisdiction in its EEZ.

6.81 In any event, the Counter-Memorial then goes on to argue that, notwithstanding President Ortega's conciliatory comments, the artisanal fishing rights of the Raizales have been "continuously violated by Nicaragua by reason of

[453] CCM, pp. 287-288, par. 9.1

the conduct of its Naval Force", which Colombia accuses of having allegedly been "following an active strategy of intimidation".[454] According to Colombia: "By threats and pillaging, the Naval Force of Nicaragua has basically rendered the assurances of President Ortega meaningless".[455]

6.82 When these allegations are tested against the sources cited, however, they are exposed as unfounded. Colombia's would-be evidence is presented in a section of Chapter 9 captioned "The Intimidating Conduct of the Nicaraguan Naval Force". Specifically, at paragraphs 9.18 to 9.22, Colombia cites to nine of the 11 aforementioned affidavits from Colombian fishermen.[456] Yet, for the reasons explained below, these affidavits do not prove Colombia's allegations.

6.83 Notably, Colombia does not adduce even a single piece of contemporaneous evidence. This omission is revealing. Given that Colombia accuses Nicaragua of an "active strategy of intimidation", some contemporaneous reports, or at least diplomatic protests, would be expected. If Nicaragua had truly "threatened" and "pillaged" Raizal fishermen, there should be records of complaints made to local authorities.

6.84 This is all the more true in the case of artisanal fishing; there are a number of cooperatives and other associations in Colombia that help artisanal fishermen make their voices heard. For reasons only it knows, however, Colombia presents no such contemporaneous evidence to the Court.

6.85 Nicaragua has recalled already the caution with which witness statements should be treated.[457] Such caution is particularly necessary here because, although

[454] CCM, pp. 289-290, para. 9.4.
[455] CCM, pp. 289-290, para. 9.5.
[456] CCM, Vol. II, Annexes 63, 64-65, 67-72.
[457] *See* paras. 6.48-6.62 above.

the affidavits are said to relate to facts that the affiant witnessed first-hand,[458] none of the affiants report himself being the victim of Nicaragua's alleged "threats" and "pillaging". At most, a few of the affiants offer second-hand accounts of events allegedly involving other fishermen.

6.86 In this regard, in discussing the evidentiary value of affidavits in *Croatia v. Serbia*, the Court summarized its prior jurisprudence as follows:

> "The Court has thus held that it must assess 'whether [such statements] were made by State officials or by private persons not interested in the outcome of the proceedings and whether a particular affidavit attests to the existence of facts or represents only an opinion as regards certain events' …. On this second point, the Court has stated that 'testimony of matters not within the direct knowledge of the witness, but known to him only from hearsay, [is not] of much weight'."[459]

6.87 The affidavit of Mr Landel Hernando Robinson Archbold, for example, states: "I know that Minival Ward, a member of the co-operative, was attacked by Nicaraguan fishermen when going to the North Cays".[460] There are two reasons this allegation does not help Colombia's case. First, it is not a first-hand report from the alleged victim himself. It is therefore hearsay, without even a general indication of the date on which the incident allegedly occurred, or any other specifics. Second, even if the conduct complained did in fact occur, it was committed by Nicaraguan "fishermen", not Nicaraguan official personnel.

6.88 Another affiant, Mr Domingo Sánchez McNabb, similarly recounts an incident involving "a fisherman named Aldrick", who claims that he "had a mishap with the Nicaraguan coast guard when, due to a problem with his boat's

[458] *See* CCM, Vol. II, pp. 373-399, Annexes, 62-66.

[459] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Merits, Judgment (3 February 2015), 2015 ICJ Rep. 3, p. 78, para. 197.

[460] CCM, Annex 62.

engine, he drifted away into Nicaraguan waters". According to Mr McNabb's declaration, the Nicaraguan authorities "took [Aldrick's] GPS, compass and fishing product and then he had to pay a series of fines to recover his fishing boat".[461]

6.89 This again relates an alleged incident involving someone other than the affiant. And, again, no specifics as to date, location or even the fisherman's full name are provided. Such evident hearsay is not entitled to any weight, still less to prove the "active strategy of intimidation" that Colombia alleges.

6.90 One more example suffices for present purposes. Mr Jorge de la Cruz de Alba Barker of San Andrés Island states: "Usually [the Nicaraguan coastguard] would stop the fishermen coming from San Andrés that are navigating west of and north of Providencia to reach Cape Bank or Quitasueño."[462] Elsewhere he claims that it "is common to have our GPS, VHF radio, cigarettes and food supplies taken by [the Nicaraguan coastguard]".[463]

6.91 Mr. de Alba Barker notably does not claim to have suffered such treatment himself. Here once more, his assertions are instead worded in general terms to describe alleged events involving others, and even then without names, dates or other information that might give his assertions some indicia of reliability.

6.92 If they are credited at all, the most that Colombia's affidavits might be said to establish is that fishermen from San Andrés and Providencia have

[461] CCM, Vol. II, p. 413, Annex 69. In other testimony it can be read that: "they [the fishers] are afraid that something might happen, since there have been incidents with Nicaraguan coastguards; I know that apart from what we hear in the media, there is one with [the] *Condorito,* who[se] [crew] were taken to Nicaragua and mistreated 5 years ago" (CCM, Vol. II, p. 386, Annex 64). It is therefore an act occurred in 2011, which places it outside the temporal scope relevant here; in addition, to the west of 82nd meridian.

[462] CCM, Annex 71.

[463] *Ibid*.

experienced some uncertainty in the wake of the 2012 Judgment, and that they are reluctant to fish in Nicaragua's waters. The affidavit of Mr Sánchez McNabb is typical. He states:

> "The [Court's 2012] decision had a strong impact on the psyche of the islands' artisanal fishermen, who no longer feel as the kings of the seas, they feel like a bird who lost one of its wings. The dispute between Colombia and Nicaragua is a problem between Bogotá and Managua, not a problem between the peoples of the islands of San Andrés, Providencia, Corn Islands, Bluefields, Pearl Lagoon, Puerto Limón or Jamaica. … After the [Court's] decision we feel apprehensive about going to fish in the zones in the North and the 82nd meridian, since we do not know with certainty whether we can or cannot fish there."[464]

6.93 This, of course, is an understandable and perhaps inevitable result of defining a previously undefined maritime boundary. But it is a far cry from proving Colombia's allegation that Nicaragua has been "seriously discouraging the artisanal fishermen of the Archipelago from reaching their traditional banks".[465]

6.94 The obvious remedy for this uncertainty, which Nicaragua has encouraged since the days immediately after the 2012 Judgment, is for the Parties to come to a mutually satisfactory agreement that takes appropriate account of both sides' needs and concerns. Nicaragua remains willing to reach such an agreement with Colombia.

6.95 For all the reasons stated, the inhabitants of the San Andrés Archipelago cannot and do not have traditional fishing rights in Nicaragua's EEZ. Even if they did (*quod non*), Colombia has not shown that Nicaragua has violated those rights.

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[464] CCM, Annex 69.
[465] CCM, p. 299, para. 9.21.

CHAPTER VII: NICARAGUA'S BASELINES

7.1. This chapter addresses Colombia's fourth counter-claim, which is that Nicaragua's legislation on straight baselines is not in accordance with customary international law.[466] Colombia is wrong. Nicaragua's legislation on straight baselines is, in fact, consistent with both customary law and the relevant provisions of the United Nations Convention on the Law of the Sea (Convention).

7.2. Chapter 7 of the Counter-Memorial indicates that the Parties are in agreement on the law applicable to the determination of straight baselines. This matter is further considered in section B of the present Chapter. As will be discussed in section C of this Chapter, the Parties are also in agreement that the basepoints along the low-water line along the coast of Nicaragua, which have been used in connection with the determination of Nicaragua's straight baselines and the outer limits of its maritime zones, have been determined in accordance with the applicable law.

7.3. Nicaragua established its system of straight baselines through Decree No. 33-2013.[467] The Counter-Memorial purports to provide an exhaustive analysis of this Decree. Unfortunately, as will be explained in section A below, the Counter-Memorial distorts the relationship between the Decree and the Court's 2012 Judgment in *Territorial and Maritime Dispute (Nicaragua v Colombia)*.[468]

7.4. The Parties also disagree on how Nicaragua has applied the rules on straight baselines to its coast. The Counter-Memorial asserts that Nicaragua's mainland and fringing islands do not meet the requirements for drawing straight

[466] CCM, para. 7.6.d
[467] Note Verbale from the Permanent Mission of Nicaragua to the United Nations Secretary General MINIC-NU-037-13, 23 September 2013 (NR, Annex 1).
[468] *Territorial and Maritime Dispute (Nicaragua* v *Colombia), Judgment, I.C.J. Reports 2012,* p. 624.

baselines as contained in article 7 of the Convention.[469] Section D of this Chapter will explain that the Counter-Memorial is in error. Section E will show that Colombia misinterprets paragraph 3 of article 7, insofar as it refers to the general direction of the coast, and misapplies a mathematical approach that in any case is unwarranted.

7.5. Colombia claims that Nicaragua, by establishing its system of straight baselines, has infringed Colombia's rights in two ways.[470] This concerns the navigational and other rights Colombia enjoys in Nicaragua's maritime zones and the alleged extension of the outer limit of Nicaragua's exclusive economic zone. As section F of this Chapter explains, the extent of Nicaragua's maritime zones and their regime has been determined in accordance with international law and Colombia may exercise its rights in those maritime zones in accordance with international law. Colombia's claim that Nicaragua's straight baselines have extended the outer limit of Nicaragua's exclusive economic zone is without basis.

7.6. The conclusions of this Chapter are contained in Section G.

A. Nicaragua's Decree No. 33-2013 Establishing Straight Baselines

7.7. Nicaragua's Decree No. 33-2013 establishes a system of straight baselines along Nicaragua's Caribbean coast. The preambular paragraphs of the Decree indicate that Nicaragua exercises its sovereignty, rights and jurisdiction over its maritime zones in accordance with international law.[471] The preamble further observes that Nicaragua ratified the United Nations Convention on the Law of the Sea on 3 May 2003, and that in the determination of its straight

[469] CCM, paras 10.33 and following.
[470] CCM, para. 10.52.
[471] Decree No. 33-2013, Preamble, para. I contained in Note Verbale from the Permanent Mission of Nicaragua to the United Nations Secretary General MINIC-NU-037-13, 23 September 2013 (NR, Annex 1).

baselines in the Caribbean Sea Nicaragua is acting in accordance with the Convention.[472]

7.8. Decree No. 33-2013 identifies nine basepoints along Nicaragua's Caribbean coast: two are located on the low-water line along the mainland coast, while the remaining 7 points are located on the low-water line along islands that fringe Nicaragua's mainland coast. As a result, Nicaragua's baseline for determining the breadth of its territorial sea and other maritime zones is constituted by eight straight baselines and the low-water line along London Reef and Nee Reef, off Miskito Cay, and Blowing Rock, off Great Corn Island, that are seaward of those straight baselines. The individual segments of this straight baseline system measure between 44 and 83 nautical miles. This makes these straight baselines unexceptional as regards their length in the light of State practice in the application of the straight baseline provisions of article 7 of the Convention and customary international law. For instance, Colombia itself has drawn straight baselines along its coasts in the Caribbean Sea and the Pacific Ocean through Decree No. 1436 of 13 June 1984.[473] These include baselines measuring respectively 130.5, 81.6 (two segments), and 76.8 nautical miles in length.[474]

7.9. Nicaragua's Decree No. 33-2013 was adopted in the wake of the 2012 Judgment of the Court in *Territorial and Maritime Dispute (Nicaragua v. Colombia)*. The Counter-Memorial, at paragraph 10.13, argues that "Nicaragua's August 2013 Decree establishing straight baselines in the Southwestern Caribbean purports to be based on the Court's 2012 Judgment".

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[472] *Ibid*., Preamble, paras. II and VI.
[473] Decree No. 1436 of 13 June 1984 partially regulating article 9 of Act No. 10 of 1978 (NR, Annex 4).
[474] Figures included in *Colombia; Straight Baselines* (Limits in the Seas; No. 103; 30 April 1985; United States Department of State; Office of the Geographer (available at https://www.state.gov/documents/organization/58565.pdf), pp. 4-5 and 7.

7.10. The Decree indeed refers to the Judgment. The Preamble lists a number of considerations including the fact that "the International Court of Justice issued a historic Judgment on 19 November 2012 regarding the Territorial and Maritime Delimitation between Nicaragua and Colombia in the Caribbean Sea".[475] As the Preamble also points out, the Court recognized that the islands fringing Nicaragua's Caribbean coast are part of Nicaragua's baselines for determining the breadth of its maritime zones.

7.11. The fact that Decree No. 33-2013 was adopted following the Court's 2012 Judgment in *Territorial and Maritime Dispute (Nicaragua v Colombia)* is no coincidence. In paragraph 159 of its Judgment, the Court observed that it could only determine the 200-nautical-mile limit of Nicaragua measured from its baselines "on an approximate basis" […] "[s]ince Nicaragua has not yet notified the Secretary-General of the location of those baselines under Article 16, paragraph 2," of the Convention. This incentivized Nicaragua to review baselines in accordance with the relevant provisions of the Convention, to adopt Decree No. 33-2013, and to communicate its baselines to the Secretary-General of the United Nations in fulfilment of its obligations under article 16(2) of the Convention and to establish certainty about the location of its maritime limits.[476]

7.12. Nicaragua's straight baseline segment between points 8 and 9 defined in Annex I to Decree No. 33-2013 is currently under review. Point 9, with the geographical coordinates 10° 55' 52.0" N; 083° 39' 58.1" W, is located on the coast of Harbour Head Lagoon. The Court in its Judgment of 2 February 2018 in *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua) and Land Boundary in the Northern Part of Isla Portillos (Costa Rica*

[475] Decree No. 33-2013, Preamble, para. V contained in Note Verbale from the Permanent Mission of Nicaragua to the United Nations Secretary General MINIC-NU-037-13, 23 September 2013 (NR, Annex 1).
[476] *See* Note Verbale from the Permanent Mission of Nicaragua to the United Nations Secretary General MINIC-NU-037-13, 23 September 2013 (NR, Annex 1).

v. Nicaragua) confirmed Nicaragua's sovereignty over Harbor Head Lagoon and the sandbar separating it from the Caribbean Sea.[477] However, the Court held that this part of the coast of Nicaragua would not be attributed a territorial sea in the delimitation involving Nicaragua and Costa Rica.[478] As a consequence, point 9 defined in Annex I to Decree No. 33-2013 no longer abuts on Nicaragua's territorial sea. Nicaragua will determine an appropriate point to the north of the mouth of the San Juan River instead of the current point 9. However, that change of Nicaragua's most southern basepoint defining its straight baselines does not make any material difference in relation to this Chapter's analysis of Decree No. 33-2013.[479]

B. The Applicable Law

7.13. The Parties are in agreement on the applicable law. The customary international law regulating the establishment of straight baselines is reflected in article 7 of the United Nations Convention on the Law of the Sea. The Counter-Memorial goes to considerable length to make the point that "Nicaragua has never protested against this customary rule" and is "bound to comply with the customary international rules on the drawing of baselines, including straight baselines".[480] Colombia's argument is unnecessary. There is no disagreement on this point and, as will be further explained below, Nicaragua has acted in accordance with these rules in determining its baselines in the Caribbean Sea.

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[477] *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua) and Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua) Judgment, I.C.J. Reports 2018*, para. 205(2).
[478] *Ibid*, para. 105.
[479] For the reasons set out below, the change of Nicaragua's most southern basepoint defining its straight baselines does not have any impact on the location of the outer limit of Nicaragua's exclusive economic zone at 200 nautical miles.
[480] CCM, paras 10.28 and 10.29.

C. Nicaragua's Basepoints Along The Low-Water Line

7.14. Article 7 of the Convention and customary international law require that the points, between which straight baselines are drawn, lie on the low-water line along the mainland or islands. Article 7(4) of the Convention provides an exception to this general rule, but this exception is not relevant to the straight baselines of Nicaragua in the Caribbean Sea.[481]

7.15. Two of Nicaragua's basepoints are located on its mainland coast, while the remaining seven basepoints are located on the low-water line along the islands fringing Nicaragua's mainland coast. Colombia, in the Counter-Memorial, has not made any argument concerning these basepoints, and the Parties are in agreement that these basepoints are in accordance with article 5 of the Convention and the corresponding rule of customary international law to the effect that "the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast". It may further be noted that Colombia in *Territorial and Maritime Dispute (Nicaragua v Colombia)* used basepoints on six of these islands (Edinburgh Cay; Miskito Cay; Ned Thomas Cay; Roca Tyra; Little Corn Island; and Great Corn Island) in its proposal for a provisional equidistance line to delimit the exclusive economic zone and continental shelf between Nicaragua and Colombia.[482] The seventh island on which a basepoint of Nicaragua's is located – Man of War Cays – is not relevant to determining an equidistance line between Nicaragua and Colombia.

[481] Article 7(4) of the Convention provides:

> Straight baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them or except in instances where the drawing of baselines to and from such elevations has received general international recognition.

[482] See *Territorial and Maritime Dispute (Nicaragua* v *Colombia), Judgment, I.C.J. Reports 2012*, para. 200 and Sketch-map No. 4 at p. 672.

D. Nicaragua's Mainland Coast And Islands Allow The Drawing Of Straight Baselines

7.16. Article 7(1) of the Convention indicates that straight baselines may be drawn in two geographical situations:

- In localities where the coastline is deeply indented and cut into; or
- If there is a fringe of islands along the coast in its immediate vicinity.

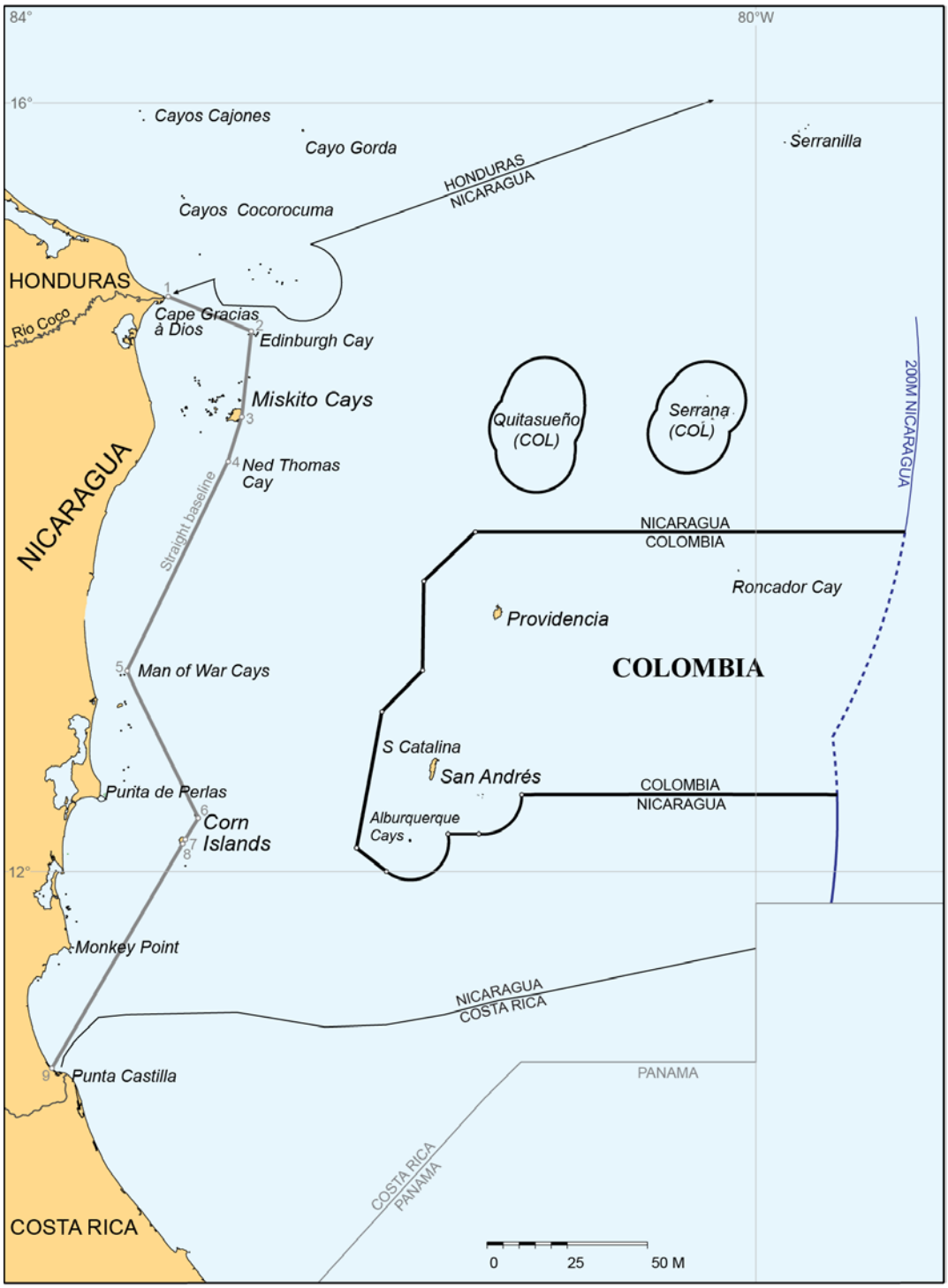
7.17. Decree No. 33-2013 indicates that Nicaragua has relied on both provisions. Preambular paragraph IV of the Decree observes that "the Caribbean coast of Nicaragua has a special configuration owing to the presence of numerous coastal islands closely linked by their history and economy to the mainland, and also owing to the fact that the coastline is deeply indented and cut into". As this formulation indicates, Nicaragua is primarily relying on the presence of islands that fringe its mainland coast, while and the other factor is referenced in a subsidiary fashion. As will be explained in further detail below, most of Nicaragua's mainland coast is fringed with islands, while the second condition for the drawing of straight baselines – a deeply indented coastline – is present in the southern part of Nicaragua's mainland coast.

7.18. The Counter-Memorial takes issue with Nicaragua's straight baselines. It first observes that Nicaragua, in determining specific straight baselines seems to rely only on the situation of fringing islands and not on that of a coastline that is deeply indented and cut into.[483] That assumption of the Counter-Memorial is clearly mistaken. As can be appreciated from Figure 7.1, the straight baseline between basepoints 8 and 9 defined by Decree No. 33-2013 runs southerly from a basepoint on Great Corn Island to the mainland coast of Nicaragua. That straight baseline does not only enclose the islands that fringe Nicaragua's mainland in that

[483] CCM, para. 10.35.

area, but in addition encloses the deeply indented and cut-into coast between Monkey Point and the terminus of the land boundary with Costa Rica.

Figure 7.1 Nicaragua's straight baselines



7.19. The Counter-Memorial suffers from the erroneous assumption that Nicaragua's coast between Monkey Point and the terminus of land boundary with Costa Rica is not deeply indented and cut into. There is uncontroverted evidence that the Counter-Memorial is mistaken on this point. Colombia through its Decree No. 1436 of 13 June 1984 has drawn a number of straight baselines along its coast in the Caribbean Sea and the Pacific Ocean. A number of these straight baselines are drawn between points on the mainland coast of Colombia where there are no fringing islands. Colombia in those instances must have relied on the assumption that its coast is deeply indented and cut into. This concerns the Caribbean coast between basepoints 5 and 6, for instance. This specific baseline is identified on Figure 7. 2 of the Reply. This part of the coast of Colombia is less indented and cut into than the coast of Nicaragua between Monkey Point and the terminus of land boundary with Costa Rica.

Figure 7.2 Colombia's straight baselines

7.20. While the Counter-Memorial recognizes that there are islands along Nicaragua's mainland coast – as a matter of fact there are 95 islands along Nicaragua's Caribbean mainland coast –[484] Colombia submits that these islands do not form a fringe along that mainland coast and are not in the immediate vicinity of that coast.[485]

7.21. The requirement that, in order to allow the drawing of straight baselines, islands have to fringe the mainland coast in its immediate vicinity is included in paragraph 1 of article 7 of the Convention. Nicaragua submits that both these conditions are met. To reach a different conclusion, the Counter-Memorial both distorts the cARase law of the Court and provides a misleading description of the factual situation.

7.22. The Counter-Memorial submits that the Court in its 2012 Judgment in *Territorial and Maritime Dispute (Nicaragua v. Colombia)* "remarked that Nicaragua's islands are "adjacent" to its coast […], but that is far from being a "fringe of islands along its coasts", in "its immediate vicinity"".[486] The Counter-Memorial ignores the fact that the 2012 Judgment in two instances refers to respectively the "Nicaraguan fringing islands" and the "islands fringing the Nicaraguan coast".[487] The Counter-Memorial also ignores the fact that the Court gave Nicaragua's fringing islands a different treatment from Serpents' Island in *Black Sea*. In *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, basepoints on Nicaragua's fringing islands were used in the construction of a provisional equidistance line.[488] To the contrary, Serpents' Island was ignored by

[484] A list of these islands is included in NR, Annex 31.
[485] CCM, paras 10.38 and 10.39.
[486] CCM, para. 10.35.
[487] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012*, paras 135 and 145
[488] *Ibid*., paras 145 and 201.

the Court in establishing a provisional equidistance line. The Court justified its choice in *Black Sea* by observing that:

> Serpents' Island calls for specific attention in the determination of the provisional equidistance line. In connection with the selection of base points, the Court observes that there have been instances when coastal islands have been considered part of a State's coast, in particular when a coast is made up of a cluster of fringe islands. […] However, Serpents' Island, lying alone and some 20 nautical miles away from the mainland, is not one of a cluster of fringe islands constituting "the coast" of Ukraine. To count Serpents' Island as a relevant part of the coast would amount to grafting an extraneous element onto Ukraine's coastline".[489]

7.23. That the Court was well aware of the implications of its findings on Serpents' Island in assessing the treatment of islands in *Territorial and Maritime Dispute* is clear from its rejection of Colombia's Quitasueño as a basepoint. The Court found that its considerations concerning Serpents' Island applied "with even greater force to Quitasueño".[490]

7.24. The Counter-Memorial also seeks to rely on the Court's Judgment in *Qatar/Bahrain* to disprove that Nicaragua's islands form a fringe in the immediate vicinity of the coast of Nicaragua.[491] The Counter-Memorial observes that the Court in its 2001 Judgment found that it would be going too far to qualify the islands off Bahrain as fringing islands along the coast as these were relatively small in number.[492]

7.25. The Counter-Memorial then infers:

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[489] *Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports 2009*, para. 149.
[490] *Territorial and Maritime Dispute (Nicaragua* v *Colombia), Judgment, I.C.J. Reports 2012*, para. 202.
[491] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001*, p. 103.
[492] CCM, para. 10.37.

> Although Nicaragua has never given a precise description of the maritime features which comprise its allegedly "fringing islands", Nicaragua could only find seven geographical points on very tiny features as base points, when its mainland coast length measures some 453 kilometers".[493]

7.26. This is a rather disingenuous argument. The number of basepoints defining a system of straight baselines obviously does not reflect the number of islands that are fringing the coast. Article 7 of the Convention allows the selection of basepoints on the most seaward of the fringing islands. In the case of Nicaragua, as well as in many other instances around the globe, this means that the number of basepoints defining the straight baselines will be limited as compared to the number of fringing islands. While there are basepoints defining Nicaragua's straight baselines on seven islands, there are in total 95 islands that fringe Nicaragua's Caribbean coast.[494]

7.27. The Court's 2001 Judgment in *Qatar/Bahrain* also is of limited relevance as a precedent for another reason, on which the Counter-Memorial is silent. After referring to the fact that the islands of Bahrain are relatively small in number, the Judgment goes on to observe:

> Moreover, in the present case it is only possible to speak of a "cluster of islands" or an "island system" if Bahrain's main islands are included in that concept. In such a situation, the method of straight baselines is applicable only if the State has declared itself to be an archipelagic State under Part IV of the 1982 Convention on the Law of the Sea, which is not true of Bahrain in this case.[495]

Nicaragua neither is, nor claims to be, an archipelagic State under Part IV of the Convention.

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[493] CCM, para. 10.38.
[494] The full list of these islands is included in NR, Annex 31.
[495] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001*, para. 214.

7.28. The Counter-Memorial also submits that size is a criterion in determining whether islands meet the criterion of fringing islands.[496] However, there is nothing in article 7 of the Convention to indicate that size is a relevant criterion in this respect, and the Counter-Memorial does not quote any State practice to support the view that this is an accepted interpretation of either article 7 or customary international law. The Counter-Memorial does seek to rely on the Court's reference to Bahrain's Hawar Island in this connection.[497] However, the Court made the reference to Hawar Island – one of Bahrain's main islands – in its discussion of the possible applicability of Part IV of the Convention concerned with archipelagic States and not in connection with article 7 of the Convention.

7.29. The Counter-Memorial next makes the argument that "a group of islands would not be considered a fringe of islands unless it forms a unity with the mainland".[498] The Counter-Memorial then conjures up some figures to demonstrate that Nicaragua's fringing islands are not fringing islands in the sense of article 7 of the Convention, arguing that:

> The three main features – the Miskitos Cays and the Corn Islands – are located, respectively, at 22 and 30 nautical miles from the nearest mainland; that is to say, more than twice the breadth of what would normally be the territorial sea.[499]

7.30. Colombia's focus on the main islands is, as explained above, not in accordance with the applicable law and, equally important, misses the point that these islands are located in an area in which there are numerous other islands. This latter point was also pleaded before this Court in *Territorial and Maritime Dispute (Nicaragua v. Colombia)*. In the Reply in that case, Nicaragua explained that the islands along its coast are fringing islands and constitute an integral part

[496] CCM, para. 10.38.
[497] CCM, para. 10.38.
[498] CCM, para. 10.39.
[499] CCM, para. 10.39 (footnote omitted).

of its mainland coast and in that connection pointed to the relevant case law.[500] Colombia's Rejoinder ignored this case law and only submitted that the Corn Islands are 26 nautical miles from the mainland coast and that the territorial sea of the islands and Nicaragua's mainland do not even overlap.[501] The Rejoinder failed to mention that there are numerous small cays between the mainland and the Corn Islands and that as a consequence the territorial seas of the two merge and overlap, as was also mentioned in the Reply.[502] The Court therefore did not accept Colombia's contention concerning Nicaragua's fringing islands. The contrived nature of Colombia's argument on this point in the present case may be illustrated by having a closer look at Figure 10.3 from the Counter-Memorial, which purports to illustrate Colombia's point.

7.31. Figure 7.3 of the Reply on the left-hand side includes Figure 10.3 of the Counter Memorial. On the right-hand side of Figure 7.3, the distances between islands of Nicaragua have been included. This does not involve an exhaustive depiction of all the spatial relations between the individual islands, but even this partial rendering of the situation illustrates that Colombia's arguments deserve no credit. Between all of Nicaragua's most seaward islands and its mainland coast are other islands.

[500] *Territorial and Maritime Dispute (Nicaragua* v *Colombia),* NR, pp. 110-114, paras 4.15-4.24.
[501] *Territorial and Maritime Dispute (Nicaragua* v *Colombia),*CR, pp. 190-191, para. 5.55.
[502] *Territorial and Maritime Dispute (Nicaragua* v *Colombia),*NR,, p. 112, para. 4.17.

Figure 7.3 Nicaragua's fringe of islands

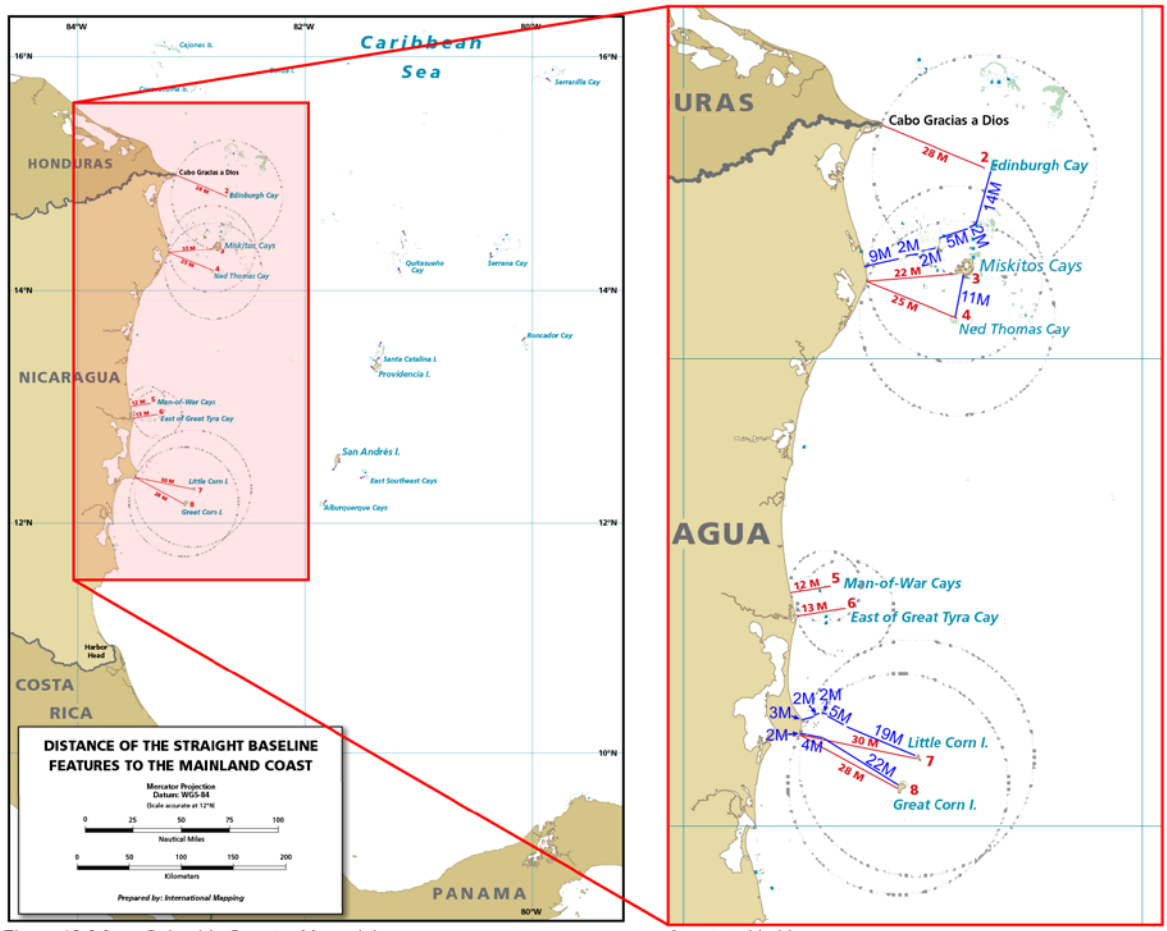

Figure 10.3 from Colombia Counter-Memorial — Annotated in blue

7.32. Colombia itself seems to be aware that its manufactured argument that Nicaragua's islands are at too large a distance from the coast is unconvincing. The Counter-Memorial comes up with a further argument to assess the geographical situation of Nicaragua's Caribbean coast in the context of article 7 of the Convention and the corresponding rules of customary law. In this connection, the Counter-Memorial relies on a passage from *Eritrea/Yemen* where the tribunal ruled:

> The relatively large islet of Tiqfash, and the smaller islands of Kutama and Uqban further west, all appear to be part of an intricate system of islands, islets and reefs which guard this part of the coast. This is indeed, in the view of the Tribunal, a 'fringe system' of the kind contemplated by article 7 of the Convention.[503]

7.33. So far, so good. Colombia goes awry when it seeks to apply this finding to Nicaragua's Caribbean coast. According to the Counter-Memorial, Nicaragua's fringing islands "have no or a very limited masking effect":[504]

> This is the case even if one were to take into account not only the seven geographical features on which Nicaragua places its base points, but all the (tiny) land masses that are located east of the mainland coast. A projection of these different islands and features against the general direction of the Nicaraguan mainland coast reveals that such islands and features mask no more than 5 to 6 percent of the coast, as depicted in Figure 10.2.[505]

7.34. This argument dissolves upon inspection of Figure 10.2 of the Counter-Memorial. First, notwithstanding the generous promise of paragraph 10.41 of the Counter-Memorial to take into account "all islands and features", Figure 10.2 actually does not do so. For instance, Figure 10.2 disregards numerous cays in the Miskito Cays and Ned Thomas Cay. Second, the Counter-Memorial adopts a strictly frontal projection to determine the extent of the masking effect. However, even under that approach 25 percent of the Nicaraguan mainland coast is masked by islands.

7.35. There is no explanation as to why adopting a strictly frontal projection is a proper approach for determining the extent of this effect. An analogy may be found in the Court's approach to determining the seaward projection of the relevant coasts in connection with the delimitation of maritime boundaries. In that

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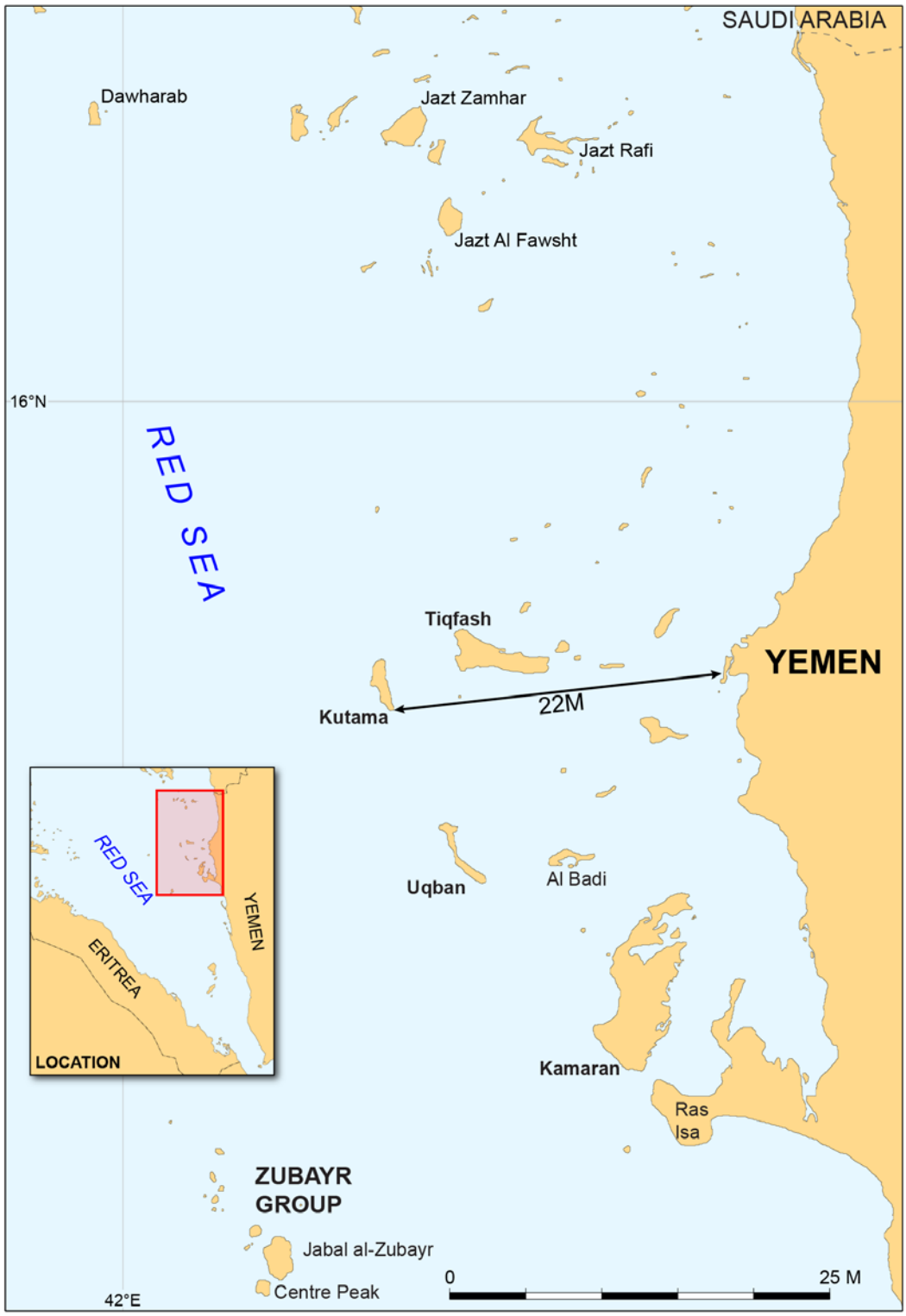
[503] *Award of the Arbitral Tribunal in the second stage of the proceedings (Maritime Delimitation) between Eritrea and Yemen*, p. 369, para. 151 as quoted in CCM, para. 10.40.
[504] CCM, para. 10.41.
[505] *Ibid*.

situation, the Court has not relied on a strictly frontal projection.[506] Although it is not possible to provide exact figures in this respect, it is submitted that in the light of the Court's case law it would be reasonable to look at the projection of "all islands and features" between a perpendicular to the general direction of Nicaragua's mainland coast and an angle of 20 degrees to that perpendicular. Under that assumption 46 per cent of Nicaragua's Caribbean mainland coast is masked by its fringing islands. This is illustrated in Figure 7.4 of the Reply.

[506] This is for instance illustrated by Sketch-map No.5 included in the Court's judgment in *Black Sea*, which determines the relevant area for the maritime delimitation between Romania and Ukraine.

Figure 7.4 Yemen's fringing islands as considered by the Tribunal



7.36. Third and finally, as was observed above at paragraphs 7.17 and 7.18 the southern part of Nicaragua's mainland coast is deeply indented and cut into. In that case, it is not required that there also is a fringe of islands to allow the drawing of straight baselines. Consequently, this part of the coast should not be taken into account in assessing to what extent Nicaragua's fringing islands mask its mainland coast. If the coast between Monkey Point and the terminus of the land boundary with Costa Rica is not taken into consideration in determining the masking effect of the islands fringing Nicaragua's Caribbean mainland coast, more than 50 per cent of that mainland coast is masked, while 16 per cent is indented and cut into.

7.37. Paragraph 10.42 of the Counter-Memorial grudgingly admits that: "It may be possible to consider that some islands or cays which are located close to Nicaragua's main coast as "in its immediate vicinity"." However, the Counter-Memorial immediately raises the bar by submitting that:

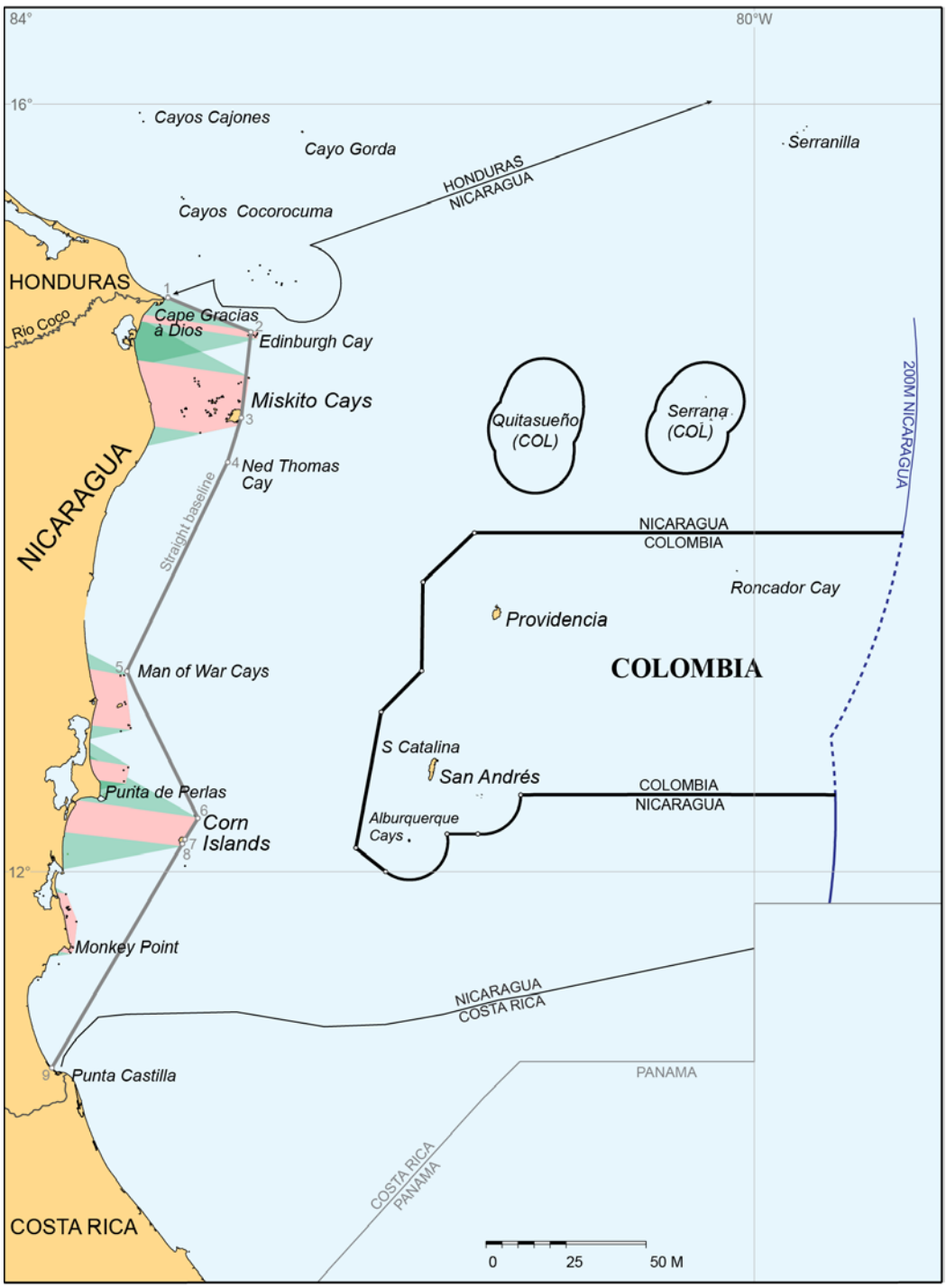
> this is not sufficient for Nicaragua to be allowed to draw straight baselines all along its coast. First, the requirement for straight baselines is that the entire "fringe of islands" lies in the immediate vicinity of the coast, not only a limited number of islands pertaining to a larger group. Second, none of the islands on which Nicaragua pretends to posit its base points can be considered to be in the "immediate vicinity" of the coast.[507]

7.38. Colombia's first argument, to the effect that the entire fringe of islands has to lie in the immediate vicinity, is in open contradiction with the case law on which the Counter-Memorial relies. In paragraph 10.40, the Counter-Memorial quotes with approval from the Award in the second phase in *Eritrea/Yemen* to the effect that a number of Yemeni islands can be seen as a fringe of islands. The

[507] CCM, para. 10.42.

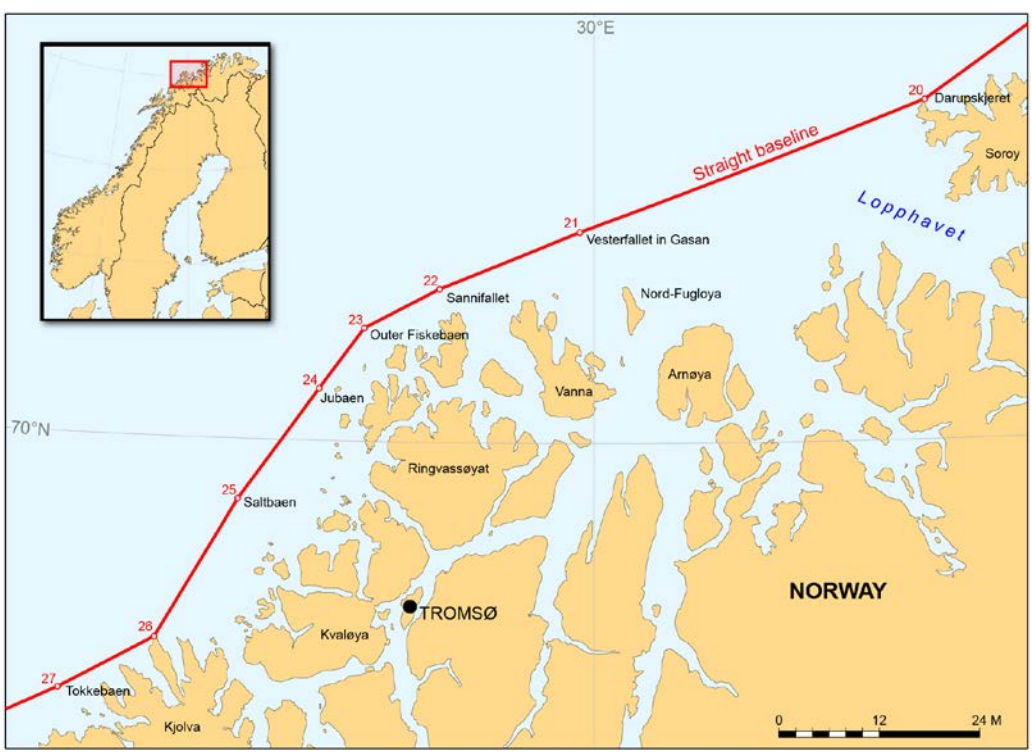
most seaward of these islands, Kutama actually is almost 22 nautical miles from the mainland coast of Yemen (see Figure 7.5).

Figure 7.5 Masking effect of Nicaragua's islands



7.39. Colombia's first argument is equally disproved by *Anglo-Norwegian Fisheries*. The Court in its 1951 Judgment found that Norway's system of straight baselines along its northern coast was in accordance with international law. As the Counter-Memorial observes, the Court's Judgment provides the basis for article 4 of the Convention on the Territorial Sea and the Contiguous zone and article 7 of the Convention.[508] A review of the straight baselines along Norway's northern coast reveals that they would not meet the requirement contained in the Counter-Memorial that the entire fringe of islands lies in the immediate vicinity of the mainland. For instance, the islands that are enclosed in Norway's straight baselines north of northern Norway's main population center of Tromsø include islands that are at distances of between 20 and 35 nautical miles from the Norwegian mainland coast (see Figure 7.6).

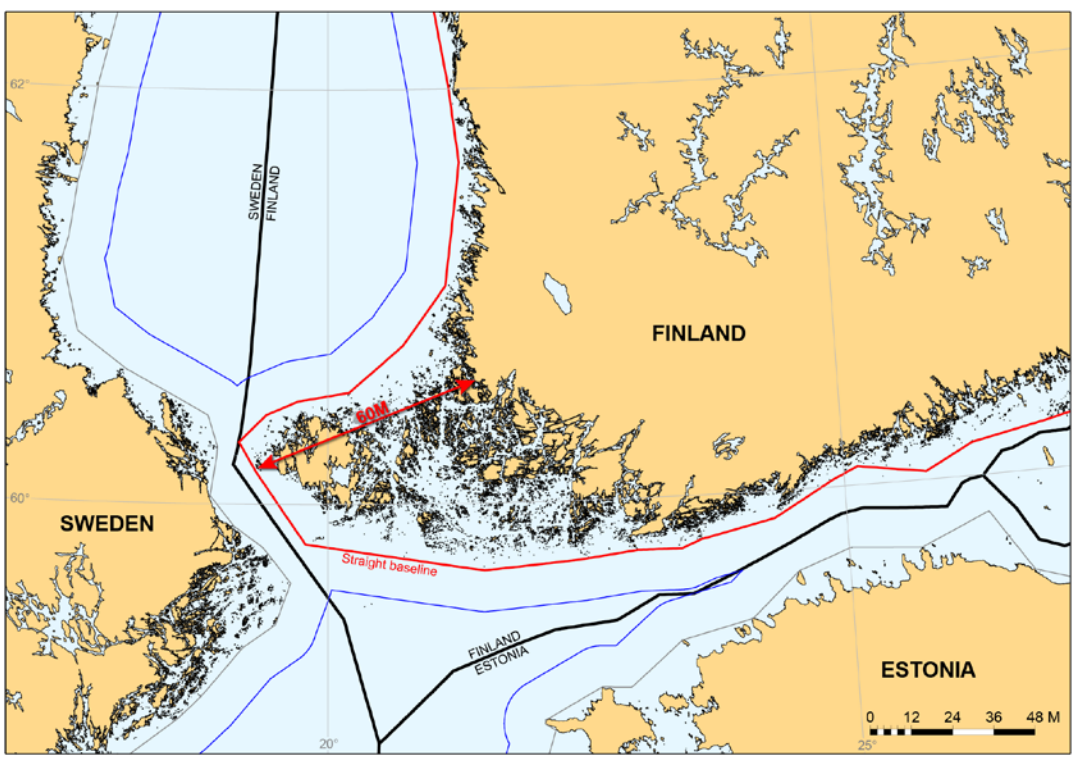
Figure 7.6 Norway's straight baseline system



[508] CCM, paras. 10.25-10.26

7.40. Another example from State practice is provided by Finland's system of straight baselines in the area of the Åland Islands. Finland's current system of straight baselines was established through Decree No. 993 on the Application of the Act on the Delimitation of the Territorial Waters of Finland of 31 July 1995.[509] Numerous islands enclosed by the Finnish system of straight baselines are further from the Finnish mainland than Nicaragua's fringing islands are from its coast (see Figure 7.7).

Figure 7.7 Finland's straight baselines



[509] Available at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/FIN_1995_Decree.pdf.

7.41. Colombia's second argument to reject the proposition that Nicaragua does not meet the requirements of article 7 of the Convention -- that none of the basepoints of Nicaragua are in the immediate vicinity of the mainland -- is a variation on its first point. As was already explained in the preceding paragraphs, the relevant case law indicates that the relevant rules of international law do not require that the entire fringe of islands lie in the immediate vicinity of the coast. Of necessity this implies that the same conclusion applies to the islands on which the basepoints of the straight baselines are located, as these will be the most seaward in the fringe of islands.

7.42. Colombia's own baseline practice again indicates that Colombia has not held itself to the standards it now seeks to impose on Nicaragua. Colombia in the Pacific Ocean has drawn straight baselines between its mainland coast and the island of Gorgona and its dependency of Gorgonilla. This concerns the straight baselines between basepoint 5 on the Colombian mainland, basepoint 6 on Gorgona, basepoint 7 on Gorgonilla, and basepoint 8 on the Colombian coast. The distance of the island of Gorgona to the Colombian mainland coast is 15 nautical miles (see Figure 7.8). The Counter-Memorial submits that "*none* of the islands on which Nicaragua pretends to posit its base points can be considered to be in the "immediate vicinity" of the coast".[510] One of Nicaragua's basepoints (basepoint 5) is actually closer to the mainland coast of Nicaragua, at a distance of 11.6 nautical miles, than the 15 nautical miles that the island of Gorgona lies from the coast of Colombia.

[510] CCM, para. 10.42; emphasis provided.

Figure 7.8 Colombia's straight baselines in the Pacific

E. Nicaragua's Straight Baselines Have Been Determined In Accordance With The Applicable Law

7.43. Section .(3)(b) of Chapter 10 of the Counter-Memorial criticizes the specific straight baselines that Nicaragua has established in the Caribbean Sea. The Counter-Memorial makes two main points in this respect. First, according to Colombia, the straight baselines of Nicaragua do not meet the requirement contained in article 7(3) of the Convention that straight baselines "must follow 'the general direction of the coast'."[511] At the outset, it may be noted that this is not quite what article 7(3) of the Convention provides. The paragraph actually provides, in relevant part, that the "drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast". Second, the Counter-Memorial submits that Nicaragua's straight baselines also do not meet article 7, paragraph 3's, requirement that "the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal water".

7.44. Before assessing the Colombian arguments related to Nicaragua's straight baselines, one preliminary remark is in order. Much of Colombia's argument is based on the assumption – erroneous, as was explained above – that Nicaragua's islands are not fringing islands and that they do not mask the coast.[512] As this basic premise underlying Colombia's assessment of Nicaragua's straight baselines is incorrect, it should not come as a surprise that Colombia's two specific arguments as presented in paragraph 7.43 are equally off the mark.

7.45. The Counter-Memorial interprets the reference to the "general direction of the coast" in article 7(3) of the Convention as being related to the general direction in localities where fringing islands mask the coast.[513] In support of this

[511] CCM, para. 10.44.
[512] *See e.g.* CCM, para. 10.45.
[513] CCM, para. 10.45.

contention, the Counter-Memorial seeks to rely on the Court's Judgment in *Anglo/Norwegian Fisheries*. In this connection, the Counter-Memorial points out that Court observed that:

> the requirement that the baselines follow "the general direction of the coast", is to reflect the general principle "that the belt of territorial waters must follow the general direction of the coast ".[514]

7.46. The Counter-Memorial's reliance on *Anglo/Norwegian Fisheries* to arrive at this restrictive interpretation of the term "general direction of the coast" is unwarranted. First, it should be noted that article 7 of the Convention uses the term 'localities' in paragraph 1, in which the conditions that allow the establishment of straight baselines are spelled out. Paragraph 3, which contains the requirement that the straight baselines must not depart to any appreciable extent from the general direction of the coast, does not include a reference to 'localities'. The Court drew this very same distinction in its Judgment in *Anglo/Norwegian Fisheries*. The paragraph of the Judgment, from which the Counter-Memorial quotes in paragraph 10.44, observes that:

> The principle that the belt of territorial waters must follow the general direction of the coast makes it possible to fix certain criteria valid for any delimitation of the territorial sea; these criteria will be elucidated later.[515]

7.47. In discussing a specific Norwegian straight baseline segment, the Court subsequently observes:

> In order properly to apply the rule, regard must be had for the relation between the deviation complained of and what, according to the terms of the rule, must be regarded as the general direction of the coast. Therefore, one cannot confine oneself to examining one sector of the coast alone, except in a case of manifest abuse; nor can one rely on

[514] CCM, para. 10.44; including a quote from *Fisheries case, Judgment of December 18, 1951, I.C.J. Reports 1951,* p. 129.
[515] *Fisheries case, Judgment of December 18, 1951, I.C.J. Reports 1951,* p. 129.

> the impression that may be gathered from a large scale chart of this sector alone. In the case in point, the divergence between the base-line and the land formations is not such that it is a distortion of the general direction of the Norwegian coast.[516]

7.48. As the Court indicates, in applying the principle of the general direction of the coast, the focus should be on the overall direction of the coast under consideration, not that of specific localities. That the straight baselines of Nicaragua have been drawn in accordance with the requirement that they should not depart to any appreciable extent from the general direction of the coast is admitted by the Counter-Memorial, which observes that "the overall drawing of these baselines has approximately the same shape as the mainland coast".[517]

7.49. The Courter-Memorial also submits that Nicaragua's straight baselines do not meet the requirement that the sea areas lying within the baselines are sufficiently linked to the land domain.[518] In this connection, the Counter-Memorial develops a mathematical test to assess Nicaragua's straight baselines. Before critically appraising that test, it may be noted that the baselines study of the UN Office of Oceans Affairs and the Law of Sea, from which the Counter-Memorial quotes with approval, observes that:

> The problem of distance between the baseline and the mainland is the subject of the rule set out in article 7, paragraph 3, which requires that sea areas lying landwards of the straight baseline "must be sufficiently closely linked to the land domain to be subject to the regime of internal waters". This is another phrase taken from the 1951 Anglo-Norwegian Fisheries case Judgment. The judges linked this concept to the basis of the determination of the rules relating to bays. They also observed that the concept should be liberally applied in the case of coasts like those of Norway. Unfortunately, it has *not been proved possible to develop a mathematical test* to justify the application of the rule. The spirit of the rule is clearly that internal

[516] *Fisheries case, Judgment of December 18, 1951, I.C.J. Reports 1951,* p. 142.
[517] CCM, para. 10.45.
[518] CCM, paras 10.46 and following.

> waters must be in fairly close proximity to the land represented by islands and promontories.[519]

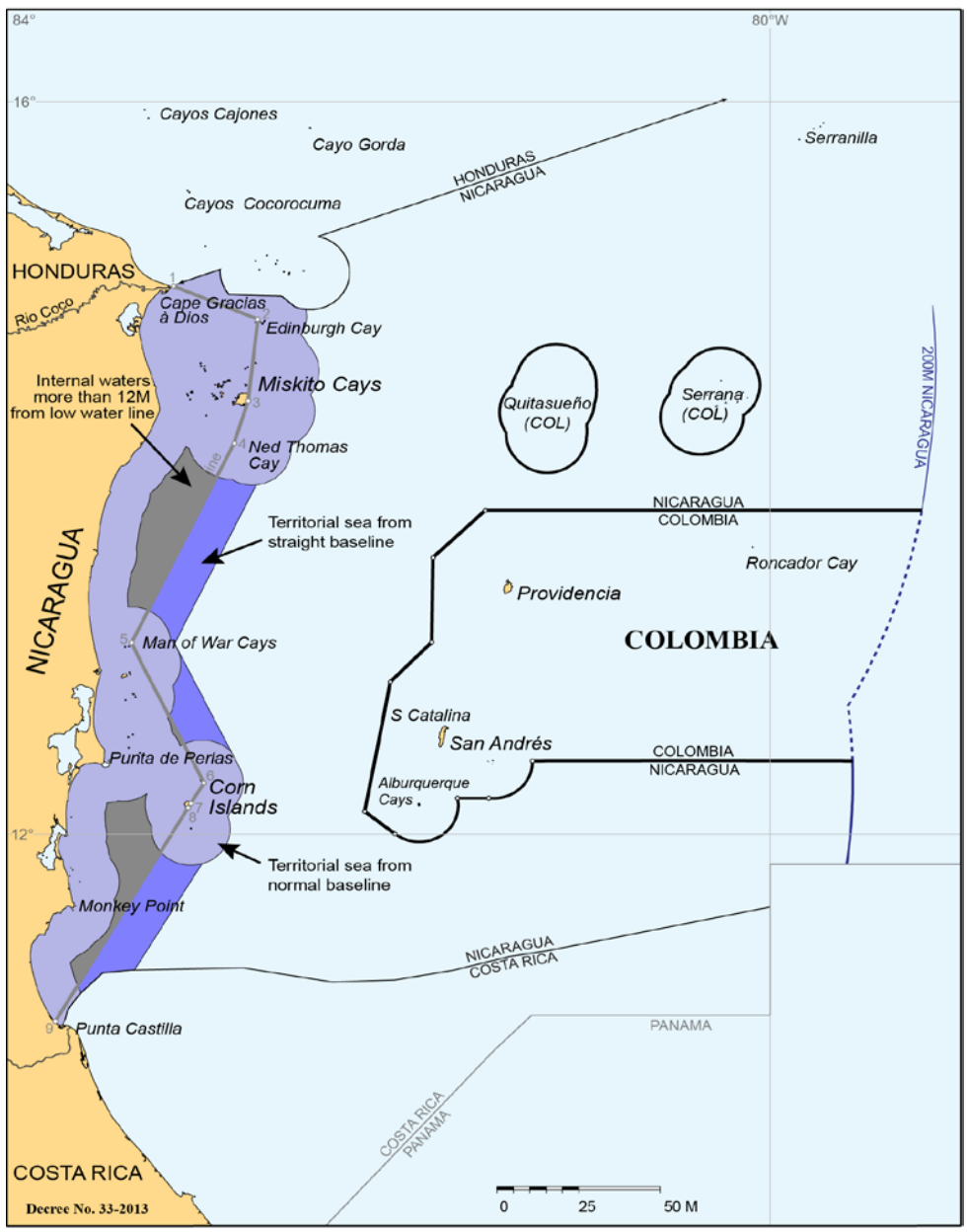
7.50. With this reservation concerning the propriety of mathematical tests, it is still appropriate to have a look at the Counter-Memorial's calculations to check whether it actually proves what it sets out to do. The Counter-Memorial starts out by observing that "it should be kept in mind" that the straight baselines of Nicaragua range from 7 to 83 nautical miles in length; (b) the distance between the outermost island and the closest mainland reaches up to nearly 30 nautical miles; and (c) the surface area of the internal waters measures 21,500 square kilometers.[520] Why these figures should be kept in mind remains unclear. It may be noted that Colombia's own straight baselines measure between 6.4 and 130.5 nautical miles;[521] and as was discussed above, there is nothing exceptional about fringing islands extending 30 nautical miles from the mainland being enclosed by straight baselines.

7.51. The area of internal waters enclosed by the straight baselines in itself does not say anything about those baselines' conformity with article 7 of the Convention and customary international law, as Colombia is suggesting. The Counter-Memorial tries to reinforce its claim by arguing that "[m]ost of this area is not even enclosed in what should be seen as Nicaragua's territorial sea measured according to the normal baselines".[522] This is patently untrue, as is also evident from Figure 10.5 of the Counter-Memorial. 81 percent of the internal

[519] Office for Ocean Affairs and the Law of the Sea, United Nations, *The Law of the Sea; Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea*, (New York, 1989), para. 57 (emphasis provided).
[520] CCM, para. 10.48.
[521] Figures included in *Colombia; Straight Baselines* (Limits in the Seas; No. 103; 30 April 1985; United States Department of State; Office of the Geographer (available at https://www.state.gov/documents/organization/58565.pdf), , pp. 4-5.
[522] CCM, para. 10.49.

waters that are enclosed by Nicaragua's straight baselines already formed part of the territorial sea of Nicaragua measured from the low-water line (see Figure 7.9).

Figure 7.9 Nicaragua's straight baselines showing areas of internal waters more than 12M from low water line



7.52. It may further be noted that the publication on baselines by the UN Office for Ocean Affairs and the Law of the Sea observes that "the rule [contained in article 7, paragraph 3, of the Convention] is clearly that internal waters must be in fairly close proximity to the land represented by islands and promontories".[523] A large part of the internal waters enclosed by Nicaragua's straight baselines is studded with the numerous islands and cays that fringe Nicaragua's Caribbean mainland coast. The remaining parts of these internal waters are located between, respectively:

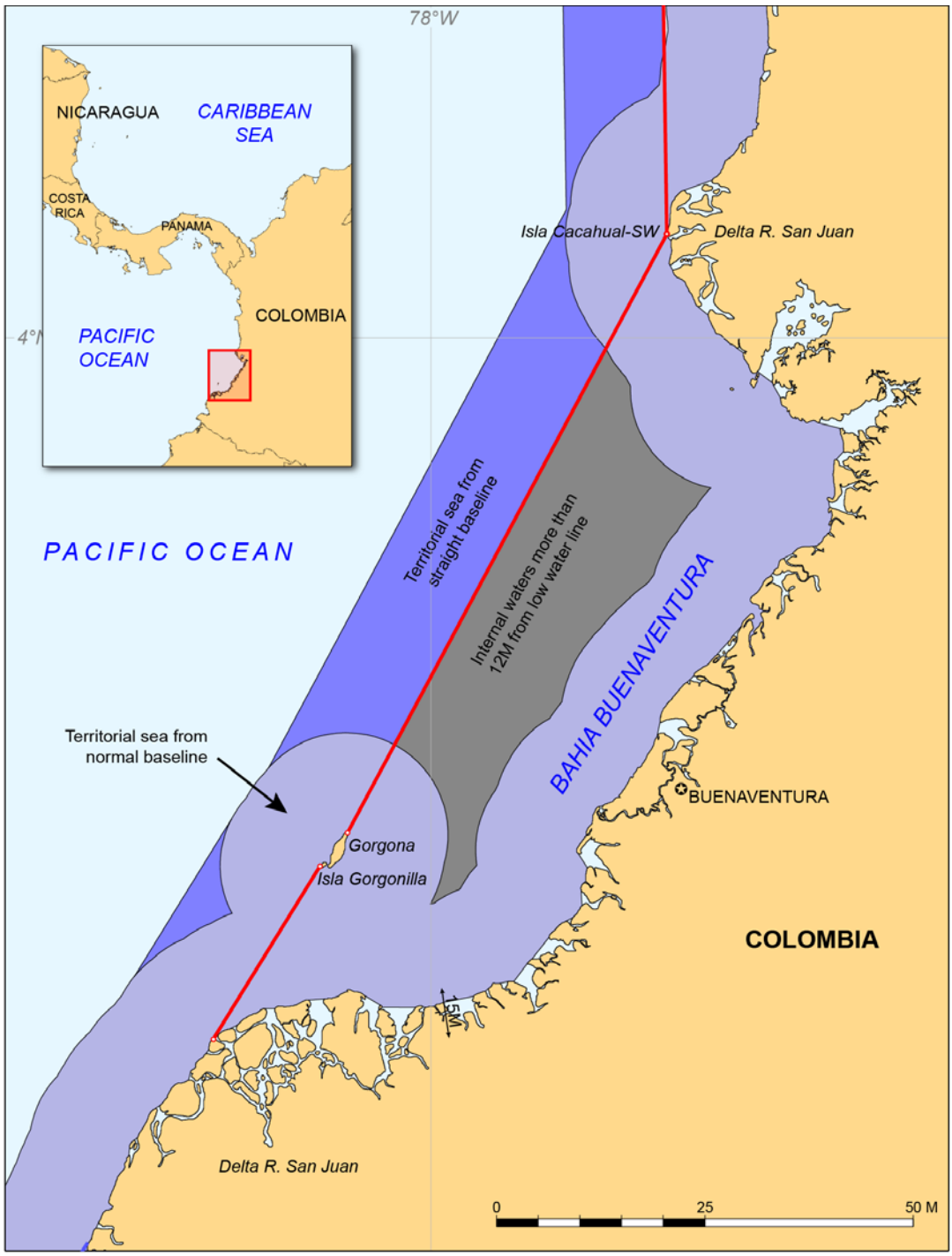
- Miskito Cays and Ned Thomas Cay on the one hand and Man of War Cays on the other;
- Tyra Cay on the one hand and Cayos de Perlas and the Corn Islands on the other; and
- Cayos de Perlas and the Corn Islands, on the one hand, and the promontory at the land boundary between Nicaragua and Costa Rica on the other.

7.53. To further assess the Counter-Memorial's play with numbers, a comparison may be made with Colombia's own practice. In the Pacific Ocean, Colombia has drawn two straight baselines (between basepoints 5 and 8 of Colombia's straight baselines) to enclose the area including the Bahia de Buenaventura. 32 per cent of the internal waters enclosed by these straight baselines would not be part of Colombia's territorial sea measured from the low-water line (see Figure 7.10). Colombia's straight baselines in the Bahia de Bonaventura are thus much more expansive that those of Nicaragua along its Caribbean coast, Only 19 per cent of the internal waters enclosed by Nicaragua's

[523] Office for Ocean Affairs and the Law of the Sea, United Nations, *The Law of the Sea; Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea*, (New York, 1989), para. 57.

straight baselines would not be part of Nicaragua's territorial sea measured from the low-water line.

Figure 7.10 Colombia's straight baselines in the Pacific showing areas of internal waters more than 12M from low water line



F. Colombia's Rights Have Not Been Infringed By Nicaragua's Straight Baselines Legislation

7.54. The Counter-Memorial claims that Nicaragua, by establishing its system of straight baselines, has infringed Colombia's rights in two ways.[524] First, the regime of the internal waters enclosed by the straight baselines is different from the regime of the territorial sea and the exclusive economic zone. Second, following the establishment of Nicaragua's straight baselines, the territorial sea in part extends into areas that were formerly part of Nicaragua's exclusive economic zone. As a consequence other States have more limited rights in Nicaragua's maritime domain.

7.55. Nicaragua's straight baselines, as established in Sections D and E above, are in conformity with article 7 of the Convention and, as a consequence, Nicaragua is entitled to determine the status of the waters landward and seaward of those baselines in accordance with international law: internal waters landward of the straight baselines, and territorial sea, exclusive economic zone and continental shelf seaward of the straight baselines. In these areas. Nicaragua is exercising is sovereignty, sovereign rights and jurisdiction in accordance with the Convention and customary international law.

7.56. Colombia also claims that "by extending Nicaragua's exclusive economic zone, Nicaragua has created an artificial overlap with Colombia's entitlement to its exclusive economic zone and continental shelf".[525] This assertion is beside the point and fails to address Nicaragua's argument in this respect in its Written Observations on Colombia's counter claims. There simply is no question of an extension of Nicaragua's 200-nautical-mile limit due to the establishment of

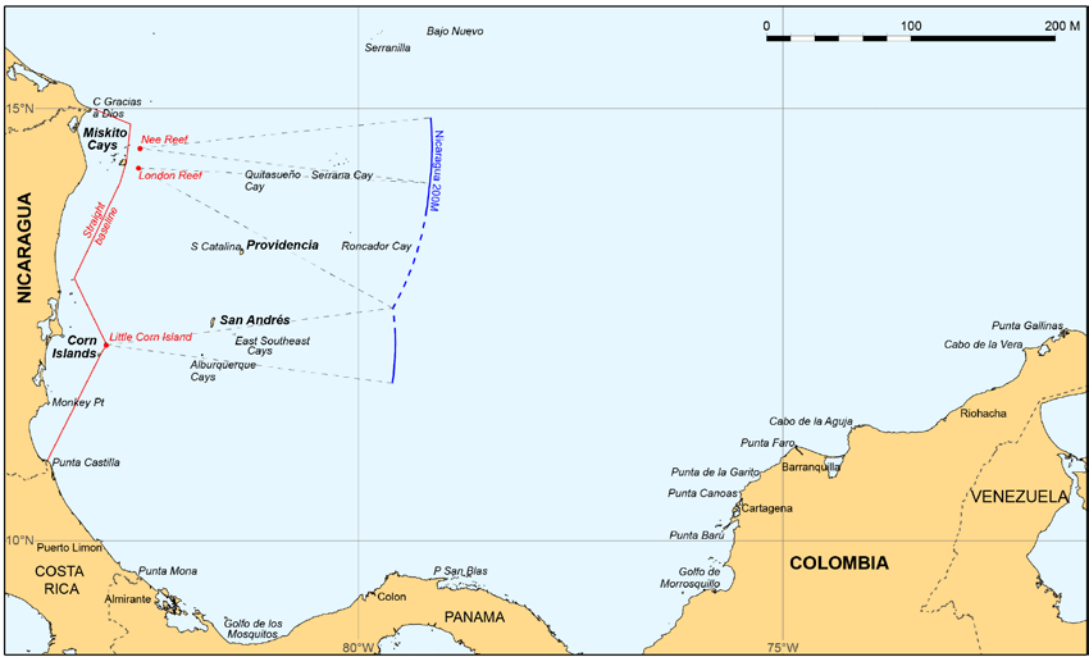
[524] CCM, para. 10.52.
[525] CCM, para. 10.52.

Nicaragua's straight baselines. As was observed in Nicaragua's Written Observations:

> 3.49 In this respect, Nicaragua observes that, as depicted on Figure 1, its 200 nm limit is precisely the same whether measured from its straight baselines or from normal baselines. This is because Nicaragua's 200 nm limit is entirely controlled by the most seaward land features used to define its straight baselines.
>
> […]
>
> 3.56 […] Nicaragua's 200 nm limit is precisely the same whether measured from its straight baselines or from normal baselines. The straight baseline decree therefore does not have the effect of impinging on Colombia's EEZ or continental shelf in any way.

7.57. Figure 1 of the Written Observations is reproduced as Figure 7.11 in this Reply. As may be appreciated, the outer limit of Nicaragua's exclusive economic zone is determined from basepoints located on the low-water line along Nee Reef, London Reef and Little Corn Island. Nee Reef and London Reef are low-tide elevations that are located within 12 nautical miles of the Miskito Cays. As article 13, paragraph 1, of the Convention, which reflects customary international law, provides, low-tide elevations that are "wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea".

Figure 7.11 Nicaragua's base points that control the 200M limit



7.58. In its Written Observations on the Admissibility of its Counter-Claims, Colombia did not address this point, observing that "[t]he discussion regarding Nicaragua's basepoints and baselines, its effect on the extent of the exclusive economic zone, and on Colombia's sovereign rights and maritime spaces, is clearly for the merits stage. Colombia will thus address it in due course."[526] Regrettably, Colombia still fails to address the argument made in Nicaragua's Written Observations and instead repeats the unfounded assertion that Nicaragua's straight baselines push its exclusive economic zone eastwards.[527] The Counter-Memorial does not express any disagreement with Nicaragua concerning the basepoints along Nicaragua's coast that control the outer limits of Nicaragua's exclusive economic zone.

[526] CWO, para. 3.67.
[527] CCM, para. 10.63.

7.59. What is perhaps most telling about Colombia's argument concerning the location of Nicaragua's 200-nautical-mile limit before and after the enactment of Decree No. 33-2013 is the lack of any figure illustrating the point and enlightening the Court about the extent of the allegedly eastward shift of that limit. Figure 7.11 of the Reply explains the point. The 200-nautical-mile limit of Nicaragua has not shifted at all following the enactment of Decree No. 33-2013.

G. Conclusions

7.60. The preceding analysis allows the drawing of the following conclusions:

a. The Parties are in agreement on the applicable law. The customary international law regulating the establishment of straight baselines is reflected in article 7 of the Convention;

b. The Parties differ on the interpretation of specific aspects of article 7 of the Convention, including the question of what constitutes a fringe of islands under paragraph 1 of article 7, and of how to determine the general direction of the coast in accordance with paragraph 3 of article 7;

c. The Parties are in agreement that the basepoints on the normal baseline that Nicaragua has employed in defining its straight baselines are in accordance with article 5 of the Convention, which reflects customary international law;

d. The Parties are in agreement that the basepoints on the low-tide elevations that Nicaragua has employed in defining the outer limits of its territorial sea and exclusive economic zone are in accordance article 13 of the Convention, which reflects customary international law;

e. Nicaragua's coast allows the drawing of straight baselines on the basis of the criteria contained in article 7, paragraph 1, of the Convention. Most of Nicaragua's mainland coast is fringed with islands in its immediate vicinity, and the coast between Monkey Point and the terminus of land boundary with Costa Rica is deeply indented and cut into;

f. Nicaragua's straight baselines have been determined in accordance with article 7, paragraph 3, of the Convention. These straight baselines do not depart to any appreciable extent from the general direction of the coast, and the sea areas enclosed by the straight baselines are sufficiently linked to the land domain to be subject to the regime of internal waters;

g. In seeking to prove that Nicaragua's straight baselines have not been determined in accordance with article 7 of the Convention and the corresponding rules of customary international law, Colombia is relying on an interpretation of those rules that it has not applied to itself in determining its own straight baselines in the Caribbean Sea and the Pacific Ocean. Nicaragua's straight baselines are in accordance with the rules as interpreted and applied by Colombia in establishing its own legislation on straight baselines;

h. Nicaragua has not infringed Colombia's rights in establishing its straight baselines. Nicaragua is entitled to apply the regime for internal waters as defined by the Convention and customary international law landward of these straight baselines, and to measure the outer limit of its territorial sea and the exclusive economic zone from these straight baselines; and

i. The outer limit of Nicaragua's exclusive economic zone has not shifted seaward following the establishment of its straight baselines through Decree No. 33-2013. This outer limit is determined from basepoints on the low-water line along its coast that are seaward of the straight baselines. Colombia's claim that Nicaragua has extended the outer limit of its exclusive economic zone in establishing its straight baselines is without basis. The claim that Nicaragua has infringed Colombia's rights to its continental shelf and exclusive economic zone consequently is also without basis.

SUBMISSIONS

1. For the reasons given in, Chapters II to V of the present Reply, the Republic of Nicaragua requests the Court to adjudge and declare that:

a) By its conduct, the Republic of Colombia has breached its international obligation to respect 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; and that, in consequence

b) Colombia must immediately cease its internationally wrongful conduct in Nicaragua's maritime zones, as delimited by the Court in its Judgment of 19 November 2012, including its violations of Nicaragua's sovereign rights and jurisdiction in those maritime zones;

c) Colombia must revoke, by means of its choice, all laws and regulations which are incompatible with the Court's Judgment of 19 November 2012, including the provisions in Decrees 1946 of 9 September 2013 and 1119 of 17 June 2014 on maritime areas which have been recognized as under the jurisdiction or sovereign rights of Nicaragua;

d) Colombia must revoke permits granted to fishing vessels operating in Nicaragua's exclusive economic zone, as delimited in the Court's Judgment of 19 November 2012;

e) Colombia must ensure 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;

f) Colombia must compensate Nicaragua for all damages caused by its violations of its international legal obligations, including but not limited to damages caused by the exploitation of the living resources of the Nicaraguan exclusive economic zone by fishing vessels unlawfully "authorized" by Colombia to operate in that zone, and the loss of revenue caused by Colombia's refusal to allow, or by its deterrence of, fishing by Nicaraguan vessels or third State vessels authorized by Nicaragua and, generally, for the damages caused by its actions and declarations to the proper exploitation of the resources in Nicaragua's exclusive economic zone, with the amount of the compensation to be determined in a subsequent phase of the case; and

g) Colombia must give appropriate guarantees of non-repetition of its internationally wrongful acts.

2. For the reasons given in Chapters VI and VII of this Reply, the Republic of Nicaragua requests the Court to adjudge and declare that the Counter-Claims of Colombia are rejected.

The Hague, 15 May 2018.

Carlos J. Argüello-Gómez

Agent of the Republic of Nicaragua

CERTIFICATION

I have the honour to certify that this Reply 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, 15 May 2018.

Carlos J. Argüello-Gómez

Agent of the Republic of Nicaragua