INTERNATIONAL COURT OF JUSTICE

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

(NICARAGUA *v.* COLOMBIA)

REJOINDER OF THE REPUBLIC OF COLOMBIA

VOLUME I

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Chapter 1

INTRODUCTION

1.1 Colombia is filing this Rejoinder pursuant to the Court's Order dated 15 November 2017, which fixed 15 November 2018 as the time-limit for its submission.[1]

1.2 As Colombia will show, Nicaragua's claims rest on a serious mischaracterisation of the facts and a misapplication of the law. When the facts are examined, it will be seen that Colombia's conduct has been entirely in keeping with its customary international law rights in the exclusive economic zone,[2] and has not impeded the exercise of Nicaragua's sovereign rights. Indeed, as shown below and in Annex 71 to this Rejoinder, since the 2012 Judgment,[3] Nicaragua's fishing in the relevant area has increased dramatically, undiminished by any alleged harassment by Colombia.[4]

1.3 With respect to the law, Nicaragua seeks to present its EEZ as if it was its territorial sea, limiting Colombia's freedom of navigation and overflight, as well as other internationally

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[1] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Counter-claims, Order of 15 November 2017, I.C.J. Reports 2017,* p. 315, para. 82 (B).

[2] Hereinafter "EEZ".

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

[4] See Annex 71: Ministry of Foreign Affairs of Colombia, *Report on Nicaraguan Fishing Statistics in the Caribbean Sea*.

lawful uses of the sea, to no more than a right of innocent passage. This misguided approach is reflected not only in the way Nicaragua has argued its case,[5] but also in the words of its own President and high-ranking officials.

1.4 For example, on 26 November 2012, just after the Court's Judgment was rendered, President Ortega proclaimed that Nicaragua was "exercising aerial and maritime sovereignty" in the "recovered area" granted by the Court.[6] Similarly, on 13 August 2013, Rear-Admiral Marvin Elías Corrales, stated that President Ortega had instructed the Naval Force to "exercise sovereignty in the sea and jurisdictional airspace restored to Nicaragua by the International Court of Justice".[7] And on 19 August 2015, President Ortega reiterated the point, stating that Nicaragua had "a new territorial sea" of "90,000 square kilometres", in which it would act accordingly under the Court's Judgment.[8] These types of assertions by President Ortega and high-ranking Nicaraguan civil and military authorities claiming

[5] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia),* Reply of Nicaragua (hereinafter, "NR"), paras. 2.35-2.38.

[6] Annex 1: Message from President Daniel Ortega to the People of Nicaragua, 26 November 2012.

[7] Annex 2: Speeches at the 33rd Anniversary of the Nicaraguan Naval Force, 13 August 2013.

[8] Annex 5: Speeches at the 35th Anniversary of the Nicaraguan Naval Force, 19 August 2015. Similarly, in February 2017, when referring to the 2012 Judgment, President Ortega reiterated that "Nicaragua is already exercising sovereignty in that territorial sea" (Annex 64: La Prensa, *Daniel Ortega did not present results*, 22 February 2017).

Nicaragua's sovereignty over its EEZ are constant and reiterative.[9]

1.5 While such statements are wrong as a matter of law, they show how Nicaragua's case is built on a false legal premise: Nicaragua's EEZ is not territorial sea, and it is not an area over which Nicaragua is entitled to exercise sovereignty.

A. The Unsupported Nature of Nicaragua's Claims Regarding the Alleged Violations of its Sovereign Rights

1.6 Nicaragua's claims rest on two basic contentions. The first is that Colombia has violated Nicaragua's sovereign rights by, as Nicaragua characterizes it, aggregating to itself the right to engage in a "systematic monitoring, surveillance and policing operation" in Nicaragua's EEZ,[10] and installing "a naval

[9] For instance, on 1 August 2013, General Spiro José Bassi, Head of the Nicaraguan Air Force, highlighted its participation in the Peace and Sovereignty Mission General Augusto C. Sandino, "exercising sovereignty with our air resources in the air and maritime spaces restored to our People by the International Court of Justice" (Annex 3: Speeches at the 34th Anniversary of the Nicaraguan Air Force, 31 July 2013). Similarly, on 21 February 2015, General Julio César Avilés, Head of the Nicaraguan Army, stated that the "Naval Force, with support from the Air Force, exercises sovereignty" and "particularly (…) since November 2012, it has done so in the waters of the Caribbean that were recognized by the International Court of Justice" (Annex 7: Speeches at the 81st Anniversary of General Augusto C. Sandino's transit to immortality, 21 February 2015). For its part, in March 2017, Congressman Wálmaro Gutiérrez stated that the ICJ had recognized the "sovereignty of Nicaragua up to 200 nautical miles from its coasts in the Caribbean" (Annex 65: El Nuevo Diario, *Congressmen repeal "patriotic tariff"*, 8 March 2017).

[10] NR, para. 2.52.

presence to occupy Nicaragua's waters and treat them as their own".[11] The second is that Colombia has engaged in "an internationally wrongful act" by enacting an Integral Contiguous Zone around the islands of the San Andrés Archipelago.[12] Seemingly as an afterthought, the Reply also adds a new claim never advanced before – namely, that Colombia continues to offer hydrocarbon blocks in areas within Nicaragua's EEZ in violation of Nicaragua's sovereign rights, an allegation that is demonstrably untrue, as Nicaragua is well aware.

(1) THE ALLEGED "INCIDENTS"

1.7 With respect to the first contention, Colombia has in no way acted as if it has "policing powers" within Nicaragua's EEZ; nor has Colombia adopted a policy that treats these waters as its own. When the facts relating to the "incidents" are examined, it will be seen that Colombia's conduct has been responsible and non-threatening. It has been fully in line with the freedoms of navigation and overflight, and other internationally lawful uses of the sea, that it enjoys, to undertake activities aimed, *inter alia*, at observing whether there are any illegal drug trafficking or environmentally harmful practices in the area. Colombia has neither impeded Nicaraguan naval vessels or fishing boats from operating in Nicaragua's EEZ, nor has it violated Nicaragua's sovereign rights, and Nicaragua is

11 NR, para. 2.34.
12 NR, para. 3.8.

unable to show otherwise. In short, there is no policy to usurp Nicaragua's EEZ rights.

1.8 To the contrary, it is Nicaragua that assumes it has full and unfettered sovereignty over its EEZ, not just the limited sovereign rights and jurisdiction that international law allocates to coastal States, such as Nicaragua.[13] For example, while Nicaragua purports to accept that Colombia has freedom of navigation and overflight in Nicaragua's EEZ,[14] it seeks to equate those freedoms with the more limited rights that apply in the territorial sea. Thus, Nicaragua cites UNCLOS – a treaty to which Colombia is not a State party – and refers to Article 18, which is devoted to the right of innocent passage in the territorial sea, not the EEZ, for declaring that "navigation" merely encompasses "the passage of ships or the movement of ships on water".[15] This is tantamount to recognizing no more than a right of innocent passage for Colombia through Nicaragua's EEZ, a proposition that is wholly untenable and finds no support in customary international law or UNCLOS.

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[13] Although Colombia is not a party to the United Nations Convention on the Law of the Sea (hereinafter "UNCLOS"), in any event, Nicaragua is, and as a State party thereto, it is bound by its provisions. Some of the obligations incumbent on a party to UNCLOS are not limited to other States parties to the Convention. Under Article 2(1), "States Parties" is a defined term. Yet, other provisions – e.g. Articles 56 (2) and 58 – establish that the coastal State shall have due regard to the rights and duties "of other States", which is an obligation not limited to States parties.

[14] NR, para. 2.13.

[15] NR, paras. 2.36 and 2.38.

1.9 The most that can be said is that there is a general principle reflected in Article 58, paragraph 3 of UNCLOS, that, in the EEZ, States shall have due regard to the rights and duties of the coastal State. Colombia has not failed to pay due regard to Nicaragua's sovereign rights. Indeed, Nicaraguan officials recognize that fishing by Nicaraguan boats in the area has significantly increased since the Court's 2012 Judgment,[16] a fact that Colombia documented in its Counter-Memorial and which is supplemented by the information provided in Annex 71 hereto.[17]

1.10 On 28 February 2018, the National Institute of Development Information of Nicaragua (INIDE, from its Spanish acronym) published statistics regarding Nicaraguan fishing in the Caribbean Sea drawn from previous studies carried out by the Nicaraguan Institute for Fishing and Aquaculture (INPESCA, from its Spanish acronym). These show that, since the Court's 2012 Judgment, Nicaragua has enjoyed a 107% increase of total catch from the Caribbean Sea,

[16] The Chief of the Nicaraguan Naval Force, Rear-Admiral Marvin Elías Corrales Rodríguez, acknowledged that Nicaraguan fishermen had not been fishing in the area before the Court's Judgment, but that by 18 November 2013, one year after the Judgment, 16 fishing boats were operating in those waters. *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia),* Colombia's Preliminary Objections (hereinafter, "CPO"), Annex 43.

[17] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia),* Colombia's Counter-Memorial (hereinafter "CCM"), para. 3.21 and Graphic No. 2 at p. 107.

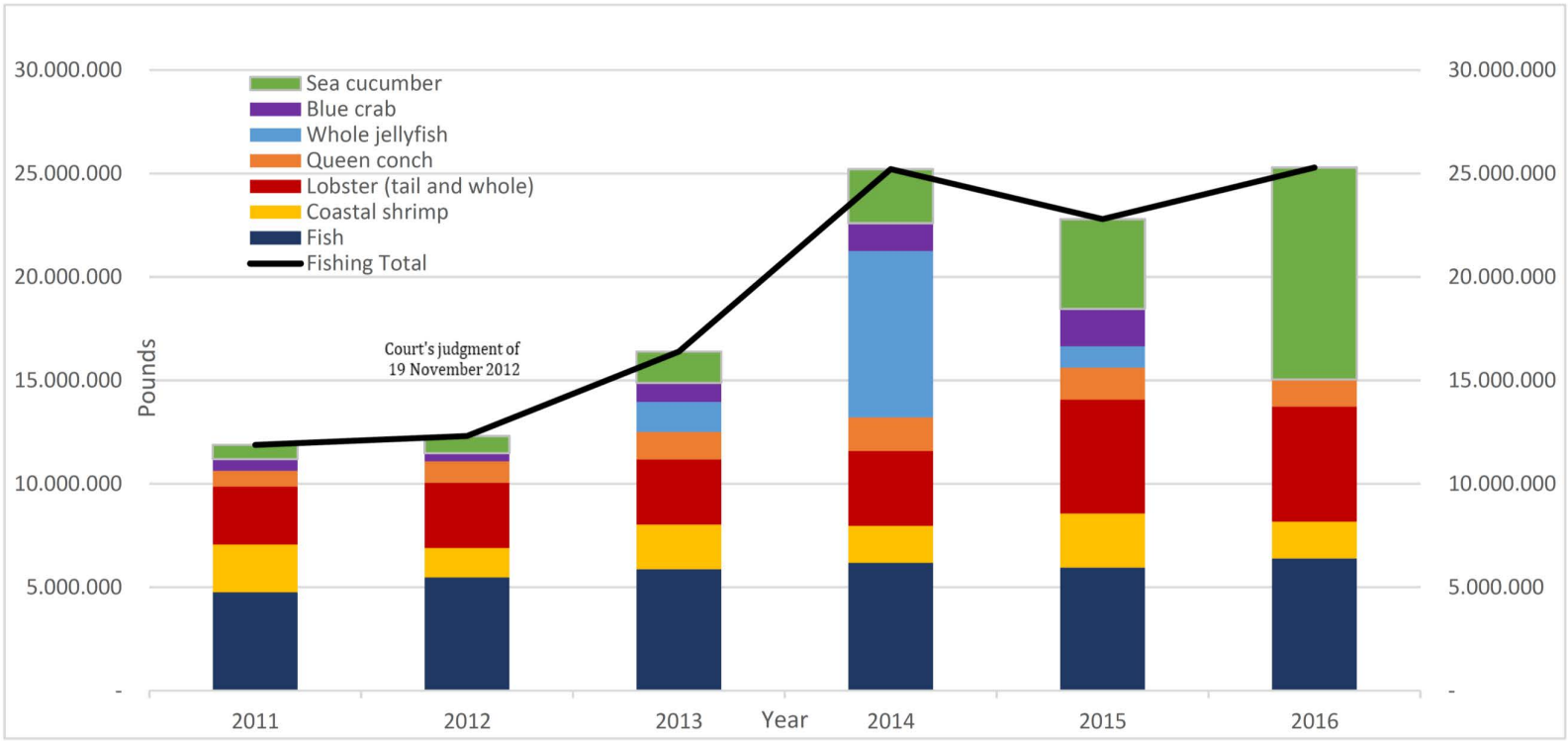
with significant increases in the number of Nicaraguan fishing vessels and annual fishing days.[18]

1.11 The table on the following page shows in graphic form this increase. It casts grave doubt on Nicaragua's claim that Colombia's conduct has had an adverse effect on Nicaragua's ability to exercise its sovereign rights over the living resources of its EEZ.

1.12 In the light of the above, the two critical questions are: (i) What are the rights of Nicaragua in its EEZ? and (ii) Is there any evidence that Colombia has violated those rights? As the Applicant in the present case, Nicaragua bears the burden of proving that its sovereign rights have been violated. Although Colombia will show in Chapter 2 that it acts in conformity with its rights and duties pursuant to its legitimate interests in the Southwestern Caribbean Sea, it does not need to prove that its conduct is expressly authorized under international law.

[18] Annex 71.

Graphic CR 1
Reported Landing of Major Fishery Resources by Nicaragua in the Caribbean Sea 2011-2016 (by Species)



1.13 In considering these issues, it should be recalled that Nicaragua, whether under customary international law or UNCLOS, only possesses sovereign rights and jurisdiction in its EEZ, not sovereignty. Pursuant to Article 56, paragraph 1, of UNCLOS, which reflects customary international law, Nicaragua's sovereign rights exist solely

> "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, and with regard to other activities for the economic exploitation and exploration of the zone".

1.14 At the same time, under the customary rule embodied in Article 56, paragraph 2, in exercising these rights, Nicaragua has an obligation to have due regard to the rights and duties of other States, including Colombia.

1.15 None of Colombia's conducts of which Nicaragua complains impeded Nicaragua from exercising its sovereign rights. This is evident from five overriding factors that are mutually consistent and fundamentally undermine Nicaragua's claims.

1.16 *First*, Colombia is fully entitled to be present in Nicaragua's EEZ in the exercise of the freedoms of navigation and overflight, and of other internationally lawful uses of the sea, provided that it has due regard for the sovereign rights of

Nicaragua. Contrary to Nicaragua's assertions,[19] customary international law does not deprive Colombia of the right to observe and collect information about the activities of maritime traffic in the area. In particular, Colombia has compelling interests to be on the look-out for suspicious boats that may be engaged in drug smuggling across the Southwestern Caribbean Sea. Colombia also has a vested interest in the preservation of the environmental integrity of the area, which includes the Seaflower Biosphere Reserve – a unique area of special environmental importance that has been recognized by UNESCO. Furthermore, Colombia has an interest in ensuring the safety and livelihood of the inhabitants of the San Andrés Archipelago, particularly the Raizales – descendant of the enslaved Africans and the original Dutch, British and Spanish settlers – many of whom continue to rely on the sea for their sustenance. Engaging in any of these activities causes no prejudice to Nicaragua. Indeed, it is to the benefit of the international community. Moreover, the activities in question are fully justified as a corollary of Colombia's freedoms of navigation and overflight and other internationally lawful uses of the sea in the region.

1.17 *Second*, Nicaragua has produced no reliable evidence with respect to the "incidents" that are said to underlie its claims. Rather than relying on contemporaneous evidence showing that Colombia engaged in an internationally wrongful

[19] See NR, paras. 2.26-2.27 and 2.52.

conduct, Nicaragua cites non-contemporaneous and third-party sources, including newspaper articles and indirect reports allegedly furnished from Nicaraguan fishing boats to its Naval Force, well after the events complained of occurred. These are erroneous in fact and insufficient in law. Actually, they are not "incidents" at all. In Chapter 3, therefore, Colombia will demonstrate on a case-by-case basis that Nicaragua has not met its burden of proving that Colombia impeded its vessels from exercising its sovereign rights.

1.18 *Third*, Nicaragua's claims are belied by the contemporaneous statements of its most senior political and military officials. While Nicaragua continues to harp on what it contends is Colombia's "rejection" of the 2012 Judgment,[20] it was Nicaragua's President himself, Daniel Ortega, who referred to the need to downplay what he termed "all this media turbulence" by stating, just three months before Nicaragua filed its Application in this case, that Colombia's Navy "has been respectful and there has not been any kind of confrontation between the Colombian and Nicaraguan Navy".[21] Similarly, it was the Chief of the Nicaraguan Naval Force – someone who would be expected to know if there had been any provocations or "incidents" – who affirmed one year after the Judgment was delivered that "[t]here have not been any conflicts and that is why I want to highlight that in one year of being there we have

[20] NR, para. 4.44.
[21] CPO, Annex 11, p. 118.

not had any problems with the Colombian Navy".[22] And it was General Avilés, the Chief of the Nicaraguan Army, who, on 18 March 2014, four months after the Pact of Bogotá ceased to be in force between Nicaragua and Colombia and the Application was filed, emphasized: "There are no incidents" involving the Colombian Navy.[23]

1.19 *Fourth*, at no time during this period did Nicaragua raise a single complaint to Colombia about any so-called "incidents". The first time Nicaragua sent a note of complaint to Colombia was in September 2014, conveniently just a few weeks before Nicaragua filed its Memorial and well after the Pact of Bogotá had ceased to be in force between Nicaragua and Colombia.

1.20 *Fifth*, while Nicaragua claims that Colombia has engaged in a systematic policy of harassing Nicaraguan fishing vessels, the fact is that statistically, even if those alleged events were true (*quod non*), they are *de minimis* in relation to the combined number of days spent by all Nicaraguan fishing vessels in the area (i.e. fishing trip days). For example, in 2013, the number of events alleged by Nicaragua represents 0.021% of its fishing trip days. As can be seen in Annex 71, similar statistics follow for 2014, 2015 and 2016.[24]

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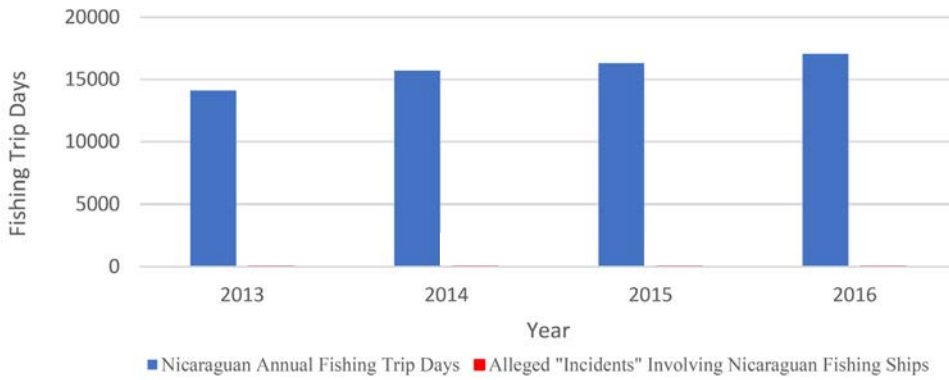
22 CPO, Annex 43, p. 355.

23 CPO, Annex 46, p. 367.

24 For 2014, the number of events alleged by Nicaragua represents 0.057% of its fishing trip days; for 2015, it represents 0.018%; and for 2016, it represents 0,005%.

Graphic CR 2
Nicaraguan Annual Fishing Trip Days and Alleged "Incidents" in the Caribbean Sea Involving Nicaraguan Fishing Ships



1.21 In short, Nicaragua's claims are not supported by evidence, and they cannot be reconciled with the repeated and consistent affirmations made by its senior officials.

(2) The Contiguous Zone

1.22 Nicaragua has also not demonstrated that Colombia violated Nicaragua's sovereign rights and maritime spaces by its adoption of Decree No. 1946, Article 5 of which provided for the establishment of a contiguous zone around the Colombian islands comprising the San Andrés Archipelago. There is not a single instance that Nicaragua can cite where one of its flagged vessels has been prejudiced or impeded from exercising Nicaragua's EEZ rights within Colombia's contiguous zone.

1.23 Under customary international law, the jurisdictional powers that States can exercise in the contiguous zone, including those enumerated in Decree No. 1946 (as amended), are not incompatible with the sovereign rights a coastal State

such as Nicaragua has within its EEZ. Each provides for a distinct set of rights that are not in conflict with each other. In other words, contiguous zone jurisdiction may be exercised by one State in an area that lies within another State's EEZ without displacing the latter's resource-based EEZ rights. Especially in today's world, contiguous zone rights enable a coastal State to exercise a degree of control close to its shores that is essential to protect its vital interests.

1.24 Article 101 of Colombia's 1991 Political Constitution, proclaiming a contiguous zone, states that such a zone "is in accordance with international law". For its part, Article 5 of Decree No. 1946 (as amended) provides that its application "will be carried out in conformity with international law and Article 7 of the present Decree". Article 7, in turn, makes it clear that nothing in the Decree will "affect or limit the rights of other states".[25] Thus, the legislation of which Nicaragua complains expressly provides that it will be applied in conformity with international law and that it will not affect or limit the rights of third States such as Nicaragua.

1.25 Colombia's enactment of the Decree has not affected or limited Nicaragua's sovereign rights or maritime spaces. As noted above, Nicaragua cannot point to any prejudice it has suffered as a result of the adoption of the Decree.

[25] Decree No. 1946 (as amended) may be found in Annex 7 to the CCM, Vol II at p. 77.

1.26 As Colombia discussed in its Counter-Memorial, and will again demonstrate in this Rejoinder, the jurisdictional powers that the Decree grants to it in the contiguous zone are essential to protect the vital interests of the Archipelago and its inhabitants, and are consistent with customary international law and with State practice. Moreover, the spatial extent of the zone is tailored to the specific geographic characteristics of the islands of the San Andrés Archipelago, and does not prejudice the sovereign rights Nicaragua possesses in the waters of its EEZ.

B. The Real Scope of Colombia's Position and the Constitutional Court's Ruling Regarding the Pact of Bogotá

1.27 Colombia has not denied Nicaragua's sovereign rights and jurisdiction over its maritime spaces, nor has it denied the binding effect of the 2012 Judgment. Yet, Nicaragua clings to an array of political statements devoid of legal content, let alone legal effect. In fact, as demonstrated in Colombia's Preliminary Objections, Counter-Memorial and this Rejoinder, Colombia has not violated Nicaragua's sovereign rights and maritime spaces.

1.28 Moreover, in its Reply Nicaragua asserts that the Constitutional Court's ruling regarding certain provisions of the Pact of Bogotá is a decision that "bar[s] compliance with the 19 November 2012 Judgment".[26] In relation to the scope of the

[26] NR, p. 191, Submissions, 1 (e).

judgment of Colombia's Constitutional Court, Nicaragua claims that the "Agent of the Respondent merely said that Colombia and its Constitutional Court now recognize the 2012 Judgment as binding"[27] and that "[t]his passage barely clarifies anything."[28]

1.29 Colombia previously referred in both its written and oral pleadings on the preliminary objections to the scope of the 2014 Constitutional Court's ruling regarding the Pact of Bogotá.[29] In the light of Nicaragua's distortion of Colombia's true position, the matter will be briefly revisited to demonstrate the baseless nature of Nicaragua's submission.

1.30 In its Preliminary Objections, Colombia summarized its position as follows:

> "In fact, Colombia has never taken any decision not to comply with the Judgment despite the disappointment of certain constituencies in Colombia with parts of it. On the contrary, both its highest officials and its highest court (the Constitutional Court) have made it clear that the Judgment is binding under international law. However, in order to give effect to the Judgment in its domestic legal order (to make it 'applicable'), it is necessary for Colombia to comply with the requirements of domestic law, in particular with

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27 NR, para. 1.8.

28 NR, para. 1.8.

29 CPO, paras. 2.41-2.46; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)*, Public Sitting, 28 September 2015, CR 2015/22, p. 16, para. 9 and p. 35, para. 18 (Agent).

> Article 101, paragraph 2, of its Constitution. Contrary to what Nicaragua would have the Court believe, there is nothing exceptional in the distinction between the position under international law and domestic law, particularly in States following a dualist approach. Nor is it unusual that time is needed to give effect to an international obligation, whether under a treaty or a judgment."[30]

1.31 Paragraphs 2.38 to 2.46 of the Preliminary Objections further explained the process before the Constitutional Court and its subsequent decision.

1.32 For his part, during the public hearings on the preliminary objections, the Agent of Colombia made it clear that the Constitutional Court "ruled unambiguously that, pursuant to Article 94 of the Charter of the United Nations, judgments rendered by this International Court of Justice are binding and cannot be disregarded".[31] He further asserted that, as a matter of international law, Colombia recognised the binding force of the 2012 Judgment, as confirmed by the Constitutional Court.[32] Counsel for Colombia also explained that, as a matter of domestic law,

> "decisions of the International Court of Justice with respect to boundaries had to be incorporated

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30 CPO, para. 2.24.

31 *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)*, Public Sitting, 28 September 2015, CR 2015/22, p. 16, para. 9 (Agent).

32 *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)*, Public Sitting, 28 September 2015, CR 2015/22, p. 17, para. 13 (Agent).

> into domestic law in the manner provided for by Article 101 of the Constitution: that is, by means of treaties."[33]

1.33 In its Reply, Nicaragua has chosen to ignore these explanations and to distort Colombia's position. This is so for at least two reasons.

1.34 *First*, the subject-matter of the dispute – as identified by the Court in its 2016 Judgment on Preliminary Objections in the present case – does not cover questions concerning Colombia's compliance with the 2012 Judgment. Rather, the scope of the present proceedings is limited to "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".[34]

1.35 In its Reply, Nicaragua continues to confuse what are in reality two distinct legal questions (compliance with the 2012 Judgment, and "alleged violations of Nicaragua's sovereign rights and maritime spaces") by amalgamating these separate questions into one. Thus, Nicaragua asserts that "[t]he central issue in the present case is precisely that Colombia *not only refused to comply* with the 2012 Judgment but *breached*

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[33] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)*, Public Sitting, 28 September 2015, CR 2015/22, p. 37, para. 23 (Bundy).

[34] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections, I.C.J. Reports 2016* (hereinafter "Judgment on the Preliminary Objections), p. 32, para. 79.

Nicaragua's sovereign rights stemming from it".[35] Yet, even if Nicaragua seeks to portray the former as "the central issue" of its case (i.e. compliance with the 2012 Judgment), in fact the Court has already established that the dispute relates only to one issue: the alleged violations of Nicaragua's sovereign rights and maritime spaces.

1.36 *Second*, Nicaragua misrepresents what Colombia's Constitutional Court actually decided with respect to the 2012 Judgment. As Colombia has already explained, in so far as questions of boundaries are concerned, Colombia's 1991 Political Constitution adopts a dualist approach. Under the Constitution, for a boundary to be established or modified as a matter of Colombian law, a treaty must be signed and ratified. This is the manner in which, according to the Constitutional Court's ruling, the 2012 Judgment will have to be incorporated into domestic law. That in no way means that Colombia has "refused to comply with the 2012 Judgment", as claimed by Nicaragua. To the contrary, the Constitutional Court itself noted that:

> "the decisions rendered by the International Court of Justice, on the basis of the jurisdiction recognized by Colombia through Article XXXI of the Pact [of Bogotá], *cannot be disregarded*, in conformity with what is prescribed in Article 94 of the Charter of the United Nations, that provides that each Member of the United Nations is committed to comply with the decision of the

[35] NR, para. 1.9. (Emphasis added).

> International Court of Justice in any case to which it is a party."[36]

1.37 Nicaragua's claim that Colombia has a systematic policy of disregarding the 2012 Judgment is thus unfounded.

C. Colombia's Counter-claims

1.38 In its Order of 15 November 2017, the Court found that Colombia's third and fourth counter-claims are admissible and form part of the current proceedings.[37] Colombia's third counter-claim requests the Court to adjudge and declare that the traditional fishing rights of the inhabitants of the San Andrés Archipelago, including the Raizales, exist and that Nicaragua has infringed those rights to access and exploit their traditional fishing banks. The fourth counter-claim requests the Court to declare that Nicaragua's system of straight baselines, adopted pursuant to Decree No. 33-2013 of 19 August 2013 is contrary to customary international law and violates Colombia's sovereign rights and maritime spaces.

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[36] CPO, Annex 4, para. 9.10. (Emphasis added).

[37] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia),* Order of 15 November 2017, paras. 82 (A) and 82 (B).

(1) NICARAGUA'S INFRINGEMENT OF THE TRADITIONAL FISHING RIGHTS OF THE INHABITANTS OF THE SAN ANDRÉS ARCHIPELAGO

1.39 Nicaragua's Reply seeks to deny the inhabitants of the San Andrés Archipelago their right to continue exercising their traditional fishing practices in maritime areas of the Southwestern Caribbean Sea, on three main grounds. *First*, Nicaragua asserts that with the adoption of UNCLOS these traditional rights have been extinguished within its EEZ because the coastal State has exclusive sovereign rights to explore and exploit the living resources therein.[38] *Second*, Nicaragua denies that the local inhabitants of the Archipelago even have such rights and contends that Colombia has failed to prove that the rights in question exist.[39] *Third*, even assuming the existence of such rights, Nicaragua denies that it has infringed them.[40] Notwithstanding these denials, Nicaragua nonetheless affirms that

> "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."[41]

1.40 On the first point, Nicaragua's arguments are seriously misguided. Nicaragua does not dispute the fact that traditional

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38 NR, paras. 6.7-6.30.
39 NR, paras. 6.31-6.76.
40 NR, paras. 6.77-6.95.
41 NR, para. 6.76.

fishing rights of nationals of one State have been recognized to exist in the territorial sea of another State even though (i) the latter State possesses sovereignty over its territorial sea as opposed to the quite limited sovereign rights that exist in the EEZ, and (ii) UNCLOS does not expressly refer to such rights. Yet, if traditional fishing rights can exist in the territorial sea of another State, it is counterintuitive, to say the least, to maintain that they cannot exist in the EEZ. Indeed, as will be seen, the jurisprudence shows the contrary.[42]

1.41 Nicaragua's second argument – that Colombia has failed to demonstrate that the inhabitants of the Archipelago, including the Raizales, have traditionally fished in what is now part of the waters of Nicaragua's EEZ – is extraordinary in its boldness. For it is no less than Nicaragua's President who has repeatedly referred to and recognized precisely these traditional fishing rights of the Raizales. Indeed, President Ortega has unequivocally stated that "we will respect the historical rights that they have",[43] there will be "open communication channels to ensure the Raizal people their fishing rights",[44] and "the raizal community, living in San Andrés can continue fishing in the Caribbean waters now belonging to Nicaragua and that their rights as native people will not be affected".[45] Quite apart from the witness statements Colombia has filed attesting to historical fishing in the area, unilateral statements such as the above

42 See Chapter 5 *infra*.
43 CCM, Annex 73. See also Annexes 1 and 6 to this Rejoinder.
44 CCM, Annex 74.
45 CCM, Annex 76.

emanating from Nicaragua's highest political authority would had never been made if the traditional fishing rights of the inhabitants of the San Andrés Archipelago did not exist, as Nicaragua now seeks to argue in its Reply.

1.42 As for Nicaragua's third argument – that it has not infringed the traditional fishing rights of the local inhabitants of the San Andrés Archipelago – Nicaragua conveniently adopts a more stringent standard of evidence from the one it applies to its own claims. In this respect, Colombia will show that the Nicaraguan Naval Force harasses and bullies the artisanal fishermen that it intercepts. As a consequence of this conduct, the artisanal fishermen fear getting stopped by the Nicaraguan armed agents, which is why they have been forced to abandon many of their traditional fishing banks.

(2) The Unlawfulness of Nicaragua's Straight Baselines

1.43 In the present case the legality of the straight baselines that Nicaragua enacted pursuant to its Decree No. 33-2013 is squarely in issue, the Court having found that Colombia's counter-claim challenging the legality of Nicaragua's straight baselines is admissible. By enacting its decree, Nicaragua has aggregated to itself, as internal waters, large areas that used to be territorial sea; and has unilaterally extended the breadth of its territorial sea and EEZ in a manner that is contrary to customary international law, as well as the strict conditions for straight

baselines set out in Article 7 of UNCLOS, which are binding on Nicaragua.

1.44 As identified by Colombia in its Counter-Memorial and in this Rejoinder, Nicaragua's straight baselines run afoul of several criteria that govern the validity of a system of straight baselines. For example: Nicaragua's coast is not deeply indented and cut into; it does not possess a fringe of islands along the coast in its immediate vicinity that justify straight baselines; its straight baselines fail to respect the requirement that they not depart to any appreciable extent from the general direction of the coast; and the sea areas they purport to appropriate as internal waters lying within the baselines are not sufficiently closely linked to the land domain to be subject to the regime of internal waters. Consequently, they should be ruled to be legally invalid.

D. The Structure of the Rejoinder

1.45 This Rejoinder is organized as follows:

Part I of this pleading introduces Colombia's arguments and explains the legitimate interests that Colombia has. Indeed,

- Chapter 2 will show that Colombia's presence in the Southwestern Caribbean Sea, including in areas within the waters of Nicaragua's EEZ, is fully in line with its rights in this area, including

freedoms of navigation and overflight and other internationally lawful uses of the sea.

In Part II Colombia will demonstrate that Nicaragua's allegation that Colombia has violated Nicaragua's sovereign rights and maritime spaces is unfounded in fact and in law, and that Nicaragua has not met its burden of proof for its claims. In particular:

- Chapter 3 will show that, with respect to the "incidents" that Nicaragua relies on for its allegation that Colombia has violated its sovereign rights, the Court's jurisdiction is limited to events that occurred between the date of the Court's 2012 Judgment (i.e. 19 November 2012) and the date when the Pact of Bogotá ceased to be in force between Nicaragua and Colombia (i.e. 27 November 2013, one day after Nicaragua filed its Application). Following that, Colombia will demonstrate, on a case-by-case basis, that none of the "incidents" involved any violation of Nicaragua's sovereign rights. Colombia will also show that it has never authorized industrial fishing in Nicaragua's EEZ and that Nicaragua's claim that Colombia continues to offer petroleum blocks in the waters of Nicaragua's EEZ is false.

- Chapter 4 turns to the second element of Nicaragua's claims – the validity of the contiguous zone established around the islands of the San Andrés Archipelago. Colombia will show that the exercise of its jurisdictional rights in the contiguous zone, and the geographical extent of that zone, are consistent with customary international law, and do not affect Nicaragua's ability to exercise sovereign rights in the waters of its EEZ. Moreover, Colombia will also demonstrate that it is bound by its own legislation to implement the contiguous zone in accordance with international law and in a manner that does not affect the rights of other States, and that Nicaragua has not proved that it has suffered any prejudice as a result of the passage or application of the legislation.

In Part III, Colombia will demonstrate that its two counter-claims found admissible by the Court are well founded. In particular:

- Chapter 5 addresses Colombia's counter-claim that Nicaragua has infringed the traditional fishing rights of the local inhabitants of the Archipelago – rights that Nicaragua, through the declarations of its President, has expressly recognized to exist. Colombia will also show that

Nicaragua's attempt to deny these rights on the basis that they have been extinguished with the adoption of the EEZ regime is misguided.

- Chapter 6 deals with the enactment by Nicaragua, after the 2012 Judgment was delivered, of a system of straight baselines. Colombia will show that these straight baselines do not conform to the conditions imposed under both customary international law and UNCLOS, that they prejudice Colombia, and that they are thus contrary to international law.

- Chapter 7 contains a short summary of Colombia's reasoning. It will be followed by Colombia's Submissions.

Colombia is also filing one volume with the documentary annexes referred to in the Rejoinder, including an Appendix in which Colombia will show that, while the Court lacks jurisdiction to consider the post-critical date events advanced by Nicaragua, none of them evidences any violation of its sovereign rights.

Chapter 2

COLOMBIA'S LEGITIMATE INTERESTS IN THE SOUTHWESTERN CARIBBEAN SEA

A. Introduction

2.1 Nicaragua has portrayed and continues to portray the conduct of Colombia in the Southwestern Caribbean Sea as one of sustained infringement of the EEZ regime,[46] particularly through an allegedly repeated obstruction of Nicaraguan authorities and harassment of Nicaraguan licensed fishing vessels, so as to give the appearance that confrontation and divisiveness prevail over cooperation. This is far from true.[47] Nicaragua speaks at length of "incidents" that would have involved Colombian authorities in the Southwestern Caribbean Sea. As will be seen in Chapter 3, this is not the case. Colombia has never claimed a "general right to engage in policing

[46] NR, para. 2.10.

[47] In fact, there is a friendly and cordial relationship between the Colombian Navy and the Nicaraguan Naval Force. The respective Commanders have met frequently in naval conferences in Buenos Aires (September 2014), Cartagena (August 2015), Mexico (September 2017) and Cartagena (July 2018). Similarly, the two Navies have cooperated in search and rescue operations – for instance, the Colombian A.R.C. "Caldas" assisted when four Nicaraguan marines shipwrecked in *Luna Verde* in December 2013 – and drug interdiction operations – like the recent multilateral Operation "Orion" in April 2018, which led to the seizing of 18.5 tons of cocaine and 1 ton of marihuana, and the capture of 85 people. In addition, in October 2018, two Nicaraguan naval officers attended the VII Naval War Games of Central America and the Caribbean in Cartagena. This type of joint activities would definitely not happen if the Colombian Navy was indeed hostile or had a harassing attitude towards the Nicaraguan Naval Force.

activities in Nicaragua's EEZ."[48] And none of the facts reproached by Nicaragua to Colombia can seriously be qualified as "policing activities."[49]

2.2 The presence of the Colombian Navy in the Southwestern Caribbean Sea is an exercise of its freedom of navigation and overflight, and other internationally lawful uses of the sea, which is wholly consistent with customary international law. As Colombia explained in its Counter-Memorial, it enjoys such rights in waters of the Nicaraguan EEZ. These freedoms allow Colombia to be present in the area and carry out a range of activities, which include observing and informing about practices that prejudice the marine environment or that threaten the habitat and livelihood of the inhabitants of the San Andrés Archipelago who have traditional fishing rights in the area; render assistance to persons and vessels in distress at sea; and cooperate to prevent and interdict drug trafficking and other forms of transnational crime. All of the above is carried out in accordance with customary international law and the relevant treaties applicable to these matters.

2.3 In its Reply, with the intent to challenge Colombia's presence and activities in the Southwestern Caribbean Sea, Nicaragua erroneously reduces freedoms of navigation and overflight, as well as other internationally lawful uses of the sea, to innocent passage. This mistaken conclusion is derived from

[48] NR, paras. 2.26-2.56.
[49] NR, paras. 2.26-2.60.

Nicaragua's apparent belief that the 2012 Judgment granted to it full and unimpeded sovereignty over the waters of its EEZ. However, Colombia will show that Nicaragua's understanding of the freedoms of navigation and overflight, and other internationally lawful uses of the sea, is contrary to international law (Section B), and that its presence in the Southwestern Caribbean Sea, including in the waters of Nicaragua's EEZ, is the legal exercise of these freedoms and an internationally lawful use of the sea, which does not infringe Nicaragua's sovereign rights and jurisdiction (Section C). Further, Colombia will show that it is not acting in a general policing fashion in the waters of the Nicaraguan EEZ, but rather, it is exercising its freedoms and rights to protect legitimate interests and concerns, including the need to prevent transnational crime at sea, drug trafficking, the need to ensure safety for fishermen, the protection of fragile ecosystems and the well-being of vulnerable communities by ensuring a healthy environment for these communities (Section D).

B. Freedoms of Navigation and Overflight, and other Internationally Lawful Uses of the Sea

2.4 Apart from the limited sovereign rights and jurisdiction reserved to the coastal State in the waters of its EEZ, therein other States enjoy freedom of navigation and overflight as well as other internationally lawful uses of the sea – including for their foreign military ships.

2.5 Rather than contesting that Colombia is entitled to freedom of navigation and overflight in Nicaragua's EEZ under customary international law,[50] Nicaragua:

- Tries to limit the scope of these freedoms by asserting that freedom of navigation merely encompasses a right of "passage"[51] (i.e. that a ship can only sail from one point to another).[52]

- Argues that third States do not enjoy the same liberties it does in the waters of its EEZ because

> "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."[53]

- Asserts that "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."[54]

2.6 Nicaragua is in error on all three points.

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50 NR, para. 2.11.
51 NR, para. 2.36.
52 NR, paras. 2.38 and 2.40.
53 NR, para. 2.8.
54 NR, para. 2.10.

2.7 *First*, as for the scope of the freedom of navigation, Nicaragua ignores the notion of "freedom", and erroneously reduces it to a mere right to navigate from point A to point B.[55]

2.8 There is no doubt that freedom of navigation entails the freedom of movement of vessels. But freedom of navigation also means the freedom of operations at sea,[56] which encompasses the right to navigate for any lawful purpose.

2.9 *Second*, freedom of navigation in waters of another State's EEZ entails paying due regard to the coastal State's limited sovereign rights, but these are otherwise unaffected.[57] However, some activities that can be freely exercised on the high seas fall under the jurisdiction of the coastal State in its EEZ. Conversely, those activities that do not fall under the

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[55] NR, para. 2.40.

[56] R. O'Rourke, *Maritime Territorial and Exclusive Economic Zone (EEZ) Disputes Involving China: Issues for Congress*, Congressional Research Service, 2017, p. 4, available at: http://www.andrewerickson.com/wp-content/uploads/2017/10/CRS_ORourke_China-Maritime-EEZ-Disputes_R42784_20171016.pdf (last visited: 1 November 2018).

[57] This has been confirmed by ITLOS in the *M/V 'Virginia G'* case. In this case, the Tribunal addressed the question whether the activity of bunkering while navigating was subject to the exclusive jurisdiction of the coastal State. It held that the coastal State has no competence with regard to bunkering activities not directed to fishermen, thereby implicitly, but necessarily, acknowledging that this activity is encompassed into freedom of navigation, *M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014*, p. 4, p. 70, para. 223. Y. Tanaka comments that some countries do no adopt regulation on bunkering activities in the EEZ. This is the case of the U.K. and other States. This is why, except when the coastal State does adopt specific regulation, "fishing vessels remain free to supply and to receive bunkers in the EEZ", Y. Tanaka, "Navigational Rights and Freedoms", in D. R Rothwell, A. G. Oude Elferink, *et al* (eds.), *The Oxford Handbook of the Law of the Sea*, Oxford University Press, 2015, p. 554 (available at the Peace Palace Library).

jurisdiction of the coastal State can be freely exercised by third States while navigating in its EEZ, to the extent, of course, that they do not infringe the rights of the coastal State and of other States. For example, freedom of navigation in the EEZ includes:

> "the right to effectuate operations with regard to the towing and rescue of vessels (...) These actions are connected with the freedom of navigation and, consequently, a coastal State should neither reserve this right to itself, as it may do within its territorial sea, nor demand from other States a prior request about the possibility of conducting such rescue actions."[58]

2.10 Likewise, the freedom of overflight in the EEZ is the same as that enjoyed on the high seas. While contemporary international law transformed large parts of the high seas into EEZ, it has not affected the freedom of overflight over the EEZ.

2.11 The 1944 Chicago Convention, which was concluded before the introduction of the EEZ in international law, distinguished between the territories of the contracting parties and the high seas.[59] When the concept of the EEZ was introduced in UNCLOS III, the Secretariat of the International Civil Aviation Organisation conducted a study on the legal implications of UNCLOS on the Chicago Convention and other air law instruments. That study concluded that:

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[58] A. A. Kovalev, *Contemporary Issues of the Law of the Sea*, Eleven International Publishing, 2004, p. 56 (available at the Peace Palace Library).

[59] Convention on International Civil Aviation, 7 December 1944, 15 UNTS 296.

> "For all practical and legal purposes, the status of the airspace above the EEZ and the regime over the EEZ is the same as over the high seas and the coastal States are not granted any precedence or priority."[60]

2.12 It follows that the scope of the freedom of overflight over the high seas and in Nicaragua's EEZ is not limited by customary international law, nor by UNCLOS, because the airspace above Nicaragua's EEZ is international. Yet, Nicaragua repeatedly claims to be exercising "sovereignty in the airspace over the waters restored by the International Court of Justice".[61]

2.13 *Third*, Nicaragua is not correct in asserting that, under customary international law as reflected in UNCLOS Article 59, and as far as the EEZ is concerned, if a right is not specifically attributed to third States, then it must be vested on the coastal State.[62] It suffices to read the ordinary meaning of the article to understand that, to the contrary, its sole purpose is to resolve conflicts that could only arise if rights in the EEZ are not automatically attributable to the coastal State.

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[60] International Civil Aviation Organisation, "United Nations Convention on the Law of the Sea – Implications, if any, for the application of the Chicago Convention, its Annexes and other international air law instruments", doc. C-WP/7777 (1984), para. 11.12, in Netherlands Institute for the Law of the Sea (ed.), *International Organizations and the Law of the Sea Documentary Yearbook 3*, 1987, p. 243 (available at the Peace Palace Library).

[61] See Annexes 1-5 and 7.

[62] NR, para. 2.8.

2.14 In sum, Nicaragua's understanding of the basics of the law applicable in the EEZ is wholly erroneous.

C. Colombia's presence in the Southwestern Caribbean Sea, including in Nicaragua's EEZ, is an exercise of its freedoms of navigation and overflight and an internationally lawful use of the sea, which does not infringe Nicaragua's sovereign rights

2.15 Nicaragua wrongly asserts that the activities carried out by the Colombian Navy in its EEZ are not lawful (Sub-section 1). Moreover, even if these activities were not permitted under the regime of freedoms of navigation and overflight, or were not internationally lawful uses of the sea, *quod non*, it would be for Nicaragua, not Colombia, to prove that they infringe its rights in its EEZ, which it has not done (Sub-section 2).

(1) The Presence of the Colombian Navy falls within the Freedom of Navigation afforded to all States under International Law

2.16 Nicaragua complains that the mere presence of the Colombian Navy in the Southwestern Caribbean Sea, including within the waters of its EEZ, is not an exercise of Colombia's freedom of navigation. However, to the extent that Colombian ships simply observe and inform about unlawful activities, they do not impede the exercise by Nicaragua of its sovereign rights.

2.17 Even with respect to military vessels, while Article 58 of UNCLOS "does not expressly mention military activities or

survey activities",[63] it is undisputable that "the naval powers maintain that the language was intended to ensure that traditional freedoms of the seas in article 87 were preserved in the EEZ."[64]

2.18 Moreover, State practice clearly confirms that States are entitled to carry out military operations in a foreign State's EEZ. As has been recalled recently:

> "The United States, like most other countries, believes that coastal states under UNCLOS have the right to regulate economic activities in their EEZs, but do not have the right to regulate foreign military activities in their EEZs.
>
> U.S. military surveillance flights in international airspace above another country's EEZ are lawful under international law, and the United States plans to continue conducting these flights as it has in the past."[65]

2.19 In this sense, that country's Handbook on the Law of Naval Operations clearly states that in the EEZ, as international

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[63] R. Beckham and T. Davenport, "The EEZ Regime, Reflection After 30 Years", *Proceedings from the 2012 LOSI-KIOST Conference on Securing the Ocean for the Next Generation,* 2012, p. 10, available at: https://www.law.berkeley.edu/files/Beckman-Davenport-final.pdf (last visited: 1 November 2018).

[64] R. Beckham and T. Davenport, "The EEZ Regime, Reflection After 30 Years", *Proceedings from the 2012 LOSI-KIOST Conference on Securing the Ocean for the Next Generation,* 2012, p. 10, available at: https://www.law.berkeley.edu/files/Beckman-Davenport-final.pdf (last visited: 1 November 2018).

[65] R. O'Rourke, *Maritime Territorial and Exclusive Economic Zone (EEZ) Disputes Involving China: Issues for Congress*, Congressional Research Service, 2017, available at: http://www.andrewerickson.com/wp-content/uploads/2017/10/CRS_ORourke_China-Maritime-EEZ-Disputes_R42784_20171016.pdf (last visited: 1 November 2018).

waters,

> "the coastal State cannot unduly restrict or impede the exercise of the freedoms of navigation in and overflight of the EEZ. Since all ships and aircraft, including warships and military aircraft, enjoy the high seas freedoms of navigation and overflight and other internationally lawful uses of the sea related to those freedoms, in and over those waters, the existence of an EEZ in an area of naval operations need not, of itself, be of operational concern to the naval commander."[66]

2.20 Similarly, the Australian Navy considers that "the EEZ regime in UNCLOS *does not* permit the coastal state to limit military activities in its EEZ"[67] because of the high seas freedoms that exist therein, which permit the conduct of military activities, with some limitations, such as to "refrain from unlawful threat, have due regard for the coastal state's rights and duties, due regard for others using the EEZ, and observe obligations under other treaties and rules".[68]

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[66] United States Navy, "The Commander's Handbook on the Law of Naval Operations", 2017, p. 2-9, available at: http://www.jag.navy.mil/distrib/instructions/CDRs_HB_on_Law_of_Naval_Operations_AUG17.pdf (last visited: 1 November 2018).

[67] Royal Australian Navy, Commander M. H. Miller, "The impact on the Law of the Sea Convention on the roles and activities of the RAN in meeting Australian Government requirements", p. 53, available at: http://www.defence.gov.au/ADC/Publications/Geddes/2005/PublcnsGeddes2005_310310_ImpactoftheLaw.pdf (last visited: 1 November 2018).

[68] Royal Australian Navy, Commander M. H. Miller, "The impact on the Law of the Sea Convention on the roles and activities of the RAN in meeting Australian Government requirements", p. 58, available at: http://www.defence.gov.au/ADC/Publications/Geddes/2005/PublcnsGeddes2005_310310_ImpactoftheLaw.pdf (last visited: 1 November 2018).

2.21 For its part, the United Kingdom's Ministry of Defence asserts that:

> "The long-standing principle of freedom of navigation in international waters allows maritime forces to access areas of national interest and potential threat. This access guarantees freedom of navigation for maritime forces up to 12 nautical miles from a coastline to allow options for intervention at a time and place of national choosing."[69]

2.22 A similar position is adopted by Spain, who also considers that in international waters (including another State's EEZ), "any State may conduct training and exercises with its naval forces, including with real fire", provided that they "respect the purposes for which that exclusive economic zone has been declared."[70]

2.23 Moreover, a warship can even exercise the right of visit in another coastal State's EEZ (a right that the Colombian Navy did not exercise in waters of the Nicaraguan EEZ):

> "[W]arships, military aircrafts, or other ships and aircrafts clearly marked and identifiable as being on government service and duly authorised, may engage in the right of visit (…) the right of visit

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[69] United Kingdom Ministry of Defence, "Joint Doctrine Publication 0 - 10: UK Maritime Power", 5th edition, 2017, p. 37, para. 3.18, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/662000/doctrine_uk_maritime_power_jdp_0_10.pdf (last visited: 1 November 2018).

[70] Annex 72: Kingdom of Spain, Ministry of Defence, *Law of the Sea Manual*, Volume 1, 27 May 2015.

> applies not only on the high seas, but also in the EEZ, subject to the coastal state rights therein".[71]

2.24 Thus, Colombia may carry out military manoeuvres and surveys in Nicaragua's EEZ so long as they are consistent with international law, in particular Article 2(4) of the UN Charter, and do not trespass on Nicaragua's sovereign rights. More generally, as expressly provided by Article 58 of UNCLOS, which reflects customary international law, in the EEZ, all States "enjoy (...) the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, *and other internationally lawful uses of the sea related to these freedoms*".[72]

2.25 In this regard, contrary to what Nicaragua suggests, Colombia is certainly not the only State having its Navy deployed in the area. Many States, both Caribbean and non-Caribbean, have vessels conducting maritime surveillance and other operations in the area. For example, the multinational drug interdiction Operation "Martillo"[73] which involved 15 States from the Americas and Europe,[74] has led to the confiscation of 693 metric tons of cocaine and USD 25 million in bulk cash and the detention of 1,863 suspects and 581 vessels and aircraft,

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[71] E. Papastavridis, *The Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans*, Hart Publishing, 2013, p. 66 (available at the Peace Palace Library).

[72] Emphasis added.

[73] See CCM, para. 2.101.

[74] Belize, Canada, Chile, Colombia, Costa Rica, El Salvador, France, Guatemala, Honduras, the Netherlands, Nicaragua, Panama, Spain, United Kingdom and United States.

since its launch on January 2012.[75] In this context, Canada has deployed destroyers, frigates, maritime coastal defence vessels, aircrafts and warships in the Caribbean Sea.[76]

2.26 Similarly, the Royal Netherlands Navy has led Operation "Caribbean Venture" and conducted drug interdiction operations in waters of the EEZ of the Dominican Republic and Haiti.[77]

2.27 For its part, the United Kingdom's Royal Navy maintains a "near constant presence in the Caribbean (…) deterring drug traffickers and patrolling the seas".[78]

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[75] United States Department of Defence, "Operation Martillo Still Hammering Away at Illicit Trafficking", 30 March 2016, available at: https://www.defense.gov/News/Article/Article/708314/operation-martillo-still-hammering-away-at-illicit-trafficking/ (last visited: 1 November 2018); see also United States Southern Command, "Operation Martillo", available at: http://www.southcom.mil/Media/Special-Coverage/Operation-Martillo/ (last visited: 1 November 2018); other maritime interdiction operations before and after the filing of Nicaragua's Application can be found in Annex 70: Ministry of Foreign Affairs of Colombia, *Sample Maritime Drug Interdiction Operations before and after the filing of Nicaragua's Application*.

[76] National Defence and the Canadian Armed Forces, "Operation CARIBBE", available at: http://www.forces.gc.ca/en/operations-canada-north-america-recurring/op-caribbe.page (last visited: 1 November 2018).

[77] Coastguard News, "Royal Netherlands Navy and U.S. Coast Guard seize 13,000 pounds of marijuana and 12 smugglers", 27 May 2015, available at: https://coastguardnews.com/royal-netherlands-navy-and-u-s-coast-guard-seize-13000-pounds-of-marijuana-and-12-smugglers/2015/05/27/ (last visited: 1 November 2018), and "Coast Guard offloads $17 million of cocaine", 20 November 2015, available at: https://coastguardnews.com/coast-guard-offloads-17-million-of-cocaine/2015/11/20/ (last visited: 1 November 2018).

[78] United Kingdom Royal Navy, "Atlantic Patrol Tasking North", available at: https://www.royalnavy.mod.uk/news-and-latest-activity/operations/north-atlantic/atlantic-patrol-tasking-north (last visited: 1 November 2018).

2.28 France has deployed naval vessels to "patrol off the island of Hispaniola to detect and intercept the primary maritime flow of drug trafficking from Colombia and Venezuela".[79]

2.29 The aforesaid is very much in line with Nicaragua's concession that Colombia has a "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 a reason to suspect that it is there."[80] Nevertheless, such presence cannot be qualified as an "occupation" of another State's EEZ, as suggested by Nicaragua,[81] since the coastal State's exclusivity in its EEZ does not comprise drug interdiction activities and it is questionable that the figure of occupation applies at all in the EEZ or when there are no hostilities.

(2) The Enjoyment by Colombia of its Freedom of Navigation and Overflight represents an Internationally Lawful Use of the Sea and does not Infringe Nicaragua's EEZ rights

2.30 In accordance with the principle of *onus probandi incumbit actori*, the burden is on Nicaragua to prove that its

[79] Ministry of Armed Forces of France, "FAA : coopération franco-américaine en mer des Caraïbes", 17 December 2014, available at : https://www.defense.gouv.fr/espanol/operations/operations/forces-prepositionnees2/forces-de-souverainete/antilles/actualites/faa-cooperation-franco-americaine-en-mer-des-caraibes (last visited: 1 November 2018).

[80] NR, para. 2.34.

[81] NR, para. 2.34.

sovereign rights have been violated.[82] In contrast, the burden is not on Colombia to prove that it did not violate Nicaragua's sovereign rights or to prove that each one of its actions are permitted under international law.

2.31 If the Court finds that Colombia's exercise of its freedoms of navigation and overflight is lawful, as Colombia submits is the case, that disposes of Nicaragua's claims. However, the converse is not true. Thus, even if the Court finds that Colombia's activities are not specifically included within the principle of freedoms of navigation and overflight, or do not constitute an internationally lawful use of the sea, Nicaragua still has to show that they constituted violations of its sovereign rights. In other words, if an activity of Colombia were not specifically recognised as encompassed into its freedoms of navigation and overflight, or another permissible use of the sea, under customary international law, *quod non*, that does not automatically mean that such activity is unlawful *vis-à-vis* Nicaragua. Nicaragua must still prove that Colombia's actions impeded, or materially prejudiced, Nicaragua's ability to exercise its sovereign rights. Since Nicaragua has failed to make

[82] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010*, p. 71, para. 162; *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 86, para. 68; *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2008*, p. 31, para. 45; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 128, para. 204; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 437, para. 101.

this demonstration, its claims must fail.[83]

2.32 In this regard, it can be recalled that the EEZ is a *sui generis* zone with a distinct legal regime that has been specifically negotiated to balance the interests of coastal States and other maritime States. In its EEZ, "[t]he coastal State's rights relate essentially to the natural resources",[84] and are limited or inexistent with respect to other matters. Concerning the prevention of drug trafficking for example, "the coastal State may assert jurisdiction over foreign vessels suspected of being engaged in drug trafficking only with regard to such activities occurring on artificial islands or other installations pursuant to Article 60 (2), LOSC".[85] Therefore, Nicaragua cannot claim an exclusive jurisdiction for addressing all matters in its EEZ.

2.33 It follows that any suggestion that Colombia violated Nicaragua's sovereign rights merely because it carried out certain observing and informing activities in its EEZ that are not specifically authorized in UNCLOS (to which Colombia is not a party) or under customary international law, is untenable. Nicaragua has to go further to show that its own rights were violated, which it has failed to do.

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83 See Chapter 3 *infra.*

84 R. R. Churchill and A. V. Lowe, *The Law of the Sea*, 3rd ed., Manchester University Press, 1999, p. 166 (available at the Peace Palace Library).

85 E. Papastavridis, "Crimes at Sea: A Law of the Sea Perspective", in E. Papastavridis, K. N. Trapp (eds.), *La Criminalité en Mer/Crimes at Sea*, The Hague Academy of International Law, Martinus Nijhoff Publishers, 2014, p. 13 (available at the Peace Palace Library).

D. Colombia is exercising its freedoms and rights to protect legitimate interests and concerns

2.34 Nicaragua's Reply completely misses the point that the nature, purpose, and intensity of the exercise by Colombia of its freedoms of navigation and overflight in the area must be assessed in their factual and geographic context, namely in the Southwestern Caribbean Sea, where there are a number of special characteristics that are highly relevant. In an attempt to support its allegations that Colombia has infringed its rights and jurisdiction, Nicaragua distorts Colombia's position by asserting that Colombia claims a "general right to engage in policing activities in Nicaragua's EEZ".[86]

2.35 This is simply not the case. As will be shown, Colombia is not acting in a policing fashion (Sub-section 1). Moreover, contrary to what Nicaragua asserts,[87] the special circumstances of the Southwestern Caribbean Sea further explain and justify the necessity for Colombia to take appropriate measures accepted by international law to prevent transnational organized crime at sea, especially drug trafficking (Sub-section 2). Likewise, since ships flying Colombia's flag also carry out activities in the area, it is Colombia's duty, as the flag State, to provide them safety at sea and other support; this latter obligation is also due to ships of any nationality (Sub-section 3). Lastly, it will be argued that Colombia's observing and

86 NR, pp. 19-32.
87 NR, paras. 1.13-1.18.

informing on environmentally-harmful activities does not infringe Nicaragua's rights (Sub-section 4).

(1) COLOMBIA IS NOT ACTING IN A POLICING FASHION

2.36 Nicaragua tries to qualify Colombia's activities in its EEZ as "policing activities".[88] However, none of the facts reproached by Nicaragua to Colombia can be qualified as such, as demonstrated in Chapter 3 below.

2.37 Colombia further notes that, in order to lend support to its case, Nicaragua also complains of what it portrays as wrongful "intent", or "policies" on the part of Colombia. Indeed, Nicaragua's written pleadings show that Nicaragua's focus is not so much on what Colombia's Navy did, but on the significance Nicaragua attributes to Colombia's presence in the Southwestern Caribbean Sea. Nicaragua's case is thus not so much about facts – although Colombia will show in Chapter 3 below that Nicaragua's version of the facts is seriously flawed – but about Colombia's intent or policy that, according to Nicaragua, would qualify as an illegal infringement of its sovereign rights.

2.38 Nicaragua's arguments fail, first, because the law on State responsibility does not attach any consequence to intent;[89]

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88 NR, paras. 2.26-2.60.

89 International Law Commission, "Commentary to the Draft Articles on Responsibility of States for Internationally Wrongful Acts", *Report of the International Law Commission on the Work of its Fifty-Third Session*,

second, because, in any event, the reasons why Colombia's Navy is present in the area are legitimate; and third, because Colombia has not interfered with Nicaragua's exercise of its sovereign rights since the 2012 Judgment.

2.39 In this regard, the special circumstances of the Southwestern Caribbean Sea, described and explained by Colombia in Chapter 2 of its Counter-Memorial, are relevant, because they form the basis for what is the objective factual and legal context (or "the relevant circumstances", to take the words of UNCLOS Article 59). Needless to say, the mere presence of a navy vessel is not tantamount to occupation – a notion which has a specific legal content in international law. Moreover, as noted above, Nicaragua's unfounded accusations derive from the fact that it wrongly equates EEZ rights to sovereignty over the territorial sea.

2.40 It is striking that Nicaragua does not address or challenge these circumstances as presented in Colombia's Counter-Memorial. Nicaragua only contends that they are irrelevant, [90] an argument that Colombia submits is misguided. For the sake of completeness, some further elements may be added to the relevant context provided in the Counter-Memorial.

A/56/10, Commentary to Article 2, p. 36, para. 10, available at: http://legal.un.org/ilc/documentation/english/reports/a_56_10.pdf (last visited: 1 November 2018).

[90] NR, paras. 1.13-1.18.

(2) COLOMBIA'S NAVY PRESENCE IS NECESSARY FOR THE PREVENTION OF TRANSNATIONAL ORGANIZED CRIME AT SEA, ESPECIALLY DRUG TRAFFICKING

2.41 Colombia is one of the Caribbean States taking appropriate measures to prevent transnational organized crime committed at sea, including in cooperation with third States. In fact, Colombia's action in this respect is an absolute necessity in the Caribbean Sea, because the area is particularly conducive for drug trafficking.

2.42 In its Reply, Nicaragua asserts that it

> "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".[91]

2.43 This assertion obfuscates completely the reality, visibly misunderstood by Nicaragua. The reality, as illustrated by the map produced in Colombia's Counter-Memorial at Figure 2.6, is that drug trafficking in the area is a widespread phenomenon. Drug trafficking in the Caribbean is not a sporadic event that Colombia's Navy may randomly encounter from time to time. A substantial presence is thus necessary to address drug trafficking in the Caribbean.

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[91] NR, para. 2.34.

2.44 Located between Colombia, Central America, the Caribbean and North America, the San Andrés Archipelago is particularly vulnerable to drug trafficking. As the Commander of the Caribbean Coastguard of Colombia has put it:

> "In both [drug trafficking] routes [to the United States and Europe], the San Andres Archipelago is like a gas station in the middle of the sea, an alternative to find fuel and logistic support".[92]

2.45 An aggravating factor is the poor control exercised by Nicaragua in its maritime areas. This area, and in general the Caribbean coast of Central America, has been described as

> "(…) kind of Wild West that in places has changed little from the days of the pirates. It has hidden ports and forts that are no-go zones for law enforcement, places from which the drug runners operate with complete impunity."[93]

In this respect Nicaragua's assertion that it "shares Colombia's concern regarding law enforcement [and] security" calls for caution.[94] This situation has been particularly well documented by the Foundation *Insight Crime* in 2012,[95] in particular in a

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[92] Annex 60: El Espectador, *Drug traffickers and the Caribbean route,* 31 March 2014.

[93] J. G. Stravridis, *Sea Power: The History and Geopolitics of the World's Oceans*, Penguin Press, 2017, p. 294 (available at the Peace Palace Library).

[94] NR, para. 1.16.

[95] InSight Crime is a foundation dedicated to the study of organized crime, considered by it as the principal threat to national and citizen security

comprehensive report published by Jeremy McDermott[96] on 19 July 2012.[97] Moreover, as evidenced by this report, it is not uncommon for fishing vessels to engage in drug trafficking, and thus try to hide their unlawful conduct behind the appearance of fishing activities. In such circumstances, a strong naval presence is necessary to curb drug trafficking and transnational organized crime more generally, a goal Colombia is committed to.

2.46 Colombia has entered into some 88 bilateral treaties and agreements related to drug trafficking.[98] Most of these agreements have been signed with Caribbean States, including Costa Rica, Cuba, the Dominican Republic, Honduras, Jamaica, Mexico, Panama, Venezuela and the United States. Additionally, the Colombian Navy has concluded agreements on

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in Latin America and the Caribbean (https://www.insightcrime.org/about-us/#ethical-commitment), with which Colombia has no relation whatsoever.

[96] Jeremy McDermott is the Executive Director and co-founder of InSight Crime. He also leads the investigations and coverage of Panama, the Caribbean and South America (except Brazil) and manages the team, which is based primarily in Medellín, Colombia. McDermott has two decades of experience reporting from around Latin America. He is a former British Army officer, who saw active service in Northern Ireland and Bosnia. Upon retiring from the military he became a war correspondent, covering the Balkans, based in Bosnia, then the Middle East from Beirut, before being sent to Colombia to cover the conflict. He has travelled extensively throughout Latin America. Before setting up InSight Crime he worked for many of Britain's most prestigious media outlets, including the BBC, the Daily Telegraph and The Economist. He specializes in drug trafficking, organized crime and the Colombian civil conflict. He has an MA from the University of Edinburgh.

[97] J. McDermott, "Bluefields: Nicaragua's Cocaine Hub", InSight Crime, 19 July 2012, available at: https://www.insightcrime.org/investigations/bluefields-nicaraguas-cocaine-hub/ (last visited: 1 November 2018).

[98] Ministry of Foreign Affairs of Colombia, Virtual Library of Treaties, available at: http://apw.cancilleria.gov.co/tratados/SitePages/BuscadorExternoForm.aspx (last visited: 1 November 2018).

naval and maritime cooperation with partner authorities from Jamaica, Costa Rica, Mexico, Honduras, the Dominican Republic, Guatemala, Panama and the Netherlands.[99]

2.47 There is no legal requirement that the Colombian Navy, after the Court's 2012 Judgment, cease its operations in waters of Nicaragua's EEZ, so long as the latter's sovereign rights are not impeded.

2.48 As indicated in Colombia's Counter-Memorial, drug interdiction activities carried out by the Colombian Navy between 2009 and 2016 around the San Andrés Archipelago resulted in 59.299 kg of cocaine seized and 163 people arrested for drug trafficking.[100] In addition to aggregate data, in Annex 70, Colombia includes a list of some maritime drug interdiction operations conducted by Colombia individually or jointly with partner States, before and after the filing of Nicaragua's Application.

2.49 In sum, Colombia takes its duty to prevent drug trafficking in the Southwestern Caribbean Sea seriously. Nicaragua, on the other hand, does not.

[99] CCM, para. 2.107.
[100] CCM, footnote 111.

(3) COLOMBIA'S OBLIGATION TO ASSISTS VESSELS IN THE SOUTHWESTERN CARIBBEAN SEA

2.50 As Colombia has previously recalled, the inhabitants of the San Andrés Archipelago, and especially the Raizales, have always depended on what the sea could provide and relied on the trade of its resources with the neighbouring communities across the Southwestern Caribbean Sea.[101] Thus, a fundamental role in this community is played by the many fishermen who have ancestrally fished far away and enjoy traditional fishing rights in areas overlapping with Nicaragua's EEZ.[102] In addition, the inhabitants of the Archipelago rely on a substantial amount of imports from the mainland, many of which are transported by sea.

2.51 As a result, there is a significant marine traffic in and around the San Andrés Archipelago by vessels which navigate both in Colombian and third States' waters, including those of Nicaragua's EEZ. These vessels are of many nationalities and include, of course, Colombian-flagged vessels – over which Colombia has a number of rights, duties and responsibilities, such as to protect and provide relief in cases of security or technical difficulties.

2.52 As a matter of fact, the weather in the Caribbean Sea is unpredictable, creating a high risk for vessels navigating in the

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101 CCM, Chapter 2, Section C.

102 CCM, Chapter 2, Section C; and Chapter 5 *infra*.

area – especially for the Raizales who have recourse to traditional methods of fishing and sailing.

2.53 It should be stressed that "as individuals, fishers enjoy the rights provided by general human rights treaties"[103] and Article 4(1) of the American Convention on Human Rights provides that Colombia is bound to protect the right to life of fishermen under its jurisdiction as the flag State.[104]

2.54 Moreover, as a State party to the 1979 International Convention on Maritime Search and Rescue,[105] Colombia is under an obligation to establish a marine search and rescue area to assist any vessel or person in distress at sea.[106] Under Article 2.1.10 of the Annex to this Convention,

> "Parties shall ensure that assistance be provided to any person in distress at sea. They shall do so regardless of the nationality or status of such a person or the circumstances in which that person is found."

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[103] I. Papanicolopulu, "International law and the protection of fishers", in A. del Vecchio (ed.), *International Law of the Sea: Current Trends and Controversial Issues*, Eleven International Publishing, 2014, p. 326 (available at the Peace Palace Library).

[104] M. Rota, "Case-law of the Inter-American Court of Human Rights: Chronicle for the Year 2008", in *Journal for Constitutional Theory and Philosophy of Law,* Vol. 9, 2009, p. 133: "The article 4 of the Convention provides two obligations: the negative obligation to not endanger life (art. 4), and the positive obligation to protect this right, including against the actions of private individuals. Indeed, the Court granted a horizontal effect to the Convention.", available at: https://journals.openedition.org/revus/502 (last visited: 1 November 2018).

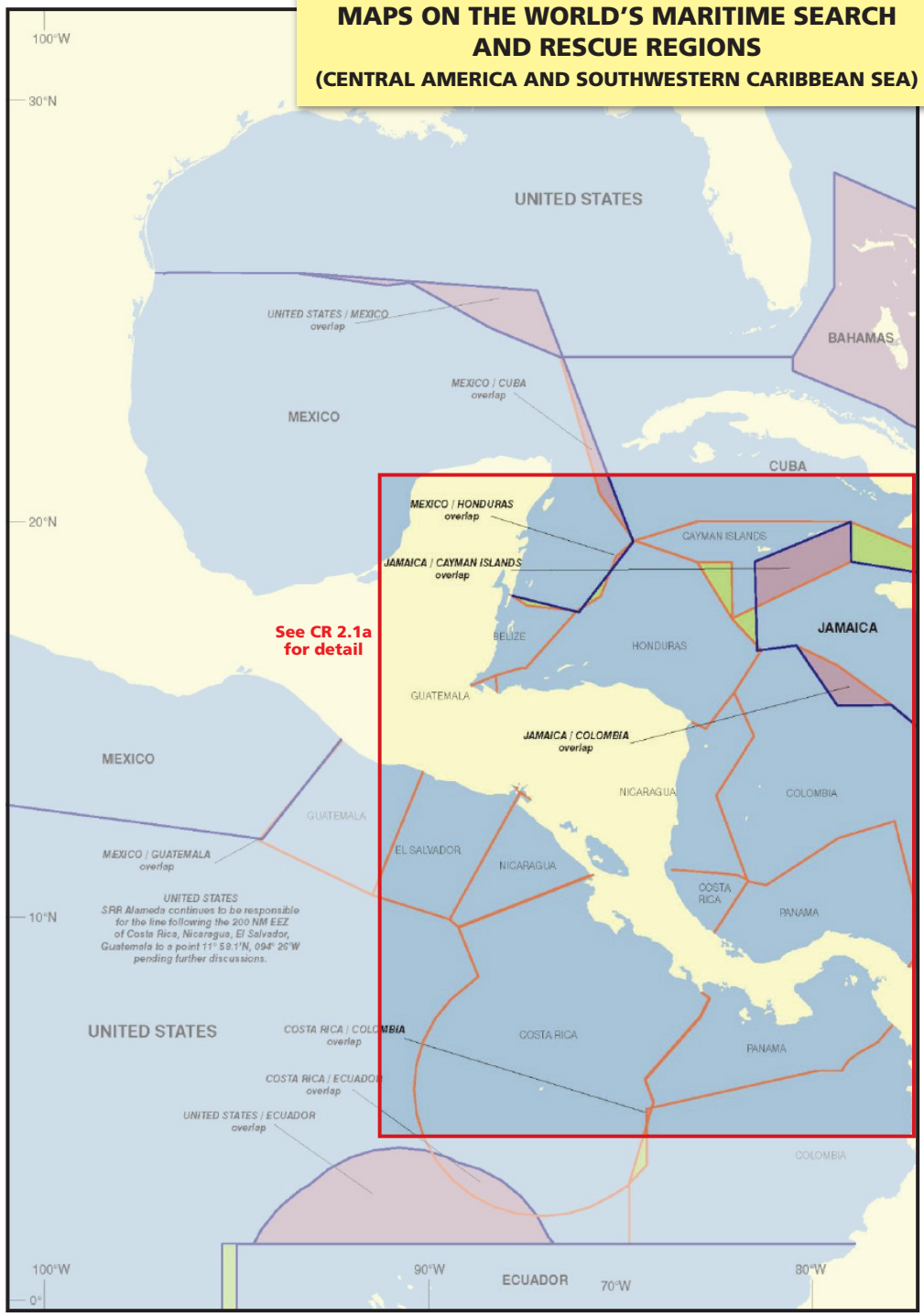
[105] Hereinafter "SAR Convention".

[106] SAR areas are based on States' technical capacities and do not necessarily conform to political boundaries.

Colombia's SAR area, as well as that of other Caribbean States (including Nicaragua) is shown in Figures CR 2.1 and CR 2.1a below:[107]

[107] United States Coast Guard, "IMO Maritime SAR Regions", p. 9 (excerpt), available at: https://www.dco.uscg.mil/Portals/9/CG-5R/nsarc/IMO%20Maritime%20SAR%20Regions.pdf (last visited: 1 November 2018).

MAPS ON THE WORLD'S MARITIME SEARCH AND RESCUE REGIONS
(CENTRAL AMERICA AND SOUTHWESTERN CARIBBEAN SEA)

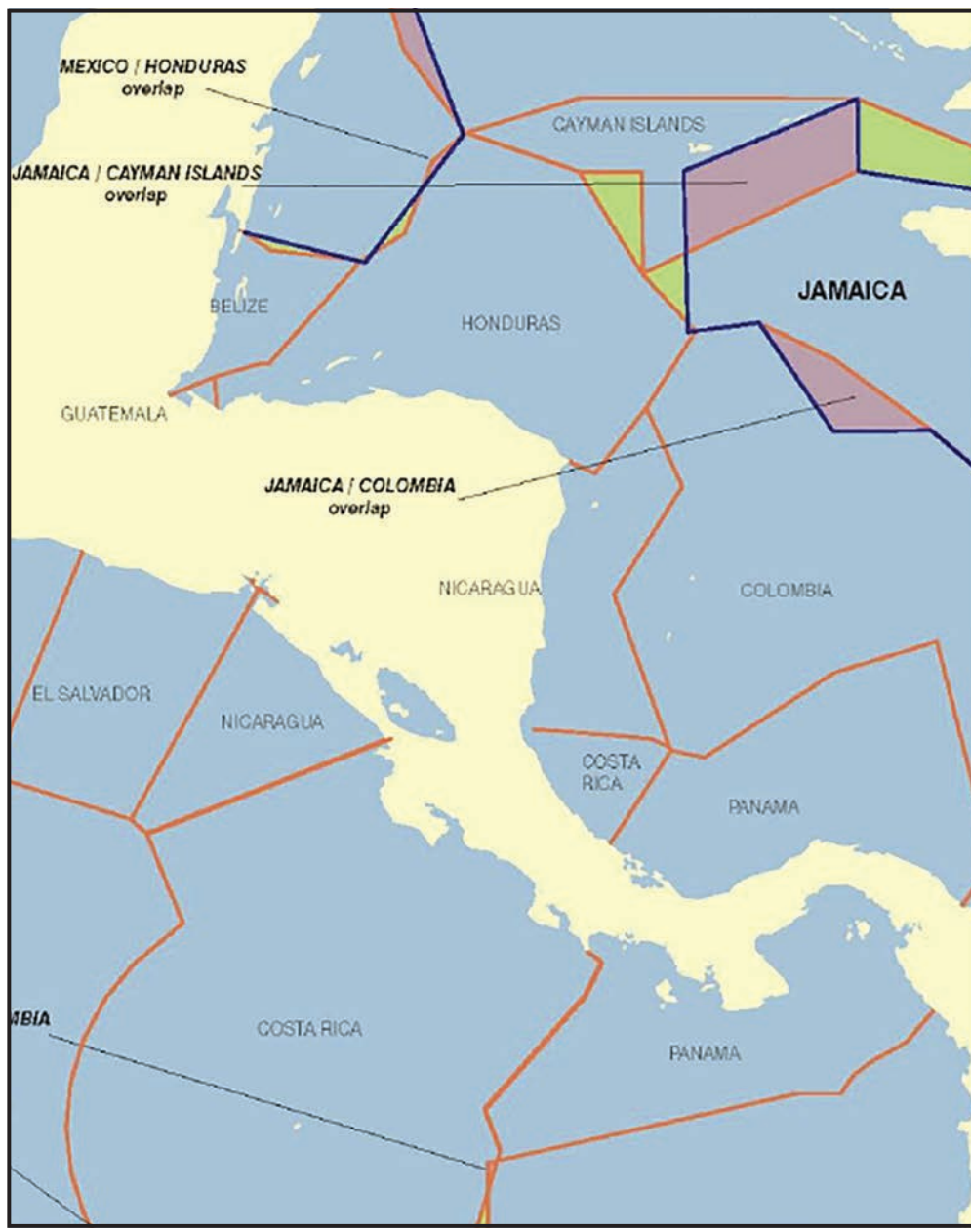


Source: http://docs.imo.org/Shared/Download.aspx?did=75819

Figure CR 2.1

MAPS ON THE WORLD'S MARITIME SEARCH AND RESCUE REGIONS

(EXCERPT OF CENTRAL AMERICA AND SOUTHWESTERN CARIBBEAN SEA)



Source: http://docs.imo.org/Shared/Download.aspx?did=75819

Figure CR 2.1a

2.55 Nicaragua, for its part, is not sufficiently equipped to ensure the safety of its vessels in the Southwestern Caribbean Sea. This explains why Nicaraguan fishermen rely on the Colombian Navy at times of distress.[108]

2.56 Rather than 'policing', the Colombian Navy's presence in the area is in conformity with international law and required for ensuring the safety of vessels in the area, including its own.

(4) COLOMBIA'S ENVIRONMENTAL OBSERVING AND INFORMING ACTIVITIES DO NOT INFRINGE NICARAGUA'S RIGHTS

2.57 The present dispute involves crucial environmental stakes and challenges that Nicaragua fails to consider. Nicaragua asserts that "the rights and duties of the Parties with respect to the preservation and protection of the environment are [not] relevant to the present case".[109]

2.58 In its Counter-Memorial, Colombia showed that "the rights and obligations of the Parties to protect and preserve the marine environment, including the environment of the local inhabitants of the Archipelago"[110] are part of the dispute before the Court.

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108 See CCM, Chapter 8.
109 NR, para. 1.12.
110 CCM, para. 3.23. See also CCM, paras. 3.24-3.85.

2.59 To portray environmental issues as wholly irrelevant to the case is both incorrect and misleading. It is incorrect because the existence of environmental concerns is central to Colombia's naval presence in the area of the Southwestern Caribbean Sea, as are certain ongoing practices that risk damaging the marine environment. It is misleading because Nicaragua is trying to "distract"[111] or "divert"[112] the Court's attention from one crucial fact, namely that both States, within their different scope of competence, should adopt the appropriate measures to protect the fragile ecosystems of the Southwestern Caribbean Sea and to ensure the right to a healthy environment to the individuals under their jurisdiction, including the Raizales.[113]

2.60 On the other hand, as demonstrated in Colombia's Counter-Memorial, under general international law, the existence of sovereign rights in maritime areas does not exempt a State such as Nicaragua from complying with its international obligations towards other States, including Colombia.[114] Nor does it affect Colombia's rights and duties, such as the duty to cooperate in the protection of the fragile marine environment of the Southwestern Caribbean Sea and the right to ensure the protection, promotion and respect of the right of the population of the Archipelago, including the Raizales, to live in a healthy environment.

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111 NR, para. 1.11.

112 NR, para. 1.2.

113 For the source of the relevant legal obligations, see CCM, Chapter 3, Section C.

114 CCM, para. 3.3.

2.61 Nicaragua seeks to exclude other States in the Southwestern Caribbean Sea from exercising their rights and complying with their duties, in particular when fragile ecosystems and fragile human communities are at stake, which is at odds with the EEZ regime under general international law. Such an attitude is also detrimental to local communities, which have a right to a healthy environment within the Southwestern Caribbean Sea.

2.62 These issues form part and parcel of the dispute. In accordance with its jurisprudence, it is for the Court itself to determine and delineate the subject-matter of a dispute in an objective manner, taking into account "the Application itself [as well] as subsequent proceedings, the Submissions of the Parties and statements made in the course of the hearings".[115]

2.63 The Court reiterated the same position in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France)* when it stated that "it would not confine itself to the formulation by the Applicant when it was called upon to determine the subject of the dispute".[116]

2.64 In its Memorial and Reply, Nicaragua describes the present dispute as one that "originates in Colombia's actions

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[115] *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960: I.C.J. Reports 1960*, p. 33.

[116] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, p. 207, para. 70.

subsequent to the *Judgment*"[117] of 19 November 2012 and, in particular, Colombia's "exercise of purported sovereign rights and jurisdiction in those waters, and its prevention of Nicaragua from exercising its sovereign rights and jurisdiction within its maritime boundaries as fixed by the Court."[118]

2.65 As the Court has noted, in order for it to adjudicate over a State's conduct, such as Colombia's, it must "discharge (…) an assessment of the legality of (…) conduct of States *with regard to the obligations imposed upon them by international law*".[119] The Court cannot undergo this process without considering its wider context, i.e. the exercise of freedom of navigation and overflight plus concerns regarding the protection and preservation of the fragile ecosystems of the Southwestern Caribbean Sea, coupled with the right to a healthy environment of the Raizales and other vulnerable communities of the Archipelago.[120] All of these constitute "other internationally lawful uses of the sea" of the kind that, under customary international law, third States possess in another State's EEZ.

2.66 Nicaragua relies on the Court's Order concerning the admissibility of Colombia's counter-claims to extrapolate that

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117 *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia),* Memorial of Nicaragua (hereinafter, "NM"), para. 1.35.

118 NM, para. 1.35.

119 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004,* p. 155, para. 41. (Emphasis added).

120 For the source of the relevant legal obligations see CCM, Chapter 3, Section C.

environmental "rights and obligations are unrelated to Nicaragua's claims".[121] But that is beside the point. That decision cannot prejudge the merits of a case, nor can they prevent a Respondent from formulating its defence on the merits as it deems appropriate.[122]

2.67 Colombia's efforts to cooperate in the preservation and protection of the fragile environment of the Southwestern Caribbean Sea are inextricably linked to the subject-matter of the dispute and are therefore within the scope of the present proceedings.[123] The environmental activities of Colombia in the Southwestern Caribbean Sea, which are limited to observing and informing others of environmental risks and the need to protect the fragile ecosystem, are in accordance with international law.

2.68 The oversimplification of the dispute by Nicaragua is untenable and Colombia respectfully invites the Court to take into account the legitimate environmental concerns in the settlement of the present dispute.

2.69 It is the said legitimate concerns that have prompted Colombia's actions (i.e. observing and informing) in conformity with international law, conducted in accordance with general

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121 NR, para. 1.20.

122 See e.g. *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 262, para. 56, and *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, I.C.J. Reports 1996*, Separate Opinion of Judge Ranjeva, p. 844.

123 NR, para. 1.22.

international law and have not impaired Nicaragua's sovereign rights and jurisdiction *(a)*; and are consistent with Colombia's responsibilities towards fragile ecosystems and environmentally vulnerable communities *(b)*.

(a) Colombia's environmental concerns are consistent with general international law and the Cartagena Convention, and do not impair Nicaragua's sovereign rights and jurisdiction

2.70 Colombia's conduct has been compatible with the rights of Nicaragua as the coastal State and is in line with the duty that both Nicaragua and Colombia have under general international law and in particular the Cartagena Convention[124] to preserve the fragile environment of the Southwestern Caribbean Sea.

2.71 As noted above, Nicaragua's Memorial attempts to deny the relevance of rights and duties concerning the protection of the environment of the Southwestern Caribbean Sea and the preservation of the right to a healthy environment of the Raizales.

2.72 Nicaragua goes further and vaguely refers to "rights and obligations" that "are not pertinent, insofar as Colombia pretends to exercise them in areas in which Nicaragua has exclusive sovereign rights and jurisdiction".[125]

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[124] Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region. See, in particular: Articles 4, 5 and 10 (in CCM, Annex 17).

[125] NR, para. 1.19.

2.73 In other parts of its Reply, Nicaragua dismisses the "catalogue of measures adopted – and treaties signed – by Colombia since the 1970s in order to protect the environment (…) in the Southwestern Caribbean Sea".[126]

2.74 In yet other parts of its Reply, Nicaragua contests Colombia's understanding of those rights and obligations, asserting that there is 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 licenses to Colombia's nationals and foreign boats in zones appertaining to Nicaragua".[127]

2.75 Nicaragua thus purports to avoid discussing the treaties relevant to the Caribbean Sea. Not even a passing mention is made to the Cartagena Convention, which is in fact crucial to understand Colombia's environmental concerns in the Southwestern Caribbean Sea.

2.76 Through its inconsistent approach, Nicaragua confuses the existence of environmental rights and obligations with their implementation.[128]

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126 NR, para. 1.16.

127 NR, para. 1.20.

128 See, in particular, the duty and right to protect and preserve the biodiversity of the Southwestern Caribbean Sea; the duty to exercise due

2.77 Paragraph 2.73 of Nicaragua's Reply is revealing in this respect. Nicaragua explicitly acknowledges that both Colombia and Nicaragua have a duty to protect the environment of the Southwestern Caribbean Sea and that such duties can be found "in relevant treaties to which both Colombia and Nicaragua are parties". In Nicaragua's own words:

> "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'".[129]

2.78 Nicaragua, thus, does not deny that Colombia has duties to protect the marine environment and that compliance with the said duties might entail "individual" actions, such as in the case of Colombia's environmental alerts in the Southwestern Caribbean Sea, which can be conducted as long as they are done in accordance with its obligations under general international law and the Cartagena Convention.

2.79 In that respect, Colombia's environmental activities consisted of informing of the environmental risks at stake and

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diligence with respect to the environment of the Southwestern Caribbean Sea; and the right and duty to protect the right of the inhabitants of the Archipelago to a healthy, sound and sustainable environment (CCM, Chapter 3, Section C).

[129] NR, para. 2.73. (Emphasis added).

the impact of harmful actions taken by fishermen, as shown in several annexes to Colombia's Counter-Memorial.

2.80 A first set of Communications shows that the Colombian Navy vessels informed Nicaraguan vessels about concerns of damage to the marine environment:

- Communication No. 678 of 5 October 2013 mentions that "[a]lso, a QUERY via marine VHF was completed, informing that they were carrying out fishing activities in the 'Seaflower' natural reserve, which is internationally protected by UNES[C]O, reminding it, on numerous occasions, that performing these fishing activities constitutes a breach of international norms…".[130]

- Communication No. 677 of 5 October 2013 also confirms that: "[l]ikewise, a QUERY by marine VHF was performed, informing the fishing boat that it was carrying out a fishing operation in an area of the 'Seaflower' natural reserve, which is internationally protected by UNES[C]O, repeatedly reminding it that it was in violation of international laws while performing such operations in that area".[131]

2.81 In the same vein, a second set of Colombia's Navy Communications alerted on illegal fishing practices by

130 CCM, Annex 43.
131 CCM, Annexes 42, 54 and 57.

Nicaraguan fishing vessels:

- Communication No. 375 of 6 August 2013 states: "A.R.C. 801 kept the fishing vessel under surveillance, noticing that it kept artisanal boats carrying out fishing with oxygen tanks".[132]

- Communication No. 059 of 16 October 2013: It is mentioned that "taking into account that lobster fishing with divers is internationally considered as predatory due to its adverse environmental impact, I hereby report this activity to the Command for whatever purposes it sees fit (...)".[133]

2.82 Finally, a third set of Colombia's Navy Communications refer to predatory fishing activities, specifically fishing with divers, which is a practice that undermines the protection and sustainability of the marine environment.[134]

2.83 It is noteworthy that in many of those communications, Colombia did not assert its own jurisdiction, but merely invoked environmental obligations owed by Nicaragua as well. Thus, the nature of Colombia's conduct is simply not of the kind that could create even a potential, let alone an actual, conflict with the enjoyment of Nicaraguan EEZ rights. Under customary

132 CCM, Annex 37.
133 CCM, Annex 45.
134 CCM, Annexes 40, 41, 47 and 48.

international law, the regime of the EEZ does not allow a coastal State from denying the rights and duties of other States, including environmental rights and duties.

2.84 Furthermore, such environmental concerns are in line with the very object and purpose of the Cartagena Convention, which was concluded in the light of the contracting parties' recognition of the economic and social value of the marine environment, their responsibility to protect this environment and its ecosystems, and the special hydrographic and ecological characteristics of the region and its vulnerability to pollution and environmental deterioration.[135]

2.85 The Cartagena Convention is based on the customary international law principle obliging States to protect and preserve the marine environment, applied to the specific characteristics of the Wider Caribbean Sea.[136]

2.86 The Convention reflects the same pro-active spirit as customary international law and establishes that its

> "Contracting Parties shall, *individually* or jointly, take all appropriate measures in conformity with international law and in accordance with this Convention and those of its protocols in force to which they are parties to prevent, reduce and control pollution of the Convention area and to ensure sound environmental management, using

135 CCM, Annex 17, Preamble.
136 CCM, para. 3.36.

> for this purpose the best practicable means at their disposal and in accordance with their capabilities."[137]

2.87 Colombia rejects Nicaragua's assertions according to which Colombia was engaged "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."[138] Colombia also denies that its "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."[139]

2.88 It is for Nicaragua to discharge its burden of proof and to demonstrate which of its sovereign rights were infringed. Nicaragua's Reply, as its Memorial, is unhelpful in this regard.

2.89 Nicaragua cannot invoke its own inaction as a pretext to accuse Colombia of "policing" its waters. As Colombia emphasized, the Cartagena Convention invites States parties to ensure sound environmental management through "the best practicable means at their disposal and in accordance with their respective capabilities."[140] This is what Colombia has done through its environmental alerts in the Southwestern Caribbean Sea.

2.90 The environmental concerns of Colombia do not

137 CCM, Annex 17, Article 4. (Emphasis added).
138 NR, para. 2.68.
139 NR, para. 2.68.
140 CCM, Annex 17, Article 4.

constitute an internationally wrongful act. On the contrary, they are a fulfilment of its responsibilities with respect to fragile ecosystems and environmentally vulnerable communities.

(b) Colombia is fulfilling its responsibilities towards fragile ecosystems and environmentally vulnerable communities

2.91 The Southwestern Caribbean Sea is host to some very important ecosystems. As the Court has recently stressed, any ecosystem should be protected as a whole.[141] The due diligence that is required from States to protect ecosystems is even greater when the ecosystems at stake are as fragile and interconnected as those in the Southwestern Caribbean Sea (i). In addition, the ecosystems of the Southwestern Caribbean Sea are inextricably linked to the livelihood, survival and basic human needs of vulnerable communities, such as the Raizales (ii).

(i) The ecosystems of the Southwestern Caribbean Sea possess special characteristics which require a greater degree of due diligence

2.92 Because of their fragility and interconnectedness, the ecosystems of the Southwestern Caribbean Sea possess special characteristics. It is only through a greater degree of due diligence that the said special characteristics can be taken into

[141] *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua) – Compensation owed by the Republic of Nicaragua to the Republic of Costa Rica*, Judgment of 2 February 2018, para. 78 (not yet printed).

account and preserved.[142]

2.93 This crucial need to protect the fragile marine and coastal ecosystems of the Southwestern Caribbean Sea found specific expression through the establishment of the Seaflower Marine Protected Area[143] and the Seaflower Biosphere Reserve. The former is part of the latter, which in turn encompasses the total area of the Archipelago. The MPA was designed to protect the biosphere reserve and includes the largest, most productive open-ocean coral reefs in the Caribbean Sea.[144]

2.94 As Colombia explained already in its Counter-Memorial,

> "[The] resources [of the Seaflower Biosphere Reserve area] face a real risk of depletion and even extinction by over-fishing, destructive fishing practices, and pollution from vessels and human activity. Those practices have an adverse knock-on

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142 *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua) – Compensation owed by the Republic of Nicaragua to the Republic of Costa Rica*, Judgment of 2 February 2018, para. 78 (not yet printed).

143 Hereinafter "MPA".

144 The Colombian Ocean Commission has explained that: "The Seaflower Biosphere Reserve houses important ecosystems such as tropical dry forests, mangrove forests, seagrass meadows or seagrass beds, soft bottoms and coralline sand beaches, which are very well preserved (Taylor et al, 2011). Likewise, it has more than 77% of the shallow coralline areas of Colombia (Invemar 2005, 2009, Coralina-Invemar 2012), the world's third biggest coral reef, deep ecosystems (including deep corals), key species, great richness and diversity of fish, corals, sponges, gorgonacea, macroalgae, queen conch, lobsters, birds, reptiles, insects, among others, which provide countless ecosystem services such as food, coastal protection, recreation, etc. (Conservation International 2008, Burke et al, 2008)" (*Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua* v. *Colombia),* Counter-Memorial of Colombia, Annex 16).

> effect on other parts of the ecosystem, and endanger the traditional fishing rights of the local population and their very existence, as well as the environment of an internationally recognized biosphere".[145]

2.95 The protection of the ecosystems of the Southwestern Caribbean Sea, which are scattered under various jurisdictions, requires the cooperation of States in the region.

2.96 The conduct of the Colombian Navy, informing and warning of dangers to the ecosystems of the Southwestern Caribbean Sea, in conformity with international law, is aimed at preventing damage to them.

2.97 Nicaragua cannot blow hot and cold. It cannot claim that it cares for the environment, when it is blatantly and without any argumentation asserting in its Reply that the Southwestern Caribbean Sea does not present "special characteristics".[146] Nevertheless, it has not challenged Colombia's lengthy depiction of the special circumstances of the Caribbean Sea.

2.98 It also shows that, far from what it claims in its Reply, Nicaragua is oblivious to, or unaware of, the potential negative impact of the deterioration of fragile ecosystems on the livelihood of vulnerable communities, such as the Raizales.

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145 CCM, para. 2.10.

146 NR, paras. 1.13-1.18.

(ii) The well-being of the Raizales is intrinsically linked to the sound protection of the environment of the fragile ecosystems of the Southwestern Caribbean Sea

2.99 That the well-being of the Raizales is intrinsically linked to a sound protection of the environment is self-evident. The silence of Nicaragua's Reply with respect to the right of the Raizales to live in a healthy and sustainable environment is even more striking than its denial of the special characteristics of the Southwestern Caribbean Sea.

2.100 Colombia is not arguing in a legal void that the protection of the environment of the Southwestern Caribbean Sea is a prerequisite for ensuring the well-being of indigenous populations and local communities such as the Raizales. International law recognizes the special relationship of indigenous peoples and local communities with the protection of the environment.[147]

2.101 In response to a request made by Colombia, in November 2017 the Inter-American Court of Human Rights[148] rendered a ground-breaking Advisory Opinion where it expounded on State obligations in relation to the environment, in the context of the protection and guarantee of the rights to life and the right to personal integrity, as recognized in Articles 4

147 CCM, Chapter 3, Section C (3).
148 Hereinafter "I/A Court H. R.".

and 5 of the American Convention on Human Rights.[149]

2.102 In its Advisory Opinion, the Court confirmed the irrefutable relationship between the protection of the environment and the realisation of human rights, due to the fact that environmental degradation affects the effective enjoyment of other human rights, as follows:

> "47. This Court has recognised the existence of an undeniable relationship between the protection of the environment and the realisation of other human rights, since the environmental degradation and the adverse effects of climate change affect the effective enjoyment of human rights."[150]

2.103 In addition, the I/A Court H. R. emphasised the interdependence and indivisibility between human rights, the environment and sustainable development, since the full enjoyment of all human rights depends on a favourable environment. Having in mind the protection of local communities, the Court stated:

> "54. From this relationship of interdependence and indivisibility between human rights, the environment and sustainable development, multiple connecting points arise with regard to which, as expressed by the Independent expert, 'all human rights are vulnerable to environmental degradation, in the sense that the full enjoyment of

[149] Annex 69: Inter-American Court of Human Rights, Environment and Human Rights, Advisory Opinion OC-23/17 requested by the Republic of Colombia, 15 November 2017 (excerpts).
[150] Annex 69.

all human rights is contingent upon a favourable environment'".[151]

2.104 The Advisory Opinion lays out a clear legal framework of the shared responsibilities of States to protect the marine environment in the Wider Caribbean region. In order to identify the fundamental principles of international environmental law, the I/A Court H. R. relied extensively on the decisions of the International Court of Justice. It stressed the crucial role of the following duties of States:[152]

- States have the obligation to prevent significant environmental damage, within or outside of their territory;
- States shall regulate, supervise and control the activities under their jurisdiction which may produce significant damage to the environment;
- States must carry out studies on environmental impact when the potential for significant damage to the environment exists;
- States must adopt contingency plans in order to minimize the possibility of serious environmental accidents; and
- States must mitigate the significant environmental damage they may have caused.

151 Annex 69.
152 Annex 69.

2.105 In line with Colombia's submissions, the I/A Court H. R. affirmed that States have the obligation to cooperate in good faith for the protection against significant transboundary environmental damage. It did so in the following terms:

> "7. With the purpose of respecting and guaranteeing the rights of life and integrity of the people under their jurisdiction, States have the obligation to cooperate, in good faith, for the protection against significant transboundary harm caused to the environment."[153]

2.106 This ground-breaking Advisory Opinion also builds on previous decisions of the I/A Court H. R., which had addressed the link between the protection of the environment and the rights of indigenous peoples and local communities.[154]

2.107 The responsibility for Colombia to ensure that the subsistence and traditional fishing activities of the Raizales are not undermined extends to the entire living space of such communities. This responsibility entails, as the Interamerican Commission on Human Rights stated in the *Kuna* case, that:

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153 Annex 69.

154 I/A Court H. R., *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador (Merits and Reparations), Judgment of June 27, 2012,* paras. 146-147; *Case of the Indigenous People of Mudungandí and the Emberá Indigenous People of Bayano and their Members v. Panama (Merits), 13 November 2012,* paras. 233-234; *Case of Xákmok Kásek Indigenous Community v. Paraguay. Judgment of August 24, 2010 (Merits, Reparations and Costs),* para. 85; *Case of the Sawhoyamaxa Indigenous Community v. Paraguay, Judgment of March 29, 2006 (Merits, Reparations and Costs),* para. 118; *Case of the Yakye Axa Indigenous Community v. Paraguay, Judgment of June 17, 2005 (Merits, Reparation and Costs),* para. 137; *Case of the Saramaka People v. Suriname, Judgment of November 28, 2007 (Preliminary Objections, Merits, Reparations and Costs),* para. 88.

"States are under an obligation to control and prevent illegal extractive activities such as logging, fishing, and illegal mining on indigenous or tribal ancestral territories, and to investigate and punish those responsible."[155]

2.108 The environmental activities that Colombia conducts in the area, consist in informing vessels that they are engaging in activities that are contrary to international law. The discharge of this obligation is especially important in situations where significant harm to fragile ecosystems is in question, or in cases of predatory fishing activities that may "entail catastrophic repercussions for the livelihood and economic well-being of the population"[156] of Colombia.

E. Conclusions

2.109 Colombia has always paid great heed to the protection of the environment, and in particular, to the protection of the fragile ecosystems of the Southwestern Caribbean Sea, shared among several States. In this context, in the spirit of Article 4 of the Cartagena Convention, Colombia has always sought to "jointly, take all appropriate measures" together with other

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[155] Inter-American Commission on Human Rights, *Case of the Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their members v. Panama, Report No. 125/12 of November 13, 2012 (Merits)*, para. 234, available at: https://www.oas.org/en/iachr/decisions/court/12.354FondoEng.pdf (last visited: 1 November 2018).

[156] *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 342, para. 237.

neighbouring States in order to ensure that the environment of the Southwestern Caribbean Sea is well preserved, and that the right of local communities, including the Raizales, to a healthy environment is fully protected.

2.110 Colombia is also acting in this spirit with respect to the protection of the Seaflower Biosphere Reserve in the context of the UNESCO's Man and Biosphere Program. As to the status of the Seaflower Biosphere Reserve, when UNESCO's International Co-ordinating Council last discussed the issue in June 2014, it called for "the authorities of Colombia and Nicaragua to continue to respect the protected areas of the Seaflower Biosphere Reserve". It also "encouraged Colombia and Nicaragua to work together in the peaceful management of the Seaflower Biosphere Reserve."[157]

2.111 Colombia is indeed open to collaborate with Nicaragua to maintain the level of self-restraint that has allowed the Seaflower Biosphere Reserve to flourish thus far. In this respect, it is worth stressing that the acts of the Colombian Navy in the

[157] The Council also explicitly invited the parties to: "Evaluate the possibilities to establish a transboundary biosphere reserve. Transboundary biosphere reserves are jointly managed by two or more countries to ensure the conservation of the environment, sustainable development and joint research on issues of relevance of the countries concerned. If the authorities of the two countries so wish, UNESCO can assist in the designation of a transboundary biosphere reserve with all stakeholders concerned." International Co-ordinating Council of the Man and the Biosphere (MAB) Programme, Twenty-sixth session, 10-14 June 2014, Final Report, Document SC-14/CONF.226/15, p. 85, available at: http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/SC/pdf/SC-14-CONF-226-14-Information_on_Seaflower-eng-rev.pdf (last visited: 1 November 2018).

Southwestern Caribbean Sea have always sought to maintain the level of environmental protection ensured by the existing international legal regime of the Seaflower Biosphere Reserve as a UNESCO protected reserve.

2.112 In line with the object and purpose of the Cartagena Convention, Colombia is willing "to take all appropriate measures in accordance with international law and in accordance with this Convention to protect the marine environment". Colombia has been doing this in a spirit of cooperation, that it would also like to pursue with Nicaragua, in order to protect the fragile ecosystems of the Southwestern Caribbean Sea and the right to a healthy environment of vulnerable communities.

2.113 To conclude, the presence of Colombia in the Southwestern Caribbean Sea, including in waters of Nicaragua's EEZ, conforms to its freedom of navigation and overflight and thus represents an internationally lawful use of the sea. Therefore, it is wholly consistent with customary international law.

2.114 As previously shown, freedom of navigation consists in the right to navigate for any lawful purpose. In particular, Colombia's presence in the Southwestern Caribbean Sea is motivated by its legitimate concerns in relation to the marine environment, search and rescue, and transnational crimes, in accordance with international law.

2.115 As such, and as it will be shown in the next Chapter of this Rejoinder, the so-called "incidents" alleged by Nicaragua are artificial and over-exaggerated. They simply do not constitute either real incidents or internationally wrongful acts.

PART II

COLOMBIA HAS NOT VIOLATED NICARAGUA'S SOVEREIGN RIGHTS OR MARITIME SPACES

Chapter 3

NICARAGUA'S ALLEGED INCIDENTS IN THE SOUTHWESTERN CARIBBEAN SEA

A. Introduction

3.1 In its Memorial, Nicaragua referred to some 36 "incidents" which it claims represent interference by Colombia with Nicaragua's sovereign rights in its EEZ – of which only 13 are dated before the critical date. These incidents, to which Nicaragua has added a few more in its Reply, are alleged to have involved the threat of the use of force by Colombia's Navy, the harassment of Nicaraguan fishing vessels, the granting of fishing permits to non-Nicaraguan vessels, the offer of hydrocarbon blocks and the prevention of the Nicaraguan Naval Force from being able to exercise its law enforcement mission east of the 82nd West Meridian, in violation of international law.[158] In its Judgment on Colombia's Preliminary Objections, the Court ruled that it had no jurisdiction to consider Nicaragua's claims based on the alleged threat to use force.[159] Colombia will therefore not respond to this aspect of Nicaragua's claims further.

3.2 In Section B, Colombia will demonstrate that, contrary to the arguments advanced by Nicaragua in its Reply, the Court

[158] NM, paras. 1.9 and 2.22-2.52 and NR, paras. 4.51-4.129.

[159] Judgment on the Preliminary Objections, p. 33, para. 78 and p. 42, para. 111(1)(c) (dispositif).

lacks jurisdiction to consider most of these incidents. This is because the vast majority of individual episodes on which Nicaragua relies took place after the "critical date", when the Pact of Bogotá ceased to be in force between Colombia and Nicaragua (27 November 2013).

3.3 With respect to the remainder of the "incidents" which are said to have occurred before the critical date, and thus over which the Court has jurisdiction, Colombia's Counter-Memorial showed that some did not even occur and, in any event, none of them could possibly constitute a violation of Nicaragua's sovereign rights. In other words, they are not incidents at all. On the one hand, Nicaragua's arguments are based on the assumption that Colombia's freedoms of navigation and overflight, and other internationally lawful uses of the sea, merely comprise the right to navigate from Point A to Point B and nothing more. Not only is this proposition untenable as a matter of law, it misses the key point: it is not Colombia that bears the burden of proving that its actions were consistent with its rights; it is for Nicaragua to prove that Colombia's actions violated Nicaragua's sovereign rights – a different question. Not only Nicaragua has presented the flimsiest of evidence to back-up its allegations, but also the material it relies on misrepresents the facts. What is more, Nicaragua also draws unwarranted legal conclusions from them. As Colombia will show in Section C, Nicaragua's Reply offers no new evidence to support any of these so called "incidents", and they remain unproven.

3.4 In its Reply, Nicaragua also contends that Colombia's National Hydrocarbon Agency "continues to act in direct contravention of the 2012 Judgment by offering hydrocarbon blocks in areas within Nicaragua's EEZ."[160] As Colombia will show in Section D, this is a new claim, which is therefore inadmissible. It is also baseless. Colombia has not licensed or awarded any petroleum blocks in areas falling outside its own EEZ.

3.5 The last element of Nicaragua's claim is that Colombia has authorized Colombian licensed vessels to fish in Nicaragua's EEZ. Although Colombia already showed in its Counter-Memorial that this claim is without merit,[161] in Section E, Colombia will again explain how Nicaragua has misrepresented the import of Colombia's licensing regime and has failed to show that Colombia issued any such authorisations. As with the other parts of the claim, this allegation is equally unfounded.

B. The Court Has No Jurisdiction over Events Occurring after 27 November 2013

3.6 Colombia does not contest that the Court has jurisdiction regarding the 13 alleged "incidents" that are said to have occurred before Nicaragua filed its Application and before Colombia ceased to be a party to the Pact of Bogotá. As the

[160] NR, para. 4.126.
[161] CCM, para. 4.46.

Court ruled in its Judgment on Colombia's Preliminary Objections, "[t]he subsequent termination of the Pact as between Nicaragua and Colombia does not affect the jurisdiction which existed on the date that the proceedings were instituted".[162]

3.7 However, the jurisdictional situation regarding the remaining "incidents" that allegedly took place *after* the Pact of Bogotá ceased to be in force between Nicaragua and Colombia is different.[163]

(1) THE LIMITS OF THE COURT'S JURISDICTION *RATIONE TEMPORIS*

3.8 When delineating the extent of its jurisdiction in the present case, the Court in its Judgment on the Preliminary Objections clearly distinguished between pre and post-critical date events. The Court stated that the dispute was circumscribed "to those [events] which allegedly occurred before the critical date".[164] It then reiterated that it would focus on "the alleged incidents that were said to have occurred before Nicaragua filed its Application".[165]

3.9 This conforms to Article XXXI of the Pact of Bogotá, which provides for the compulsory jurisdiction of the Court only "so long as the present Treaty is in force".[166] As a result, the

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162 Judgment on the Preliminary Objections, p. 26, para. 48.
163 CCM, para. 4.21.
164 Judgment on the Preliminary Objections, p. 33, para. 76.
165 Judgment on the Preliminary Objections, p. 33, para. 77.
166 The full text of Article XXXI reads as follows:

Court has no jurisdiction to rule on the legality of any alleged wrongful acts said to be attributed to Colombia after 27 November 2013 when the Pact was no longer in force for Colombia.

3.10 In considering this issue, it should also be recalled that there are actually two "critical dates", both of which have jurisdictional repercussions. The first – 26 November 2013 – is the date on which Nicaragua filed its Application in these proceedings. As the Court noted in its Judgment on the Preliminary Objections: "The Court recalls that the date at which its jurisdiction has to be established is the date on which the application is filed with the Court."[167] Thus, 26 November 2013 was the critical date for determining whether the Court had jurisdiction over Nicaragua's claims set out in its Application.

> "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."

[167] Judgment on the Preliminary Objections, p. 18, para. 33.

3.11 The second "critical date" relevant here for jurisdictional purposes is the following day, 27 November 2013, which is when the Pact of Bogotá ceased to be in effect for Colombia as a result of its denunciation one year earlier. Once this happened, the compromissory clause appearing in Article XXXI of the Pact providing for the Court's jurisdiction also ceased to be applicable to Colombia *ratione temporis*. While this did not affect the scope of the Court's jurisdiction as established on the date of Nicaragua's Application, it did mean that the Pact no longer provided a basis for jurisdiction for the Court to rule on the legality of any events relied on by Nicaragua after 27 November 2013 for its claim that Colombia violated its sovereign rights.

3.12 The Court has recognised that its jurisdiction can be limited by conditions set out in a compromissory clause in a treaty. As the Court noted in its Judgment in the case concerning *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda)*:

> "The Court recalls in this regard that its jurisdiction is based on the consent of the parties and is confined to the extent accepted by them (…) When that consent is expressed in a compromissory clause in an international agreement, any

> conditions to which such consent is subject must be regarded as constituting the limits thereon."[168]

3.13 In particular, the Court has recognised that temporal limitations in a compromissory clause can have the effect of excluding disputes from the Court's jurisdiction. In the *Certain Property (Liechtenstein* v. *Germany)* case, Liechtenstein relied on Article 1 of the European Convention for the Peaceful Settlement of Disputes of 29 April 1957 as the basis of the Court's jurisdiction for its claim regarding Germany's treatment of certain property of Liechtenstein nationals.[169] Article 27(a) of the European Convention provides that the Convention shall not apply to "disputes relating to facts or situations prior to the entry into force of this Convention as between the parties to the dispute".

3.14 The European Convention came into force as between Lichtenstein and Germany on 18 February 1980. For jurisdictional purposes, therefore, the Court had to determine whether the "facts or situations" in question giving rise to Liechtenstein's claim arose before or after the critical date of 18 February 1980.[170]

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168 *Armed Activities in the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 39, para. 88.

169 *Certain Property (Liechtenstein* v. *Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005,* p. 10, para. 1.

170 *Certain Property (Liechtenstein* v. *Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, p. 22, para. 39.

3.15 In the event, the Court found that the "facts or situations" that were the real source of the dispute arose out of a series of confiscation decrees issued in 1945 (the Beneš Decrees) and a 1955 Settlement Convention concluded between the United States, the United Kingdom, France and the Federal Republic of Germany. Since these constituted "facts or situations" prior to the entry into force of the European Convention as between Liechtenstein and Germany, the Court found that it lacked jurisdiction *ratione temporis* to decide the dispute.[171] In other words, the Court has no jurisdiction over "facts or situations" on which a claim is based if those events occurred at a time when there was no jurisdictional bond between the parties.

3.16 Similarly, in the case concerning *Jurisdictional Immunities of the State* (*Germany* v. *Italy)*, the Court held that Italy's counter-claim fell outside the temporal limit of Article 27(a) of the European Convention because the dispute raised by Italy to support its counter-claim related to facts and situations that existed *prior* to the entry into force of the European Convention as between the two parties.[172] Accordingly, the Court held that the dispute fell outside the temporal scope of the Convention and that the counter-claim thus did not come within the Court's jurisdiction and was inadmissible.[173]

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171 *Certain Property (Liechtenstein* v. *Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, p. 27, paras. 52 and 54 (1)(b).

172 *Jurisdictional Immunities of the State (Germany* v. *Italy), Counter-claims, Order of 6 July 2010, I.C.J. Reports 2010*, pp. 320-321, para. 30.

173 *Jurisdictional Immunities of the State (Germany* v. *Italy), Counter-claims, Order of 6 July 2010, I.C.J. Reports 2010*, p. 321, para. 31.

3.17 In short, for the Court to have jurisdiction to consider whether facts alleged by a party in support of its claim constitute a breach of an international obligation by the other party, those facts must have occurred during a period when a jurisdictional basis exists between the parties. In the present case, the "incidents" relied on by Nicaragua that occurred after 27 November 2013 took place at a time when the Pact of Bogotá was no longer in force with respect to Colombia. Just as the Court lacks jurisdiction over claims based on "facts or situations" occurring *before* a basis of jurisdiction exists between the parties to a case, so also does the Court lack jurisdiction to consider "facts or situations" that take place *after* any basis of jurisdiction has lapsed.

3.18 Colombia's consent to the Court's jurisdiction under the Pact of Bogotá was limited *ratione temporis*; it was valid only for "so long as the [Pact of Bogotá] is in force". As the Court in the *Border and Transborder Armed Actions (Nicaragua* v. *Honduras)* case observed, the commitment to submit a dispute to the Court in Article XXXI of the Pact of Bogotá remains "valid *ratione temporis* for as long as that instrument itself remains in force between those States".[174]

3.19 It follows that the Court lacks jurisdiction to consider whether any of the "incidents" that Nicaragua refers to that took place after 27 November 2013 constitute a violation of

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

Nicaragua's sovereign rights or maritime spaces. It is for this reason that, in its Counter-Memorial, Colombia only addressed the "incidents" referred to by Nicaragua that took place during the period between the date of the Court's Judgment in the original case (19 November 2012) and the date when the Pact of Bogotá ceased to be in force for Colombia (27 November 2013). Colombia will continue to do the same in this pleading, although, *ex abundanti cautela*, Colombia will also show in an Appendix to this Rejoinder how the post-critical date "incidents" cited by Nicaragua are for the most part factually wrong and, in any case, do not amount to a violation of its sovereign rights or maritime spaces.[175]

(2) The Defects in Nicaragua's Jurisdictional Arguments

3.20 In its Reply, Nicaragua has advanced a number of arguments in support of the proposition that the Court has jurisdiction to consider whether post-critical date "incidents" constitute a violation of its sovereign rights. Colombia will address the flaws undermining each of Nicaragua's contentions in turn.

3.21 Nicaragua's first argument is that the Court's decision on the admissibility of two of Colombia's counter-claims, which were lodged after the Pact of Bogotá ceased to be in force for Colombia, shows that the Court has jurisdiction over events that

[175] See CR, Vol. II.

"represent the continuation of a dispute over which the Court already has jurisdiction" even if the basis of jurisdiction relied on for the principal claims has lapsed in the meantime.[176] However, this is a *non sequitur*: the jurisdictional position *ratione temporis* is not the same for claims and counter-claims.

3.22 Under Article 80, paragraph 2, of the Rules of Court, a counter-claim "shall be made in the Counter-Memorial". That is the earliest a Respondent can file a counter-claim since, by definition, a counter-claim must "counter" the claim detailed in the Applicant's Memorial. It would be unrealistic to oblige a Respondent to file a counter-claim before it had detailed knowledge of the claim itself. Provided that the counter-claim is directly connected with the subject-matter of the claim of the other party and comes within the jurisdiction of the Court, the counter-claim is admissible. Since the date for filing the Counter-Memorial may be after the date on which the basis of jurisdiction for the principal claim has lapsed, as it is in the present case, to rule that a counter-claim, which meets the conditions of Article 80 but could not have been presented earlier, is inadmissible for lack of jurisdiction *ratione temporis* would be unfair to the Respondent State. As the Court noted in its Order on the admissibility of Colombia's counter-claims:

> "the opposite approach would have the disadvantage of allowing the applicant, in some instances, to remove the basis of jurisdiction after

[176] NR, paras. 4.10-4.12.

> an application has been filed and thus insulate itself from any counter-claims submitted in the same proceedings and having a direct connection with the principal claim".[177]

3.23 In addition, with respect to its counter-claims that have been ruled admissible, Colombia is not relying on events that took place after the critical date. Rather, the counter-claims are based on facts or situations that transpired between the date of the Court's 2012 Judgment and 27 November 2013; that is, during the period when the Pact of Bogotá still provided a basis of jurisdiction as between the parties. The same holds true for Nicaragua: it is not entitled to rely on acts that took place after the Pact ceased to be in force for Colombia. Contrary to Nicaragua's contention, the Court's Order on the counter-claims does not stand for the proposition that the Court's jurisdiction extends to events after 27 November 2013.

3.24 Equally inapposite is Nicaragua's attempt to rely on what it terms the "*Nottebohm* rule". In so doing, Nicaragua refers to a passage from the Court's Judgment in that case where the Court indicated that, once it has established jurisdiction to entertain a case, "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".[178] But that case did not deal with

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[177] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Counter-claims, Order of 15 November 2017, I.C.J. Reports 2017*, pp. 310-311, para. 67.

[178] NR, paras. 4.10 and 4.12, citing *Nottebohm case (Preliminary Objections), Judgment of November 18th, 1953: I.C.J. Reports 1953*, p. 123, and *Alleged Violations of Sovereign Rights and Maritime Spaces in the*

the temporal situation that is presented in these proceedings, and it does not support Nicaragua's thesis.

3.25 In *Nottebohm (Liechtenstein* v. *Guatemala)*, the Court ruled that it had jurisdiction with respect to a claim that was introduced by Liechtenstein in an Application that was filed *before* the lapse of Guatemala's optional clause declaration. However, unlike Nicaragua's claims in the present case, Liechtenstein's claim was based solely on events that occurred while Guatemala's declaration was still in effect. Nowhere did the Court indicate in its Judgment that the mere fact that it had been seised meant that it had jurisdiction to consider Guatemala's responsibility for any events that took place *after* its declaration had lapsed. Indeed, the Court noted that "[t]here can be no doubt that an Application filed after the expiry of this period [i.e. after the period during which Guatemala's optional clause declaration was effective] would not have the effect of legally seising the Court."[179]

3.26 Had Nicaragua filed its Application after the 27 November 2013 critical date and based its claim on facts that took place after the Pact lapsed for Colombia, the Court clearly would not have had jurisdiction to entertain the claim. The same result should obtain with respect to Nicaragua's current attempt to rely on post-critical date "facts" for its claim.

Caribbean Sea (Nicaragua v. *Colombia), Counter-claims, Order of 15 November 2017, I.C.J. Reports 2017*, pp. 310-311, para. 67.

[179] *Nottebohm case (Preliminary Objection), Judgment of November 18th, 1953: I.C.J. Reports 1953*, p. 121.

3.27 Nicaragua's next argument is that, because the Court has considered claims "based on facts that occurred after the filing of the Application on multiple occasions"[180], it is therefore entitled to consider facts that occurred after the filing of its Application in this case, including after the Pact of Bogotá ceased to have any effect for Colombia. Relying on the *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland)* and *LaGrand (Germany* v. *United States of America)* cases, Nicaragua states that the "appropriate test" for considering the existence of jurisdiction over post-Application facts is "whether the facts 'aris[e] directly out of the question which is the subject-matter of [the] Application'".[181] This argument is equally untenable.

3.28 In *Certain Questions of Mutual Assistance in Criminal Matters*, the Court's jurisdiction was based on Article 38(5) of the Rules of Court (*forum prorogatum),* which obviously has no application here. Jurisdiction in the *LaGrand* case was based on a compromissory clause with no resemblance to Article XXXI of the Pact of Bogotá. Similarly, the compromissory clause in *Fisheries Jurisdiction* was far different from that in the Pact.

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180 NR, para. 4.16.

181 NR, para. 4.18, citing *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Merits, Judgment, I.CJ. Reports 1972*, p. 203, para. 72 and L*aGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001,* pp. 483-484, para. 45.

These cases cited by Nicaragua are simply inapposite to the situation in these proceedings.

3.29 That being said, Colombia does not contest that, in certain circumstances, the Court can take into account facts that occur after the filing of the Application. But in none of the cases cited by Nicaragua as authority for that proposition, the jurisdictional link between the parties lapsed after the Application was filed; i.e., there was still a continuing jurisdictional basis on which to consider post-Application facts. The present case is fundamentally different. Here, both the consent of Colombia and the jurisdictional link between the parties terminated on the day after Nicaragua's Application was filed. None of the precedents cited by Nicaragua supports the proposition that, in those circumstances, the Court is entitled to take into account facts or situations occurring not only after the Application was filed, but also after the basis of jurisdiction has lapsed.

3.30 Nicaragua tries to counter this point by referring to the Court's provisional measures Order in the *Legality of Use of Force (Yugoslavia* v. *Belgium)* case. But, once again, the effort is unavailing given that the case in question also did not deal with the kind of situation presented here, and the temporal limitation contained in Yugoslavia's Article 36 (2) optional clause declaration was drafted in terms different from the compromissory clause appearing in Article XXXI of the Pact of Bogotá.

3.31 In *Legality of Use of Force (Yugoslavia* v. *Belgium),* Yugoslavia's optional clause declaration provided for the compulsory jurisdiction of the Court in all disputes "arising or which may arise after the signature of the present Declaration".[182] Thus, for jurisdictional purposes, the key question was when the dispute arose. Since the dispute between Yugoslavia and Belgium arose *before* Yugoslavia had deposited its Article 36(2) declaration – i.e. at a time where there was no jurisdictional link between the parties – the Court ruled that there was no *prima facie* basis of jurisdiction such that provisional measures could be prescribed.

3.32 This is very different from Article XXXI of the Pact of Bogotá, which provides for jurisdiction over disputes only "so long as the present Treaty is in force". It is undisputed between the parties that the Pact was not in force when the post-27 November 2013 events on which Nicaragua relies for its claim occurred. Thus, the situation is entirely different from that at issue in *Legality of Use of Force (Yugoslavia* v. *Belgium)*. Indeed, citing from the Permanent Court's Judgment in the Preliminary Objections phase of the *Phosphates in Morocco* case, the Court, in its Order on Yugoslavia's request for provisional measures, underscored that "any limitation *ratione temporis* attached by one of the Parties to its declaration of acceptance of the Court's jurisdiction, 'holds good as between

[182] NR, para. 4.19.

the Parties'".[183] The same holds true for a limitation *ratione temporis* contained in the compromissory clause of a treaty, such as the Pact of Bogotá.

3.33 Notwithstanding this, Nicaragua argues that, as in *Yugoslavia* v. *Belgium*, the focus in the present case should be on when the dispute arose, not when the basis of jurisdiction lapsed, and that Colombia cannot attempt to "slice the dispute in discrete pieces".[184] Accordingly, Nicaragua's thesis is that, because its dispute with Colombia arose before the Pact ceased to have effect for Colombia, the Court's jurisdiction extends to ruling on the legality of Colombia's actions after 27 November 2013 because those acts constitute part of the same dispute.[185]

3.34 This line of argument ignores the temporal limitations of Article XXXI of the Pact for Colombia. It destroys the jurisdictional symmetry of such limitations. Just as the Court has no jurisdiction to rule on facts or situations that arose before the instrument providing for jurisdiction – in this case the Pact – came into effect, so also it lacks jurisdiction to rule on events that transpired after the relevant instrument ceased to be in effect as between the parties to the dispute.

3.35 If taken to their logical conclusion, Nicaragua's contentions would also have the perverse effect of allowing a

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183 *Legality of the Use of Force (Yugoslavia* v. *Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 135, para. 30.

184 NR, para. 4.21.

185 NR, paras. 4.25-4.26.

party to lodge an application against another party after the instrument providing for jurisdiction ceases to be effective by arguing that the underlying dispute arose earlier, while the instrument was still in force. This is clearly not the law; it would run directly contrary to the Court's statement in the *Nottebohm* case that the expiry of the time period when the instrument providing for jurisdiction is effective "would not have the effect of legally seising the Court".[186]

3.36 Based on the foregoing, while the Court has jurisdiction to consider whether the acts of the Colombian Navy between the date of the 2012 Judgment and 27 November 2013 amounted to a violation of Nicaragua's sovereign rights, which they did not, it does not have jurisdiction to consider any events that occurred after 27 November 2013 when the Pact of Bogotá ceased to be in force for Colombia. Nicaragua is simply trying to pad its claim by reference to events falling outside of the Court's temporal jurisdiction.

C. None of the Alleged "Incidents" Constitute a Violation by Colombia of Nicaragua's Sovereign Rights

3.37 There are 13 events that Nicaragua characterizes as "incidents" that occurred before the critical date. Since they form the basis of Nicaragua's claim that Colombia violated its sovereign rights, each event must be examined carefully. Once

[186] *Nottebohm case (Preliminary Objections), Judgment of November 18th, 1953: I.C.J. Reports 1953*, p. 121.

that is done, it becomes evident that none of them violated Nicaragua's rights.

3.38 This is confirmed by Nicaragua's own conduct during the period in question. As explained below, that conduct is fundamentally inconsistent with the notion that Nicaragua considered Colombia to be engaging in any wrongful conduct at the time.

(1) NICARAGUA'S OWN CONDUCT UNDERMINES ITS CLAIMS

3.39 The first point to note is that Nicaragua never protested any of these "incidents" to Colombia until it was preparing its Memorial for this case, well after the critical date and months after the "incidents" themselves had allegedly occurred. In itself, this strongly suggests that Nicaragua did not consider them to be a violation of its sovereign rights.

3.40 It was not until 13 August 2014, more than eight months *after* Nicaragua filed its Application, that Nicaragua's Foreign Ministry sought information from its Naval Forces as to whether any "incidents" had taken place. And it was only on 13 September 2014, shortly before Nicaragua was due to file its Memorial, that Nicaragua sent a diplomatic note to Colombia alleging that Colombia had infringed its sovereign rights. In these circumstances, it is difficult to avoid the conclusion that Nicaragua was trying to manufacture a case where no basis for one genuinely existed.

3.41 This conclusion is reinforced when it is recalled that, precisely during the period when Nicaragua now asserts that Colombia was engaging in activities that violated its sovereign rights, Nicaragua's senior-most political and military officials were on record as emphasizing the contrary. Those officials are on record as stating that: (i) Colombia's Navy had *not* approached Nicaraguan fishing vessels;[187] (ii) in the one year following the Court's Judgment (i.e. up to the critical date), Nicaragua had *not* had any problems or conflicts with the Colombian Navy and the Navies of both countries had maintained continuous communications;[188] (iii) there were *"no incidents"* even as of March 2014 – that is, some four months *after* Nicaragua had filed its Application;[189] and (iv) the Colombian Navy had been respectful towards Nicaragua and there had not been *any kind of confrontation between the Navies*.[190]

3.42 Recognizing the weakness of its claims, Nicaragua's Reply asserts that "Colombia's 'incident-by-incident' approach tends to obscure the critical context that must inform the Court's evaluation of the facts".[191] Not only is this line of reasoning erroneous – Nicaragua has the burden of showing that specific conduct attributed to Colombia breached its sovereign rights – it

187 CCM, para. 4.8 and CPO, Annex 36.
188 CCM, para. 4.8 and CPO, Annex 43.
189 CCM, para. 4.8 and CPO, Annex 46.
190 CCM, para. 4.8 and CPO, Annex 11.
191 NR, para. 4.44.

ignores a crucial element of that conduct and its real context. This is the fact, unrebutted by Nicaragua, that Nicaragua did not raise a single complaint to Colombia at the time, and that its own most senior political and military leaders repeatedly emphasised that there had been no incidents or confrontations involving Colombia.

3.43 Nicaragua tries to pass off the affirmations of its President and senior military officials that there were no incidents, no Colombian approaches to Nicaraguan fishing vessels, no problems or conflicts between the Navies of the two countries, and no confrontations by arguing that all of these statements merely reflected "a deliberate policy of restraint" on Nicaragua's part.[192] This self-serving assertion lacks credibility.

3.44 Had Nicaragua genuinely been following a policy of self-restraint, one would have at least expected reports from the Nicaraguan Naval Force stating that there had been provocations from Colombia, but that the Navy was adopting a low profile and exercising restraint in order to avoid raising tensions.[193] And one would have expected Nicaragua's President to say that there

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[192] NR, para. 4.36.

[193] NR, para. 4.37. Nicaragua points to a statement of General Avilés stating that the Nicaraguan Armed Forces were in communication with the Colombian authorities, that "there has been no boarding to fishing vessels" and that business fishermen had declared that the Colombians "have been going around but not boarding, which is serious". Nicaragua tries to spin this statement to suggest that the situation was "serious" (NR, para. 4.38). But it is clear that what the General was referring to was the eventual boarding of fishing boats, which, had it ever occurred, would have been serious, not to the mere presence of Colombian vessels. As admitted by the General, there was never any boarding by Colombia of Nicaraguan fishing boats.

had been incidents, but that Nicaragua had not responded in kind so that the matter would not escalate. Moreover, one would expect Nicaragua to be able to produce contemporary records of such "incidents" and rules of engagement for its Navy instructing Nicaraguan vessels to exercise self-restraint. Yet there is nothing of the kind. Indeed, it is undisputed that the Nicaraguan Naval Force never informed Nicaraguan political officials of any "incidents" until ten months after the Application had been filed, and then only after being prompted by Nicaragua's Foreign Ministry, which was then in the process of preparing Nicaragua's Memorial.

3.45 The statements of Nicaragua's political and military leaders represent positive affirmations that there were no incidents, problems, confrontations or anything else of a provocative nature on the part of Colombia, not evidence of self-restraint. If there were no incidents, there was no reason to exercise self-restraint. In these circumstances, to suggest, as Nicaragua does in its Reply, that these statements were "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" is unconvincing.[194]

3.46 To be clear, Colombia is not relying on these statements to "rehash" the argument that there was no dispute between the

[194] NR, para. 4.40.

parties at the time Nicaragua filed its Application, as Nicaragua mistakenly asserts in its Reply.[195] Rather, the statements from Nicaragua's highest officials contradict Nicaragua's account of the "incidents" and undermine their relevance. As Nicaragua emphasised in its Reply: "[t]he facts are the facts".[196] When coupled with the meagre nature of the "facts" that Nicaragua adduces in support of its claims, the statements of its political and military leaders represent an important element of the context for assessing Nicaragua's claims.

(2) COLOMBIA'S RIGHT TO BE PRESENT IN THE AREA

3.47 The other side of the equation regarding the context for examining the individual "incidents" relied on by Nicaragua concerns Colombia's right to be present in the area in the exercise of its freedoms of navigation and overflight, and other internationally lawful uses of the sea.

3.48 Contrary to Nicaragua's assertion, Colombia has not adopted a policy of "occupation" of Nicaragua's EEZ – a notion which, as already noted, has a specific legal content in international law and moreover, has nothing to do with rights such as freedoms of navigation and overflight. Rather, as explained in Chapter 2, Colombia has been exercising said freedom of navigation and overflight, as well as other internationally lawful uses of the sea, especially bearing in mind

195 NR, para. 4.28.
196 NR, para. 4.29.

that it has a legitimate interest in maintaining a presence in the area in order to assess whether there is maritime shipping that is engaged in illegal activities such as drug trafficking, and to call attention to fishing vessels engaged in destructive environmental activities that they should modify their practices. Colombia also has an interest in ensuring the security and well-being of the inhabitants of the San Andrés Archipelago. None of this amounted to an interference in, let alone violation of, Nicaragua's sovereign rights.

3.49 In accordance with the principle of *onus probandi incumbit actori*, the burden is on Nicaragua to prove that its sovereign rights have been violated.[197] However, as Colombia will demonstrate in the next section, there are serious evidentiary problems with Nicaragua's version of the facts, which render the factual basis for its claims unreliable and incapable of proving any such violation.

3.50 Legally, the EEZ is a *sui generis* zone with a distinct legal regime that was specifically negotiated to balance the interests of coastal States and those of other maritime States.

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[197] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010*, p. 71, para. 162; *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 86, para. 68; *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2008*, p. 31, para. 45; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 75, para. 204; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 437, para. 101.

Under customary international law, a coastal State such as Nicaragua, does not have sovereignty in its EEZ; only limited sovereign rights for the purpose of exploring and exploiting, as well as conserving and managing, the natural resources of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation of the zone.[198] The coastal State also has limited jurisdiction in its EEZ. This extends solely to the establishment and use of artificial islands, installations and structures, marine scientific research, and the protection and preservation of the marine environment, none of which are germane since there is no allegation that Colombia interfered with such jurisdictional rights.

3.51 It follows that any suggestion (*quod non*) that Colombia violated Nicaragua's sovereign rights merely because the alleged "incidents" are claimed not to represent the legitimate exercise of the freedoms of navigation and overflight, and other internationally lawful uses of the sea, is untenable. Nicaragua has to go further and to show that its own rights were violated by the failure of Colombia to pay due regard to those rights. As Proelss has observed in his Commentary on UNCLOS:

> "As the *sui generis* nature of the EEZ is inseparably linked to existence of exclusive sovereign rights and jurisdiction of the coastal

[198] D. Rothwell and T. Stephens, *The International Law of the Sea,* Hart Publishing, 2016, pp. 90-91 (available at the Peace Palace Library). See also UNCLOS Article 56.

> State under Art. 56, this zone ought to be treated as high seas if and to the extent to which these rights and jurisdiction are not affected".[199]

3.52 In *The M/V "SAIGA" (No. 2)* case, for example, the International Tribunal for the Law of the Sea noted that, "while [UNCLOS] attributes certain rights to coastal States and other States in the exclusive economic zone, it does not follow automatically that rights not expressly attributed to the coastal State belong to other States or, alternatively, that rights not specifically attributed to other States belong as of right to the coastal State".[200]

3.53 As will be seen in the next section in which Colombia addresses the specific "incidents", Nicaragua has failed to demonstrate that Colombia's conduct impeded Nicaragua from exercising any of its sovereign rights in its EEZ.

(3) THE INDIVIDUAL "INCIDENTS"

3.54 In this Sub-section, Colombia will address the thirteen individual "incidents" that Nicaragua alleges took place before the Pact of Bogotá ceased to be in force for Colombia. As Colombia will show, the "evidence" produced by Nicaragua

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[199] A. Proelss, *United Nations Convention on the Law of the Sea: a Commentary*, C.H. Beck / Hart / Nomos, 2017, p. 451 (Proelss Commentary) (available at Peace Palace Library).

[200] *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea), Judgment, ITLOS Reports 1999*, p. 56, para. 137.

falls well short of demonstrating any violation by Colombia of Nicaragua's sovereign rights.

Incident 1

3.55 Nicaragua asserts that on 19 February 2013, a Colombian naval vessel prevented a Nicaraguan naval vessel from inspecting a Colombian-flagged fishing boat that was operating in the *Luna Verde* area. Colombia has previously explained why the facts show that this alleged "incident" could never have happened because the Colombian vessel was hundreds of miles away at the time.[201]

3.56 In response, Nicaragua's Reply states that the source for the "incident" is not a complaint from the Nicaraguan naval vessel that was allegedly trying to inspect the Colombian boat – indeed, there was no complaint at all raised by the Nicaraguan Naval Force – but rather from a Colombian news article.[202] Nicaragua also admits that the article "does not clarify exactly when the incident took place".[203] That is the sum total of the "evidence" Nicaragua submits for this so-called "incident".

3.57 It is striking that Nicaragua relies solely on a news report from the Colombian news outlet, Caracol, as evidence that the incident occurred, not on any reports from its own naval

201 CCM, para. 4.23.
202 NR, para. 4.51.
203 NR, para. 4.51.

forces.[204] In any event, consistent with its established jurisprudence on this matter, the Court should treat news reports of this kind with considerable caution, particularly since it has been demonstrated that the "facts" in question never took place.

3.58 In the *Armed Activities on the Territory of the Congo (Democratic Republic of Congo* v. *Uganda)* case, for example, the Court observed that "particular caution" should be shown where press information is relied upon as evidence.[205] The Court noted that press articles are secondary evidence which is not capable of proving the existence of facts; at best, such material can only confirm the existence of facts which are established by other evidence. Here, there is no other evidence.

3.59 In *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, the Court also emphasised the need to treat press reports and secondary sources with caution. As the Court explained:

> "in the present case the Court has before it documentary material of various kinds from various sources. A large number of documents has been supplied in the form of reports in press articles, and some also in the form of extracts from books. Whether these were produced by the applicant State, or by the absent Party before it ceased to appear in these proceedings, the Court has been careful to treat

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[204] NM, para. 2.39 and Annex 34.

[205] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 204, para. 68.

> them with great caution; even if they seem to meet high standards of objectivity, the Court regards them not as evidence capable of proving facts, but as material which can nevertheless contribute, in some circumstances, to corroborating the existence of a fact, i.e., as illustrative material additional to other sources of evidence."[206]

3.60 To sum up, with respect to Incident 1, there is no first-hand evidence confirming either the existence, the timing or the specifics of the "incident" Nicaragua is seeking to rely on. There was also no complaint. Nor is there any evidence of prejudice to Nicaragua. That is wholly insufficient for purposes of supporting a claim that Colombia violated Nicaragua's sovereign rights.

Incident 2

3.61 According to Nicaragua, Incident 2 involved the conduct of "military and surveillance manoeuvres" by a Colombian airplane and patrolling by Colombian frigates, which Nicaragua paints as in violation of its sovereign rights.[207] Again, Nicaragua's Reply adds no new evidence relating to this "incident". Instead, Nicaragua once more relies on a few

[206] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986,* p. 40, para. 62. The Court reiterated this position in a more recent Judgment where it stated: "Evidence of this kind and other documentary material (such as press articles and extracts from books) are merely of a secondary nature and may only be used to confirm the existence of facts established by other evidence". (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015*, p. 87, para. 239).

[207] NM, para. 2.25 and NR, para. 4.54.

Colombian press reports for its claim without producing a shred of evidence of its own that such manoeuvres hindered Nicaragua or Nicaraguan fishing in any way.[208] As is the case for Incident 1, the Court should treat these reports with considerable caution, given that there is no first-hand evidence from either Nicaraguan fishing boats or the Nicaraguan Naval Force to suggest that Nicaragua's account of Incident 2 is accurate or that Nicaragua suffered any prejudice as a result.

3.62 Nicaragua acknowledges that Colombia enjoys freedoms of navigation and overflight in and over Nicaragua's EEZ.[209] Yet, notwithstanding that there was not a single complaint from Nicaragua or its fishermen regarding this event, Nicaragua asserts that it is not credible to view Colombia's actions as benign.[210] The problem with this line of argument is that there is absolutely no evidence to back it up. To the contrary, this was nothing more than the lawful exercise by Colombia of its freedoms of navigation and overflight, as well as other internationally lawful uses of the sea.

3.63 Nicaragua's Reply then goes on to state that, "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 part of a

208 NM, para. 2.25 and footnote 69.
209 NR, paras. 2.31 and 2.32.
210 NR, para. 4.56.

pattern of Colombia's persistent and insistent disregard for Nicaragua's sovereign rights and jurisdiction".[211]

3.64. There is no such pattern.[212] Indeed, Nicaragua itself acknowledges that throughout the relevant period fishing by Nicaraguan fishermen increased in its waters;[213] in fact, it increased exponentially, as Colombia demonstrated in its Counter-Memorial[214] and demonstrates as well in this Rejoinder.[215] In other words, any actions said to be attributed to Colombia did not dissuade Nicaraguan fishing vessels from operating in Nicaragua's EEZ. If there is any "pattern" of conduct that is relevant, it is characterized by (i) the paucity of evidence Nicaragua has been able to muster with respect to the "incidents", (ii) Nicaragua's failure to lodge a single protest over any of them, and (iii) the consistent statements emanating from Nicaragua's political and military leaders saying precisely the opposite of what Nicaragua now alleges.

3.65. There is no principle of customary international law or provision in UNCLOS, that prohibits flights by military aircraft over another State's EEZ.[216] As noted by Ambassador Tommy Koh, during the negotiations of UNCLOS concerning military

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211 NR, para. 4.58.

212 See Chapter 1 *supra.*

213 NR, para. 5.4.

214 CCM, para. 3.21.

215 Annex 71.

216 H. S. Kim, "Military Activities in the Exclusive Economic Zone: Preventing Uncertainty and Defusing Conflict", *International Law Studies*, Vol. 80, 2006, p. 259, available at: https://digital-commons.usnwc.edu/ils/vol80/iss1/9/ (last visited: 1 November 2018).

activities in the EEZ, "[i]t was the general understanding that the text we negotiated and agreed upon would permit such activities to be conducted".[217]

3.66. This is confirmed by the negotiating history of Article 58 of UNCLOS, which does not give coastal States the right to regulate the conduct of foreign military activities in their EEZ. It is significant in this respect that, at the seventh session of the Conference in 1978, Peru proposed a provision requiring foreign warships and military aircraft to "refrain from engaging in manoeuvres or using weapons" in the EEZ without the coastal State's consent.[218] However, this proposal was rejected.

3.67. Moreover, the fact that there was no complaint from Nicaragua is consistent with the repeated affirmations of its President and senior military officials that Colombia had been respectful and that there had been no incidents or confrontations during the period when the "incident" is said to have taken place. In sum, Colombia's actions, which did not involve the use of weapons or the interdiction, let alone boarding, of any Nicaraguan ships, did not constitute a violation of Nicaragua's sovereign rights.

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[217] T. Koh, cited in J. Van Dyke (ed.), *Consensus and Confrontation: The United States and the Law of the Sea Convention, a Workshop of the Law of the Sea Institute, January 9-13, 1984*, University of Hawaii / Law of the Sea Institute, 1985, pp. 303-304 (available at the Peace Palace Library).

[218] M. H. Nordquist, S. N. Nandan and S. Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, University of Virginia / Martinus Nijhoff (Virginia Commentary), Vol. II, 1993, p. 563 (available at the Peace Palace Library).

Incident 3

3.68. Incident 3 involved President Santos delivering a speech on a Colombian frigate, which Nicaragua asserts was engaged in a "sovereignty exercise" involving patrolling by Colombian naval vessels into waters as far west as the 82nd West Meridian.[219] Once again, there is not a shred of evidence from Nicaragua demonstrating where the Colombian vessel was alleged to have navigated. Nor does Nicaragua offer any evidence that Colombia interfered with the exercise by Nicaragua of its sovereign rights in its EEZ. No complaints were made at the time either internally amongst Nicaraguan actors or by Nicaragua to Colombia. In such circumstances, there is no factual or legal basis for finding a violation of Nicaragua's sovereign rights.

3.69. Recognizing that it has no evidence of its own to back up the claim, Nicaragua's Reply refers to a statement made by President Santos during the exercise according to which he said: "We find ourselves patrolling and exercising sovereignty over Colombian waters".[220] But Nicaragua accepts that the exercise was conducted "off the coast of San Andrés", which would have been in Colombian waters. While Nicaragua contends that the

219 NM, para. 2.27.
220 NR, para. 4.59.

exercise reached up to the 82nd West Meridian,[221] it produces no evidence to this effect.

3.70. In sum, with respect to Incident 3 as well as the other "incidents", there is no evidence of any violation of Nicaragua's sovereign rights, no demonstration of any prejudice to Nicaragua, which appears not even to have been aware that anything objectionable had occurred, and no complaints from anyone on the Nicaraguan side.

Incident 4

3.71. Incident 4 involved what is said to be a communication by a Colombian naval vessel on 13 October 2013 informing a Nicaraguan vessel (the "Rio Escondido") that, according to Nicaragua's version of events, it was "sailing in Colombian waters".[222] In its Counter-Memorial, Colombia showed that this incident did not happen because on that date the Colombian vessel identified by Nicaragua (the A.R.C. "20 de Julio") was anchored some one hundred miles further south in the territorial sea of San Andrés.[223]

3.72. In its Reply, Nicaragua changed its story. It now argues that, even if Colombia's account is correct, it only suggests that the Nicaraguan vessel may have misidentified the Colombian

221 NR, para. 4.59.
222 NM, para. 2.40.
223 CCM, para. 4.26.

ship, not that the "incident" did not happen.[224] Of course, Colombia can only respond to the allegations advanced by Nicaragua. It is Nicaragua that is unable to provide an accurate account of the facts, including identifying the Colombian vessel that was supposed to have been involved, despite bearing the burden of proof for its claims. Nicaragua's only source for its allegations is a letter from the Nicaraguan Naval Force to the Ministry of Foreign Affairs dated 26 August 2014 – some ten months *after* the "incident" is alleged to have occurred – that contains no first-hand or contemporaneous evidence supporting Nicaragua's claim.

3.73. It follows that Nicaragua has not even come close to demonstrating that any such "incident" occurred, let alone that it amounted to a violation of its sovereign rights. Indeed, Nicaragua even goes so far as to distort the 26 August 2014 letter on which it relies. While Nicaragua's Memorial asserted that the Colombian naval commander warned the Nicaraguan vessel that it was sailing "*in* Colombian waters", Nicaragua's own document actually has the Colombian Commander saying simply that the Nicaraguan vessel was sailing "*towards* Colombian waters".[225] Even on Nicaragua's *ex post facto* version of events, therefore, such a statement cannot possibly be construed as an infringement on Nicaragua's sovereign rights.

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224 NR, para. 4.62.

225 NM, Annex 23 A.

Incident 5

3.74. Incident 5 relates to the alleged harassment at 09:50 hours on 19 October 2013 by Colombian aircraft that are claimed to have flown at a threatening low altitude over a Nicaraguan coast guard vessel and a fishing boat.[226]

3.75. Unlike Nicaragua, which has only relied on indirect reports of the "incident",[227] Colombia filed a contemporaneous Travel Report from one of its naval vessels that was monitoring air traffic in the area on the day in question.[228] That Report indicates that it detected a Colombian aircraft at 11:00 hours that was engaged in "verifying surface and aerial panorama", but no traffic at 09:50 hours as alleged by Nicaragua. Moreover, echo radar indicated that the aircraft was at an altitude of 4,600 feet, which is consistent with Colombian Air Force rules. This cannot be characterized as flying at a "threatening low altitude" as alleged by Nicaragua.

3.76. In the light of the Court's admonishment that: "the Court will treat with caution evidentiary materials specially prepared for this case and also materials emanating from a single source"[229] – which Nicaragua's Annex 23 A gives every indication of being – and that, "[i]t will prefer contemporaneous

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226 NR, para. 4.64.

227 See for example NM, Annex 20 and Annex 23 A.

228 CCM, Annex 49.

229 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 201, para. 61.

evidence from persons with direct knowledge"[230] – as is the case with respect to the Colombian Navy's Travel Report – Nicaragua once again has failed to prove any violation of its sovereign rights.

Incidents 6 and 7

3.77. Nicaragua's allegations regarding these two incidents are similar and can be discussed together. They allegedly involved Colombian aircraft flying at low altitude in a "hostile manner" over Nicaraguan fishing boats and naval vessels. Once again, however, Nicaragua presents no contemporary evidence of these facts and no evidence of any impediment to the exercise of its sovereign rights.

3.78. Colombia demonstrated in its Counter-Memorial that its aircraft were not flying in such a manner, and that it was perfectly legitimate for its aircraft to undertake general observation activities in an area outside of Nicaragua's territorial sea known for maritime drug trafficking.[231] In any event, the Court has already held that the alleged incidents that were said to have occurred before Nicaragua filed its Application relate to the claim on alleged violations of sovereign rights and maritime spaces – rather than that concerning a threat of use of force upon which it stated it did not have

[230] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 201, para. 61.

[231] CCM, paras. 4.31-4.33.

jurisdiction.[232] What remains is the fact that Colombian aircraft were fully entitled to exercise their freedom of overflight. In any case, the naval vessels and fishing boats were never prevented from carrying out their activities and Nicaragua did not protest at the time of their alleged occurrence.

3.79. Once more, Nicaragua is unable to provide any contemporary evidence for these "incidents". It relies on its 26 August 2014 internal letter,[233] almost a year after the events in question, its subsequent diplomatic note to Colombia of 13 September 2014,[234] and a one-page list of "locations". [235] These do not constitute any first-hand evidence of the underlying facts or give their source.

3.80. No new evidence is presented in Nicaragua's Reply. Rather, Nicaragua repeats its mantra that these events must be seen against the context of what is claimed to be a pattern of provocative Colombian actions.[236] However, as Colombia has explained, there was no such "pattern". The true context is that (i) the events in question did not give rise to any contemporary complaint from either the fishing boats or Nicaragua's Naval Force to the Nicaraguan authorities, (ii) Nicaragua itself made no protest to Colombia, and (iii) Nicaragua's military heads confirmed that there were no confrontations or incidents. Those

232 Judgment on the Preliminary Objections, p. 33, para. 77.
233 NM, Annex 23 A.
234 NM, Annex 18.
235 NM, Annex 24.
236 NR, para. 4.66.

facts completely undermine the claims that Nicaragua raises in these proceedings. In short, there was no violation of Nicaragua's sovereign rights with respect to either of these "incidents".

Incident 8

3.81. Incident 8 allegedly involved a Colombian helicopter flying over a Nicaraguan naval vessel on 31 October 2013 at 09:00 hours, and subsequently landing on a Colombian frigate.

3.82. In its Memorial, Nicaragua adduced no evidence to suggest that its vessel was threatened or impeded in any way. It simply relied on second hand reports that were prepared months after the alleged event took place. The Reply adds nothing to Nicaragua's case other than to speculate that, while the helicopter was airborne "it plainly *could* have impermissibly harassed the Nicaraguan vessel".[237] But "could have harassed" is not the same thing as "did harass". The Reply also asserts that Colombia "does not challenge the facts".[238] But this is plainly wrong. In its Counter-Memorial, Colombia introduced contemporary evidence in the form of a Travel Report from its naval vessel, the A.R.C. "Independiente", demonstrating that the helicopter did not take off until 09:42 hours on the day in

[237] NR, para. 4.78. (Emphasis added).
[238] NR, para. 4.77.

question, well *after* the time when Nicaragua says the "incident" occurred.[239]

3.83. Apart from the fact that there was no complaint issued by Nicaragua at the time, Nicaragua also has not produced any evidence to show that the fishing boat was threatened or impeded in its activities. The mere flying and landing of a Colombian helicopter on a Colombian vessel nearby is entirely consistent with Colombia's freedoms of navigation and overflight, as well as other internationally lawful uses of the sea. It cannot therefore constitute a violation of Nicaragua's sovereign rights.

Incidents 9 and 10

3.84 Incidents 9 and 10 are also based on the same second-hand report – the internal report attached in Annex 23 A to Nicaragua's Memorial – dated some ten months after the "incidents" are said to have occurred. Nicaragua's allegation is that Colombian frigates chased away two Nicaraguan fishing boats, the "Lucky Lady" (Incident 9) and the "Miss Sofia" (Incident 10), stating that they were in Colombian waters. Apart from the lack of any first-hand evidence for these events, to which the Nicaraguan Reply adds nothing, Colombia has explained why these alleged "incidents" could not have happened in the manner recounted by Nicaragua.[240]

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239 CCM, para. 4.34 and Annex 49.

240 CCM, paras. 4.37 and 4.39.

3.85 In its Counter-Memorial, Colombia presented evidence that the Colombian frigate allegedly involved in Incident 9 was not even in the Caribbean Sea at the time that Nicaragua's Memorial indicated the "incident" occurred.[241]

3.86 In response, Nicaragua tries to explain away its lack of credible evidence by again claiming that the date it gave in its Memorial for Incident 9 was the date the matter was reported to a local naval base, not necessarily the date that the event complained of took place.[242] This rather feeble excuse, which Nicaragua omitted to explain in its Memorial, still leaves Nicaragua unable to provide any specifics about the incident, including when it was said to have transpired or how the fishing boat was prevented from continuing with its activities. In short, the evidence Nicaragua adduces to support its claim is neither reliable nor probative that the incident occurred or that any prejudice to Nicaragua's sovereign rights was caused.

3.87 The same deficiencies undermine Nicaragua's claim based on Incident 10 concerning the "Miss Sofia": no first-hand contemporary evidence; no complaints at the time; no evidence of the fishing boat being prevented from operating in Nicaragua's EEZ. Moreover, the notion that the Colombian vessel – the A.R.C "Almirante Padilla" – contacted the "Miss Sofia" to inform it that it was in Colombian waters, as alleged by Nicaragua, is belied by the fact that, after the "Miss Sofia"

241 CCM, para. 4.37, Annex 50.

242 NR, para. 4.80.

abandoned two of its fishermen, it was a Colombian frigate that had to rescue them. The frigate even tried to contact the "Miss Sofia" to return the fishermen, but the latter never bothered to respond.[243] In short, there were no communications between the Colombian vessel and the "Miss Sofia".

3.88 As documented in Annex 53 to Colombia's Counter-Memorial, it was in these circumstances that the A.R.C. "Almirante Padilla" contacted the Nicaraguan coast guard vessel "Rio Escondido". Contrary to Nicaragua's assertion, that contact did not involve any refusal to leave the area or mention of the Court's 2012 Judgment.[244] Rather, having been unable to contact the "Miss Sofia" itself, the Colombian frigate initiated a series of exchanges with the Nicaraguan patrol boat that had been overheard also trying to contact the "Miss Sofia" by radio to arrange for the transfer of the two rescued fishermen. When the "Miss Sofia" could not be reached, arrangements were made to transfer the fishermen to another Nicaraguan fishing boat, the "Caribbean Star", instead. Far from representing a violation of Nicaragua's sovereign rights, Colombia's actions were driven by humane considerations. Significantly, the two fishermen rescued by Colombia never intimated that the Colombian vessel had threatened their fishing boat or crew. Rather, they signed written declarations attesting to their good treatment at the hands of crew onboard the Colombian frigate.[245]

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243 CCM, paras. 4.39-4.40 and Annex 53.
244 NR, para. 4.83.
245 CCM, Annex 52.

3.89 Moreover, even if Nicaragua's version of these "incidents" is accepted (*quod non*), which is highly improbable given the Nicaraguan Naval Force's assurances that there were no incidents involving Colombia during this period, Nicaragua has not demonstrated how either the fishing vessels or Nicaragua were prejudiced in a manner that constituted a violation of Nicaragua's sovereign rights.

Incidents 11, 12 and 13

3.90 These last three incidents allegedly involved Colombian airplanes flying over Nicaraguan vessels situated in Nicaragua's EEZ. As Colombia pointed out in its Counter-Memorial, there is no evidence of any hostile actions or prejudice caused to Nicaragua.[246] As before, Nicaragua did not produce any direct source material supporting its allegations, only vague descriptions set out in the later-prepared 26 August 2014 internal document, the sole purpose of which seems to have been a belated attempt to shore up Nicaragua's otherwise undocumented claims at a time when Nicaragua was in the final stages of preparing its Memorial.

3.91 Nicaragua's Reply only contains two brief paragraphs on these "incidents", which largely repeat what it said in its Memorial without providing any new evidence or showing how

[246] CCM, paras. 4.42-4.44.

Nicaragua was prevented from exercising its sovereign rights. In so far as Colombia enjoys freedom of overflight in the EEZ, Colombia's mere overflight over Nicaraguan vessels cannot constitute a violation of Nicaragua's sovereign rights. Notwithstanding the gaps in Nicaragua's case, it is worth noting that, as with all the other "incidents", Nicaragua made no protest at the time – a fact that is consistent with the contemporary statements of Nicaragua's naval officials, political and military leaders stating that there were no incidents.

D. Colombia Has Not Awarded Petroleum Blocks in Nicaragua's EEZ

3.92 Nicaragua alleges in its Reply – and for the first time in the current proceedings – that Colombia is "[o]ffering and awarding hydrocarbon blocks encompassing parts of Nicaragua's EEZ"[247] and that this constitutes a violation of Nicaragua's sovereign rights. No such claim was made in the Application or Memorial. As Colombia will show in Sub-section 1, the claim is inadmissible. Moreover, even if it were admissible (*quod non)*, the claim has no merit (Sub-section 2).

(1) NICARAGUA'S NEW CLAIM IS INADMISSIBLE

3.93 Article 40, paragraph 1, of the Statute provides that the subject of the dispute "shall be indicated" in the Application. This is supplemented by Article 38, paragraph 2, of the Rules of

[247] NR, para. 4.129.

Court, which stipulates that the Application must specify "the precise nature of the claim". As the Court observed in the *Phosphate Lands in Nauru (Nauru* v. *Australia)* case, these provisions are "essential from the point of view of legal security and the good administration of justice".[248]

3.94 Nicaragua's new claim that Colombia has issued petroleum blocks in violation of Nicaragua's sovereign rights was neither identified as part of the subject of the dispute in Nicaragua's Application; nor was the nature of such a claim ever set out or even mentioned implicitly in that document. Indeed, the claim did not even appear in Nicaragua's Memorial. It has been raised for the first time in the Reply. In such circumstances, the claim is inadmissible.

3.95 In rejecting the admissibility of a late-filed claim in the *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo)* case, the Court noted that:

> "additional claims formulated in the course of proceedings are inadmissible if they would result, were they to be entertained, in transforming 'the subject of the dispute originally brought before [the Court] under the terms of the Application'".[249]

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[248] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 267, para. 69.

[249] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Judgment, I.C.J. Reports 2010*, p. 656, para. 39 citing *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 695, para. 108.

As the Court emphasised, "it is the Application which is relevant and the Memorial, 'though it may elucidate the terms of the Application, must not go beyond the limits of the claim as set out therein'."[250]

3.96 In the present case, Nicaragua did not even raise its new claim relating to petroleum blocks in its Memorial. As noted above, the new claim has only appeared in the Reply. It bears no relationship to the original claim, which was based on a series of statements by Colombian authorities, a number of so-called maritime "incidents" (discussed above) and the establishment of the contiguous zone (discussed in the next Chapter). This reinforces the conclusion that the claim should be deemed inadmissible.

3.97 Indeed, the Court has noted that the situation is even more serious when a new claim only appears in the Reply, at a time when the Respondent is no longer able to assert preliminary objections – a right that the Court termed "a fundamental procedural right" in the *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo)* case. As the Court explained:

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[250] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Judgment, I.C.J. Reports 2010*, p. 656, para. 39 citing *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 267, para. 69 citing the *Case concerning Prince von Pless Administration, Order of 4 February 1933, P.C.I.J., Series A/B, No. 52,* p. 14.

> "This right is infringed if the Applicant asserts a substantively new claim after the Counter-Memorial, which is to say at a time when the Respondent can still raise objections to admissibility and jurisdiction, but not preliminary objections".[251]

3.98 As to the relationship of the new claim to the claim(s) raised in the Application, the Court has stated that "it is not sufficient that there should be links between them of a general nature".[252] Rather, the new claim must either be implicit in the original claim, or it must arise directly out of the question that is the subject-matter of the Application.[253] Nicaragua's new claim relating to alleged petroleum blocks satisfies neither of these tests. It was not implicit in Nicaragua's Application, or even in its Memorial; and it does not arise out of the same questions that were the subject-matter of the Application: the question whether Colombian vessels harassed Nicaraguan vessels in violation of Nicaragua's sovereign rights, and the question concerning Colombia's integral contiguous zone.

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[251] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Judgment, I.C.J. Reports 2010,* p. 658, para. 44.

[252] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Judgment, I.C.J. Reports 2010*, p. 657, para. 41, citing *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 695, para. 110.

[253] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Judgment, I.C.J. Reports 2010*, p. 657, para. 41, citing the *Case concerning the Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment of 15 June 1962: I.C.J. Reports 1962*, p. 36 and the *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007*, p. 697, para. 114.

3.99 For these reasons, Nicaragua's new claim is inadmissible.

(2) The Claim Is Without Merit in any Event

3.100 Even if the Court were disposed to consider Nicaragua's new claim, it can readily be shown that the claim has no merit.

3.101 In the first place, it should be recalled that Nicaragua already resorted to the same argument during the hearings on preliminary objections in a different case, and that Colombia had shown that argument to be fallacious. This was 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)*. There, Nicaragua's Agent presented a map by the Colombian National Agency of Hydrocarbons (ANH, from its Spanish acronym) dated 2015 as an example of supposed "unilateral actions of Colombia regarding the exploration or exploitation of the resources, not only over Nicaraguan waters — as established by the Court's Judgment of November 2012 (…)".[254]

3.102 In those hearings, Colombia clarified that there are no existing licenses in the areas concerned; that these areas appear listed in Colombia's ANH maps since well before the 2012

[254] *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia)*, Public Sitting, 6 October 2015, CR 2015/27, p. 16, para. 21 (Nicaraguan Agent).

Judgment; and that while two blocks were awarded in 2010 (CAYOS 1 and CAYOS 5) – again, before the 2012 Judgment – they were suspended in 2011, and no contracts were signed afterwards.[255]

3.103 In its Reply, Nicaragua attempts to rehash this argument by stating that "the signature of the relevant contracts remains outstanding"[256] – which is not true. Nicaragua seeks to make a case out of nothing, because as stated, in October 2011 President Santos removed from consideration oil and gas exploration and exploitation in and around the San Andrés Archipelago. Moreover, since 2012 both the Administrative Tribunal of San Andrés and the Council of State (Colombia's highest administrative law tribunal) have confirmed the suspension of activities relating to these two blocks.[257] It follows that there is no possible violation of Nicaragua's sovereign rights in this regard.

3.104 As for the "remaining" nine blocks not awarded in 2010, Nicaragua contends in its Reply that they continue to be offered

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255 *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia)*, Public Sitting, 7 October 2015, CR 2015/28, p. 40, para. 19 (Wood).

256 NR, para. 4.128.

257 Annex 20: Administrative Tribunal of San Andrés, Providencia and Santa Catalina, Judgment on Case No. 88-001-23-31-003-2011-00011-00 filed by the Corporation for the Sustainable Development of San Andrés, Providencia and Santa Catalina (CORALINA) against the National Agency of Hydrocarbons (ANH), 4 June 2012.

by Colombia by reference to a map from the ANH dated 17 February 2017.[258]

3.105 As noted above, Nicaragua's claim and the "evidence" it purports to rely on is inadmissible as it concerns a different subject-matter from the claims it introduced in its Application and has been advanced more than three years after the Court ceased to have jurisdiction between the parties due to the denunciation by Colombia of the Pact of Bogotá.

3.106 Moreover, even if the Court were to consider the map, it does not show any violation of Nicaragua's sovereign rights. Once again, none of these blocks have been the object of any implementation process since 2010. This is because: (i) some of these areas are excluded because they are within a natural park, i.e. the Seaflower Biosphere Reserve and Marine Protected Area, and (ii) as noted by the ANH in its website, "Areas Available" are "those areas that have not been allocated."[259] Thus, there is no existing contract or proposal awarded for the blocks in question (nor there could be), and Nicaragua's sovereign rights remain unaffected.

3.107 What is striking is how Nicaragua's arguments change at its convenience, and how distorted its account of the facts is. Quite simply, Colombia has awarded no petroleum blocks in

[258] NR, Figure 4.3.

[259] National Agency of Hydrocarbons, "Lands Map, February 17th 2017", available at: http://www.anh.gov.co/en-us/Asignacion-de-areas/Paginas/Mapa-de-tierras.aspx (last visited: 1 November 2018).

areas falling within Nicaragua's EEZ as delimited by the Court in 2012. It follows that Colombia has not violated Nicaragua's sovereign rights and maritime spaces.

E. The False Accusation that Colombia Has Authorized Fishing in Nicaragua's EEZ

3.108 Nicaragua alleged in its Memorial that Colombia has issued fishing license authorisations to Colombians and nationals of third States to operate in Nicaraguan waters.[260] To support its accusation, Nicaragua submitted as evidence: (i) Resolution No. 5081 issued by the Governorship of the Archipelago Department of San Andrés, Providencia and Santa Catalina on 22 October 2013;[261] (ii) Resolution No. 305 issued by the General Maritime Direction (DIMAR, from its Spanish acronym) on 25 June 2014;[262] and (iii) a Report on the Status of the Natural Resources and the Environment issued by the Office of the Comptroller General of San Andrés, Providencia and Santa Catalina on July 2013.[263]

3.109 In its Reply, Nicaragua reformulated its accusation against Colombia by indicating that: "Colombia has also continued to violate Nicaragua's sovereign rights and jurisdiction by authorizing, encouraging and protecting

260 NM, paras. 2.22, 2.51 and 2.52.
261 NM, Annex 11.
262 NM, Annex 14.
263 NR, Annex 12.

industrial fishing in Nicaragua's EEZ."[264] As "evidence" of the alleged violation, Nicaragua submitted a number of resolutions issued by DIMAR,[265] and the Governorship of the Archipelago Department of San Andrés, Providencia and Santa Catalina – albeit Nicaragua claims these resolutions were issued by DIMAR, it is clear in its own Annexes that they were not.[266]

3.110 Based on the above, Nicaragua asks the Court to declare Colombia's international responsibility for its allegedly "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"[267] and, therefore that Colombia be ordered to "revoke permits granted to fishing vessels operating in Nicaragua's exclusive economic zone, as delimited in the Court's Judgment of 19 November 2012"[268].

3.111 The first defect in Nicaragua's claim and the "evidence" it submits is that it is based on post-critical date facts. The

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264 NR, para. 4.101.

265 General Maritime Direction, Resolution No. 0311 of 2013 (26 June 2013) (NR, Annex 7); General Maritime Direction, Resolution No. 305 of 2014 (25 June 2014) (NR, Annex 9, which was already submitted in the Memorial as Annex 14); General Maritime Direction, Resolution No. 0437 of 2015 (27 July 2015) (NR, Annex 12); General Maritime Direction, Resolution No. 0459 of 2016 (27 July 2016)(NR, Annex 16); General Maritime Direction, Resolution No. 550 of 2017 (15 August 2017) (NR, Annex 17).

266 General Maritime Direction, Resolution No. 4997 (NR, Annex 11); General Maritime Direction, Resolution No. 4356 of 2015 (NR, Annex 13); General Maritime Direction, Resolution No. 4780 of 2015 (NR, Annex 14); General Maritime Direction, Resolution No. 2465 of 2016 (NR. Annex 15).

267 NR, para. 4.121.

268 NR, Submissions, para, 1 (d).

resolutions regarding the vessels "Rough Rider" (NR, Annex 11), "Capt. Geovanie" (NR, Annex 13) and "The Saga" (NR, Annex 14) were issued respectively on 10 November 2014, 1 September 2015 and 24 September 2015. The Court lacks jurisdiction to consider whether any of these facts – which took place after 27 November 2013 when the Pact of Bogotá ceased to be in force for Colombia – constitutes a violation of Nicaragua's sovereign rights or maritime spaces.

3.112 Additionally, the special and transitory measures (i.e. exemption from a security tax payment and automatic navigation authorisation) granted for vessels registered in the jurisdiction of the Harbour Masters of San Andrés and Providencia are sovereign acts of the Colombian State materialized in a series of resolutions issued by DIMAR between 2014 and 2017 (NR, Annexes 9, 12, 16 and 17). As these acts also occurred after the Pact of Bogotá ceased to be in effect for Colombia, the Court lacks jurisdiction to consider if they constitute a violation of Nicaragua's sovereign rights or maritime spaces.

3.113 Thus, the only facts with respect to which the Court has jurisdiction are: the resolutions concerning the affiliation of the fishing vessel "Captain KD",[269] and the special and transitory measures granted by DIMAR in Resolution No. 311 of 2013.[270]

269 NM, Annex 11.
270 NR, Annex 7.

3.114 However, for the sake of completeness, Colombia will also address Nicaragua's post-critical date facts and evidence to demonstrate that none of these support Nicaragua's complaints either.

3.115 The fact of the matter is that the Colombian fishing industry in the San Andrés Archipelago was devastated by the 2012 Judgment because of its lack of access to areas situated in areas forming part of Nicaragua's EEZ.

3.116 A 2013 Report on the Status of the Natural Resources and the Environment issued by the Office of the Comptroller General of San Andrés, which Nicaragua submits as evidence of its claims, precisely noted that "the great majority of the industrial [fishing] companies have left the islands".[271] That report also indicated that catches of species such as lobster and whitefish had declined to a fraction of their pre-Judgment levels.[272]

3.117 In fact, in 2013, the largest fisheries and export company in San Andrés, Antillana, reported six months after the Judgment that it was ceasing operations "due to the economic unsustainability of the industry after the loss of 75,000 square

[271] NM, Annex 12.

[272] The Report shows that the catch of whitefish fell from 116 tons in 2012 to 27 tons from January to July 2013 and the catch of lobster fell, in that same period, from 133 tons to 36 tons (NM, Annex 12, pp. 190-192).

kilometres of marine spaces in San Andrés".[273] Moreover, the second largest company, King Crab, also stated that it was ceasing operations for the same reason.[274] Rather than granting licenses as before over areas that came to be situated in Nicaragua's EEZ, it was the inability to access these areas that caused a significant collapse of the industry and severe economic hardship to the inhabitants of the Archipelago.

3.118 With regard to the resolutions issued by DIMAR (NM Annex 14; NR Annexes 7, 9, 12, 16 and 17), Nicaragua alleges that through them Colombia has authorised industrial fishing in Nicaragua's EEZ and encouraged such fishing by giving financial incentives.[275] This statement is demonstrably false: they do not grant fishing licenses simply because DIMAR is not the competent authority to grant these permits. Moreover, nowhere in these resolutions are economic incentives granted to promote fishing in Nicaragua's EEZ.

3.119 What these resolutions provide is the following:

(i) They authorize to "stay and operate in the jurisdiction of the San Andrés and Providencia Harbour Master's Office (…) upon authorisation of the Office of the Secretary of Agriculture and

[273] Annex 54: El Universal, *San Andrés' largest fishery is shutting down,* 19 May 2013; and Annex 55: El Isleño, *Chamber of Commerce regrets the closure of Antillana*, 23 May 2013.
[274] Annex 57: Radio Nacional de Colombia, *ICJ ruling jeopardizes industrial fishing in San Andrés*, 13 August 2013.
[275] NR, para. 4.104.

Fishing of the Government of San Andrés, Providencia and Santa Carolina [sic]".[276]

As can be seen, they do not authorise industrial fishing because fishing permits are issued by the Secretariat of Agriculture and Fishing of San Andrés, not by DIMAR.

(ii) The special and transitory measures, such as the exemption from the payment of the Maritime Security Service, were granted to overcome the "negative economic and social effects" of the 2012 Judgment, but do not refer at all to Nicaragua's EEZ.

3.120 As can be seen, Nicaragua's reading of these DIMAR Resolutions is a mere distortion of the facts. Colombia's issuance of special and transitory measures does not authorise nor encourage industrial fishing in waters of the Nicaraguan EEZ. They only grant certain financial reliefs to the benefit of the fishing fleet registered in San Andrés and Providencia – an act not prohibited by international law, and one that in no way affects or purports to affect Nicaragua's sovereign rights.

3.121 As for the resolutions issued by the Governorship of the Archipelago Department of San Andrés, Providencia and Santa

[276] NR, para. 4.104.

Catalina,[277] Nicaragua alleges that through them Colombia issued fishing permits in Nicaragua's EEZ.[278] This statement is incorrect, as the following analysis of each resolution will show:

a. Resolution No. 5081 of 2013:[279] As explained by Colombia in its Counter-Memorial,[280] Nicaragua's assertion is based on the "Whereas" clauses, whilst in the operative part of the permit, Article Three clearly does not include *Luna Verde* bank nor any maritime spaces adjudicated to appertain to Nicaragua by the 2012 Judgment. Indeed, the authorisation is specifically limited to "the Archipelago Department of San Andrés, Providencia and Santa Catalina (Roncador, Serrana and Quitasueño, Serranilla Keys) and Shallows (Alicia and Nuevo)".

b. Resolution No. 4997 of 2014:[281] This resolution merely authorises the disaffiliation of the vessel "Rough Rider" from the permitholder's fishing fleet (see Article One). Thus, it does not grant a fishing permit and in no way evidences that Colombia is granting fishing authorisations in waters of the Nicaraguan EEZ.

277 NM, Annex 11 and NR, Annexes 11, 13, 14 and 15.
278 NR, paras. 4.105-4.107.
279 NM, Annex 11.
280 CCM, para. 4.46.
281 NR, Annex 11.

Additionally, the only areas mentioned in the Resolution are "the banks (Roncador, Serrana and Quitasueño, and Serranilla) and Shoals (Alicia and Nuevo), and in the fishing zones that are permitted by the laws, fishing regulations and system of Protected Marine Areas". No mention whatsoever is made of any areas falling within waters of the Nicaraguan EEZ.

c. Resolution No. 4356 of 2015:[282] The same analysis made above with respect to Resolution No. 4997 of 2014 applies to this resolution. *First*, it simply authorizes the disaffiliation of the vessel "Fair Winds" from the permitholder's fishing fleet (see Article One). Thus, it does not grant a fishing permit and in no way evidences that Colombia is granting fishing authorisations in waters of the Nicaraguan EEZ. *Second*, the only areas mentioned in the Resolution are "the banks (Roncador, Serrana and Quitasueño, and Serranilla) and Shoals (Alicia and Nuevo), and the zone where fishing is permitted by the laws". No mention whatsoever is made of any areas falling within waters of the Nicaraguan EEZ.

Simply put, unlike licenses that had been issued before the 2012 Judgment, which listed the *Luna Verde* Bank as

282 NR, Annex 13.

one of the permitted fishing areas,[283] the new Resolutions expressly indicate that the areas where fishing activities are authorised are solely those which the Court has recognised to lie within Colombia's territorial sea and EEZ.

d. Resolution No. 4780 of 2015:[284] Again, this resolution refers to the affiliation of the vessel "The Saga" to the fishing fleet of the permit holder Ms Vianova Forbes James (see Article One). It does not grant a fishing permit, and its purpose is not to indicate the areas in which Colombia is granting fishing authorisations.

As with Resolution No. 5081 of 2013, Nicaragua's claim is based on the "Whereas" clauses. However, operative Article Six only establishes that the "fishing fleet carries out fishing activities in the authorised fishing grounds in the area of the Department of San Andrés, Providencia and Santa Catalina". There is no authorisation to fish at the *Luna Verde* bank or in any maritime spaces recognised to Nicaragua by the 2012 Judgment.

3.122 In sum, the Resolutions issued by the Governorship of the Archipelago Department of San Andrés, Providencia and

[283] Annex 18: Archipelago Department of San Andrés, Providencia and Santa Catalina, Resolution No. 2479, 13 June 2006; and Annex 19: Archipelago Department of San Andrés, Providencia and Santa Catalina, Resolution No. 20, 13 November 2009.

[284] NR, Annex 14.

Santa Catalina submitted by Nicaragua in its Memorial and Reply,[285] do not authorise fishing activities in Nicaragua's EEZ. To the contrary, all of them expressly indicate that the areas where fishing operations can be carried out are areas which the Court recognised fall within Colombia's territorial sea or EEZ (i.e. Roncador, Serrana, Quitasueño, Serranilla, Bajo Alicia and Bajo Nuevo). Nowhere in their operative part is there an authorisation to carry out fishing activities at the *Luna Verde* bank or in other maritime spaces situated within Nicaragua's EEZ.

3.123 Finally, Resolution No. 2465 of 2016,[286] issued by the Governorship of the Archipelago Department of San Andrés, Providencia and Santa Catalina, is completely irrelevant. It refers to the procedure for inscription in the fishermen's book and the identification of artisanal commercial fishermen. Accordingly, it has nothing to do with the granting of fishing permits or any Nicaraguan maritime spaces. To the contrary, Article 8 expressly provides that: "The commercial artisanal fishing activities can only be exercised in the territory that includes the jurisdiction of the Archipelago Department of San Andrés, Providencia and Santa Catalina".

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285 NM, Annex 11 and NR, Annexes 11, 13 and 14.

286 NR, Annex 15.

F. Conclusions

3.124 Based on the foregoing, it is clear that Nicaragua has not demonstrated any violation of its sovereign rights or maritime spaces by Colombia. This includes the "incidents" that are claimed to have occurred before the critical date when the Pact of Bogotá ceased to be in force between Nicaragua and Colombia, the alleged issuance of fishing permits in Nicaraguan waters and the alleged granting of hydrocarbon exploration and exploitation licences. It follows that Nicaragua's submissions on this aspect of its claims should be rejected.

Chapter 4

THE CONTIGUOUS ZONE OF THE COLOMBIAN ISLAND TERRITORIES IN THE SOUTHWESTERN CARIBBEAN SEA

A. Introduction

4.1 In its Reply, Nicaragua requests the Court to adjudge and declare that "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".[287]

4.2 It appears from the Reply that, so far as concerns the contiguous zone, Nicaragua claims that Decree No. 1946 (as amended) directly affects its rights under customary international law. Nicaragua claims that the Decree does so because it extends beyond the EEZ delimitation line set out in the 2012 Judgment; because the powers described in the Decree go beyond those permitted under customary international law; and because in certain places the contiguous zone extends to a distance beyond 24 nautical miles from the baselines, also

[287] The wording of the submissions in Nicaragua's Reply is quite different from that in its Application and Memorial, but on each occasion, it would seem that Nicaragua does not seek to challenge Decree 1946 (as amended) in the abstract, but only in so far as Nicaragua's own rights have been directly affected by enactment of the Decree.

allegedly contrary to customary international law. Nicaragua further asserts that the mere adoption of the Decree violates its rights under customary international law, even though it has failed to demonstrate that the Decree has in effect been enforced by Colombia in a manner that has made Nicaragua suffer any harm due to such application.

4.3 As Colombia has shown in its Counter-Memorial, each of these assertions is without merit. In this Chapter, Colombia will address in particular the arguments deployed in Nicaragua's Reply. After describing Decree No. 1946 (as amended) (Section B), the Chapter first shows that, under customary international law, Colombia may lawfully exercise its contiguous zone powers in areas where the contiguous zone overlaps with part of Nicaragua's EEZ (Section C). It next shows that none of the powers provided for in the Decree go beyond those which Colombia is entitled to exercise under customary international law (Section D). The next section explains that the outer limit of the Colombian integral contiguous zone in the Southwestern Caribbean Sea is a lawful simplification of maritime zones and does not encroach upon Nicaragua's rights (Section E). And, finally, it explains that Nicaragua has failed to demonstrate that the enactment and application of the Decree has violated any of its rights under international law (Section F).

B. Decree No. 1946 of 2013 (as amended in 2014)

4.4 Colombia's Political Constitution of 1991 provides for a contiguous zone in accordance with the international law of the sea.[288] This was implemented, so far as concerns the contiguous zone in the Southwestern Caribbean Sea, by Article 5 of Decree No. 1946 concerning the Territorial Sea, Contiguous Zone, and Continental Shelf of the Colombian Island Territories in the Southwestern Caribbean, issued on 9 September 2013 and amended by Decree No. 1119 of 17 June 2014.[289]

4.5 The present section describes these provisions of Colombian law, which are in full conformity with the customary international law of the sea. The section also corrects Nicaragua's distortions and misinterpretations of Colombian domestic law.[290]

4.6 The existence of Colombia's contiguous zone was reflected in Article 101 of the Political Constitution of Colombia

[288] CCM, para. 5.9.

[289] CCM, Annex 7.

[290] It is typical of Nicaragua's approach that it even complains about the name given by Colombia under its internal law to the contiguous zone it has declared around the islands and cays of the San Andrés Archipelago. Nicaragua asserts, in footnote 73 of its Reply, that the name 'Integral Contiguous Zone' "is abusive: it corresponds to no accepted notion in international law." Yet States are not required to use UNCLOS terminology when naming zones and features under domestic law. The adjective 'integral' is appropriate in order to reflect the geographical reality that the greater part of the contiguous zone around the Archipelago forms a single zone, not a series of separate contiguous zones.

of 1991,[291] which refers to "the subsoil, the territorial sea, the contiguous zone, the continental shelf, the exclusive economic zone" and which provides that these are "in accordance with international law or the laws of Colombia in the absence of international law."[292] The quoted words confirm, at the level of the Colombian Constitution, that the Colombia's contiguous zone is to be implemented in conformity with international law.

4.7 This principle is further confirmed by the express provisions of the Decrees of 2013 and 2014.[293] Article 1(3) of the 2013 Decree provides that Colombia exercises jurisdiction and sovereign rights over the maritime spaces other than the territorial sea "in the terms prescribed by international law". The commitment to act in conformity with international law is reiterated by the addition in 2014 of a last paragraph to Article 5 (on the contiguous zone), which states that the application of Article 5 "will be carried out in conformity with international law and Article 7" (which itself provides that the rights of other States are not affected or limited by the Decree).

4.8 Decree No. 1946 (as amended) was issued by the President of the Republic of Colombia in exercise of his powers under the 1991 Political Constitution in furtherance of Law 10 of 1978, which provides that the Government shall indicate the

[291] There had been an earlier reference to the contiguous zone in a law of 1984: see CCM, para. 5.9.

[292] CCM, para. 5.9.

[293] The background to Decree No. 1946, which was issued by the President of Colombia on 9 September 2013 and amended by Decree No. 1119 of 17 June 2014, was described in CPO, paras. 2.61-2.62.

baselines from which various maritime spaces are measured, and Law 47 of 1993 (concerning the Archipelago Department of San Andrés, Providencia and Santa Catalina). After reciting Article 101 of the 1991 Political Constitution, and relevant provisions of Laws 10 of 1978 and 47 of 1993, the preamble to the Decree proclaims that: "The Republic of Colombia exercises all the rights over its maritime spaces in accordance with International Law".

4.9 Article 1(1) and (2) of the Decree set out a detailed definition of the island territories of Colombia in the Southwestern Caribbean Sea. Article 1(3) provides, *inter alia*, that Colombia "exercises full sovereignty over its insular territories and territorial sea" and "jurisdiction and sovereign rights over the rest of the maritime spaces generated by its insular territories in the terms prescribed by international law". Article 2 provides that "[i]n accordance with (…) customary international law" the maritime spaces generated by the island territories (including the contiguous zone) "are part of Colombia".

4.10 Article 3(1) of the Decree provides that "the Government will indicate the points and baselines for which the width of territorial seas will be measured, along with the contiguous zone". Article 3(2) provides that "[t]hese lines will be drawn in accordance with criteria recognized by customary international law" (which include special criteria related to islands situated on atolls or islands surrounded by reefs). Article 3(3) concerns

straight baselines. Article 6 then makes provision for the publication of official thematic maps of the points and baselines, and also of the Integral Contiguous Zone once the points and baselines have been set forth in a Decree.

4.11 Article 4 makes provision for the 12 nautical miles' territorial seas of the island territories.

4.12 Article 5 makes provision for the contiguous zone of the island territories. It comprises three sections. Section 1 provides that the contiguous zone of the island territories extends up to a distance of 24 nautical miles from the baselines. Section 2 provides that "the lines indicated for the outer limits of the contiguous zones will be joined to each other through geodetic lines." Section 3 then describes the faculties of enforcement and control necessary for specified purposes. The final paragraph of Section 3 then includes the following provision, which applies to the whole of Article 5 of the Decree: "The application of this article will be carried out in conformity with international law and Article 7 of the present Decree."

4.13 Article 7 provides that the Decree will not "affect or limit (…) the rights of other states".

4.14 Nicaragua complains that the map of Colombia's contiguous zone included in the Counter-Memorial (Figure 5.1) differs from the map shown at the televised press conference on 9 September 2013, a depiction of which Nicaragua reproduced

in its Application and reproduces again at Figure 3.1(a) of its Reply. As stated in Colombia's Preliminary Objections and in its Counter-Memorial,[294] Colombia has not yet issued an official map showing the contiguous zone because technical work is still ongoing to determine the relevant points and baselines according to Article 3 of the Decree, so that they can be proclaimed in accordance with Article 6 of the Decree. Pending such official publication, Figure 5.1 of the Counter-Memorial depicts the integral contiguous zone for illustrative purposes, and – for the purposes of the present case – is nothing more than an accurate illustration of how the Decree should apply in practice.

4.15 As explained in the Counter-Memorial, due to the geography of the region, the contiguous zones of the islands intersect – each island is less than 48 nautical miles from a neighbouring island – and hence the zone which Colombia established is a single, integrated contiguous zone for the Archipelago. Furthermore, for the effective implementation of this contiguous zone, Colombia, in conformity with customary international law, drew geodetic lines to connect the 24-nautical-mile arcs from the islands.

4.16 Nicaragua, in its Reply, accepts "the entitlement of Colombia to a contiguous zone",[295] which necessarily includes the establishment of a contiguous zone for the San Andrés

294 CPO, para. 2.59 and CCM, para. 5.1.
295 NR, para. 3.20.

Archipelago. Nicaragua does, however, dispute the extension of the contiguous zone into its EEZ, the rights exercised within the contiguous zone, and the simplification of the outer limits of the contiguous zone. Colombia will address Nicaragua's objections to the contiguous zone of its island territories in turn.

C. Colombia's Integral Contiguous Zone May Overlap with Nicaragua's EEZ

4.17 Nicaragua attempts to convince the Court that under customary international law, a contiguous zone of one State may not extend into the EEZ of another State. Nicaragua's proposition is that its EEZ rights extinguish any protective rights and powers of Colombia as part of the contiguous zone regime.[296] Nicaragua does not present any convincing evidence or doctrine to that effect. There is none. The Court should thus reject its unfounded *ipse dixit* interpretation of customary international law.

4.18 This Section will show that the right of the coastal State to establish a contiguous zone is independent of, and not incompatible with, any resource-oriented EEZ rights of another State in the same space. Within the contiguous zone, the coastal State only has the right to exercise the degree of control necessary to protect its vital interests within its territory or territorial sea. Colombia will demonstrate that no inherent conflict exists between one State's EEZ rights and another

[296] NR, para. 3.21.

State's contiguous zone powers, and that, under international law, a coastal State is permitted to exercise its contiguous zone rights, regardless of the existence of another State's EEZ rights in the same maritime space.

4.19 In its Counter-Memorial, Colombia demonstrated that the right of the coastal State to establish a contiguous zone under customary international law is distinct from the right to a contiguous zone in the 1958 Convention on the Territorial Sea and the Contiguous Zone,[297] and later in UNCLOS.[298] The customary right to establish a contiguous zone encompasses the exercise of control necessary to protect the vital interests of the coastal State including, *inter alia*, security interests and environmental protection.[299] Nevertheless, even if the Court were to accept Nicaragua's contention that the customary right to establish a contiguous zone has been codified and is now limited to the precise formulations in Article 24 of the 1958 Convention and Article 33 of UNCLOS, Colombia will demonstrate that both the establishment of its contiguous zone and all the powers specified in Article 5 of Decree No. 1946 (as amended), are in conformity with those provisions.

4.20 For present purposes, the key point is that the jurisdiction and powers vested in the coastal State within the

297 Hereinafter "the 1958 Convention".
298 CCM, paras. 5.39-5.54.
299 CCM, para. 5.48.

contiguous zone are different from the sovereign rights a State possesses in its EEZ. As the Virginia Commentary notes:

> "The rights of control exercisable by the coastal State in the contiguous zone, however, differ from its sovereign rights or jurisdiction in the exclusive economic zone, which relate to the natural resources of that zone"[300]

4.21 In the EEZ, UNCLOS Article 56 and customary international law provide that the coastal State has specific, mainly resource-oriented rights, including the exclusive right to exploit the resources of the water column, the sea-bed and its subsoil, and has specific jurisdiction with regard to the establishment and use of artificial islands, installations and structures, marine scientific research and the protection and preservation of the marine environment. These defined rights must be exercised with due regard to the rights and duties of other States in the zone.

4.22 The EEZ regime thus does not bestow sovereignty upon the EEZ coastal State; that State only possesses certain exclusive resource-oriented sovereign rights and jurisdiction in its EEZ, while all other States continue to enjoy their traditional rights and freedoms therein. Hence, the exercise of these specific resource-oriented rights by the coastal State in its EEZ is subject

[300] Virginia Commentary, p. 275; see also Proelss Commentary, p. 262; J. Carlson, "Presidential Proclamation 7219: Extending the United States' Contiguous Zone – Didn't Someone Say This Had Something to Do with Pollution?", *University of Miami Law Review*, Vol. 55, No. 3, 2001 (available at the Peace Palace Library).

to the obligation to have due regard to the rights and duties of other States, including those in UNCLOS Article 33 and the customary right to establish a contiguous zone.

4.23 Nicaragua contends that Colombia must prove that any rights it claims within Nicaragua's EEZ – in this case, contiguous zone rights – are attributed to Colombia and not to Nicaragua in accordance with UNCLOS Article 59.[301] This argument is misguided; Article 59 has no role to play.

4.24 Article 59 was a new provision negotiated at UNCLOS III with a view to providing a basis for the resolution of any conflict of interests between the coastal State and any other State, in cases where the Convention did not allocate rights or jurisdiction to the coastal State or other States. There is little if any practice concerning Article 59.

4.25 In any event, Nicaragua's reliance on this provision does not assist its case. *First*, Nicaragua simply assumes that Article 59 reflects customary international law but fails to prove its opposability to Colombia. For this reason alone, the Court should disregard any purported relevance of Article 59 to the case. *Second*, even if the Court were minded to consider that Article 59 reflected customary international law, *quod non,* it is clear from its terms, context and negotiating history that Article

[301] NR, para. 2.10.

59 has no relevance to the question that arises in the present case, that of overlapping contiguous zones and EEZs.

4.26 Article 59 of UNCLOS reads:

> "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."[302]

UNCLOS Article 59 does not envision, as Nicaragua would have it, the attribution of additional rights to the coastal State in its EEZ. Article 59 only concerns *conflicts of interests* of the coastal State in its EEZ and those of other States: *interests*, not rights or jurisdiction. Furthermore, Article 59 applies only to cases where UNCLOS "does not attribute rights or jurisdiction" to any State. As much of Nicaragua's argument against Colombia's contiguous zone circles around UNCLOS Article 33, it is evident that the Convention does in fact attribute contiguous zone rights and jurisdiction. Hence, Article 59 is inapplicable to the question at hand.

4.27 Nor has Nicaragua shown any *conflict* of interests. As explained below, there is no inherent conflict between the

[302] Emphasis added.

resource-related rights and jurisdiction of the coastal State in the EEZ and the control that may be exercised, for specific purposes, by a coastal State in the contiguous zone. Nor has Nicaragua shown any actual such conflict in the present case. Finally, the content of the rule in Article 59 does not assist Nicaragua: even if it applied, Article 59 gives no preference to EEZ rights over the rights of other States, including the latter's contiguous zone rights.

4.28 UNCLOS Article 73 prescribes that any legislation or enforcement by the coastal State within the EEZ must be limited to the specific rights and duties of the State in the EEZ:

> "The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, 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."

Therefore, as part of the EEZ regime, the EEZ coastal State does not possess the right to exercise, beyond its own contiguous zone, control with respect to its customs, fiscal, immigration or sanitary laws and regulations. The absence of such a right as part of the EEZ regime is intentional. During the Conference, it was repeatedly stressed that the EEZ and the contiguous zone regimes conferred separate and distinct types of jurisdictions

upon the State.[303] The contiguous zone rights were reserved for the first 24 nautical miles from the coast presumably to protect the freedom of navigation and other rights of all other international users.[304] It is thus clear that not only does the EEZ State lack the right to protect its own interests with respect to customs, fiscal, immigration or sanitary laws and regulations as part of the EEZ regime, but, *a fortiori*, it may not interfere with or purport to safeguard the contiguous zone rights that another State may have in the same area. Under international law, the right and duty to protect such vital interests of the coastal State are vested solely in that State.

4.29 There is no inherent conflict between the rights of the coastal State in the contiguous zone and the rights of another State in its EEZ. At UNCLOS III,

> "the prevailing view (…) was that (…) the envisaged legal regime of the EEZ was intended to

303 Virginia Commentary, p. 270; see e.g. Official Records of the Third United Nations Conference on the Law of the Sea: A/CONF.62/C.2/SR.9, *Summary records of meetings of the Second Committee*, 9th meeting, India, para. 3; Indonesia, para. 4; Iraq, para. 11; Algeria, para. 12; A/CONF.62/C.2/SR.22, *Summary records of meetings of the Second Committee*, 22nd meeting, Switzerland, paras. 135-136; A/CONF.62/C.2/SR.26, *Summary records of meetings of the Second Committee*, 26th meeting, Egypt, para. 27; A/CONF.62/C.2/SR.31, *Summary records of meetings of the Second Committee*, 31st meeting, Italy, para. 32; Germany, para. 35; Bahrain, paras. 42-43, available at: http://legal.un.org/diplomaticconferences/1973_los/vol2.shtml (last visited: 1 November 2018).

304 The objection to extending the contiguous zone beyond 12 nautical miles was raised for fear it would "lead to serious disturbance of international communication and the freedom of navigation". J. Symonides, "Origin and legal essence of the contiguous zone", in *Ocean Development & International Law*, Vol. 20, Issue 2, 1989, p. 206 (available at the Peace Palace Library).

> cover entirely different subjects [than the contiguous zone regime], and that there were thus no overlaps in substance between these two maritime zones".[305]

As noted above, the rights of the State in the EEZ mainly concern resources, and its jurisdiction is limited to specified actions in relation to these (UNCLOS Article 56). For example, the EEZ State may regulate the exploitation of resources in the EEZ or regulate traffic to offshore installations. In contrast, contiguous zone jurisdiction is preventive and corrective: therein the coastal State is afforded the necessary powers in order to prevent and punish infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea. The right to exercise control in the contiguous zone only comes into operation once the event or action develops a potential to adversely affect the essential interests of the coastal State in its territory or territorial sea.

4.30 Thus, if in a given maritime area, State A exercises EEZ rights while State B exercises contiguous zone rights, no conflict should arise, as each State has jurisdiction over events which affect its own rights and interests. In this area of the sea, State A, the EEZ State, would have the right to regulate the enumerated resource exploitations and have jurisdiction over offshore installations, maritime research and an alike; in part of the same maritime area, State B, the contiguous zone State, will exercise the necessary control in the contiguous zone over

[305] Proelss Commentary, p. 262.

actions and inbound ships which threaten to violate its customs, fiscal, immigration or sanitary laws and regulations and over ships which have transgressed such laws and regulations.[306] As neither State may exercise jurisdiction over events affecting the protective laws and regulations of the other State, there can be no conflict.

4.31 The different jurisdictions in the two maritime regimes were distinguished in UNCLOS III. During the 31st meeting of the Second Committee, which concluded the Committee's discussion on the contiguous zone, the representative of the German Democratic Republic clarified that:

> "[w]ith respect to the rights of the coastal State in the contiguous zone, he said they should include the right to control customs, immigration, fiscal and sanitation regulations. The regulations governing the contiguous zone would not affect the right of the coastal State to utilize the living and mineral resources in the zone adjacent to its territorial sea if the concept of the economic zone was incorporated in the new law of the sea."[307]

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306 As discussed in the Counter-Memorial, it is Colombia's position that under customary international law, in the contiguous zone the coastal State may exercise necessary control over other actions and events which may adversely affect its vital interests. See CCM, paras. 5.50-5.54.

307 Official Records of the Third United Nations Conference on the Law of the Sea, A/CONF.62/C.2/SR.31, *Summary records of meetings of the Second Committee*, 31st meeting, Germany, para. 35, available at: http://legal.un.org/docs/?path=../diplomaticconferences/1973_los/docs/english/vol_2/a_conf62_c2_sr31.pdf&lang=E (last visited: 1 November 2018).

The representative of Bahrain

> "agreed with the view that the establishment of a contiguous zone for particular purposes beyond the territorial waters of a coastal State was not inconsistent with the concept of an exclusive economic zone since the latter, as its name implied, would be an area in which the utilization of resources and other economic matters were the *sole concern*.
>
> A coastal State's rights in the contiguous zone were of a functional and protective nature."[308]

A contrary proposition would undermine the essential interests of the coastal State in its contiguous zone and the balance struck in the text of UNCLOS.

4.32 The limited jurisdiction of a State in its EEZ was intentional; the Conference rejected the initiative of certain States to transform the EEZ into a 200-nautical-mile territorial sea.[309] While certain voices within the Conference suggested that the contiguous zone should be discarded,[310] the concept was

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[308] Official Records of the Third United Nations Conference on the Law of the Sea, A/CONF.62/C.2/SR.31, *Summary records of meetings of the Second Committee*, 31st meeting, Bahrain, paras. 42-43, available at: http://legal.un.org/docs/?path=../diplomaticconferences/1973_los/docs/english/vol_2/a_conf62_c2_sr31.pdf&lang=E (last visited: 1 November 2018). (Emphasis added).

[309] Virginia Commentary, p. 550.

[310] Virginia Commentary, p. 269; see e.g. Official Records of the Third United Nations Conference on the Law of the Sea: A/CONF.62/C.2/SR.9, *Summary records of meetings of the Second Committee*, 9th meeting, Mexico, para. 2; Israel, paras. 5-6; Kenya, para. 10, available at: http://legal.un.org/docs/?path=../diplomaticconferences/1973_los/docs/english/vol_2/a_conf62_c2_sr9.pdf&lang=E (last visited: 1 November 2018).

preserved because it differs from the EEZ and confirms the coastal State's customary rights. The jurisdiction and rights bestowed upon the coastal State for each regime are intentionally distinct.[311] During the 31st meeting of the Second Committee, the Italian representative explained that:

> "His position on the contiguous zone was related to his concept of the economic zone. The rights of the coastal State in the economic zone would be purely economic, while its rights in a much more restricted zone would relate to national security, customs, taxation, health and immigration, and the right to guarantee the protection of its territory. If the breadth of the territorial sea was to be reduced and a contiguous zone established beyond it, it should be stated very clearly that the coastal State had different competences over the different parts of the high seas beyond its territorial waters. It would have rights and competences with regard to the protection of its territory in the contiguous zone, while it would have rights and competences with regard to the protection of its clearly defined economic interests in the economic zone measured from the outer limit of the territorial sea. The

311 Virginia Commentary, p. 270; see e.g. Official Records of the Third United Nations Conference on the Law of the Sea: A/CONF.62/C.2/SR.9, *Summary records of meetings of the Second Committee*, 9th meeting, Indonesia, para. 4; Iraq, para. 11; Algeria, para. 12; India, para. 3; A/CONF.62/C.2/SR.22, *Summary records of meetings of the Second Committee*, 22nd meeting, Switzerland, paras. 135-136; A/CONF.62/C.2/SR.26, *Summary records of meetings of the Second Committee*, 26th meeting, Egypt, para. 27; A/CONF.62/C.2/SR.31, *Summary records of meetings of the Second Committee*, 31st meeting, Italy, para. 32, available at: http://legal.un.org/diplomaticconferences/1973_los/vol2.shtml (last visited: 1 November 2018). See also J. Carlson, "Presidential Proclamation 7219: Extending the United States' Contiguous Zone – Didn't Someone Say This Had Something to Do with Pollution?", *University of Miami Law Review*, Vol. 55, No. 3, 2001, p. 518 (available at the Peace Palace Library).

> concept, and *the functions of the contiguous zone and the economic zone were thus very different.*"[312]

The Italian position was in line with the position of the representative of Switzerland, who had explained in an earlier meeting on the contiguous zone that:

> "First, the proposed economic zone and the contiguous zone served different purposes: within the economic zone, the coastal State would have exclusive exploitation rights over living and non-living resources; its sole competence in the contiguous zone, however, would be the prevention and punishment of offences against certain rules designed to ensure the maintenance of good order.
>
> Secondly, the type of jurisdiction to be exercised in each zone was completely different: in the exclusive economic zone, the coastal State would have – chiefly legislative – jurisdiction over natural resources and the preservation of the marine environment; in the contiguous zone, it would have the right to punish certain offences committed or to prevent offences likely to be committed by a vessel or its crew on the territory of the coastal State or in its territorial waters. Its competence did not extend to offences that had been or would be committed in the contiguous zone, and there could thus be no application of rules within that zone."[313]

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312 Official Records of the Third United Nations Conference on the Law of the Sea, A/CONF.62/C.2/SR.31, *Summary records of meetings of the Second Committee*, 31st meeting, Italy, para. 32, available at: http://legal.un.org/docs/?path=../diplomaticconferences/1973_los/docs/english/vol_2/a_conf62_c2_sr31.pdf&lang=E (last visited: 1 November 2018). (Emphasis added).

313 Official Records of the Third United Nations Conference on the Law of the Sea, A/CONF.62/C.2/SR.22, *Summary records of meetings of the Second Committee*, 22nd meeting, Switzerland, paras. 136-137, available at:

Similarly, the representative of Iraq explained that:

> "the concept of the contiguous zone differed from that of the economic zone. While he did not oppose the proposals to postpone consideration of the question of the contiguous zone until after the question of the economic zone had been discussed, he pointed out that the concept of the economic zone related only to jurisdiction over resources. The concept of the contiguous zone, on the other hand, involved the jurisdiction of the coastal State in regard to customs, fiscal, sanitation and immigration regulations."[314]

The Indonesian representative pointed out that while:

> "the contiguous zone would lose its importance if the idea of an economic zone were approved, but since the latter would essentially relate to questions of economics and marine resources, his delegation preferred that the concept of the contiguous zone should not be discarded completely, since it involved other powers of the coastal State with regard to customs, fiscal and police control, and sanitation and immigration regulations."[315]

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http://legal.un.org/docs/?path=../diplomaticconferences/1973_los/docs/english/vol_2/a_conf62_c2_sr22.pdf&lang=E (last visited: 1 November 2018).

[314] Official Records of the Third United Nations Conference on the Law of the Sea, A/CONF.62/C.2/SR.9, *Summary records of meetings of the Second Committee*, 9th meeting, Iraq, para. 11, available at: http://legal.un.org/docs/?path=../diplomaticconferences/1973_los/docs/english/vol_2/a_conf62_c2_sr9.pdf&lang=E (last visited: 1 November 2018).

[315] Official Records of the Third United Nations Conference on the Law of the Sea, A/CONF.62/C.2/SR.9, *Summary records of meetings of the Second Committee*, 9th meeting, Indonesia, para. 4, available at: http://legal.un.org/docs/?path=../diplomaticconferences/1973_los/docs/english/vol_2/a_conf62_c2_sr9.pdf&lang=E (last visited: 1 November 2018).

4.33 Since State A, the EEZ State, may not exercise its own contiguous zone jurisdiction beyond its contiguous zone, and any contiguous zone jurisdiction it exercises will be limited to preventing the infringement of *its own* vital interests with respect to customs, fiscal, immigration or sanitary laws and regulations, State A does not possess the right to regulate beyond its territorial sea activities which may adversely affect the customs, fiscal, immigration or sanitary laws and regulations of State B. The right and duty to protect itself against such activities and to punish any perpetrators rests solely with State B in that part of State A's EEZ which is State B's contiguous zone.

4.34 Were the coastal State precluded from exercising its contiguous zone rights beyond the territorial sea, its ability to protect its vital interests, as expressed in its relevant laws and regulations, would be severely undermined. The consequences of such a preclusion, would be exacerbated in geographical contexts like that of the San Andrés Archipelago. These effects can be illustrated in several scenarios.

4.35 In the first scenario, if the coasts of the two States are less than 24 nautical miles apart, each State exercises sovereignty within its respective territorial sea. It was for this reason that then President Clinton proclaimed that the

contiguous zone of the United States does not extend to the territorial sea of another State.[316]

4.36 In a second scenario, if the coasts of the opposing States are 48 nautical miles apart and the delimitation was the median line, each State would be entitled to a territorial sea of 12 nautical miles and a contiguous zone of up to 12 nautical miles. Whether one or both of the States were to declare an EEZ up to the equidistance line would have no effect on the exercise of contiguous zone rights by either State. In case the States are less than 48 nautical miles apart, the contiguous zones of the States overlap; each State would exercise the necessary degree of control over ships inbound into its respective territorial sea and events that affect its defensive laws and regulations, within their respective overlapping contiguous zones.

4.37 In contrast to Nicaragua's claim that the delimitation of the contiguous zones is part of the delimitation of the EEZ,[317] the possibility of overlapping contiguous zones was recognised in the UNCLOS negotiations, and, according to the Virginia Commentary, was the reason for the removal of the delimitation provision with respect to the contiguous zone.[318] The

316 W. Clinton, *Proclamation 7219 – Contiguous Zone of the United States*, 1999, available at: http://www.presidency.ucsb.edu/ws/?pid=56452 (last visited: 1 November 2018).

317 NR, paras. 3.21-3.23.

318 Virginia Commentary, pp. 273-274; other explanations have also been put forward for the removal of the delimitation provision. See H. Caminos, "Contiguous Zone", *Max Planck Encyclopaedia of Public International Law*, para. 16 (available at the Peace Palace Library); Proelss Commentary, pp. 262-263; D. R. Rothwell and T. Stephens, *The*

Commentary quotes the following explanation for the removal of the delimitation provision in the preparatory work of the ISNT/Part II draft:

> "There is no provision in the Convention for the delimitation of contiguous zones. Such a zone cannot, by definition, be extended into the territorial sea of another state. Since the nature of control to be exercised in the contiguous zone does not create any sovereignty over the zone or its resources, *it is possible for two states to exercise control over the same area* if their zones should overlap, for the purpose of prevention of or punishment for infringement of their respective customs, fiscal, immigration or sanitary laws and regulation within their respective territories of territorial sea."[319]

This rationale applies with equal force to delimitations in which the contiguous zone rights of the coastal State are to be exercised within the EEZ of the other State. The contiguous zone does not bestow upon the coastal State any sovereign rights with respect to the resources of the EEZ; nor does it accord it any jurisdiction which could conflict with those assigned to an EEZ State in UNCLOS Article 56(b). It only accords jurisdiction with respect to inbound threats of infringement of the laws and regulations of the coastal State or to outbound

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International Law of the Sea, Hart Publishing, 2016, p. 90 (available at the Peace Palace Library).

[319] Virginia Commentary, pp. 273-274, quoting Commonwealth Group of Experts, *Ocean Management: A Regional Perspective – The Prospects for Commonwealth Maritime Co-operation in Asia and the Pacific*, Commonwealth Secretariat, 1984. (Emphasis added). See also: H. Caminos, "Contiguous Zone", *Max Planck Encyclopaedia of Public International Law,* para. 16 (available at the Peace Palace Library).

perpetrators. Thus, analogous to overlapping contiguous zones, one State's contiguous zone rights may co-exist with another State's EEZ rights.

4.38 Nicaragua refers in its Reply to the United States Proclamation of its contiguous zone in 1999.[320] However, it neglects to mention that in the Proclamation, the United States recognised that the only maritime area where contiguous zone rights may not overlap with rights of other States is the territorial sea. That is why the Proclamation states that the United States contiguous zone cannot extend "within the territorial sea of another nation".[321] In addition, it underlined that it in no way affected the United States' EEZ rights and obligations. This reaffirms the position that exercising contiguous zone rights in no way restricts the sovereign rights of States in other areas, such as the EEZ.

4.39 In the case of delimitations which only accord a coastal State a territorial sea – a scenario in which Colombia finds itself as a result of the 2012 Judgment – the inability to extend the contiguous zone into the EEZ of the opposing State would be devastating to the coastal State's ability to protect its vital interests. The coastal State would thus not be able to prevent infringements of its vital interests in its territorial sea or territorial domain from materializing, and its ability to punish

320 NR, para. 3.35.

321 W.J. Clinton, *Proclamation 7219 – Contiguous Zone of the United States*, 1999, available at: http://www.presidency.ucsb.edu/ws/?pid=56452 (last visited: 1 November 2018).

and deter further offenses would also be compromised. The danger to the coastal State would be further exacerbated, since the neighbouring EEZ State would itself not have the jurisdiction to prevent such threats from materializing or to punish offenders that escaped the coastal State's territorial sea. In fact, such a proposition would create the absurd situation in which customary rights, indispensable to the coastal State, would be rendered unenforceable.

4.40 Therefore, Colombia submits that, under customary international law, a coastal State has the right to extend its contiguous zone rights up to 24 nautical miles from the coast. A coastal State has the right to safeguard, at the very least, its vital protective customs, fiscal, immigration, sanitary, environmental, security or cultural heritage laws and regulations regardless of any resource-based rights of other States in the same area. A contrary proposition would deprive the coastal State of the ability to prevent the infringement of its vital protective laws and regulations, as neither it nor its neighbour would be empowered to act.

4.41 Nicaragua, in its Reply, makes several demonstrably fallacious arguments on this issue.

4.42 *First*, Nicaragua claims that the Sketch-map of the contiguous zone presented by Colombia illustrates that Colombia accepts that the maritime boundaries in the north with

Honduras and Jamaica confine its contiguous zone.[322] It is quite puzzling that Nicaragua, after criticizing the same Sketch-map based on the Decree, now purports to take it out of context. The Sketch-map only illustrates the contiguous zone where it is relevant to the case and any depiction of it within Colombia's EEZ serves only to illustrate its simplification. According to the Decree, the integral contiguous zone is not confined by the division of sovereign rights to resources and other jurisdictions with Honduras and Jamaica.

4.43 *Second*, Nicaragua claims that the delimitation of the EEZ and continental shelf between Colombia and Nicaragua in the 2012 Judgment entailed the delimitation of the contiguous zones between the States. Colombia does not consider Nicaragua's argument to have any merit. Nicaragua's argument is not based on what the Court decided in the 2012 Judgment, but rather on the fact that maps presented in that case at some point depicted contiguous zones.[323] Nicaragua never requested a delimitation that included the contiguous zone; it was outside the object of the dispute. Nicaragua's claim directly contradicts the Court's own understanding of what is *res judicata* in its 2012 Judgment.

4.44 Nevertheless, the contiguous zone is not a maritime area subject to be delimited, and even if it was, as Colombia explained above, there was no overlapping of the contiguous

322 NR, para. 3.24.
323 NR, paras. 3.21-3.23.

zones of the parties to that case and therefore there was no need to delimit them – and the Court obviously did not do that. In any case, even if there had been such an overlap, both the Proelss Commentary, on which Nicaragua heavily relies, and the Virginia Commentary, accept that two contiguous zones may overlap without giving rise to any need for a delimitation.

4.45 *Third*, Nicaragua submits that the contiguous zone rights of Colombia are not included within UNCLOS Article 58,[324] which is part of general international law. The reference in Article 58(1) to Article 87 of UNCLOS (i.e. freedom of the high seas), and the recognition that, except for the listed examples therein, all States have the right to conduct "other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft", and the requirement that such uses are "compatible with the other provisions of this Convention", entail a reference to the "*inter alia*" component of Article 87. Thus, under both customary international law and Article 58, all States retain in the EEZ, the traditional high seas freedoms except those assigned to the EEZ State under Article 56 or its customary equivalent. Since contiguous zone rights are traditional high seas rights of the coastal State exercisable in the area adjacent to its territorial sea (and fully compatible with other provisions of the Convention), and such rights were not assigned as part of the EEZ regime to

[324] NR, para. 3.21.

the EEZ coastal State, they constitute a lawful exercise of rights of other States within the EEZ of another State.

4.46 For the above reasons, Colombia submits that the Court should reject Nicaragua's objection to the brief overlap of Colombia's contiguous zone into Nicaragua's EEZ. The delimitation performed by the Court in the 2012 Judgment has left the western flank of Colombia's Archipelago with only a territorial sea and two of the islands conforming that Archipelago were granted only a territorial sea.[325] Hence, as a direct consequence of the Court's 2012 Judgment, part of Colombia's contiguous zone perforce lies in waters of Nicaragua's EEZ. In its EEZ, Nicaragua does not possess the right to safeguard Colombia's territory and territorial sea from potential infringement of Colombia's vital interests addressed by its customs, fiscal, immigration or sanitary laws and regulations. Moreover, Nicaragua also lacks the right to detain and punish perpetrators who infringed such vital Colombian interests and have managed to flee seaward from Colombia's territorial sea. Hence, besides the fact that a contiguous zone may lawfully co-exist within the EEZ of another State, if Colombia was precluded from exercising its powers therein the Colombian islands would be exposed to violations of its customs, fiscal, immigration or sanitary laws and regulations, and Colombia

[325] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012*, p. 710, para. 235 and p. 714, Sketch-map No. 11.

could not do anything to prevent such threats from materializing. Nor could Nicaragua, for that matter.

D. The Powers Set Out in the Decree Are in Conformity with International Law

4.47 In its Reply, Nicaragua grossly distorts Colombia's position concerning the contiguous zone. Colombia does not claim "that it could potentially extend its contiguous zone over the whole Caribbean Sea (or even further)".[326] And Colombia does not argue that customary international law does not "prescribe[] geographical and material limits to the contiguous zone".[327] What Colombia claims is that no rule of customary international law was violated by the issuance of Decree No. 1946 (as amended).

4.48 *First*, the present section will show that Article 33 of UNCLOS does not reflect present-day customary international law on the contiguous zone. Nicaragua has failed to show otherwise.

4.49 *Second*, the section will show that under existing customary international law, a coastal State is permitted to establish zones contiguous to its territorial sea, of varying breadth and for a range of purposes, going in some respects beyond those expressly envisaged in Article 33 of UNCLOS.

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326 NR, para. 3.7.

327 NR, para. 3.8.

4.50 *Third*, and in the alternative, even if the Court were to hold that Article 33 of UNCLOS reflects, in whole or in part, rules of customary international law, this treaty provision has been interpreted and applied broadly enough to encompass both the spatial and the substantive content of Article 5 of Decree No. 1946 (as amended).

4.51 *Fourth*, even if the powers set forth in Article 5 of Decree No. 1946 (as amended) were being applied in a manner going beyond what the rules of customary international law on the contiguous zone would permit, that would not in itself mean that such application violated Nicaragua's EEZ rights. Whether that was the case would depend upon the specific powers in question and the circumstances of their application. Colombia will show that based on customary international law all States enjoy extensive freedom of navigation and overflight rights, as well as other internationally lawful uses of the sea within a coastal State's EEZ. The exercise of such rights, even if deemed additional to those that may be exercised in the contiguous zone, *quod non*, is lawful under international law even if, for the purposes of domestic law, they are described as being exercisable as part of a contiguous zone. The question is not whether Colombia's contiguous zone is excessive spatially or in terms of powers, *quod non*, but rather if it has somehow violated the Nicaragua's EEZ rights.

(1) ARTICLE 33 DOES NOT REFLECT CUSTOMARY INTERNATIONAL LAW

4.52 Any assessment of whether the contiguous zone of the Colombian island territories in the Southwestern Caribbean Sea complies with customary international law must begin by examining whether Colombia's claimed jurisdiction complies with the customary international law concerning the contiguous zone. As elaborated in the Counter-Memorial, under customary international law the interests for the protection of which the coastal State may exercise control in the contiguous zone are not limited to those set out in Article 24 of the 1958 Convention and Article 33 of UNCLOS, but rather have evolved with the threats posed to the coastal State, and include, *inter alia*, the coastal State's security and environmental concerns.[328]

4.53 The customary international law right of the coastal State to establish a contiguous zone to protect its vital interests dates back to the 18th century and was recognised in the 1958 Convention.[329] Article 24 of the Convention provides:

> "1. In a zone of the high seas contiguous to its territorial sea, the coastal State may exercise the control necessary to:

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328 CCM, paras. 5.39-5.55.

329 A. V. Lowe, "The Development of the Concept of the Contiguous Zone", *British Yearbook of International Law*, Vol. 52, 1982 (available at the Peace Palace Library).

(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.

2. The contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured.

3. Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its contiguous zone beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of the two States is measured."

UNCLOS Article 33, adopted after only limited discussion by UNCLOS III, provides:

"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."

Article 33 UNCLOS is almost identical to Article 24 of the 1958 Convention, except for the deliberate omission of the latter's paragraph 3 (delimitation).

4.54 In its Reply, referring to the Draft Articles on the Law of the Sea adopted by the International Law Commission (ILC) in 1956, Nicaragua states that: "The matters listed in this draft article reflect State practice contemporary with its adoption".[330] And it adds,

> "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".[331]

4.55 This tries to shift the burden of proof. It is Nicaragua that asserts that Colombia's Decree has violated the customary international law on the contiguous zone and the burden is, therefore, on Nicaragua to show that. If Nicaragua's claim is based on the customary status of Article 33, then it is for Nicaragua to establish such status, based on State practice and *opinio juris*. Not only has Nicaragua failed to do so, its own arguments and references undermine its contentions.

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330 NR, para. 3.30.

331 NR, para. 3.40.

4.56 First, discussions over the various texts negotiated on the contiguous zone show that there were fundamental disagreements as to the texts adopted. At the time of the negotiation of the 1958 Convention and later during UNCLOS III, "customs, fiscal, immigration or sanitary laws and regulations" were considered sufficient, by some, to protect the vital interests of the coastal State. But this was far from a unanimous view. Indeed, during UNCLOS I, Poland proposed an amendment that would add "security" to the list of specified rights in Article 24. While Poland's proposal was adopted by the responsible Committee and gained the support of the majority of the participating States, it did not achieve the necessary two-thirds majority in the Plenary and so was ultimately not adopted.[332]

4.57 Nicaragua itself admits that the final text of Article 24 of the 1958 Convention was a result of compromise. Indeed, the record shows that there was no general agreement among States as to the rights of the State in the contiguous zone. Nicaragua further admits that no real agreement or exchange of views was reached during the UNCLOS negotiations.[333]

4.58 Professor Vaughan Lowe, who has acted as Counsel for Nicaragua, surveys the development of the concept of the contiguous zone, noting that when the 1958 Convention was

[332] H. Caminos, "Contiguous Zone", *Max Planck Encyclopaedia of Public International Law*, para. 17 (available at the Peace Palace Library).
[333] NR, para. 3.33.

concluded, writers such as Fitzmaurice and Lauterpacht still questioned the existence of the concept itself under international law.[334]

4.59 He notes that there was "no uniform practice establishing the agreement of parties to the 1958 Convention upon the interpretation of the contiguous zone article"[335] and that "practice is divergent, and its analysis is complicated by the emergence of claims to pollution, defence and economic zones going beyond the scope of the 1958 contiguous zone article."[336]

4.60 Lowe notes further that Article 24 was "incorporated verbatim, and without significant discussion" by UNCLOS III.[337] He concludes that,

> "*lack of agreement upon its meaning* has not affected its durability. Whatever the shortcomings it might have as a treaty provision, the 1958 formula succeeded in bringing together *a number of different approaches to maritime jurisdiction*."[338]

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334 A. V. Lowe, "The Development of the Concept of the Contiguous Zone", *British Yearbook of International Law*, Vol. 52, 1982, pp. 158-159 (available at the Peace Palace Library).

335 A. V. Lowe, "The Development of the Concept of the Contiguous Zone", *British Yearbook of International Law*, Vol. 52, 1982, p. 168 (available at the Peace Palace Library).

336 A. V. Lowe, "The Development of the Concept of the Contiguous Zone", *British Yearbook of International Law*, Vol. 52, 1982, p. 168 (available at the Peace Palace Library).

337 A. V. Lowe, "The Development of the Concept of the Contiguous Zone", *British Yearbook of International Law*, Vol. 52, 1982, p. 168 (available at the Peace Palace Library).

338 A. V. Lowe, "The Development of the Concept of the Contiguous Zone", *British Yearbook of International Law*, Vol. 52, 1982, p. 168 (available at the Peace Palace Library). (Emphasis added).

4.61 Thus, Article 33 of UNCLOS was concluded as a compromise text when no agreement on the scope of the powers to be exercised in the contiguous zone existed. As is usual in such situations, its terms are broad and allow for various interpretations and continuing disagreement between UNCLOS parties. Therefore, those terms did not and do not adequately reflect the status of customary international law on the contiguous zone.

(2) THE CUSTOMARY INTERNATIONAL LAW ON THE CONTIGUOUS ZONE

4.62 Colombia explained in its Counter-Memorial that, under customary international law, based upon State practice and acceptance as law,[339] in an area contiguous to its territorial sea, the coastal State may exercise the control necessary to protect and safeguard its essential interests, including but not limited to those relating to customs, fiscal, immigration or sanitary laws and regulations enacted to protect its interests in its territory and territorial sea. This right enables the coastal State to safeguard its essential interests in such fields as security or drug trafficking, while limiting potential interference with the maritime rights of other States.[340] The rights of the coastal State within the contiguous zone do not extend to the resources of the sea-bed or the water column; nor do they extend to marine

339 CCM, Chapter 5.

340 H. Caminos, "Contiguous Zone", *Max Planck Encyclopaedia of Public International Law*, para. 16 (available at the Peace Palace Library).

scientific research or offshore installations of the contiguous zone.

4.63 This is also what the negotiations over the texts which became both Article 24 of the 1958 Convention and later UNCLOS Article 33 reveal. The broad language aimed at bridging the various views on the contiguous zone was intended to prevent misuse by the coastal State in ways that might undermine the rights and freedoms of other States, in particular their freedom of navigation and other internationally lawful uses of the sea, while still affording the coastal State the control necessary to protect its essential interests. These dual policies must be kept in mind in identifying the extent of contiguous zone rights under customary international law.

4.64 Nicaragua attempts to dismiss the State practice presented by Colombia in its Counter-Memorial by stating that:

> "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"[341]

But it is wholly inconsistent for Nicaragua to claim that Article 33 represents customary international law while at the same time

[341] NR, para. 3.39.

asserting that the practice of States presented by Colombia "does not reflect a general practice".

4.65 The Court will encounter here a fundamental flaw recurring throughout Nicaragua's argumentation. Rather than meeting its burden of proof to establish that its rights have been violated by a Decree that is allegedly not in accordance with international law, it attempts to shift that onus to Colombia, as if it were the latter that is supposed to show that it has not violated any of Nicaragua's rights in the EEZ.

4.66 As to State practice itself, Colombia stands by the State practice put forward in its Counter-Memorial demonstrating the general practice and the content and scope of the contiguous zone, in the contemporary world.[342] Following both the 1958 Convention and UNCLOS, States have engaged in a widespread practice of adopting and enforcing legislation that expands the limitations in Articles 24 and 33. States' domestic laws and powers within the contiguous zone have come to encompass varied and legitimate concerns, ranging from security and defence to environmental protection and maritime conservation, and to cultural heritage protection.

4.67 Nicaragua's attempt to set aside this widespread practice fails for several reasons.

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342 CCM, paras. 5.39-5.55 and Appendix B.

4.68 *First*, Nicaragua seeks to dismiss some of this practice with obscure and unconvincing reasoning. For example:

- That the Court should dismiss the "legislation of Gambia [since it] is old and unclear as it refers to 'any law or right of The Gambia'."[343] i.e. since it is expansive in its application of contiguous zone rights, it should be ignored.

- That the expansive laws of Israel and Cameroon should be ignored since they have yet to declare a contiguous zone, ignoring the substance of the laws.[344]

- That Vietnam only addresses security matters relating to third States' military vessels,[345] when in fact the "Government of the Socialist Republic of Vietnam exercises the control in its contiguous zone necessary *to see to its security* and custom and fiscal interest".[346]

- It dismisses other States' practice with the blanket statement that the practice of certain States is irrelevant because it does not mention "security". However, it is the content of the law, not the specific term used that reflects

343 NR, para. 3.38 and footnote 153.
344 NR, para. 3.38 and footnote 153.
345 NR, para. 3.38 and footnote 153.
346 Vietnam, Statement on the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone and the Continental Shelf, 1997, available at: https://www.state.gov/documents/organization/58573.pdf (last visited: 1 November 2018). (Emphasis added).

the relevant State practice. For example, Romanian law, while not referring to security, explicitly refers to control in its contiguous zone to prevent "infractions relating to the crossing of the State frontier", clearly a security consideration.[347]

4.69 Nicaragua also attempts to dismiss legislation enacted before UNCLOS as somehow irrelevant.[348] However, when current legislation was enacted is irrelevant; it represents current State practice and evidence of *opinio juris*. Moreover, if considerable legislation pre-dating UNCLOS goes beyond the scope of the latter yet is still in force, it cannot be said that UNCLOS Article 33 reflects customary international law.

4.70 Most critically, Nicaragua is mistaken since the key terms of UNCLOS Article 33 have remained unchanged from the 1958 Convention. Hence, even if the Court were to decide to adopt a cut-off date for relevant legislation and other practice, it should be the adoption of the 1958 Convention and not that of UNCLOS.

4.71 Nicaragua tries to dismiss the State practice presented as insufficient in quantity to establish the predominant State

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[347] Romania, Act Concerning the Legal Regime of the Internal Waters, the Territorial Sea and the Contiguous Zone, 1990, Article 7, available at: http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/ROM_1990_Act.pdf (last visited: 1 November 2018).

[348] NR, para. 3.38.

practice.[349] However, the practice put forth by Colombia represents the legislation of almost half of the States that have declared a contiguous zone.[350] That is more than sufficient to establish the predominance of practice.

4.72 Additionally, Nicaragua claims that the legislation of the States concerned differs, some claiming rights over security, others over environmental protection and so on.[351] However, Nicaragua misses the point. As explained above, the customary international law on the contiguous zone enables States to protect their interests in their territory and territorial sea with due regard for the rights of other States, such as freedom of navigation rights or EEZ rights. All of the laws and regulations concerned protect their interests in the territory and territorial sea in matters such as security, pollution, cultural heritage and so on. Thus, the State practice identified by Colombia demonstrates a common understanding of the scope and content of customary international law, as a tool to protect the State's essential interests in its territory and territorial sea.

(3) THE CORRECT INTERPRETATION OF ARTICLE 33

4.73 Under Article 33 of UNCLOS the coastal State has the right to exercise up to 24 nautical miles from its coast the control necessary to prevent and punish the infringement of its

349 NR, paras. 3.38-3.39.
350 CCM, Appendix B.
351 NR, para. 3.38.

customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea.

4.74 Accordingly, even if UNCLOS Article 33 were deemed to enumerate exhaustively the customary international law rights within its contiguous zone, Colombia has the right to exercise the control necessary to prevent any actions or events that may infringe its vital interests within its territory or territorial sea as reflected in "its customs, fiscal, immigration or sanitary laws and regulations". In other words, Colombia has the right to prevent any actions taken by ships within its contiguous zone that may infringe these vital interests of Colombia, including any ships inbound into Colombia's territorial sea, which are suspected of intending to infringe Colombia's customs, fiscal, immigration or sanitary laws and regulations. Moreover, Colombia has the authority under international law to send naval vessels to pursue and apprehend any violators of such interests that fled Colombia's territorial sea and are present in its contiguous zone.

4.75 Treaty terms, including the extent of the terms "customs", "fiscal", "immigration" and "sanitary", are to be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[352]

[352] Vienna Convention on the Law of Treaties, Article 31.

4.76 UNCLOS was conceived as an especially long-term treaty, intended by its drafters to put in place a legal order of the seas and oceans.[353] As a "treaty of continuing duration", drafted to endure through improvements in scientific understanding and technological developments, UNCLOS and its terms must be interpreted in an evolutionary manner. In the *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua)* case, the Court held that:

> "[W]here the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is 'of continuing duration', the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning."[354]

4.77 This holding applies to the interpretation of the generic terms "customs", "fiscal", "immigration" and "sanitary" in UNCLOS, which date back over 60 years, at least to the Draft Articles on the Law of the Sea adopted in 1956 by the ILC. The meaning of these terms changes with time and its reference tracks through time both social developments and scientific understanding; for example, the understanding of health and the factors which adversely affect it, has evolved significantly since the 1950s. There is no evidence that the participants in UNCLOS III intended the scope of terms such as these to be

353 UNCLOS, Preamble.

354 *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213, para. 66.

frozen in their 1950s understanding. On the contrary, with the recognised objective of protecting the vital interests of the coastal State, the drafters surely intended such terms to be interpreted in an evolutionary manner to assure continuous *effet utile*.

4.78 As explained above, during the drafting of UNCLOS, these generic terms were deemed to cover a coastal State's vital interests in its territory and territorial sea. The purpose of Article 33 was to endow the coastal State with sufficient control to prevent inbound threats to its territory or territorial sea from materialising and to accord adequate control to punish those who violated them, all without compromising the correlative rights of other States. Such a purpose, by its very nature, requires an evolutionary interpretation to the threats of the present, lest the threats to the coastal State evolve with time while the jurisdiction to deal with them does not. The generality of the terms selected enables a coastal State to adapt its control to the evolving threats to its vital interests.

4.79 In its 1956 report to the General Assembly, the ILC explained that:

> "The 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."[355]

4.80 Two reasons were put forth by the ILC for the omission of an express reference to "security": (1) "security" was considered too wide a term, that could enable the coastal State to extend its jurisdiction and undermine the freedom of navigation; and (2) "customs, fiscal, immigration or sanitary laws and regulations" were considered to be sufficient to cover the security interests of the coastal State.[356]

4.81 Interpretation of a treaty term, including whether the term should be interpreted extensively or restrictively, must be performed in light of the other provisions of the treaty. In this regard, UNCLOS Article 303 is especially enlightening in that it applies a broad and flexible interpretation to the terms in

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355 International Law Commission, "Commentary to the articles concerning the law of the sea", *Report of the International Law Commission on the Work of its Eighth Session*, A/CN.4/104, Commentary to Article 66, p. 295, para. 4, available at: http://legal.un.org/ilc/documentation/english/reports/a_cn4_104.pdf (last visited: 1 November 2018).

356 International Law Commission, "Commentary to the articles concerning the law of the sea", *Report of the International Law Commission on the Work of its Eighth Session,* A/CN.4/104, Commentary to Article 66, p. 295, para. 4, available at: http://legal.un.org/ilc/documentation/english/reports/a_cn4_104.pdf (last visited: 1 November 2018); See H. Caminos, "Contiguous Zone", *Max Planck Encyclopaedia of Public International Law*, para. 16, (available at the Peace Palace Library); J. Symonides, *The New Law of the Sea*, Polish Institute of International Affairs, 1988, p. 205 (available at the Peace Palace Library).

UNCLOS Article 33. Article 303, entitled "Archaeological and historical objects found at sea" provides that:

> "(1) States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose.
>
> (2) In order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the seabed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article."

4.82 UNCLOS Article 303 not only generalises and unifies the terms "customs", "fiscal", "immigration" and "sanitary", but recognises a contiguous zone right which is, *stricto sensu*, far removed from a narrow reading of these generic terms. It interprets the potential removal of "objects of an archaeological and historical nature" to constitute an infringement of the coastal State's "customs", "fiscal", "immigration" and "sanitary" laws and regulations. Not only is this a broad interpretation of the terms in Article 33, but the objective is expanded beyond protecting the vital laws and regulations of the coastal State, to controlling traffic in archaeological and historical objects. UNCLOS Article 303 confirms that "customs", "fiscal", "immigration" and "sanitary" are generic terms providing for the protection of the vital interests of the coastal State, and that such generic terms are to be interpreted accordingly.

4.83 The proposition that the terms of UNCLOS Article 33 should be interpreted in an evolutionary manner has been supported by legal scholarship. The President of UNCLOS III, Ambassador Tommy Koh, deemed the liberal or broad interpretation of the text of UNCLOS Article 33 to represent the majority view of scholars.[357] An evolutionary interpretation of the terms in UNCLOS Article 33 was recently supported in the Proelss Commentary, which warned that

> "[a]n all too narrow interpretation of the purposes enumerated in Art. 33 should therefore not stand in the way of effectively combating new and serious threats, for example those originating in vessel-source pollution."[358]

4.84 In its Reply, Nicaragua has again labelled Colombia's protective control measures in its integral contiguous zone as contrary to the provisions of UNCLOS Article 33, which Nicaragua construes as limiting the authority of the coastal State under customary international law. The latter contention has been rebutted by Colombia in the Counter-Memorial and in this Rejoinder. Colombia will now demonstrate that the former claim

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[357] T. Koh, "The Territorial Sea, Contiguous Zone, Straits and Archipelagos under the 1982 Convention on the Law of the Sea", *Malaya Law Review*, Vol. 29, 1987, pp. 163, 174-175 (available at the Peace Palace Library). Ambassador Koh was referring to the interpretation of the term "territory or territorial sea" with respect to the question whether the coastal State may exercise the same powers with respect to inbound or outbound ships, i.e., whether it may arrest and punish inbound ships. According to Ambassador Koh, the liberal interpretation equating the powers of the coastal State in the contiguous zone and the territorial sea is the majority view. See also: J. Symonides, *The New Law of the Sea*, Polish Institute of International Affairs, 1988, pp. 205-206 (available at the Peace Palace Library).

[358] Proelss Commentary, p. 267.

by Nicaragua misrepresents Colombia's contiguous zone. The contiguous zone is in full compliance with customary international law, even if the law were deemed to be limited to a strict reading of the generic terms of UNCLOS Article 33.

4.85 The powers that Colombia may exercise, theoretically, in the contiguous zone are set forth in Article 5(3) of Decree No. 1946 (as amended):

> "3. In developing what has been provided for in the previous numeral, with the purpose of protecting the sovereignty in its territory and territorial sea, in the Integral contiguous zone established in this Article 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."[359]

[359] CCM, Annex 7. (Emphasis added).

4.86 A careful reading of Article 5(3) shows that Nicaragua's contention that it exceeds the recognised rights of the coastal State in the contiguous zone is meretricious. Decree No. 1946 (as amended) proclaims that Colombia has the right to exercise the control necessary to prevent actions and events that transpire in the contiguous zone, which may adversely affect its vital interests and preventive laws and regulations. The operative part of Article 5(3) extends to the prevention and control of infractions of the laws and regulations with respect to: the security of the State including from piracy and drug trafficking; conduct contrary to security at sea; the national maritime interests; customs, fiscal, migration and sanitary matters; the preservation of the marine environment; and cultural heritage. Under customary international law, all of these competences constitute lawful exercises of control by the coastal State in the contiguous zone, in order to protect vital national interests.[360] Moreover, *none* of these competences displaces or conflicts with Nicaragua's EEZ rights. Thus, even if the whole of customary international law applicable to the contiguous zone were deemed by the Court to be confined to Article 33, *quod non*, Colombia's exercise of control in its contiguous zone would still be in compliance with international law.

4.87 There is no doubt that the exercise of control with respect to "the national maritime interests, the customs, fiscal, migration and sanitary matters" are lawful exercises of control

[360] CCM, Chapter 5.

by a coastal State in its contiguous zone. Article 5(3) of the Decree is not, however, confined to such generic terms; for the avoidance of doubt, Article 5(3) specifies, in greater detail, several key issues that affect the preventive customs, fiscal, migration and sanitary laws and regulations of Colombia.

4.88 Decree No. 1946 (as amended) provides that Colombia will exercise control to prevent infringement "of the laws and regulations related to the integral security of the State, including piracy and trafficking of drugs and psychotropic substances". Clearly, the exercise of control necessary to prevent and punish piracy and drug trafficking fits neatly in the conventional boundaries of UNCLOS Article 33. Both piracy and drug trafficking contravene the laws and regulations of the coastal State in relation to customs, fiscal and sanitary matters. A coastal State, aware that pirates attack ships inbound and outbound from its territorial sea or that drug trafficking vessels are inbound into its territorial sea or have escaped its territorial sea *en route* to their illicit markets, cannot be left powerless to stop them. A coastal State is clearly allowed to take preventive and corrective measures in its contiguous zone against pirates and drug traffickers, for both affect its vital interests in its territory or territorial sea.[361]

[361] For example, the United States provides that in its contiguous zone, its Coast Guard may "board and search a foreign vessel suspected of smuggling drugs, carrying illegal immigrants, polluting the ocean, or tampering with sunken ships or other underwater artifacts (…)" See: Office of the Vice President of the United States, *Vice President Al Gore Announces New Action to Help Protect and Preserve U.S. Shores and Oceans*, 1999, available at:

4.89 With respect to other "laws and regulations related to the integral security of the State" and "conduct contrary to the security in the sea", Colombia submits that security has been recognised as part of the customary interpretation of UNCLOS Article 33. As detailed in the Counter-Memorial, the protection of security interests of the coastal State has been adopted by many States as part of their contiguous zone regimes.[362] In 1984, two years after the adoption of UNCLOS and when the 1958 Convention had long been in force, a Commonwealth Group of Experts explained that the coastal State's rights in the contiguous zone include safety laws and regulations: "[i]n a zone contiguous to the territorial sea, the coastal state may exercise the control necessary to prevent infringement of its customs, fiscal, immigration, health and *safety* laws and regulation".[363] In any case, as demonstrated by the examples provided in Article 5(3) of the Decree, i.e. piracy and drug trafficking, the clear intention of the Colombian law is to exercise the necessary control only over events which may adversely affect its laws and regulations in its territory and territorial sea; such actions would fall under the "customs",

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https://clintonwhitehouse5.archives.gov/textonly/WH/EOP/OSTP/html/999_8.html (last visited: 1 November 2018). It may be recalled that, in contrast to some States in the Southwestern Caribbean Sea, Colombia has invested heavily in its capacity to prevent piracy and drug trafficking in the region. See CCM, paras. 2.98-2.109.

362 CCM, para. 5.48 and Appendix B.

363 Commonwealth Group of Experts, *Ocean management: a regional perspective: the prospects for Commonwealth Maritime Co-operation in Asia and the Pacific*, Commonwealth Secretariat, 1984, pp. 33-34 (available at the Peace Palace Library). Emphasis added.

"fiscal", "immigration" and "sanitary" generic categories, insofar as they are embodied in customary international law. If, however, modern security threats are deemed to extend beyond the confines of "customs", "fiscal", "immigration" and "sanitary", a contemporary and evolving interpretation of UNCLOS Article 33 should find such security interests included.

4.90 The prevention and punishment of infringement of its laws and regulations concerning the preservation of cultural heritage is explicitly included in UNCLOS Article 303. Nicaragua submits that Colombia has failed to show that UNCLOS Article 303(2) reflects customary international law.[364] Again, as throughout its Reply, Nicaragua attempts to shift the burden of proof to Colombia. As a party to UNCLOS, Nicaragua has accepted, by ratification, the interpretation of UNCLOS Article 33 as put forth in UNCLOS Article 303(2). If Nicaragua claims that UNCLOS Article 33 reflects customary international law, it must prove it; similarly, if it claims that while UNCLOS Article 33 reflects customary international law, the interpretation in UNCLOS Article 303(2) does not, it must prove it. Nicaragua has failed to do both. Colombia considers it to be irrelevant whether Article 303(2) reflects customary international law since, by ratifying UNCLOS, Nicaragua has accepted the authentic interpretation of the generic terms in Article 33 found in Article 303(2).

[364] NR, para. 3.51.

4.91 While some controversy exists over as to the scope of the contiguous zone State's right to exercise the necessary degree of control to prevent threats to its "sanitary" laws and regulations,[365] a cogent interpretation, whether originalist or evolving, should accord the coastal State the right to exercise control in its contiguous zone over an environmental threat which threatens to adversely affect its territory or territorial sea. For example, if the coastal State is aware of actions which threaten to pollute and destroy the biosphere within its territory or its territorial sea, threatening both the health of the population and its food security, it would be unthinkable for international law to render the coastal State powerless to stop such actions from materialising.

4.92 Thus, Colombia's intention to exercise a measure of control in its contiguous zone necessary to prevent or punish violations of its laws and regulations with respect to the preservation of the environment is lawful under customary international law as well as consistent with UNCLOS Article 33.

4.93 The English word "sanitary" derives from the Latin word *sanitas*, which means "health".[366] The Oxford English

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[365] Proelss Commentary, p. 267; J. Carlson, "Presidential Proclamation 7219: Extending the United States' Contiguous Zone – Didn't Someone Say This Had Something to Do with Pollution?", *University of Miami Law Review*, Vol. 55, No. 3, 2001 (available at the Peace Palace Library).

[366] Oxford Dictionary, *Sanitary,* available at: https://en.oxforddictionaries.com/definition/sanitary (last visited: 1 November 2018).

Dictionary defines the term "sanitary" as: "Relating to the conditions that affect hygiene and health, especially the supply of sewage facilities and clean drinking water." The Merriam-Webster Dictionary similarly defines "sanitary" as "relating to health".[367] In 1984, the Commonwealth Group of Experts, used the term "health" instead of "sanitary" to explain the extent of the rights within the contiguous zone.[368] It is now widely recognised by the scientific community and the general public that environmental damage is a cause of severe health problems. Indeed, the Court has recognised "that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn."[369] It would thus be unreasonable to interpret the word "sanitary", which means "health", as not including environmental threats. As one commentator recently wrote "it is the 'sanitary' power that has the greatest potential to be applicable to environmental matters".[370]

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[367] Merriam-Webster Dictionary, *Sanitary*, available at: https://www.merriam-webster.com/dictionary/sanitary (last visited: 1 November 2018).

[368] Commonwealth Group of Experts, *Ocean management: a regional perspective: the prospects for Commonwealth Maritime Co-operation in Asia and the Pacific*, Commonwealth Secretariat, 1984, pp. 33-34 (available at the Peace Palace Library).

[369] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I. C. J. Reports 1996*, p. 226, para. 29.

[370] K. Zou, *Sustainable Development and the Law of the Sea*, Brill Nijhoff, 2017, pp. 51-52.

4.94 While some commentators have argued that "sanitary" was not intended at the Conference to include pollution,[371] several States, including the United States and Canada, have recognised that contiguous zone rights extend to environmental threats, and specifically pollution.[372] On 2 September 1999, President Clinton extended the contiguous zone of the United States to 24 nautical miles, stating in the Proclamation that the "[e]xtension of the contiguous zone of the United States to the limits permitted by international law will advance the law enforcement *and public health interests* of the United States."[373] The same day, Vice-President Gore, referring to President Clinton's Proclamation, announced that

> "[w]ithin the extended contiguous zone, the Coast Guard may now board and search a foreign vessel suspected of smuggling drugs, carrying illegal immigrants, *polluting the ocean*, or tampering with sunken ships or other underwater artifacts, without

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371 Proelss Commentary, p. 267; see also J. Carlson, "Presidential Proclamation 7219: Extending the United States' Contiguous Zone – Didn't Someone Say This Had Something to Do with Pollution?", *University of Miami Law Review*, Vol. 55, No. 3, 2001 (available at the Peace Palace Library).

372 J. Carlson, "Presidential Proclamation 7219: Extending the United States' Contiguous Zone – Didn't Someone Say This Had Something to Do with Pollution?", *University of Miami Law Review*, Vol. 55, No. 3, 2001 (available at the Peace Palace Library); N. Wulf, "Contiguous Zone for Pollution Control", *Journal of Maritime Law and Commerce*, Vol. 3, 1972, pp. 537-558 (available at the Peace Palace Library); K. Zou, *Sustainable Development and the Law of the Sea*, Brill Nijhoff, 2017, pp. 53-54 (available at the Peace Palace Library).

373 W. Clinton, *Proclamation 7219 – Contiguous Zone of the United States*, 1999, available at: http://www.presidency.ucsb.edu/ws/?pid=56452 (last visited: 1 November 2018). (Emphasis added).

> first obtaining permission from the country where the vessel is registered."[374]

4.95 Such an interpretation is cogent: in the 21st century, it is recognised that a responsibility of the State includes taking actions to protect the health of its population. It would be unthinkable that a coastal State would recognise a potential threat to the marine environment in its contiguous zone and to the health of its population but be prevented from taking action until the threat materialised in its territory or territorial sea. Such a proposition would not only defeat the purpose of the contiguous zone, it would defy common sense.

4.96 The same approach was voiced during UNCLOS III. The representative of Algeria urged the retention of the concept of the contiguous zone, since, *inter alia*, "bearing in mind the level of pollution in the Mediterranean, he felt that his country needed strong regulations to protect the marine environment adjacent to its coasts."[375]

4.97 The Rio+20 Conference concluded that "indigenous peoples and local communities are often the most directly

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374 Office of the Vice President of the United States, *Vice President Al Gore Announces New Action to Help Protect and Preserve U.S. Shores and Oceans*, 1999, available at: https://clintonwhitehouse5.archives.gov/textonly/WH/EOP/OSTP/html/999_8.html (last visited: 1 November 2018). (Emphasis added).

375 Official Records of the Third United Nations Conference on the Law of the Sea, A/CONF.62/C.2/SR.9, *Summary records of meetings of the Second Committee*, 9th meeting, Algeria, para. 12, available at: http://legal.un.org/docs/?path=../diplomaticconferences/1973_los/docs/english/vol_2/a_conf62_c2_sr9.pdf&lang=E (last visited: 1 November 2018).

dependent on biodiversity and ecosystems and thus are often the most immediately affected by their loss and degradation."[376] In this regard, the situation of the San Andrés Archipelago requires the exercise of control by Colombia over potential environmental damage in the contiguous zone. As Colombia explained in the Counter-Memorial, environmental damage and predatory fishing by Nicaraguan vessels are especially threatening to the Raizales, an indigenous people who depend for their livelihood and their well-being on the environment in this area of the Southwestern Caribbean Sea.[377]

4.98 Thus, under customary international law, Colombia may lawfully exercise control in its contiguous zone to protect the Raizal community from such harm to the ecosystem which threatens their health. Therefore, a hypothetical action which it might take in the contiguous zone, targeted at preventing environmental threats from impacting its territory or territorial sea and not infringing any of the specified EEZ rights of Nicaragua or other lawful international users, would be an internationally lawful use of the sea and the exercise of contiguous zone rights, under customary international law.

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[376] United Nations General Assembly, "The Future We Want", A/66/L.56, para. 197, available at: http://undocs.org/en/A/66/L.56 (last visited: 1 November 2018).

[377] CCM, Chapter 2, Section C.

(4) THE POWERS SET FORTH IN THE DECREE ARE NOT CONTRARY TO INTERNATIONAL LAW

4.99 Even if some of the powers set forth in Article 5 of Decree No. 1946 (as amended) were beyond those to which a coastal State is entitled to exercise under the rules of customary international law on the contiguous zone (*quod non*), that would not in itself mean that those powers could not be exercised in Nicaragua's EEZ or necessarily violated Nicaragua's EEZ rights.

4.100 Since the enactment of Decree No. 1946 (as amended) in itself cannot be considered a violation of Nicaragua's rights (see Section F below), the legal issue is not the wording of the Decree, but rather if and how Nicaragua's rights in its EEZ have been violated by Colombia's actions. This is the case whether events took place within the areas covered by the Decree (and Nicaragua has not identified a single such instance) or outside those areas; and whether Colombia considered its actions to be an exercise of its contiguous zone powers or an internationally lawful use of the sea, such as the exercise of its freedoms of navigation and overflight. The answer to this latter question, one that Nicaragua has focused on, is a *non sequitur*. In all cases, the crux of the issue is identifying whether Nicaragua's sovereign rights or maritime spaces were actually violated, not how Colombia characterised its own actions.

4.101 Considering that Nicaragua has failed to point to any violation of its EEZ rights in the Colombian integral contiguous

zone, there is no need for the Court to determine the conformity of Decree No. 1946 (as amended) with customary international law. Nevertheless, even if the Court took upon itself that task and found that the Decree were not in conformity with customary international law, that still does not answer the question of whether the rights of Nicaragua in its EEZ have been violated in any way.

4.102 Whether Nicaragua's rights were violated would depend upon the specific powers in question and their application. As Colombia explained above, all States enjoy extensive freedoms of navigation and overflight within the EEZs of other coastal States (including those related to security), as well as other internationally lawful uses of the sea. The exercise of these rights and freedoms additional to those that may be exercised in the contiguous zone may nevertheless be lawful under international law even if, for the purposes of Colombian domestic law, they are categorised and described as being exercisable in the contiguous zone. For international legal purposes, the way domestic law describes itself is not decisive; it is international law's characterisation which is determinative.[378] The exercise of such freedom of navigation would not violate Nicaragua's EEZ rights, which would not have been affected by the terms of the Decree. In other words,

[378] International Law Commission, "Commentary to the Draft Articles on Responsibility of States for Internationally Wrongful Acts", *Report of the International Law Commission on the Work of its Fifty-Third Session*, A/56/10, Commentary to Article 4, p. 42, para. 11, available at: http://legal.un.org/ilc/documentation/english/reports/a_56_10.pdf (last visited: 1 November 2018).

the question is not whether Colombia's contiguous zone legislation is excessive spatially or in terms of powers (*quod non*) but rather if Colombia has actually violated Nicaragua's EEZ rights.

4.103 As explained above, under customary international law, all States retain within the EEZ high seas rights and freedoms not specifically assigned to the EEZ coastal State. All of Colombia's powers under the Decree fit squarely into those residual freedoms. For example, even if control in the contiguous zone related to security were deemed beyond the evolutionary interpretation of Article 33, *quod non*, it would be a lawful exercise of control based on the freedoms of navigation and overflight, and other internationally lawful uses of the seas.

4.104 As Nicaragua, the EEZ coastal State, does not have jurisdiction, as part of the EEZ regime, to exercise control over events that affect Colombia's protective laws and regulations, the exercise of such powers by Colombia does not violate or otherwise interfere with Nicaragua's rights, whether such powers are viewed as within its contiguous zone rights or as an internationally lawful use of the sea.

4.105 At the end of the day, just as Nicaragua has failed to demonstrate more generally a violation of its EEZ rights by Colombia, so it has failed to demonstrate any such violation by the promulgation of the powers contained in Decree No. 1946 (as amended). Colombia thus requests the Court to reject

Nicaragua's argument concerning the extent of the rights in the Decree and to find that all the powers claimed by Colombia in the Decree are lawful exercises of control within a State's contiguous zone or otherwise an internationally lawful use of the sea exercised by Colombia within another State's EEZ.

E. The Outer Limits of Colombia's Contiguous Zone Do Not Contravene Nicaragua's Rights

4.106 This section responds to Nicaragua's contention that the outer limits of Colombia's contiguous zone do not conform with customary international law.

4.107 It is uncontested that all the islands in the San Andrés Archipelago are entitled to a territorial sea and consequently to a contiguous zone. As a result of their naturally unique geographic configuration, the contiguous zones of these islands intersect thus creating an integrated contiguous zone. As Colombia demonstrated in the Counter-Memorial and recalled earlier, the simplification of the contiguous zone through the use of geodetic lines, is essential to enable Colombia to adequately protect its rights within its territorial sea and terrestrial domain.[379] In contrast to Nicaragua's exaggeration, the area beyond 24 nautical miles, but within the contiguous zone that overlaps with Nicaragua's EEZ, is minimal, as can be seen in Figure CR 4.1 below.

[379] CCM, Chapter 5.

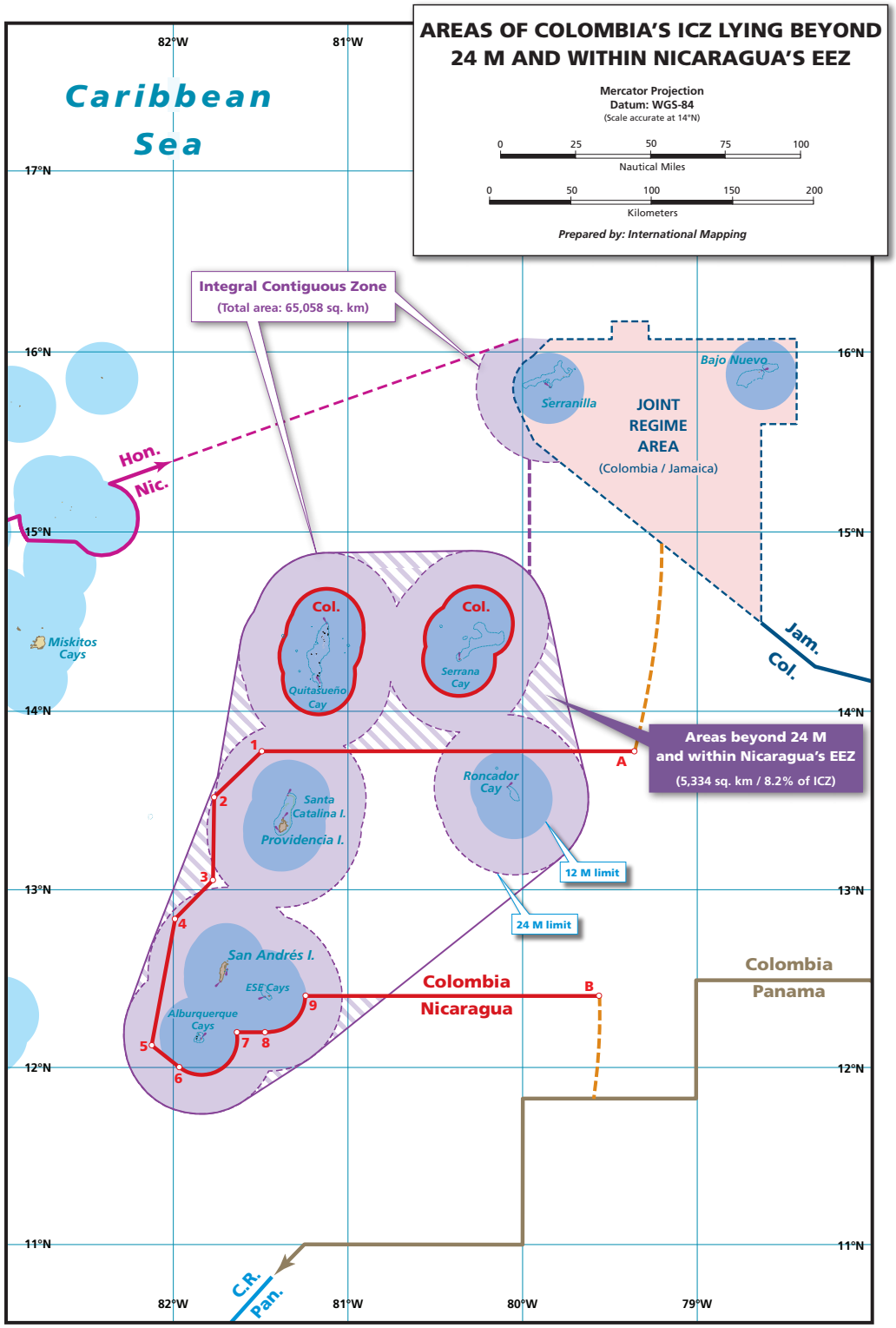

AREAS OF COLOMBIA'S ICZ LYING BEYOND 24 M AND WITHIN NICARAGUA'S EEZ
Mercator Projection
Datum: WGS-84
(Scale accurate at 14°N)
0 25 50 75 100
Nautical Miles
0 50 100 150 200
Kilometers
Prepared by: International Mapping
Caribbean Sea
Integral Contiguous Zone
(Total area: 65,058 sq. km)
JOINT REGIME AREA
(Colombia / Jamaica)
Bajo Nuevo
Serranilla
Hon.
Nic.
Jam.
Col.
Col.
Col.
Miskitos Cays
Quitasueño Cay
Serrana Cay
Roncador Cay
Santa Catalina I.
Providencia I.
San Andrés I.
ESE Cays
Alburquerque Cays
Areas beyond 24 M and within Nicaragua's EEZ
(5,334 sq. km / 8.2% of ICZ)
12 M limit
24 M limit
Colombia
Nicaragua
Colombia
Panama
C.R.
Pan.
A
B
1
2
3
4
5
6
7
8
9
82°W
81°W
80°W
79°W
17°N
16°N
15°N
14°N
13°N
12°N
11°N

Figure CR 4.1

4.108 In the process of establishing the outer limit of its contiguous zone, Colombia first drew arcs of circle of 24 nautical miles around each of its islands in the Southwestern Caribbean Sea. The result was, however, deemed to be impractical as being unmanageable by the Colombian Navy, or in fact any other naval force under similar circumstances, as is clear when one examines the contours of the contiguous zone without the geodetic lines, as shown in Figure CR 4.2 below.

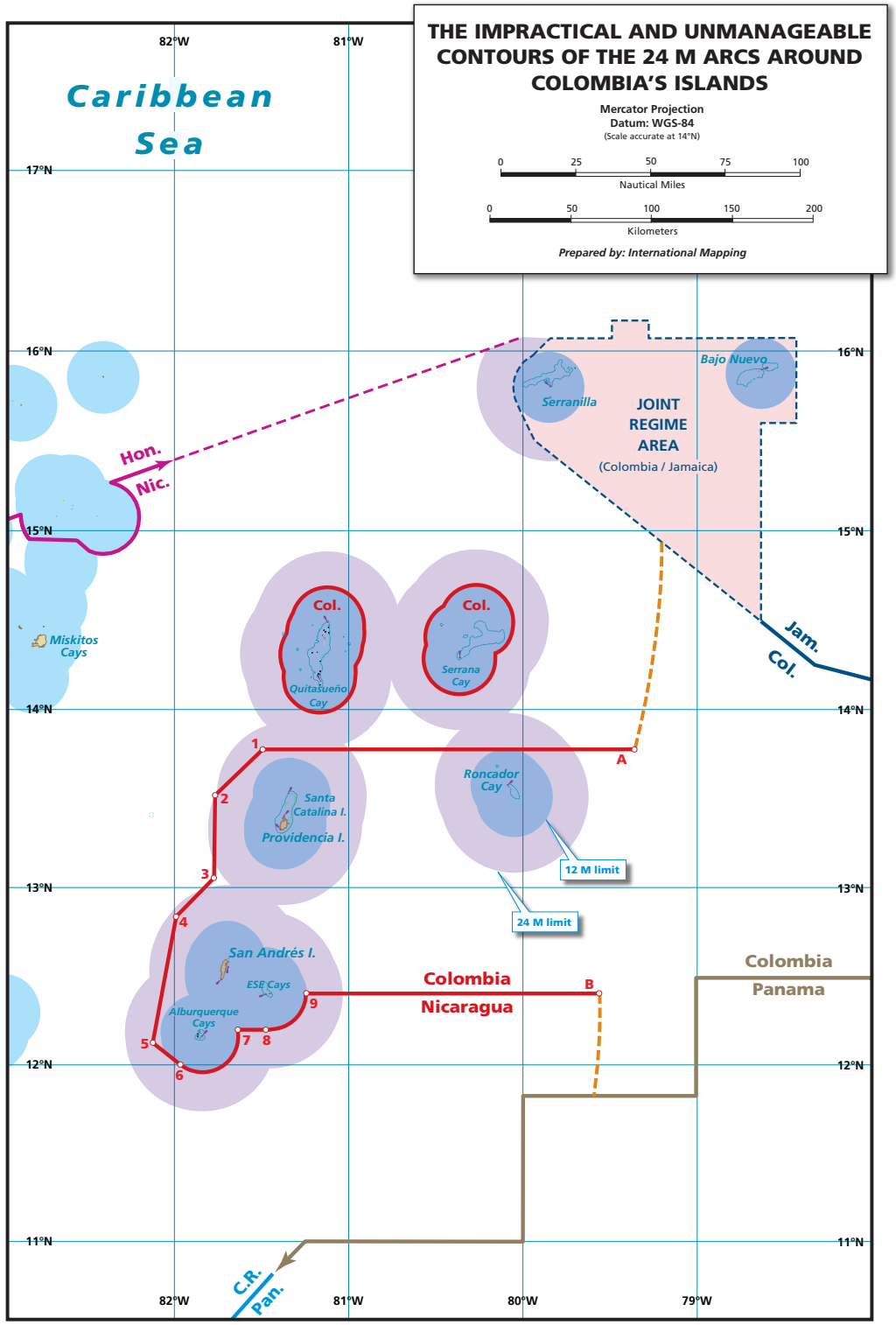
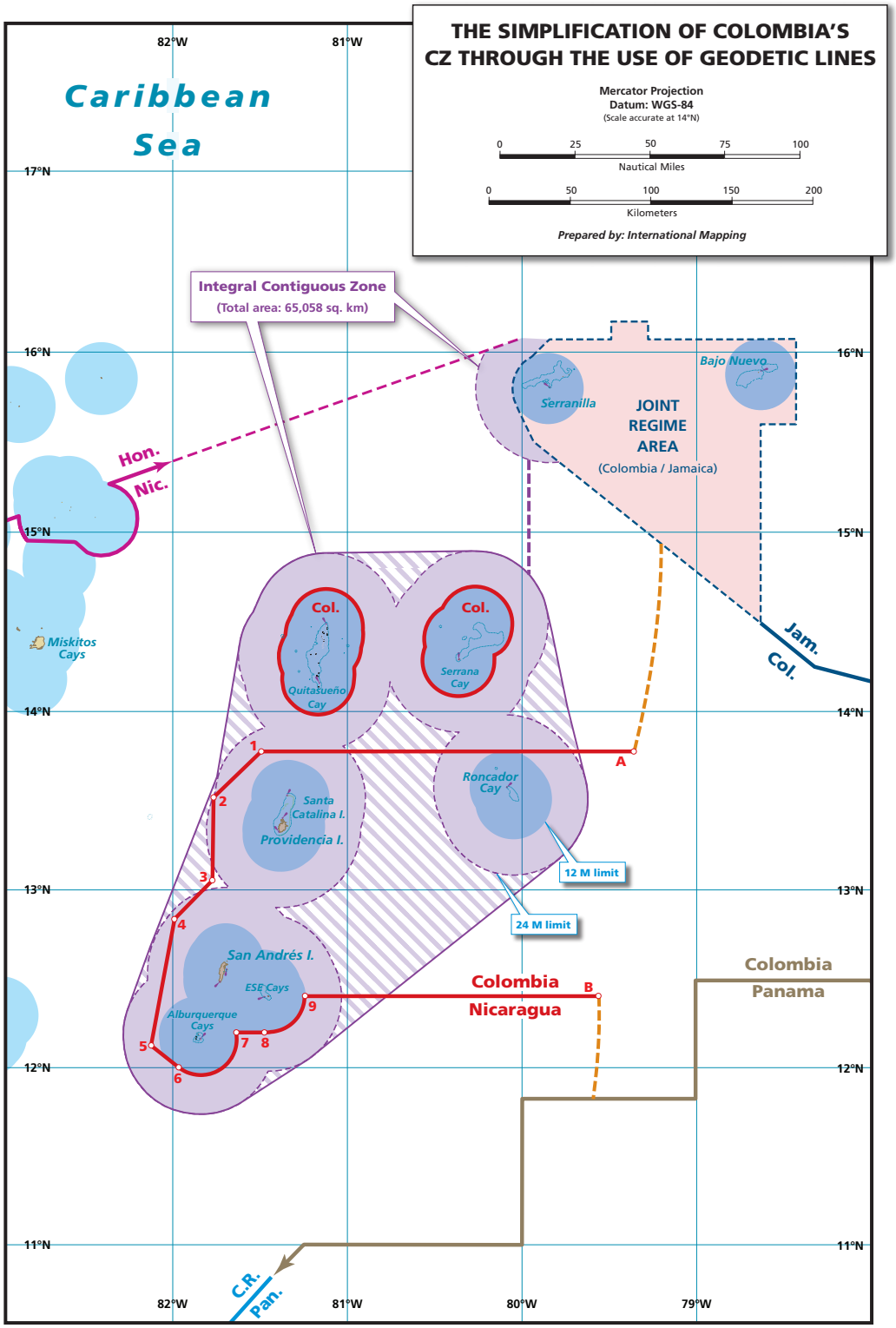

THE IMPRACTICAL AND UNMANAGEABLE CONTOURS OF THE 24 M ARCS AROUND COLOMBIA'S ISLANDS
Mercator Projection
Datum: WGS-84
(Scale accurate at 14°N)
0 25 50 75 100
Nautical Miles
0 50 100 150 200
Kilometers
Prepared by: International Mapping
Caribbean Sea
82°W
81°W
80°W
79°W
17°N
16°N
15°N
14°N
13°N
12°N
11°N
Hon.
Nic.
Miskitos Cays
Serranilla
Bajo Nuevo
JOINT REGIME AREA
(Colombia / Jamaica)
Jam.
Col.
Col.
Quitasueño Cay
Col.
Serrana Cay
Roncador Cay
Santa Catalina I.
Providencia I.
San Andrés I.
ESE Cays
Alburquerque Cays
12 M limit
24 M limit
Colombia
Nicaragua
Colombia
Panama
C.R.
Pan.
1
2
3
4
5
6
7
8
9
A
B

Figure CR 4.2

4.109 The picture says it all. Absent the simplification of the contiguous zone, a tangle of interconnected arcs, imposing significant difficulties in implementation, would be produced. Since Nicaragua has persistently failed to protect the environment and security in this part of the Southwestern Caribbean Sea, it was imperative that Colombia's contiguous zone be manageable and effective. Hence, geodetic lines were used by Colombia to connect the 24-nautical-mile arcs, thus simplifying the outer perimeter of the contiguous zone. As evident from Figure CR 4.3, the use of the geodetic lines created a contiguous zone which enables Colombia to fulfil its obligations toward the residents of the Archipelago, infringes no Nicaraguan right and is clear and understandable for other members of the international community.


THE SIMPLIFICATION OF COLOMBIA'S CZ THROUGH THE USE OF GEODETIC LINES
Mercator Projection
Datum: WGS-84
(Scale accurate at 14°N)
0 25 50 75 100
Nautical Miles
0 50 100 150 200
Kilometers
Prepared by: International Mapping
Caribbean Sea
Integral Contiguous Zone
(Total area: 65,058 sq. km)
JOINT REGIME AREA
(Colombia / Jamaica)
Serranilla
Bajo Nuevo
Hon.
Nic.
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Col.
Col.
Col.
Quitasueño Cay
Serrana Cay
Miskitos Cays
Roncador Cay
Santa Catalina I.
Providencia I.
San Andrés I.
ESE Cays
Alburquerque Cays
12 M limit
24 M limit
Colombia
Nicaragua
Colombia
Panama
C.R.
Pan.
A
B
1
2
3
4
5
6
7
8
9
17°N
16°N
15°N
14°N
13°N
12°N
11°N
82°W
81°W
80°W
79°W

Figure CR 4.3

4.110 When reasonable and not excessive, a simplified line has been adapted for maritime zones in analogous circumstances. While the establishment of a contiguous zone does not require, and is not, a delimitation,[380] it is worthwhile to briefly review the judicial practice of delimitation to ascertain whether the use of geodetic lines by Colombia is a lawful practice in determining maritime zones.

4.111 As early as 1951, in *Fisheries,* the Court confirmed that in the particular circumstances of a case, methods of setting maritime boundaries or limits may depart from the general rules.[381] In cases where the geography would otherwise have produced maritime boundaries which are unmanageable or overly complicated, the Court resorted to the use of simplified and manageable lines. For example, in the 2012 Judgment, the Court decided to use a simple and straight delimitation line instead of a complicated line which follows the contours of the coasts:

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[380] As explained by the Commonwealth Group of Experts in 1984, the delimitation provision was removed from the contiguous zone because there is no need to delimit a contiguous zone; two or more contiguous zone jurisdictions may be exercised by different States in the same area. See Commonwealth Group of Experts*, Ocean management: a regional perspective: the prospects for Commonwealth Maritime Co-operation in Asia and the Pacific*, Commonwealth Secretariat, 1984, p. 39 (available at the Peace Palace Library). Hence, as explained above, a contiguous zone of State A and an EEZ of State B, may co-exist and do not require a delimitation, as both regimes bestow distinct, separate and non-conflicting sets of powers upon the States.

[381] *Fisheries case, Judgment of December 18th, 1951: I.C.J. Reports 1951,* pp. 128-130.

> "The method used in the construction of the weighted line (…) results in a line which has a curved shape with a large number of turning points. Such a configuration of the line may create difficulties in its practical application. The Court therefore proceeds to a further adjustment by reducing the number of turning points and connecting them by geodetic lines. This produces a simplified weighted line which is depicted on sketch-map No. 10."[382]

Similarly, in its recent Judgment in *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica* v. *Nicaragua)*, the Court decided on a simplified line for delimitation. The Court said that "[g]iven the complexity of the lines described in the previous paragraph [i.e. the adjusted equidistance line], the Court considers it more appropriate to adopt a simplified line". [383]

4.112 Simplification on a limited scale is an acceptable exercise in maritime delimitation; it fulfils the purpose of arrangements ensuring the orderly management of the oceans. While not a maritime delimitation, the use of a single, simplified line for contiguous zones facilitates the management by the coastal State of its rights and duties and affords foreseeability to the international users as well as other members of the international community.

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[382] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012,* p. 710, para. 235.

[383] *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica* v. *Nicaragua),* Judgment of 2 February 2018, p. 63, para. 158.

4.113 As recognised by the Court in 2012, the San Andrés Archipelago presents an idiosyncratic case for setting maritime boundaries. As Sketch-Map No. 10 in the 2012 Judgment confirms, setting the boundary at the 12-nautical-mile arcs of circle of the Colombian islands would have created difficulties, hence the use of a simplified line was justified.[384] The same should apply to the 24-nautical-mile arcs around *the same* islands. The management of a contiguous zone set to the 24-nautical-mile arcs around the islands would create significant practical, navigational and administrative difficulties, which are exacerbated by the unique challenges facing littoral States of the Southwestern Caribbean Sea.[385] As explained in the Counter-Memorial and in this Rejoinder, the Raizales, whose prosperity and well-being are an urgent national and international priority, depend upon the ability of Colombia to safeguard their vital interests, *inter alia*, through the contiguous zone. Creating an effective and enforceable contiguous zone was thus imperative.

4.114 With these considerations in view, Colombia utilised geodetic lines to connect the arcs to create simplified and manageable lines for the contiguous zone. The use of straight lines to define the limits of the contiguous zone enables the Colombian Navy to efficiently protect vital interests. Moreover, the straight geodetic lines enable the other users of the Southwestern Caribbean Sea to foresee when they enter the

384 *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012*, p. 710, para. 235 and Sketch-Map No. 10, p. 712.

385 CCM, Chapters 2 and 5.

contiguous zone. Overall, the simplification of the contiguous zone is dictated by the geography in this part of the Southwestern Caribbean Sea.

4.115 Moreover, as Colombia demonstrated above, there is no conflict between the sovereign resource-related rights of the coastal State within its EEZ and the rights of another coastal State within its contiguous zone. The contiguous zone does not bestow upon the coastal State any territorial or sovereign rights. As the ILC stated as early as 1956, "this power of control does not change the legal status of the waters over which it is exercised."[386] In those parts of Nicaragua's EEZ, in which Colombia may exercise contiguous zone rights, whether within 24 nautical miles from the coast or as part of the simplification of the contiguous zone to enable the effective exercise of the contiguous zone rights, Nicaragua would continue to fully enjoy all the sovereign rights and jurisdiction accorded to it under the EEZ regime. Hence, the simplification of the geographical scope of the contiguous zone while providing Colombia with the ability to effectively protect its vital interests, neither undermines nor diminishes Nicaragua's sovereign rights within the EEZ; while the one derives a benefit, the other sustains no loss.

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386 International Law Commission, "Commentary to the articles concerning the law of the sea", *Report of the International Law Commission on the Work of its Eighth Session*, A/CN.4/104, Commentary to Article 66, p. 295, para. 1, available at: http://legal.un.org/ilc/documentation/english/reports/a_cn4_104.pdf (last visited: 1 November 2018).

4.116 Without the simplification of the contiguous zone, all maritime shipping would be subject to Colombia's contiguous zone rights within the 24-nautical-mile arcs, while unaffected in the small pockets that form part of the simplification of the contiguous zone. As evident, such areas are limited in size, and it is doubtful if any shipping passing through this area would be able to avoid completely Colombia's contiguous zone rights within the 24-nautical-mile arcs. Moreover, it is questionable if the international community would benefit from a jagged line producing erratic contiguous zone jurisdiction. As explained above, a coherent division of jurisdiction is beneficial to all users of the sea. It is also questionable whether the interests of the international community lie in allowing, unchecked, activities which may threaten the vital interests of a coastal State, for example, drug trafficking, smuggling or pollution.

4.117 Nicaragua contends that the simplification of the contiguous zone is contrary to international law since it extends beyond 24 nautical miles from the coasts of the Colombian islands. Nicaragua submits that States do not establish a contiguous zone that goes beyond 24 nautical miles from the baselines and that the 2012 Judgment is distinguishable since, to quote Nicaragua, the passage

> "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."[387]

Nicaragua's arguments are misleading.

4.118 In practice, contiguous zones may have been extended by other means. While States have extended their contiguous zones up to 24 nautical miles from baselines, special consideration due to the contours of the coast may have been taken into account in setting those baselines themselves. While not all straight baselines are lawful (like Nicaragua's),[388] maritime zones established on their basis, including contiguous zones, have perforce extended beyond the prescribed 24 nautical miles from normal baselines. Nicaragua's reliance on State practice thus misses the point and fails to undermine Colombia's position that particular cases justify the adjustment of maritime lines. In this case, the Court has confirmed that Colombia's Archipelago is such a special case. The geodetic lines connecting the arcs lead to the same outcome as has the simplified line used by the Court.

4.119 Nicaragua's objection to the use of simplified lines for "the unilateral extension by a State of one of its maritime zones beyond the maximum limit authorized by customary international law"[389] is puzzling. Nicaragua itself purports to use simplified lines – straight baselines – to unilaterally extend its

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387 NR, para. 3.18.
388 See for example: CR, Chapter 6.
389 NR, para. 3.18.

jurisdiction seaward beyond the distance prescribed by international law. Nicaragua purports to extend its territorial sea and even claim internal waters in areas beyond the distance prescribed by international law! Nicaragua's excessive and unlawful use of simplified lines, and the extent to which such simplified lines is the unilateral extension by a State of one of its maritime zones beyond the maximum limit authorized by customary international law, is shown by figure 7-9 of Nicaragua's Reply:

FIGURE 7.9 OF NICARAGUA'S REPLY: NICARAGUA'S STRAIGHT BASELINES SHOWING AREAS OF INTERNAL WATERS MORE THAN 12 M FROM THE LOW WATER LINE

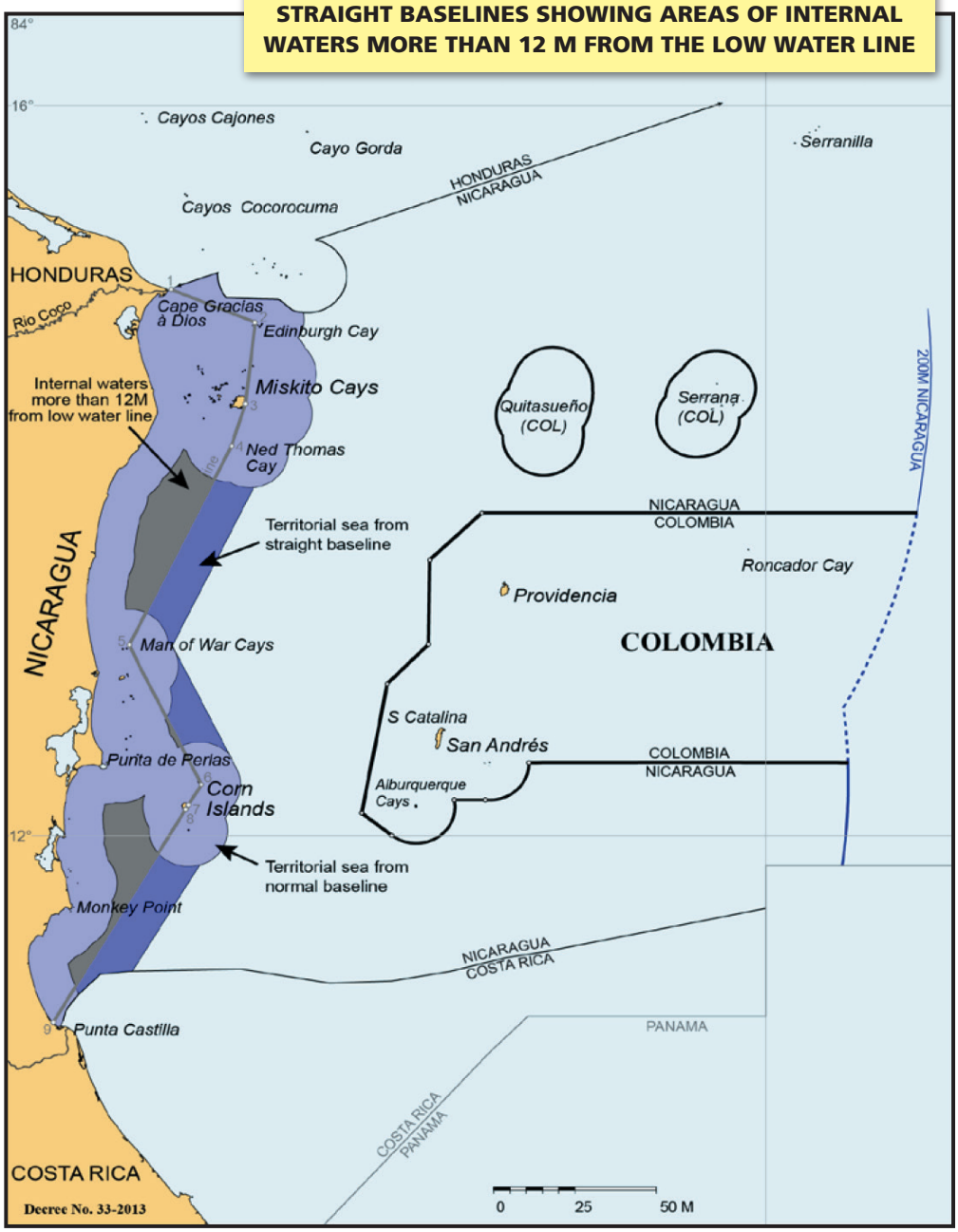

Figure CR 4.4

4.120 As Colombia will explain in Chapter 6 of this Rejoinder, Nicaragua's coast and several remote islands do not constitute an idiosyncratic case that justifies the use of simplified straight baselines for unilaterally projecting seaward all the maritime jurisdictions of the State. Far from it, Nicaragua's baselines are unlawful, exorbitant and in fact reduce the rights of Colombia and the entire international community. The point here is that Nicaragua's use of a simplified line as part of its purported straight baselines demonstrates that Nicaragua's objection to Colombia's simplified line is self-contradictory and hypocritical.

4.121 With no effect upon Nicaragua's rights, *de minimis* effect, if any, on shipping and with significant benefits to Colombia and the rest of the Southwestern Caribbean Sea, Colombia submits that the simplification of the contiguous zone promotes the public order and efficient management of the oceans and is justified based on the law and the facts. Colombia thus requests the Court to reject Nicaragua's argument against the use of a simplified line for its contiguous zone.

F. Neither the Enactment nor the Application of the Decree Violated any Rights of Nicaragua

4.122 It has already been shown that, on its face, Decree No. 1946 (as amended) does not violate Nicaragua's rights under the customary international law of the sea. In its Counter-Memorial, Colombia explained that in any event Nicaragua could not point to any action in the contiguous zone

of the Colombian island territories in the Southwestern Caribbean Sea that had prejudiced Nicaragua's rights.[390]

4.123 In its Reply, Nicaragua argues that the mere enactment of Decree No. 1946 (as amended) entails Colombia's international responsibility *vis-à-vis* Nicaragua.[391] In doing so, Nicaragua seeks to make two points: *first*, that the existence of an internationally wrongful act does not depend upon injury; and *second*, that the mere enactment of legislation may constitute an internationally wrongful act.

4.124 Colombia does not contest either of these two points in principle. What it does reject is the distortion of these principles in their putative application by Nicaragua.

4.125 So far as concerns the first point, it is clear from the ILC commentary to Article 2 of the Articles on State Responsibility, quoted by Nicaragua, that whether or not injury is an element of an internationally wrongful act depends entirely on the primary obligation that is alleged to have been breached:

> "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.

390 CCM, paras. 5.56-5.57.
391 NR, paras. 3.53-3.60.

> 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 such elements are required depends on the content of the primary obligation, and there is no general rule in this respect."[392]

4.126 Nicaragua's entire argument on whether, in the present case, the primary obligation requires "damage" consists of the following assertion:

> "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."[393]

4.127 Colombia rejects this assertion. It is thoroughly misleading to describe the primary rule as "the preservation of the exclusive sovereign rights belonging to Nicaragua in its EEZ in accordance with Articles 56 and 58 of the UNCLOS". Describing a rule in such general terms, such as "preservation" or "appropriation", sheds little, if any, light on the complex interplay between the EEZ State and other States and the obligations owed by other States towards the EEZ State in

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[392] International Law Commission, "Commentary to the Draft Articles on Responsibility of States for Internationally Wrongful Acts", *Report of the International Law Commission on the Work of its Fifty-Third Session*, A/56/10, Commentary to Article 2, p. 36, para. 9, available at: http://legal.un.org/ilc/documentation/english/reports/a_56_10.pdf (last visited: 1 November 2018).

[393] NR, para. 3.56. Emphasis in the original

respect of its sovereign rights, jurisdiction and other rights and duties in the EEZ. And even if the obligation is stated in general terms – an obligation not to infringe Nicaragua's EEZ rights – Nicaragua's assertion is circular since it offers no explanation as to how Colombia has "appropriated" Nicaragua's EEZ rights. As explained above, Colombia did not appropriate any EEZ rights to itself, rather Colombia only has the right to exercise, within the contiguous zone, rights which are distinct and different from Nicaragua's EEZ rights.

4.128 Under both UNCLOS and customary international law, the relationship between the sovereign rights, jurisdiction and other rights and duties that the coastal State has and the rights and duties of other States in the EEZ requires a detailed, point-by-point analysis. Nicaragua has not even begun to attempt anything of the sort. Had it done so, it would have become clear that the enactment of Decree No. 1946 in no way violated Nicaragua's EEZ rights nor failed to accord due regard to Nicaragua's rights. As Colombia explained above, all the powers exercisable in accordance with Decree No. 1946 (as amended) are distinct from EEZ rights, are internationally lawful uses of the sea and may lawfully be exercised within another State's EEZ.

4.129 Turning to Nicaragua's second point, while it may be the case that in certain circumstances the mere enactment of legislation may constitute an internationally wrongful act that was not the case with Decree No. 1946 (as amended).

4.130 Nicaragua misstates the law when it says, baldly, that "it is unquestionable that the adoption of a national law or regulation entails the international responsibility of the enacting State."[394] Of course, it is unquestionable that an act of legislation by a State legislator, or a regulation by a government, is an act of the State for the purposes of international responsibility.[395] Thus, the enactment of Decree No. 1946 (as amended) is attributable to Colombia. But whether such enactment entails a breach of an international obligation is quite another matter.

4.131 Whether the mere enactment of Decree No. 1946 (as amended), notwithstanding the lack of any act of implementation or any application whatsoever, can be considered a violation of international law depends upon a close examination of the case-law and the particular facts of the present case, something Nicaragua has failed to perform.

4.132 According to the commentary to the ILC Articles on State Responsibility,

> "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

394 NR, para. 3.60.

395 International Law Commission, "Commentary to the Draft Articles on Responsibility of States for Internationally Wrongful Acts", *Report of the International Law Commission on the Work of its Fifty-Third Session*, A/56/10, Commentary to Article 4, p. 40, para. 1, available at: http://legal.un.org/ilc/documentation/english/reports/a_56_10.pdf (last visited: 1 November 2018).

> 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.*"[396]

4.133 This indicates that the matter is entirely case-specific. Nicaragua cites a number of cases, none of which is comparable to the present one.

4.134 Nicaragua begins with the *Case concerning certain German interests in Polish Upper Silesia*, noting that the Court examined the conformity of a Polish statute with a treaty.[397] Even if this were the case, at best it would show that, in certain circumstances, enactment of legislation can be a violation of international law. But, in fact, the Permanent Court was referring to *the application* of the law rather than its enactment:

> "The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court's giving judgment on the question whether or not*, in applying that law*, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention."[398]

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396 International Law Commission, "Commentary to the Draft Articles on Responsibility of States for Internationally Wrongful Acts" in *Report of the International Law Commission on the Work of its Fifty-Third Session*, A/56/10, Commentary to Article 12, p. 57, para. 12, available at: http://legal.un.org/ilc/documentation/english/reports/a_56_10.pdf (last visited: 1 November 2018). (Emphasis added).

397 NR, para. 3.58.

398 *Certain German Interests in Polish Upper Silesia (Germany* v. *Poland), P.C.I.J, Series A, No. 7*, pp. 18-19. (Emphasis added).

It is also noteworthy that the matter in question concerned expropriation of property of German nationals through domestic law and its conformity with a treaty, and thus, in such a scenario, the enactment itself altered the property rights of the individuals concerned. This case does not help Nicaragua; the enactment of Decree No. 1946 did not alter or adversely affect any Nicaraguan rights.

4.135 In a footnote, Nicaragua lists a series of human rights cases.[399] It is not surprising that Nicaragua does not make more of these, since they do not assist its contention either. What they do show is that, only when the legislation has a continuing and direct effect on the claimant's human rights, then the legislation itself may amount to a violation of international law. There is indeed considerable jurisprudence from the European Court of Human Rights (ECtHR) supporting the proposition that in certain circumstances the mere enactment of legislation involves a breach of human rights obligations, but this is because of the continuous and direct effect on the individual's human rights.

4.136 In *Dudgeon* v. *The United Kingdom* for example, an Act concerning the criminalization of certain homosexual activities in place in Northern Ireland was contested. One question that arose was if the mere existence of the Act, as opposed to

399 NR, footnote 187.

different laws in England and Wales at the time, was of practical consequences. The United Kingdom asserted that,

> "no one was prosecuted in Northern Ireland during the period in question for an act which would clearly not have been an offence if committed in England or Wales. There is, however, no stated policy not to prosecute in respect of such acts."[400]

Thus, officially, prosecution was a matter of discretion.[401]

4.137 The ECtHR opined that:

> "[i]n the personal circumstances of the applicant, *the very existence of this legislation continuously and directly affects his private life* (…) It cannot be said that the law in question is a dead letter in this sphere. It was, and still is, applied so as to prosecute persons with regard to private consensual homosexual acts involving males under 21 years of age (see paragraph 30 above). Although no proceedings seem to have been brought in recent years with regard to such acts involving only males over 21 years of age, apart from mental patients, there is no stated policy on the part of the authorities not to enforce the law in this respect (ibid). Furthermore, apart from prosecution by the Director of Public Prosecution, there always remains the possibility of a private prosecution."[402]

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400 European Court of Human Rights, *Case of Dudgeon* v. *The United Kingdom,* 22 October 1981, Series A No. 45, p. 10, para. 30.

401 European Court of Human Rights, *Case of Dudgeon* v. *The United Kingdom,* 22 October 1981, Series A No. 45, p. 10, para. 31.

402 European Court of Human Rights, *Case of Dudgeon* v. *The United Kingdom*, 22 October 1981, Series A No. 45, p. 14, para. 41. (Emphasis added).

4.138 The Court placed emphasis on the fact that, as long as there was a possibility that the offensive act, which violated the applicant's right to privacy, may be applied, the legislation was a breach of the United Kingdom's obligations. But it did so because in the circumstances the existence of the law "continuously and directly affected" the individual applicant's personal life.

4.139 In *Modinos* v. *Cyprus*, under similar circumstances, the ECtHR repeated the requirement of continuous and direct effect on the applicant's private life. It stated that:

> "23. It is true that since the Dudgeon judgment the Attorney-General, who is vested with the power to institute or discontinue prosecutions in the public interest, has followed a consistent policy of not bringing criminal proceedings in respect of private homosexual conduct on the basis that the relevant law is a dead letter.
>
> Nevertheless, it is apparent that this policy provides no guarantee that action will not be taken by a future Attorney-General to enforce the law, particularly when regard is had to statements by Government ministers which appear to suggest that the relevant provisions of the Criminal Code are still in force (see paragraph 9 above). Moreover, it cannot be excluded, as matters stand, that the applicant's private behaviour may be the subject of investigation by the police or that an attempt may be made to bring a private prosecution against him.
>
> 24. Against this background, *the Court considers that the existence of the prohibition*

> *continuously and directly affects the applicant's private life.* There is therefore an interference."[403]

4.140 Finally, Nicaragua turns to what it terms "recent law of the sea cases". In fact, it mentions only two: *Virginia 'G'* and *Saiga (No. 2),* claiming that in these cases the International Tribunal for the Law of the Sea (ITLOS) examined the legality of the enactment of legislation.[404] However, what Nicaragua fails to acknowledge is that the Tribunal explained that the issue was pertinent, but for the reason that the *primary obligation* specifically concerned legislation:

> "Under this provision, the rights and obligations of coastal and other States under the convention arise not just from the provisions of the convention but also from national laws and regulations 'adopted by the coastal State in accordance with the provisions of this Convention'. Thus, the Tribunal is competent to determine the compatibility of such laws and regulations with the Convention."[405]

4.141 Other cases could have been mentioned, but presumably were not since they do not help Nicaragua's case. For example, in *Fisheries*, the Court characterised the dispute as follows:

> "The subject of the dispute is clearly indicated under point 8 of the Application instituting proceedings: 'The subject of the dispute is the

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[403] European Court of Human Rights, *Case of Modinos* v. *Cyprus,* 22 April 1993*,* Series A No. 259*,* p. 8, para*.* 24. (Emphasis added).

[404] NR, para. 3.59.

[405] *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea), Judgment, ITLOS Reports 1999*, pp. 52-53, para. 121.

> validity or otherwise under international law of the lines of delimitation of the Norwegian fisheries zone laid down by the Royal Decree of 1935 for that part of Norway which is situated northward of 66°28.8' North latitude.' And further on: '…. the question at issue between the two Governments is whether the lines prescribed by the Royal Decree of 1935 as the base-lines for the delimitation of the fisheries zone have or have not been drawn in accordance with the applicable rules of international law'."[406]

4.142 However, what prompted the United Kingdom's application was the implementation of the Royal Decree by Norway against British nationals fishing in the waters covered by it.[407] Thus, it cannot be said that the case stands for the proposition that a law or regulation that contradicts international law on its face necessarily constitutes a breach of international law.

4.143 The same reasoning is found in a decision of a World Trade Organisation (WTO) Panel. On a general note it found that,

> "under traditional public international law, legislation under which an eventual violation could, or even would, subsequently take place,

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406 *Fisheries case, Judgment of December 18th, 1951: I.C.J. Reports 1951,* p. 125.

407 *Fisheries case, Judgment of December 18th, 1951: I.C.J. Reports 1951,* p. 125.

> does not normally in and of itself engage State responsibility."[408]

This is the case, it added, when obligations "concern only the relations between States, State responsibility is incurred only when an actual violation takes place".[409]

4.144 In the *LaGrand* case,[410] the Court distinguished between the existence of a domestic law and its application in a given case, emphasizing that it is the latter that could constitute a violation of international law. The law in question was not problematic in itself, as it could have been applied in accordance with international law. It was only its application in violation of the Vienna Convention on Consular Relations that may constitute an internationally wrongful act.

4.145 The case law thus indicates that *only* when the domestic law *is applied* in violation of international law an internationally wrongful act may occur.

4.146 Correspondingly, the ILC commentary to the Articles on State Responsibility notes that:

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[408] World Trade Organisation, *United States – Sections 301-310 of the Trade Act of 1974*, Report of the Panel, WT/DS152/R, 22 December 1999, p. 322, para. 7.80.

[409] World Trade Organisation, *United States – Sections 301-310 of the Trade Act of 1974*, Report of the Panel, WT/DS152/R, 22 December 1999, p. 322, para. 7.81.

[410] *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 466, para. 125.

> "In other circumstances, the enactment of legislation may not in and of itself amount to a breach, especially if it is open to the State concerned to give effect to the legislation in a way which would not violate the international obligation in question. In such cases, whether there is a breach will depend on whether and how the legislation is given effect."[411]

4.147 As indicated above, Decree No. 1946 (as amended) provides that it is intended to:

> "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."[412]

4.148 Even if this were not in conformity with the customary international law applicable to the contiguous zone (*quod non*), or the rights of all States within the EEZ (*quod non*), the mere existence of the Decree would not constitute a violation of

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411 International Law Commission, "Commentary to the Draft Articles on Responsibility of States for Internationally Wrongful Acts", *Report of the International Law Commission on the Work of its Fifty-Third Session*, A/56/10, Commentary to Article 12, p. 57, para. 12, available at: http://legal.un.org/ilc/documentation/english/reports/a_56_10.pdf (last visited: 1 November 2018).

412 CCM, Annex 7.

international law. The Decree can and will be implemented in accordance with international law. The Decree itself states that:

> "The application of this article [Article 5 on the contiguous zone] will be carried out in conformity with international law and Article 7 of the present Decree."[413]

And Article 7 reads,

> "Nothing in this Decree will be understood to affect or limit the rights and obligations derived from the 'Treaty on maritime delimitation between the Republic of Colombia and Jamaica' signed between those States on 12 November 1993, *nor will it affect or limit the rights of other states*."[414]

4.149 Decree No. 1946 (as amended), in itself and on its face, is not in conflict with international law and, as in the *LaGrand* case, should only be evaluated based on whether or not its implementation violates Nicaragua's EEZ rights. The Decree itself is in conformity with international law and does not allow for any potential breaches of Nicaragua's EEZ.

4.150 Just as the mere enactment of the Decree is neither contrary to international law nor has violated Nicaragua's rights, the same has to be said about its application. Nicaragua has failed to show a single instance where Colombia has impeded it from exercising its EEZ rights within Colombia's contiguous

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413 CCM, Annex 7.

414 CCM, Annex 7. (Emphasis added).

zone. The inescapable conclusion is that no Colombian action in the contiguous zone has given rise to any violation of Nicaragua's sovereign rights or maritime spaces.

G. Conclusions

4.151 Decree No. 1946 of 9 September 2013 (as amended by Decree No. 1119 of 17 June 2014) established the contiguous zone of the Colombian island territories in the Southwestern Caribbean Sea, in accordance with international law. It is clear on the face of the Decree that it is to be interpreted and applied in full conformity with the customary international law of the sea.

4.152 There is nothing in customary international law that precludes Colombia's contiguous zone from extending into Nicaragua's EEZ or that precludes Colombia from exercising the corresponding rights and freedoms therein.

4.153 None of the powers provided for in the Decree go beyond those which Colombia is entitled to exercise under customary international law as part of the contiguous zone regime; but even if this were not the case, that would not mean that they were necessarily contrary to international law since a State enjoys residual freedoms of navigation and overflight, as well as other internationally lawful uses of the sea within another State's EEZ.

4.154 The simplification of the outer limit of the Colombian contiguous zone in the Southwestern Caribbean Sea is justified in law and on the facts, and, in any event, does not encroach upon Nicaragua's EEZ rights.

4.155 Finally, Nicaragua cannot argue that the mere enactment of the Decree nor its application has violated any rights of Nicaragua under international law. It has failed to show that it has suffered any injury whatsoever as a result of the enactment or application of the Decree.

PART III

COLOMBIA'S COUNTER-CLAIMS

Chapter 5

NICARAGUA'S INFRINGEMENT OF THE TRADITIONAL FISHING RIGHTS OF THE INHABITANTS OF THE SAN ANDRÉS ARCHIPELAGO

A. Introduction

5.1 Although Nicaragua recognised on numerous occasions, through the statements of its President, the traditional fishing rights of the inhabitants of the San Andrés Archipelago, in particular the Raizales,[415] Colombia must regretfully note that the Applicant is using the current pending proceedings to take the President's words back. Nicaragua's judicial strategy, after the Court ruled Colombia's third counter-claim admissible, is to deny the existence of the vested traditional fishing rights of this vulnerable community,[416] as well as their infringement.[417]

5.2 Nicaragua cannot undo what it has already acknowledged to exist. President Ortega's statements are the Achilles' heel in the Nicaraguan argumentation. Its Reply, which cannot and in fact does not feign ignorance of these declarations,[418] perversely suggests that the President's conciliatory tone merely stands for "the unremarkable proposition that continued fishing in Nicaragua's EEZ by the

415 CCM, paras. 3.93-3.94 and Annexes 73-77; CR, Section D *infra*.
416 NR, paras. 6.3-6.76.
417 NR, paras. 6.77-6.95.
418 NR, paras. 6.63-6.76.

Raizales would have the [sic] be the subject of an agreement".[419] In other words, Nicaragua distorts the words of its own President in an attempt to prove that, although it is apparently ready to accommodate the rights of the artisanal fishermen of the Archipelago in a further agreement, it has not recognised the existence of these vested rights as of today.[420] This account reveals the lack of weight of Nicaragua's overall argument, which blurs the distinction between the recognition of the traditional fishing rights regime and the separate matter of the conclusion of technical agreements fleshing out that regime.[421] What is more, Nicaragua's reading of the statements of its Head of State conflicts with the finding, consistently upheld in the jurisprudence, according to which bilateral agreements are not necessary for the perpetuation of acquired rights.

5.3 The express recognition by the President of Nicaragua of the traditional fishing rights of the inhabitants of the San Andrés Archipelago should, in itself, be sufficient to dispose of its belated attempt to repudiate those rights. But Nicaragua has unsurprisingly diverted the focus to other matters. In particular, its Reply relies on convoluted interpretations of UNCLOS, an instrument to which Colombia is not a Party, to assert that all historic rights have somehow evaporated due to the appearance of the EEZ in international law.[422] Nicaragua draws no inference from the fact that the historic rights at stake here are merely

419 NR, para. 6.73.
420 NR, paras. 6.70-6.76 and 6.94.
421 See Section D *infra*.
422 NR, paras. 6.3-6.30.

traditional fishing rights vested on the inhabitants of the Archipelago instead of exclusive sovereign rights of Colombia.[423] To the contrary, Nicaragua erroneously puts all historic rights under the exceptional rights umbrella.[424] Turning the relevant test upside-down, Nicaragua wrongly suggests that, in order not to be extinguished, traditional fishing rights require "express carve-outs" in multilateral or bilateral agreements.[425] What is more, Nicaragua barely hides the fact that its reasoning leads to the disingenuous result according to which traditional rights in general can exist within the land territory, internal waters, territorial sea and archipelagic waters of a State, but not in its EEZ.

5.4 Additionally, Nicaragua criticizes the evidence put forward by Colombia. According to the Applicant, Colombia has neither proven the existence of the traditional fishing rights,[426] nor their infringement by Nicaragua's Naval Force.[427] Partially quoting from the sworn affidavits, Nicaragua's Reply heightens the threshold for establishing the existence of those vested rights in a manner that clearly contradicts the practical

423 CPO, Annex 10: Declaration of the President of the Republic of Colombia, 18 February 2013, "Colombian fishermen will be able to exercise – and we have said this clearly – their historical fishing rights in all places where they have been fishing before."; CCM, Annex 1: Press Release from the Ministry of Foreign Affairs with regard to the Seaflower Biosphere Reserve, 30 August 2013, "(…) Colombia is analysing the mechanisms, resources and actions available to it under domestic laws and international law, to promote the defense of national interests, historic fishing rights and the rights of the Colombian population of the Archipelago."

424 NR, para. 6.15.

425 NR, paras. 6.13-6.17.

426 NR, paras. 6.32-6.62.

427 NR, paras. 6.77-6.95.

considerations underpinning the consistent jurisprudence on this matter.[428]

5.5 Nicaragua's stance regarding the law and the evidence attests to the fact that the dispute concerns not only the infringement but also, and in particular, the very existence of the traditional fishing rights, which the Nicaraguan Reply seeks to deny in no less than 25 of the 31 pages devoted to this counter-claim. This is why Colombia respectfully requests the Court to find, on the one hand, that the traditional fishing rights of the inhabitants of the San Andrés Archipelago do exist and, on the other hand, that they have been breached.

5.6 Colombia will first recall the importance of traditional fishing for the inhabitants of the San Andrés Archipelago, the human factor that Nicaragua has ignored in its Reply (Section B). It will then refute Nicaragua's contention according to which the traditional fishing rights have been extinguished either by the emergence of the EEZ or the 2012 Judgment (Section C). After that, Colombia will show that, in any event, Nicaragua has recognised the traditional fishing rights in the aftermath of the appearance of the EEZ and of the 2012 Judgment. Accordingly, even if the Court were to agree with Nicaragua's contention that the vested rights could be superseded solely in the establishment of the regime of the EEZ, *quod non*, nothing precluded the

[428] *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213, para. 141; *The South China Sea Arbitration (Philippines* v. *China), Award of 12 July 2016, PCA Case No. 2013-19*, p. 315, paras. 805-807.

parties to agree otherwise, as they have expressly done (Section D). Afterwards, Colombia will demonstrate that, in light also of the nature of the practices at stake and of the remoteness of the maritime areas in question, it has met the threshold for proving the existence of the traditional fishing rights (Section E). Finally, Colombia will show that the Nicaraguan Naval Force has violated the traditional fishing rights of the inhabitants of the Archipelago (Section F).

B. The Dependence of the Inhabitants of the Archipelago on Their Traditional Fishing in the Southwestern Caribbean Sea

5.7 Colombia already addressed in its Counter-Memorial the historical evolution of the traditional fishing rights at issue, the definition of artisanal as opposed to subsistence and industrial fishing, as well as the social and economic implications of this practice for the inhabitants of the Archipelago, in particular, the Raizal people.[429] Nicaragua, which for the most part does not dispute this "narrative",[430] asserted in its Reply that it is ready to take into account "the fishing needs of the Raizales".[431] While it is true that the Reply has raised challenges to some aspects of the affidavits filed by Colombia that will be addressed in Sections E and F, Nicaragua remained silent with regard to the historical and anthropological developments included in the

429 CCM, paras. 2.61-2.86.
430 NR, para. 6.3.
431 NR, para. 6.76.

Counter-Memorial. Rather than reiterating these developments, Colombia will summarize their most fundamental aspects.

5.8 Artisanal fishermen clearly play a crucial role in the San Andrés Archipelago. Aside from its economic and social importance, traditional fishing ensures food security on San Andrés and Providencia.[432] This is why cooperatives, such as "Fish and Farm", and associations, such as the "Association of Fishermen and Farmers of San Andrés and Providencia" (ASOPACFA, from its Spanish acronym), have policies providing that the products must first be sold to the local community.[433] In this respect, there is in fact a degree of overlap between the notions of artisanal and subsistence fishing.[434] While artisanal practices have a commercial component, they also carry an important role for the subsistence of the inhabitants of the Archipelago. Contrary to industrial fishermen, artisanal fishermen do not engage in large-scale fishing activities in boats that trawl with big nets or huge numbers of hooks.[435] However, traditional fishing is not fixed in time in the sense that vessels, gear and techniques are not susceptible of being improved.[436]

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[432] CCM, Annexes 62, 65, 71 and 72.

[433] CCM, Annexes 62 and 68.

[434] CCM, paras. 2.69-2.70.

[435] CCM, para. 2.71.

[436] *Award of the Arbitral Tribunal in the Second Stage of the Proceedings between Eritrea and Yemen (Maritime Delimitation)*, Decision of 17 December 1999, R.I.A.A., Vol. XXII, p. 360, para. 106.

5.9 In order to reach the traditional fishing grounds of Cape Bank[437] and the Northern Cays (Serrana, Quitasueño, Roncador, Serranilla and Bajo Nuevo), the artisanal fishermen of the Archipelago initially relied on schooners, sloops and catboats and later, during the second half of the twentieth century, on *lanchas* equipped with outboard or inboard motors.[438] Because of its unique traits, turtling is the activity that mainly attracted the interest of the record keepers, historians and anthropologists who studied the Archipelago.[439] However, fishing was equally important to the men and women of the sea who settled in this remote part of the Southwestern Caribbean Sea. Due to the reduced land available for agriculture, life in the Archipelago always depended on what the sea could offer and the trade of its resources with the other coastal communities.

5.10 The inhabitants of the Archipelago were remarkable seafarers that held close ties with the coastal communities based in the Mosquito Coast, Costa Rica, Panama, Jamaica, the Cayman Islands and continental Colombia. They did not live secluded on their islands, but instead navigated and established settlements in the whole Southwestern Caribbean Sea. The Raizales constitute a distinct ethnic and cultural community and are still present in many of the coastal States of the region. Their intimate connection with the sea is best exemplified by the fact that they navigated, traded and fished in this area of the

437 For a description of the geographical area known as Cape Bank, which includes *Luna Verde*, see Section E *infra.*

438 CCM, Annexes 65, 66, 69 and 91.

439 CCM, Annex 93.

Southwestern Caribbean Sea before and after the coming into existence of Nicaragua and Colombia as independent States.

C. The Traditional Fishing Rights Survived the Emergence of the EEZ Regime and the 2012 Judgment

5.11 Nicaragua has made two distinct arguments in its attempt to prove that historic rights *in abstracto*, regardless of their characterisations, can be superseded. First and foremost, Nicaragua relies on the emergence of the EEZ to argue that the vested rights of the inhabitants of the San Andrés Archipelago have been extinguished "as early as 1984" with the crystallisation of the new regime under general international law.[440] Alternatively, Nicaragua indirectly suggests that these rights have been ousted by the 2012 Judgment.

5.12 In relation to the second argument, Colombia's Counter-Memorial[441] has already shown that, according to the consistent jurisprudence, rights vested on the inhabitants of border regions remain unaffected by delimitation processes both on land and in the sea.[442] Colombia's Rejoinder can hence be brief on this point

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440 NR, para. 6.6.

441 CCM, paras. 3.98-3.111.

442 *Award in the Arbitration regarding the delimitation of the Abyei Area between the Government of Sudan and the Sudan People's Liberation Movement/Army*, Award of 22 July 2009, R.I.A.A., Vol. XXX, p. 408, para. 753; *Award of the Arbitral Tribunal in the First Stage of the Proceedings between Eritrea and Yemen (Territorial Sovereignty and Scope of the Dispute)*, Decision of 9 October 1998, R.I.A.A., Vol. XXII, p. 244, para. 126; *Award of the Arbitral Tribunal in the Second Stage of the Proceedings between Eritrea and Yemen (Maritime Delimitation)*, Decision of 17 December 1999, R.I.A.A., Vol. XXII, p. 361, paras. 110-111; *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the*

since Nicaragua does not even attempt to rebut the argument by challenging the jurisprudence. Nicaragua's Reply merely relies on the misleading contention according to which it is apparently "revealing" that Colombia "did not see fit during the previous case to even advert to the existence of the rights it now claims".[443] Regardless of Nicaragua's perceptions as to what is revealing or not, the fact remains that the Court, as well as arbitral tribunals, have consistently denied any role to the conduct of private individuals for the specific purpose of determining the course of boundaries. Accordingly, Nicaragua's conjectures in this regard are wholly irrelevant.

5.13 Colombia will thus focus its attention on Nicaragua's legal argument that the traditional fishing rights "were extinguished with the creation of the EEZ regime".[444] It is worth noting from the outset that Nicaragua's proposition is not premised on the existence of a provision, under conventional or customary law, which would explicitly prohibit traditional fishing rights within the EEZ. With regard to UNCLOS, such an enquiry would indeed be futile since the parties agree that Part V does not proscribe traditional fishing rights. It is therefore not surprising that Nicaragua's Reply, rather than looking for a non-existing prohibition where there is none, self-servingly states

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Delimitation of the Exclusive Economic Zone and the Continental Shelf between Them, R.I.A.A., Vol. XXVII, p. 227, para. 292*; Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 400, para. 66; *German Settlers in Poland, Advisory Opinion, 1923 P.C.I.J. Series B, No. 6*, p. 36.

443 NR, paras. 6.40-6.43.

444 NR, para. 6.5.

that what is required is an "express carve-out", a provision preserving traditional fishing rights.[445] Relying on the maxim *expressio unius est exclusi alterius,*[446] which does not displace the rules of treaty interpretation, Nicaragua swiftly dismisses traditional fishing rights for being allegedly incompatible with the EEZ regime.

5.14 At the heart of Nicaragua's incompatibility plea lies the notion of "exclusivity":[447] the idea that coastal States enjoy sovereign rights *vis-à-vis*, among other things, the exploitation and management of the living resources of the EEZ. While the incompatibility might be true in relation to competing assertions of States aiming at regulating and managing the living resources of the coastal State, Colombia neither claims sovereignty nor sovereign rights within Nicaragua's EEZ.[448] Colombia is not even claiming rights on its own behalf since the traditional fishing rights are in fact private rights vested on the artisanal fishermen of the San Andrés Archipelago.

5.15 Colombia fails to see the reason why traditional fishing rights should be perceived as being contrary to the exclusive

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445 NR, paras. 6.13-6.17.

446 NR, para. 6.12.

447 NR, para. 6.9.

448 CCM, para. 3.101: "It goes without saying that the customary rights in question, whose content will be developed below, are not tantamount to exclusive sovereign rights; nor do they derogate from the sovereign rights of Nicaragua. These traditional rights are not even to be considered the customary equivalent of a joint regime area (…). Rather the nature of these rights is more limited. They are merely customary rights of access and exploitation that fall well short of a claim of sovereignty or of sovereign rights (…)."

rights of the coastal State within the EEZ. After all, States enjoy full-fledged sovereignty, which is also exclusive, within their territory, but Nicaragua does not dispute that traditional rights have generally been preserved both in the land territory, internal waters and territorial sea of States. Hence, the exclusive nature of the rights involved cannot, by itself, justify Nicaragua's proposition. If traditional rights can subsist within areas where States enjoy sovereignty, *a fortiori* they can also exist within areas in which States merely enjoy sovereign rights.

5.16 In its effort to demonstrate that what is required is a "carve-out" explicitly preserving traditional rights, Nicaragua has sought to depict historic rights as generally being exceptional in nature. Yet, historic is not tantamount to exceptional, and a document of the United Nations Secretariat, which Nicaragua partially quotes,[449] gives a more nuanced account of the debate on the point. Indeed, the 1962 UN study on the *Juridical Regime of Historic Waters Including Historic Bays* does not boil down all instances of historic claims to the assertion of exceptional rights. On the contrary, the authors of the study addressed at length the question whether historic rights necessarily constitute "exceptional regimes",[450] "prescriptive

[449] NR, para. 6.15.

[450] United Nations, *Juridical Regime of Historic waters including historic bays – Study prepared by the Secretariat*, Doc. A/CN.4/143, pp. 7-11, paras. 42-61, available at: http://legal.un.org/ilc/documentation/english/a_cn4_143.pdf (last visited: 1 November 2018).

rights"[451] and "exceptions to rules laid down in a general convention".[452] The study sensibly reached the conclusion that it depends on the circumstances. If a certain subject-matter has not been regulated within a convention, such as one of the treaties concluded at UNCLOS I, it is pointless to reserve the historic right in a provision.[453] In others words, it is only when the convention and the historic right clearly conflict that the absence of a carve-out might be of relevance.

5.17 Since historic rights are not necessarily exceptional rights, Nicaragua is mistaken in suggesting that "carve-outs" are always required. The question that arises is whether non-exclusive traditional fishing rights vested in the inhabitants of a border region are incompatible with the coastal State's sovereign rights to such an extent that an express reservation would be required under the relevant applicable law. As stated by Norway in the *Fisheries (United Kingdom* v. *Norway)* case, and quoted in the 1951 Judgment,

> "[t]he Norwegian Government does not rely upon history to justify exceptional rights, to claim areas

[451] United Nations, *Juridical Regime of Historic waters including historic bays – Study prepared by the Secretariat*, Doc. A/CN.4/143, pp. 11-12, paras. 62-68, available at: http://legal.un.org/ilc/documentation/english/a_cn4_143.pdf (last visited: 1 November 2018).

[452] United Nations, *Juridical Regime of Historic waters including historic bays – Study prepared by the Secretariat*, Doc. A/CN.4/143, pp. 12-13, paras. 72-79, available at: http://legal.un.org/ilc/documentation/english/a_cn4_143.pdf (last visited: 1 November 2018).

[453] United Nations, *Juridical Regime of Historic waters including historic bays – Study prepared by the Secretariat*, Doc. A/CN.4/143, pp. 12-13, paras. 75-77, available at: http://legal.un.org/ilc/documentation/english/a_cn4_143.pdf (last visited: 1 November 2018).

> of sea which the general law would deny; it invokes history, together with other factors, to justify the way in which it applies the general law".[454]

In that case, the Court found in favour of Norway because it could not be said that its historic claim conflicted with customary international law, which is the law also applicable to the present case. No carve-out was required and yet, if Nicaragua's approach as to what constitutes conflict were to be followed, Norway's straight baselines decree could have been said to be contrary to the rule according to which the baseline should follow the low-water mark on permanent land. In other words, it is only when the incompatibility is manifest that a carve-out is required.

5.18 Nicaragua in the end mainly relies on one single paragraph of an UNCLOS provision to put forward its thesis that traditional fishing rights have been extinguished in the EEZ.[455] Article 62(3) states that:

> "In 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 significance of the living resources of the area to the economy of the coastal State concerned and its other national interests, the provisions of articles 69 and 70, the requirements

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454 *Fisheries case, Judgment of December 18th, 1951: I.CJ. Reports 1951*, p. 133; see also M. Bourquin, *Les baies historiques*, Mélanges Georges Sauser-Hall, 1952, pp. 37-51 (available at the Peace Palace Library).

455 NR, paras. 6.16-6.17.

> of developing States in the subregion or region in harvesting part of the surplus and 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."

This provision, which has to do with the optimum utilisation of the living resources in the EEZ, mentions the need to minimize economic dislocation in States "whose nationals have habitually fished in the zone". But this reference to "habitual fishing", which could easily encompass industrial fishing from distant fleets and is not equivalent to the notion of "traditional fishing rights", is not concerned with acquired rights vested on individuals and communities. The provision only deals with "giving access to other States" and, far from being incompatible with private rights of artisanal fishermen, can be applied alongside the traditional rights regimes. Because Nicaragua relies on this provision, it is worth mentioning in passing that as of November 2018, that is to say 18 years after it became a Party to UNCLOS, Nicaragua has yet to determine the allowable catch in its EEZ.

5.19 Article 51 of UNCLOS regarding archipelagic waters is the only provision in that instrument that specifically mentions traditional fishing rights in a maritime area. According to Nicaragua, this provision sets the relevant standard: "the fact that there is no analogous provision in Part V can only mean that

traditional fishing rights do not exist in the EEZ".[456] But Nicaragua's argument fails to recognise that, notwithstanding the absence of a similar provision within Part II of UNCLOS, traditional fishing rights have not been superseded in the territorial sea either. With regard to this maritime area, it appears that Article 2(3) of UNCLOS, a provision which broadly states that "[t]he sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law", is equally protective of traditional fishing rights. Thus, when it comes to the EEZ, Nicaragua cannot rely on the absence of an explicit permissive provision to put forward its claim that traditional fishing rights have been extinguished. What is more, Nicaragua cannot ignore the fact that Article 58(2) of UNCLOS on the rights and duties of other States in the EEZ provides, in a manner reminiscent of Article 2(3) that "other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part".

5.20 Nicaragua's Reply deliberately ignores both the *Award in the Arbitration regarding the Delimitation of the Abyei Area* and the decision in the *Arbitration between Barbados and the Republic of Trinidad and Tobago*, which were already mentioned in the Counter-Memorial.[457] The former concluded that "the transfer of sovereignty should not be construed to extinguish traditional rights to the use of land (or maritime

456 NR, para. 6.14.

457 CCM, paras. 3.98 and 3.105.

resources)" without drawing any distinction between different maritime areas.[458] The second specifically mentioned that, notwithstanding the delimitation, Trinidad and Tobago had an obligation to grant "Barbados access to fisheries within [its] EEZ".[459]

5.21 Nicaragua's Reply does, however, clumsily attempt to deny the relevance of the *Award of the Arbitral Tribunal in the Second Stage of the Proceedings between Eritrea and Yemen (Maritime Delimitation)* to the present proceedings. Nicaragua recognises that this award found that traditional fishing rights existed within the EEZ of the coastal States involved.[460] Yet it asserts that, because Article 2(3) of the Arbitration agreement authorized the Tribunal to take into account "any pertinent factor", in addition to UNCLOS, it must follow that the "arbitral tribunal did not rely on UNCLOS in rendering its decision on historic fishing rights".[461]

5.22 Remarkably, Nicaragua's Reply fails to cite a single paragraph from Chapter IV of the Second Stage Award, the

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458 *Award in the Arbitration regarding the Delimitation of the Abyei Area between the Government of Sudan and the Sudan People's Liberation Movement/Army*, Award of 22 July 2009, R.I.A.A., Vol. XXX, p. 408, para. 753.

459 *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the Delimitation of the Exclusive Economic Zone and the Continental Shelf between Them*, R.I.A.A., Vol. XXVII, p. 227, para. 292.

460 NR, para. 6.24.

461 NR, para. 6.29.

section that addressed the "traditional fishing regime".[462] Nicaragua draws no inference from the fact that the Tribunal made no reference to pertinent factors in the relevant paragraphs. But, aside from the fact that the Tribunal explicitly rejected this speculative argument, Nicaragua's explanation is counter-intuitive. Indeed, even if "the tribunal was empowered to look beyond the terms of UNCLOS",[463] no judge or arbitrator would give pre-eminence to a pertinent factor over UNCLOS if the two were truly conflicting and the latter was applicable to the parties. As the Arbitral Tribunal stated:

> "The traditional fishing regime is not limited to the territorial waters of specified islands; nor are its limits drawn by reference to claimed past patterns of fishing. (…) *By its very nature it is not qualified by the maritime zones specified under the United Nations Convention on the Law of the Sea, the law chosen by the Parties to be applicable to this task in this Second Stage of the Arbitration*. The traditional fishing regime operates throughout those waters beyond the territorial waters of each of the Parties, and also in their territorial waters and ports, to the extent and in the manner specified in paragraph 107."[464]

Given the jurisprudence, Nicaragua's applicable law-based explanation is a last-ditch attempt to clutch at straws.

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462 *Award of the Arbitral Tribunal in the Second Stage of the Proceedings between Eritrea and Yemen (Maritime Delimitation)*, Decision of 17 December 1999, R.I.A.A., Vol. XXII, pp. 356-361, paras. 87-111.

463 NR, para. 6.27.

464 *Award of the Arbitral Tribunal in the Second Stage of the Proceedings between Eritrea and Yemen (Maritime Delimitation)*, Decision of 17 December 1999, R.I.A.A., Vol. XXII, p. 361, para. 109. (Emphasis added).

5.23 Aside from the purported incompatibility theory, Nicaragua stresses that historic rights premised on "[t]he exercise of freedoms permitted under international law cannot give rise to a historic right" because nothing calls for acquiescence if it is done in conformity with international law.[465] This argument, which again assumes that traditional fishing rights are necessarily exceptional rights that must contradict other rules of international law, is not pertinent with regard to non-exclusive traditional rights. The historical controversy over the breadth of the territorial waters demonstrates that traditional fishing rights can crystallise within areas that used to be part of the high seas prior to the extension of the territorial sea from 3 to 6 and 12 nautical miles.

5.24 Similarly, in the *Fisheries Jurisdiction* cases, the Court recognised the United Kingdom's and Germany's historic rights to access and exploit banks located in the Icelandic preferential rights zone.[466] While it is true that the fishing at stake was industrial, this precedent still attests to the fact that historic rights, which do not seek to negate the coastal State's rights, can exist regardless of the fact that the particular maritime area used to be part of the high seas. Nicaragua's own Reply proves the point. By drawing attention to traditional fishing rights in archipelagic waters, Nicaragua implicitly, but inevitably,

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465 NR, para. 6.60.

466 *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3; *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 175.

recognises that acquired rights can crystallise within areas where the freedom of fishing used to apply, given that archipelagic baselines often enclose maritime areas that used to be high seas.

D. Nicaragua's Express Recognition of the Traditional Fishing Rights

5.25 Colombia reiterates that the debate as to whether traditional fishing rights have been superseded by the appearance of the EEZ becomes purely theoretical when it can be shown that, in any event, both parties have recognised the existence of such vested rights.

5.26 Colombia's main argument is that traditional fishing rights are protected under international law regardless of the maritime area involved and irrespective of any form of recognition from coastal States. Accordingly, for Colombia, President Ortega's statements recognising the rights of the artisanal fishermen of the Archipelago have a purely declaratory effect. They accept already existing rights and customs that can, of course, be subsequently fleshed out in technical agreements. However, Colombia's alternative argument is that if traditional fishing rights were to be considered incompatible with the EEZ, this is without consequence in the present case since the concurrent statements by the Presidents of the two countries can be construed as having a constitutive effect. Nothing precluded Nicaragua and Colombia from reaching the conclusion that the traditional fishing rights of the inhabitants of the San Andrés

Archipelago should be preserved and protected in the aftermath of the 2012 Judgment.

5.27 Rather than neglecting the statements of its own President, Nicaragua in its Reply endeavours to find an explanation for them, which, while upholding the good intentions of its highest representative, also attempts to render his words without troublesome legal consequences. As conveniently put in the Reply, "President Ortega's attempts to strike a conciliatory tone *cannot change the legal situation*".[467]

5.28 Nicaragua does not contest, and neither does Colombia, that President Ortega has shown a measure of goodwill by repeatedly emphasising the need to "respect the ancestral rights of the Raizales".[468] In fact, right after the 2012 Judgment, President Ortega referred to this matter stating that Nicaragua "fully respect[s] the right to fish and navigate in those waters that they have sailed historically and have also survived from the resources of the sea".[469] But for Nicaragua, these references to traditional fishing somehow "fall far short of 'explicit recognitions'".[470] As Nicaragua puts it, the President's statements merely indicate "that artisanal fishing 'rights' do not exist absent an appropriate agreement",[471] and that the declarations stand "only for the unremarkable proposition that

467 NR, Chapter VI, Sub-section (*c*), p. 141. (Emphasis added).
468 NR, para. 6.70.
469 Annex 1: Message from President Daniel Ortega to the People of Nicaragua, 26 November 2012.
470 NR, para. 6.67.
471 NR, para. 6.71.

continued fishing in Nicaragua's EEZ by the Raizales would have the be the [sic] subject of an agreement".[472]

5.29 Aside from the fact that the record shows an altogether different story, Nicaragua's reasoning gives rise to serious difficulties. For example, Nicaragua stresses in relation to the February 2013 statement that, while it is true that President Ortega indicated that Nicaragua will "allow Raizales to continue fishing", that statement constituted "an *exercise* of Nicaragua's sovereign rights and jurisdiction, not the fulfilment of an obligation in *derogation* of Nicaragua's rights".[473] But even if that were to be true, which is doubtful and which nothing in the record supports as can be seen from the transcription of President Ortega's speech,[474] it would not deprive "this public statement of its intended legal effects".[475] For Nicaragua does not, and cannot, dispute the fact that such reading would amount to granting rights to the artisanal fishermen.

5.30 As previously stated, Nicaragua blurs the distinction between recognition of the traditional fishing rights and the separate question of the conclusion of technical agreements to define their exact contours. President Ortega often addresses both matters in conjunction, but the distinction is nevertheless

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472 NR, para. 6.73.

473 NR, para. 6.72. (Emphasis added).

474 Annex 6: Speeches at the 79th Anniversary of General Augusto C. Sandino's Transit to Immortality, 21 February 2013.

475 *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 267, para. 43*; Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 472, para. 46.

clear. Thus, on 2 December 2012, the President of Nicaragua stated that:

> "Be sure that we will respect the historical rights that they (the Raizals) have had over those territories. We will find the mechanisms to ensure the right of the Raizal people to fish, in San Andrés, so we can protect those people that live of that territorial sea and also so we can confront drug trafficking in that region."[476]

This statement, on the one hand, expressly recognises pre-existing "historical rights" and, on the other hand, stresses that "mechanisms" should be established to "ensure" the "right of the Raizal people to fish". In other words, the mechanisms are a tool, admittedly an important one, to safeguard the traditional fishing rights, but not a precondition to their existence, which was regarded as an established fact.

5.31 In his 21 February 2013 statement,[477] President Ortega emphasised the importance of establishing a "mechanism", a "commission" or a "consular section", for the sake of fleshing out the content of the traditional fishing rights.[478] This time the emphasis was not on the recognition of the traditional rights, which was taken as a given, but on matters to be clarified such

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476 CCM, Annexes 73 and 74.

477 CCM, Annex 76. See also: Annex 6: Speeches at the 79th Anniversary of General Augusto C. Sandino's Transit to Immortality, 21 February 2013.

478 CCM, Annex 76. See also: Annex 6: Speeches at the 79th Anniversary of General Augusto C. Sandino's Transit to Immortality, 21 February 2013.

as who and how. The mechanism should "identify the raizal fishermen so that they can keep fishing without problems in the waters that the International Court of Justice reverted to the country [Nicaragua] in the Caribbean Sea".[479] The situation needs to be regulated "because right now there is no way to know how many vessels belong to the raizal community and which are related by [sic] industrial fishing".[480] A consular section in San Andrés would allow to clearly determine, "from there", "how many raizal fishermen are there, which are their boats, so that they can fish freely".[481]

5.32 While it is true that these are all aspects that may require information, Nicaragua's Reply is mistaken in suggesting that "artisanal fishing 'rights' do not exist independently of 'mechanisms to be approved by Nicaragua'".[482] The fact of the matter is that Nicaragua's President has already recognised the existence of the traditional fishing rights as well as their fundamental characteristics. Artisanal fishermen are allowed to

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479 CCM, Annex 76. See also: Annex 6: Speeches at the 79th Anniversary of General Augusto C. Sandino's Transit to Immortality, 21 February 2013.

480 CCM, Annex 76. See also: Annex 6: Speeches at the 79th Anniversary of General Augusto C. Sandino's Transit to Immortality, 21 February 2013.

481 CCM, Annex 76. See also: Annex 6: Speeches at the 79th Anniversary of General Augusto C. Sandino's Transit to Immortality, 21 February 2013.

482 NR, para. 6.70.

"fish freely"[483] without having to ask for permission from INPESCA in the waters appertaining to Nicaragua.

5.33 Notwithstanding its attempt to diminish the value of its President's statements, Nicaragua concludes that "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".[484] But such bilateral agreement would only serve to put into place the mechanism supplementing the traditional fishing rights regime, whose existence is already established.

E. The Evidence Corroborates the Existence of the Traditional Fishing Rights

5.34 Far from addressing the evidence put forward in Colombia's Counter-Memorial, Nicaragua relies on partial citations so as to dispute the existence of traditional fishing rights in waters of its EEZ. Nicaragua goes further and asserts that Colombia's evidence "disproves its claims".[485] Clearly, Nicaragua believes that anything other than its superficial assessment of the sworn statements must be in vain since, in its contention, the affidavits were made by private persons

[483] CCM, Annex 76. See also: Annex 6: Speeches at the 79th Anniversary of General Augusto C. Sandino's Transit to Immortality, 21 February 2013.
[484] NR, para. 6.76.
[485] NR, Chapter VI, Section B, Sub-section (*b*).

interested in the outcome of the proceedings and apparently "prepared in haste for purpose of this litigation".[486]

5.35 This is nothing more than Nicaragua trying to silence the voice of the Raizales. But a full reading of the affidavits discloses an altogether different picture from the one portrayed in Nicaragua's Reply. For the Applicant, the traditional fishing activities did not occur in what are currently waters under its jurisdiction and, if they did (which it begrudgingly admits), they "were too infrequent and of too recent standing to establish either historic rights or a local custom under international law".[487] This dismissive critique is focused on two aspects, spatial and temporal, each of which Colombia will address in turn.

5.36 However, before refuting Nicaragua's fragmented reading of the affidavits, Colombia must draw attention to an aspect that the Applicant purposefully ignored in its Reply. This has to do with the standard of proof for establishing the existence of traditional fishing rights. Colombia is invoking rights vested in a small community of artisanal fishermen that live in an important but, nevertheless, relatively remote region of the Southwestern Caribbean Sea. Under these circumstances, the jurisprudence stresses that the matter of proof must be approached with common sense. For example, in the recent

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486 NR, para. 6.50.

487 NR, para. 6.62.

award in the *South China Sea Arbitration*, the Arbitral Tribunal found that:

> "Based on the record before it, the Tribunal is of the view that Scarborough Shoal has been a traditional fishing ground for fishermen of many nationalities, including the Philippines, China (including Taiwan), and Viet Nam. The stories of most of those who have fished at Scarborough Shoal in generations past have not been the subject of written records, and the Tribunal considers that traditional fishing rights constitute an area where matters of evidence should be approached with sensitivity. That certain livelihoods have not been considered of interest to official record keepers or to the writers of history does not make them less important to those who practice them. With respect to Scarborough Shoal, the Tribunal accepts that the claims of both the Philippines and China to have traditionally fished at the shoal are accurate and advanced in good faith."[488]

5.37 Likewise, in the *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua)*, the present Court was prepared to recognise the existence of a customary right to fish based on little evidence because it considered, also with sensitivity and common sense, that the practice in question, "especially given the remoteness of the area and the small, thinly spread population, [was] not likely to be documented in any official record".[489]

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[488] *The South China Sea Arbitration (Philippines* v. *China), Award of 12 July 2016, PCA Case No. 2013-19*, p. 315, para. 805.

[489] *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213, para. 141.

5.38 In other words, Nicaragua's attempt to heighten the burden of proof is misguided considering the nature of the traditional practices and the context in which they took place. Under these circumstances, as previously developed, Colombia considers that the historical documents it gathered are more than adequate to substantiate the proposition that the inhabitants of the Archipelago were men and women of the sea who navigated, traded, turtled and fished throughout the Southwestern Caribbean Sea since time immemorial.[490]

5.39 According to Nicaragua, "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".[491] To support that proposition, Nicaragua merely highlights the fact that the affidavits frequently refer to traditional fishing that occurred in the North Cays (Serrana, Quitasueño, Roncador, Serranilla and Bajo Nuevo).[492] Obviously the artisanal fishermen's sworn statements contain several references to fishing that took place in waters surrounding these islands. Indeed, it would be extraordinary if the traditional banks were to be located only on the Nicaraguan side of the 2012 line. However, it would be equally remarkable if these traditional fishing activities, which Nicaragua takes for granted, were to be located only on the Colombian side of the 2012 line. Nicaragua would have the Court believe that traditional fishing has always

490 CCM, paras. 2.67-2.86.
491 NR, para. 6.51.
492 NR, paras. 6.51-6.54.

for some reasons been restricted to the banks situated within 12 nautical miles of islands such as Quitasueño and Serrana as if the drawing of a line could influence the conduct of the artisanal fishermen retroactively. But, as explained in the Counter-Memorial, bathymetry and of course the affidavits, give the best indication of where traditional fishing took place.

5.40 Indeed, some of the biggest and most important fishing banks, both shallow and deep-sea, are located in the vicinity of the Colombian islands but, nevertheless, in maritime areas adjudicated by the Court to Nicaragua as depicted in Figures 2.4 and 2.5 of Colombia's Counter-Memorial. Yet, despite its so-called "careful examination of Colombia's affidavits",[493] Nicaragua conveniently fails to mention that the artisanal fishermen expressly refer to traditional banks located in waters that had, according to President Ortega himself, "reverted" to Nicaragua.[494]

5.41 Many of the affiants consider that Cape Bank constitutes one of the most important traditional grounds for the artisanal fishermen of the Archipelago. Cape Bank is the vast area of shallow waters that extends from the Mosquito Coast to the 82nd West Meridian and beyond. The fact that some of the affiants refer to the 82nd West Meridian is because such coordinate largely coincides with *Luna Verde* (also known as *La Esquina*) – that is to say, the area where the shallow grounds of Cape Bank

493 NR, para. 6.62.
494 CCM, Annex 76.

give place to its deep-sea grounds, which are also crucial for the artisanal fishermen of the Archipelago. *Luna Verde* is simply the part of Cape Bank which is located to the east of the 82nd West Meridian. As stated by Mr George de la Cruz de Alba Barker, an artisanal fisherman based in San Andrés:

> "Cape Bank, what they sometimes call today Luna Verde but I do not know where this name comes from, is the name with which I have known the area since I was a child. Cape Bank goes from Cape Gracias a Dios in Honduras down to Costa Rica. It is not only limited to the area east of the 82nd Meridian and South of the 15th parallel. My parents also fished in this area, and today we generally go there when there is not enough product in the South Cays. Fishing is more abundant in this zone and this is why we go there although it is farther from the South Cays."[495]

5.42 Thus, the affidavits both explicitly and implicitly refer to Cape Bank which is considered by artisanal fishermen as "one of the best places to fish".[496] Indeed, some of the affiants expressly mention "Cape Bank",[497] while others point to locations that are obviously part of its shallow, as well as its deep-sea, grounds such as the "82° West Meridian",[498] "Luna Verde",[499] "Great Corn Island and Little Corn Island",[500]

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495 CCM, Annex 71.
496 CCM, Annex 68.
497 CCM, Annexes 62, 65, 68, 70, 71 and 72.
498 CCM, Annexes 63, 64, 65, 69 and 71.
499 CCM, Annex 71
500 CCM, Annex 64.

"Rosalind Bank",[501] "Bobel cay"[502] and "Cape Gracias a Dios".[503] As stated by Mr George de la Cruz de Alba Barker:

> "The fishing banks are mostly located where the sea's depth changes from very shallow to relatively deep. West of Quitasueño these banks are located east of the 82nd Meridian and south of the 15th parallel. But more to the South, to the west of Providencia, they are located on the 82nd Meridian and a little beyond. These are the best areas since Cape Bank is huge and has many resources."[504]

5.43 Likewise, Mr Wallingford Gonzalez Steele Borden declared that he "mostly fish[es] in the 82nd Meridian, west of Providencia, with traps".[505] In its Reply, Nicaragua states that "this vague reference 'to the area of the 82° west of Providencia' does not support Colombia's case" because that meridian "comes very close" to the maritime boundary drawn by the Court.[506] Merely insisting on the proximity between the meridian and the boundary, Nicaragua does not deny that the bathymetry of the region clearly shows that west of Providencia, the shallow and deep-sea grounds of Cape Bank are entirely located within the maritime areas adjudicated to Nicaragua, as shown in Figures 2.4 and 2.5 of Colombia's Counter-Memorial.

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501 CCM, Annexes 65 and 71.
502 CCM, Annexes 63, 64 and 65.
503 CCM, Annex 63, 69 and 71.
504 CCM, Annex 71.
505 CCM, Annex 63.
506 NR, para 6.54.

5.44 Aside from Cape Bank, the affiants mentioned other important traditional banks that are located on the Nicaraguan side of the 2012 line, such as "Julio Bank",[507] "Far Bank"[508] and "North East Bank".[509] These are mainly deep-sea banks situated in the waters surrounding the North Cays that have at times been named by the artisanal fishermen who discovered them. In these waters, the artisanal fishermen fish "groupers that [they] call 'John Pou', Mandilous, Satten, Red Eyes, Soapfish, Yellow Eyes and Bream" and that are particularly appreciated in the local markets.[510] These deep-sea banks are mainly situated north of Quitasueño, and between, respectively, Providencia and Quitasueño, Quitasueño and Serrana, and Serrana and Roncador. Thus, Mr Landel Hernando Robinson Archbold states that:

> "Unfortunately some of our banks are now in the waters of Nicaragua (…). If I want to fish in North East Bank and in Julio Bank, which are located in Nicaraguan waters between Quitasueño and Providencia, I have to be very careful."[511]

5.45 Likewise, Mr Wallingford Gonzales Steele Borden stressed that:

> "When we fish close to the cay, it is because we are looking for shallow banks. But we also fish farther from the cays in the deep-sea banks located between Providencia and Quitasueño, between

507 CCM, Annexes 62, 63, 64, 65 and 66.
508 CCM, Annexes 63, 64 and 65.
509 CCM, Annexes 62, 64, 65 and 66.
510 CCM, Annex 65.
511 CCM, Annex 62.

> Quitasueño and Serrana, and between Serrana and Roncador. In those areas, there are large fishing banks that are very well known to us, such as 'Far Bank' and 'Julio Bank'. There you find the groupers which are the fish that the cooperative is most interested in. Those fishing banks have names given to them by the people who have discovered them. But no, there is no Wallin[g]ford bank at the moment."[512]

5.46 Mr Ligorio Luis Archbold Howard similarly underlined that:

> "I fish in Nicaragua's waters north and west of Providencia. (…) The fishing grounds of Far bank, North East and Julio Banks are traditional fishing grounds of Providencia and now some of their coordinates are in Nicaraguan waters. They are deep-water banks very important for artisanal fishermen of Providencia because it is where you can find the fish most appreciated by the islanders. We fish from Low Cay off the northern tip of Providencia up to the Southern tip of Quitasueño. I spend 5 or 6 days in Julio Bank, North-East Bank, Far Bank, Low Cay. (…) There are similar deep-sea banks between Quitasueño and Serrana, but I do not know their names. Fishermen try to keep them secret, it is a family tradition. They might have a name but I know that I am not the first one who went there so I did not name them."[513]

5.47 Mr Ornuldo Rodolfo Walters Dawkins, in addition to fishing in the deep-sea banks located in between these islands, also goes farther north where the shallow grounds of *Luna*

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512 CCM, Annex 63.

513 CCM, Annex 65.

Verde give way to its extended deep-sea banks located to the north and northwest of Quitasueño:

> "I continue to fish in the area between Providencia and Quitasueño. I have fished in Julio Bank, Far Bank, North East Bank and Serrana. But we also fish farther from the cays like for example as far as 35 miles from the North tip of Queena [Quitasueño]."[514]

5.48 In fact, Nicaragua's own written pleadings demonstrate that traditional banks are situated in maritime areas located on the Nicaraguan side of the 2012 delimitation. In paragraph 4.121 of its Reply, Nicaragua based its assertion that "Luna Verde is an area for commercial fishing, not artisanal fishing", on its own Annex 22.[515] Quite apart from the fact that the annexed newspaper article does not state the above, which would make no sense since artisanal and industrial fishing both constitute distinct sub-categories of commercial fishing under Colombian law,[516] that article specifies that the artisanal fishermen lost traditional banks to the "west of Providencia and to the east of Bolivar Key", as well as the area known as *Luna Verde* or *La Esquina*.[517] While the latter was "exploited especially by industrial fishermen", the article clearly indicates that that area is also a traditional ground for artisanal fishermen.[518] Likewise, already in its Memorial, Nicaragua's annexes proved the point.

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514 CCM, Annex 64.
515 NR, para. 4.121 and Annex 22.
516 Annex 17: Ministry of Agriculture, Decree 2256 of 1991, Article 12.
517 NR, Annex 22.
518 NR, Annex 22.

For example, the 2013 Report of the Office of the Comptroller General of San Andrés on the status of natural resources and the environment, made explicit reference to the 82nd West Meridian, North East Bank and *Luna Verde* or *La Esquina*.[519] With regard to the latter, the Report suggested that this bank was "exploited in greater proportion by industrial fisheries of the Archipelago".[520] Once again, it follows that *Luna Verde* is also a traditional bank exploited by Colombia's artisanal fishermen.

5.49 Unable to maintain that the traditional banks are only located in the Colombian maritime areas as defined in the 2012 Judgment, Nicaragua declares that "at the earliest, artisanal fishermen began venturing into deeper waters closer to Nicaragua only in the 1970s" and that, consequently, "Colombia's assertion that its fishermen have fished in [its] EEZ 'since time immemorial' is [a] profound overstatement".[521] Nicaragua's temporal objection is based on the proposition that traditional fishing rights cannot crystallise over a time frame spanning five decades, which, in itself, is dubious. But what is most problematic is that Nicaragua intentionally distorts the affidavits.

5.50 Technological developments have enabled artisanal fishermen to venture more frequently in the traditional banks located farther from the Archipelago. Nonetheless, the evidence

519 NM, Annex 12.
520 NM, Annex 12.
521 NR, para. 6.57.

shows that fishing expeditions to Cape Bank and to the waters surrounding the North Cays were always part and parcel of the culture of the inhabitants of the San Andrés Archipelago. Contrary to what Nicaragua would have the Court believe, Mr Wallingford Gonzalez Steele Borden has not stated that in the 1960s and prior to that decade traditional fishing merely occurred within areas located close to Providencia and San Andrés.[522] On the contrary, he said that:

> "We artisanal fishermen always fished in Roncador, Quitasueño, Serrana and in the area of 82° west of Providencia. We would even go further and reach Bobel Cays close to Cape Gracias a Dios. But at the time the expeditions occurred less frequently because in the sixties we had a lot of fish also around Providencia. We would go in these expeditions to the Northern and Western banks a few times a year and stay there one or two months. With less fish around Providencia we started going more often to these banks. Of course it was easier once engines arrived and we started using *lanchas*. (…) *Lanchas* allow us to reach the grounds with less effort."[523]

5.51 Obviously, the affiants mainly relate to their parents' and their own lifetime experiences because it is the time period that they have witnessed. However, it does not follow, and the artisanal fishermen do not state, that the geographical scope of their fishing activities were previously limited to Providencia and San Andrés. Nor can Nicaragua plausibly argue that those

522 NR, para. 6.56.
523 CCM, Annex 63.

activities were "too infrequent".[524] For while it is true that the artisanal fishermen could not go to Cape Bank, *Luna Verde* and the deep-sea banks situated between the North Cays on a daily basis, expeditions that would last weeks or months occurred regularly several times a year. Those expeditions certainly constitute practices that can give rise to traditional fishing rights or local customs.

5.52 In addition to distorting the affidavits, Nicaragua has also misread Colombia's domestic law. Nicaragua's misinterpretation reaches its peak when it asserts that Colombia's legislation prevents artisanal fishermen from fishing beyond 12 nautical miles of San Andrés and Providencia.[525] Partially quoting from DIMAR Resolution No. 121 of 2004, and likewise partially annexing that instrument, Nicaragua wrongly asserts that said instrument "placed tight limits on the areas where artisanal fishermen were permitted to fish".[526]

5.53 But the scope and purpose of that resolution,[527] as can be seen from its title, is to "facilitate", not encumber, artisanal fishing. Also, it establishes a special procedure in relation to coastal (*costera*) and inshore (*de bajura*) artisanal fishing. Contrary to offshore (*de altura*) artisanal fishing, coastal and inshore artisanal fishing occurred, according to Colombian law,

524 NR, para. 6.62.
525 NR, para. 6.39.
526 NR, para. 6.39.
527 NR, Annex 6.

within, respectively, 1 nautical mile and 12 nautical miles of the coast.[528]

5.54 Contrary to what Nicaragua asserts,[529] Resolution No. 121 does not, and in fact cannot, prohibit offshore artisanal fishing. In so far as it is not regulated by this resolution, artisanal offshore fishing is perfectly legal to the extent that it is done in conformity with Decree No. 2256 of 1991, which requires the deliverance of a regular, more formal permit.

5.55 Nicaragua has also ignored the fact that both the President and the Foreign Minister of Colombia, as well as other Colombian officials, have repeatedly recognised that many of the traditional fishing grounds of the artisanal fishermen of the San Andrés Archipelago are located on the Nicaraguan side of the 2012 line.[530] However, Nicaragua has pointed to an alleged inconsistency in the Colombian position, which it inferred from two recommendations of a Committee of Experts of the International Labour Organisation (ILO).[531] It appears that the

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528 Annex 17: Ministry of Agriculture, Decree 2256 of 1991, Article 12.

529 NR, para. 6.39.

530 CCM, Annex 20; CPO, Annexes 10 and 38.

531 NR, paras. 6.32-6.37; ILO, Committee of Experts on the Application of Conventions and Recommendations, "Observations (CEACR) – adopted 2013, published 103rd ILC session (2014), Indigenous and Tribal Peoples Convention, 1989 (No. 169) – Colombia (Ratification: 1991)", available at: https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3141200 (last visited: 1 November 2018); ILO, Committee of Experts on the Application of Conventions and Recommendations, "Observations (CEACR) – adopted 2014, published 104rd ILC session (2015), Indigenous and Tribal Peoples Convention, 1989 (No. 169) – Colombia (Ratification: 1991)", available at:

Office of Cooperation and International Relations, a section of the Colombian Ministry of Labour, cavalierly concluded, in a letter which Colombia is annexing to this Rejoinder, that the artisanal fishermen of the San Andrés Archipelago could not have been impacted by the 2012 line since the islands and, in particular, the North Cays, as well as their appurtenant territorial sea, remained under Colombian sovereignty.[532]

5.56 This statement was delivered in response to a communication made to an ILO body by the Colombian General Confederation of Labour on behalf of the Raizal Small-Scale Fishers' Associations.[533] Responding to the claim that Colombia had, in particular, breached the Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No. 169), the Office of Cooperation and International Relations sought to refute the proposition that the government had not ensured the right of prior consultation of the Raizal people in the context of the *Territorial and Maritime Dispute* case. While that aspect of the communication is comprehensively addressed to in the response of the Office of

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https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO::P13100_COMMENT_ID,P13100_LANG_CODE:3182299,en:NO (last visited: 1 November 2018).

[532] Annex 24: Ministry of Labour, Note to the ILO in relation to the application by Colombia of Convention No. 169, 2 September 2013.

[533] Annex 67: General Confederation of Labour, *Submission of complaint on behalf of the General Confederation of Labour and the cooperatives and associations of artisanal fishermen and Raizal groups of the Archipelago of San Andrés, Providencia and Santa Catalina against the Colombian State*, 18 February 2013; and Annex 68: General Confederation of Labour, *Submission of complaint relating to the breach of Convention No. 169 by the Colombian State*, 10 February 2014.

Cooperation and International Relations, that Office significantly failed to provide even a shred of evidence to support its assertion that the traditional fishing sites were precisely located in the vicinity of areas not affected by the decision.

5.57 Moreover, the Office's assertion can hardly be reconciled with the extensive description of "Plan San Andrés" in its response to the ILO. This plan was established by the Colombian Government in the aftermath of the 2012 Judgment to alleviate the adverse effects endured by the artisanal fishermen who had traditionally relied on fishing grounds located in maritime areas that were adjudicated to Nicaragua.

5.58 The Labour Ministry's communication to the ILO indicates that Colombia spent 4.383 million Colombian pesos (some US $ 2.5 million) in marine aquaculture programs intended to provide alternative employment sources for artisanal fishermen; and for six months granted a monthly subsidy of 1.8 million Colombian pesos (more than US $ 1,000) to artisanal fishermen who were certified as such and regularly engaged in this activity before 19 November 2012, the day the 2012 Judgment was rendered.[534]

[534] For the list of requirements to be afforded the monthly subsidy, see Annex 21: Department for Social Prosperity, Resolution No. 02117, 21 December 2012.

5.59 The implementation of the artisanal fishing component of the "Plan San Andrés" was overseen by Monitoring Committees composed by artisanal fishermen, the Ombudsman and the Archipelago's Secretary of Agriculture and Fishing, who in 2013 published the list of subsidies granted (a total of 755 in San Andrés and 275 in Providencia), specifying the beneficiary's name, ID number and cooperative or association to which they belong.[535]

5.60 If Nicaragua's claim that artisanal fishermen were not in fact impaired after the 2012 Judgment from continuing fishing where they had ancestrally done so were true, it would not have been necessary for the Colombian Government to establish a plan and devote a significant amount of money to address what in effect became after November 2012 a pressing social issue.

5.61 In this regard, the communications to the ILO from the General Confederation of Labour on behalf of the Raizal Small-Scale Fishers' Associations actually strengthen the proposition that many traditional fishing banks are located on the Nicaraguan side of the 2012 line. Indeed, the communications received by the ILO clearly indicate that, according to the artisanal fishermen of the Archipelago, traditional fishing used

[535] Annex 22: Archipelago Department of San Andrés, Providencia and Santa Catalina, List of Beneficiaries of the Artisanal Fishermen Subsidy in San Andrés, 9 April 2013; and Annex 23: Archipelago Department of San Andrés, Providencia and Santa Catalina, List of Beneficiaries of the Artisanal Fishermen Subsidy in Providencia, 9 April 2013.

to take place in areas that were adjudicated to Nicaragua. According to the claimants, Colombia must take:

> "[T]he necessary measures so that the artisanal fishermen workers of San Andrés and Providencia can exercise freely as before their activity of artisanal fishermen in order to seek to improve their social and economic situations, seriously affected by the ruling of the International Court of Justice".[536]

Similarly, the claimants stressed that:

> "Likewise, the Nicaraguan government must adopt measures to allow the Raizal artisanal fishermen to fish in the waters recently adjudicated to that State that were being exploited by this Raizal community".[537]

In other words, it appears that the position of the artisanal fishermen of the Archipelago is coherent regardless of whether their claims are being supported by Colombia in the context of the current proceedings or, on the contrary, brought against the Colombian Government before the ILO. Thus, the communications submitted to the ILO on behalf of the Raizal Small-Scale Fishers' Associations clearly support the existence of traditional fishing rights in the maritime areas adjudicated to Nicaragua.

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536 Annex 67. See also Annex 68.

537 Annex 67. See also Annex 68.

F. The Evidence Substantiates the Infringement of the Traditional Fishing Rights

5.62 Nicaragua brushed off the evidence attesting to the infringement of the traditional fishing rights by qualifying most of it as amounting to "hearsay".[538] Likewise, Nicaragua also asserted that Colombia did not adduce "contemporaneous evidence" and that "the omission is revealing" considering that Nicaragua is being accused of an "active strategy of intimidation".[539] At the very least, Nicaragua argued, contemporaneous "diplomatic protests" or "complaints made to local authorities" should be expected.[540]

5.63 The Nicaraguan Reply makes no attempt to hide the two different yardsticks that it applies *vis-à-vis*, on the one hand, its own claims and, on the other hand, Colombia's counter-claim. With regard to its own claims, which allegedly also involve the implementation "of a considered policy" demonstrating "Colombia's disregard for Nicaragua's sovereign rights and jurisdiction",[541] Nicaragua appears to be content with the fact that its "evidence" is based on asynchronous second-hand accounts.

5.64 Nicaragua's acute case of selective memory is well portrayed by the fact that its list of so-called "incidents" is based

538 NR, paras. 6.79, 6.85, 6.87, 6.89 and 6.91.
539 NR, para. 6.83.
540 NR, para. 6.83.
541 NR, para. 4.45.

on a diplomatic note, which is based on a report from the Nicaraguan Naval Force, which in turn is based on a request from the Nicaraguan Foreign Ministry, that are all far removed temporally from the alleged events to which they refer.[542] While the Colombian affidavits were apparently "prepared in haste for purposes of this litigation",[543] the diplomatic note that was sent three weeks before the filing of the Nicaraguan Memorial is seemingly a perfect piece of evidence despite the fact that it is not backed up with contemporaneous evidence.

5.65 Apart from criticizing the lack of contemporaneous evidence, Nicaragua also stresses that the incidents mentioned in the affidavits are not specific as to the date of occurrence.[544] Yet, Nicaragua again forgets that on many occasions it has provided the date of an indirect report instead of the date of the purported "incident" to support its own claims and that several of the "incidents" it relies on could not have happened as recounted by Nicaragua.[545]

5.66 Aside from highlighting Nicaragua's self-serving double standards, Colombia will go through the evidence once more to demonstrate that Nicaragua has infringed the traditional fishing rights of the inhabitants of the San Andrés Archipelago. Colombia has shown in its Counter-Memorial that by bullying, the Nicaraguan Naval Force has instilled a climate of fear

542 See Chapter 3 *supra*.
543 NR, para. 6.50.
544 NR, paras. 6.87, 6.88 and 6.91.
545 See Chapter 3 *supra*, incidents 1, 4 and 9.

amongst the artisanal fishermen, who, as a consequence of this conduct, have been forced to abandon many of their traditional fishing grounds.[546]

5.67 The conduct of the Nicaraguan Naval Force is well portrayed in a number of affidavits annexed to Colombia's Counter-Memorial.[547] While Nicaragua's quick assessment of this part of the counter-claim appears to suggest that, in its opinion, the incidents are trivial in nature, the fact that the Nicaraguan Naval Force requests food, cigarettes or coffee from the fishermen it intercepts, is not only inappropriate, it is serious. When a fisherman is approached, or even worse boarded, by Nicaraguan armed agents, he feels intimidated "since [they] have weapons"[548] and, as understandably put by Mr Antonio Alejandro Sjogreen Pablo, fishermen "cannot say no".[549] There is a sharp contrast with the type of "incidents" alleged by Nicaragua and those suffered by Colombia, in that none of those allegedly involving the Colombian Navy relate to boarding a Nicaraguan vessel or looting the fishermen.

5.68 Let us be clear. These Nicaraguan agents have done worse than stealing lunches and beverages. As stated by Mr George de la Cruz de Alba Barker, "[i]t is common to have our GPS, VHF radio, cigarettes and food supplies taken by them".[550]

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546 CCM, paras. 9.11-9.23.
547 CCM, Annexes 67, 69, 70, 71 and 72.
548 CCM, Annex 71.
549 CCM, Annex 72.
550 CCM, Annex 71.

The Nicaraguan Naval Force, he continues, "also strip[s] the boats of all their equipment of any value".[551] As indicated by Mr Alfredo Rafael Howard Newball, "[t]hey stop them, they take away their products, their equipment and they threaten and mistreat them".[552]

5.69 While Nicaragua relies on the ILO's aforementioned recommendations whenever it finds them to be convenient, it surprisingly fails to mention that, according to those recommendations, the complaint on behalf of the artisanal fishermen specified that "Raizal fishers have to cross Nicaraguan maritime territory, which is reported to give rise to difficulties and the payment of fines".[553]

5.70 Nicaragua states that President Santos' statement of 18 February 2013[554] is "pure hearsay".[555] However, it does not deny that President Ortega had to instruct its Naval Force not to detain and not to request permits from the artisanal fishermen prior to and after President Santos' statement.[556] In fact,

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551 CCM, Annex 71.

552 CCM, Annex. 67.

553 ILO, Committee of Experts on the Application of Conventions and Recommendations, "Observations (CEACR) – adopted 2014, published 104rd ILC session (2015), Indigenous and Tribal Peoples Convention, 1989 (No. 169) – Colombia (Ratification: 1991)", available at: https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO::P13100_COMMENT_ID,P13100_LANG_CODE:3182299,en:NO (last visited: 1 November 2018).

554 CPO, Annex 10.

555 NR, para. 6.79.

556 Annex 6: Speeches at the 79th Anniversary of General Augusto C. Sandino's Transit to Immortality, 21 February 2013. See also CCM, Annexes 75 and 76.

Nicaragua itself annexes evidence attesting to the occurrence of incidents.[557] Annex 20 of Nicaragua's Reply refers to three incidents that involved the Nicaraguan Naval Force and Raizal fishermen. Annex 12 of Nicaragua's Memorial attests to the fact that the artisanal fishermen are impeded of performing their work because of the conduct of the Nicaraguan Naval Force, which harangues them and, in general, adopts a "very aggressive" behaviour.[558]

5.71 Nicaragua disingenuously suggests that "the most that Colombia's affidavits might be said to establish is that fishermen from San Andrés and Providencia have experienced some uncertainty in the wake of the 2012 Judgment, and that they are reluctant to fish in Nicaragua's waters".[559] Yet, the affiants consistently stress that "there have been incidents with Nicaraguan coastguards"[560] and that, as a consequence, they fear "to get stopped"[561] and being "taken to the Nicaraguan coasts".[562]

5.72 Because of these incidents, many of the artisanal fishermen have stopped going to their traditional banks that are situated in the maritime zones recognised to appertain to Nicaragua or that are located around the Colombian islands. Landel Hernando Robinson Archbold, who is "afraid of the Nicaraguan coast-guard", "do[es] not fish up to la Esquina and

557 NR, Annex 20 and NM, Annex 12.
558 NM, Annex 12.
559 NR, para. 6.92.
560 CCM, Annex 64.
561 CCM, Annex 65.
562 CCM, Annex 71.

Cape Bank" anymore.[563] Ornuldo Rodolfo Walter Dawkins does not fish "beyond the 82nd Meridian" any longer.[564] Ligorio Luis Archbold Howard "do[es] not go all the way to Serrana and Quitasueño because there are more possibilities of getting stopped by Nicaraguan fishermen or coastguard".[565] Orlando Francis Powell states that he is "afraid" of going to traditional banks such as Cape Bank, Quitasueño and Serrana, so "[t]he last time we went in an expedition we went in Roncador because there we do not risk crossing the Nicaraguan coastguards".[566] Eduardo Steel Martinez "currently only fish[es] around San Andrés" because he fears getting stopped by the Nicaragua Naval Force as it sometimes occurs when artisanal fishermen "try to reach Cape Bank or the North Cays".[567] George de la Cruz de Alba Barker says artisanal fishermen "cannot go" anymore to the North Cays or to Cape Bank because "the decision whether they let us pass through, is up to the Nicaraguan coastguard".[568] Antonio Alejandro Sjogreen Pablo explains that because of the conduct of the Nicaraguan Naval Force "plenty of our people stopped going to Cape Bank and the North Cays".[569]

563 CCM, Annex 62.
564 CCM, Annex 64.
565 CCM, Annex 65.
566 CCM, Annex 68.
567 CCM, Annex 70.
568 CCM, Annex 71.
569 CCM, Annex 72.

5.73 All of the above clearly substantiates Nicaragua's infringement of the traditional fishing rights of the inhabitants of the San Andrés Archipelago.

G. Conclusions

5.74 Colombia has demonstrated that the inhabitants of the San Andrés Archipelago, in particular the Raizales, have traditionally engaged in artisanal fishing in maritime areas that were adjudicated to appertain to Nicaragua in the 2012 Judgment, as well as in Colombian areas that require navigating through waters of the Nicaraguan EEZ. While Nicaragua has decided in this case, contrary to the position taken by its President, to deny the existence of these recognised fishing rights, it has provided no rational explanation susceptible of justifying why traditional fishing rights should solely be extinguished in the EEZ.

5.75 Quite apart from its irrelevant assessment of the case-law relating to the adjustment of maritime boundaries, Nicaragua has failed to identify even one single precedent, which in either the operative part or the essential reasoning of the decision, stated that non-exclusive fishing rights are extinguished in the EEZ. Regardless of Nicaragua's tortuous reading of UNCLOS, Colombia has also shown that the parties to this case expressly and repeatedly recognised the existence of the traditional fishing rights. This notwithstanding, Colombia has proven that the Nicaraguan Naval Force has repeatedly bullied the artisanal

fishermen of the Archipelago, thus discouraging them from reaching their traditional fishing banks.

5.76 By means of this counter-claim, Colombia respectfully requests the Court to find that Nicaragua has infringed the traditional fishing rights of the inhabitants of the San Andrés Archipelago. Colombia also asks the Court to rule that Nicaragua is under an obligation to ensure that the inhabitants of the San Andrés Archipelago, including the Raizales, enjoy unfettered access to: a) the traditional fishing banks located in the maritime areas adjudicated to appertain to Nicaragua; and b) the traditional fishing banks located in the Colombian maritime areas, access to which requires navigating through the maritime areas adjudicated to appertain to Nicaragua. With regard to compensation of the assessable damage, including loss of profit, its form and amount should be determined at a later phase of the proceedings, following established practice.

Chapter 6

NICARAGUA'S VIOLATION OF COLOMBIA'S SOVEREIGN RIGHTS AND MARITIME SPACES THROUGH ITS STRAIGHT BASELINES DECREE

A. Introduction

6.1 In its Counter-Memorial, Colombia submitted a counter-claim challenging the legality, under international law, of Nicaragua's Decree No. 33-2013, enacted in order to establish straight baselines for the measurement of Nicaragua's maritime areas in the Caribbean Sea.[570]

6.2 As Colombia demonstrated in that pleading, Nicaragua's straight baselines are contrary to customary international law, and contrary to Article 7 of UNCLOS, which is binding on Nicaragua. These baselines, which have been enacted following the 2012 Judgment, are drawn from a series of basepoints located on features that the Court used to proceed to the delimitation between Nicaragua and Colombia,[571] with the

[570] In its Reply, Nicaragua acknowledges that the 2018 Judgment in the case concerning *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica* v. *Nicaragua)* has an effect on the delimitation of its territorial sea, and indicates that the basepoint set at Harbour Head, is under review. See NR, para. 7.12.

[571] The Court declared that "[s]ince [some Nicaraguan] islands are located further east than the Nicaraguan mainland, they will contribute all of the base points for the construction of the provisional median line. For that purpose, the Court will use base points located on Edinburgh Reef, Muerto Cay, Miskitos Cays, Ned Thomas Cay, Roca Tyra, Little Corn Island and Great Corn Island", *Territorial and Maritime Dispute (Nicaragua* v.

addition of two features located on Nicaragua's Caribbean mainland coast not mentioned by the Court.[572] These basepoints are described in the Decree as follows:

Table CR 1
Annex I to Nicaragua's decree No. 33-2013 of 19 August 2013

Item No.	*Latitude (N) Deg. Min. Sec.*	*Longitude (W) Deg. Min. Sec.*	*Name*
1	15 00 05.9	083 07 43.0	Cabo Gracias a Dios
2	14 49 15.8	082 41 00.0	Edinburgh Cay
3	14 22 31.2	082 44 06.1	Miskito Cays
4	14 08 40.6	082 48 29.0	Ned Thomas Cay
5	13 03 11.6	083 20 38.6	Man of War Cays
6	12 56 10.8	083 17 31.9	East of Great Tyra Cay
7	12 16 55.5	082 57 54.0	Isla del Maiz Pequeña (Little Corn Island)
8	12 10 39.3	083 01 49.9	Isla del Maiz Grande (Great Corn Island)
9	10 55 52.0	083 39 58.1	Harbour Head

6.3 As Colombia explained in its Counter-Memorial, the unlawful consequences of the enactment of this Decree are extreme with respect to the international community as a whole and, in particular, to Colombia and other neighbouring coastal States. Figure CR 6.1 hereunder illustrates its consequences in terms of the artificial and unlawful extension of Nicaragua's maritime claims in the Caribbean Sea.

Colombia), Judgment, I.C.J. Reports 2012, p. 699, para. 201. The basepoint from which Nicaragua departed from the Court's Judgment, without any explanation, is Edinburgh Reef, since the Decree No. 33-2013 refers instead to Edinburgh Cay.

[572] CCM, Annex 13 (Decree No. 33-2013, Baselines of the Marine Areas of the Republic of Nicaragua in the Caribbean Sea). Colombia protested against this Decree by letter dated 1 November 2013 to the Secretary-General of the United Nations. Costa Rica and the United States protested as well.

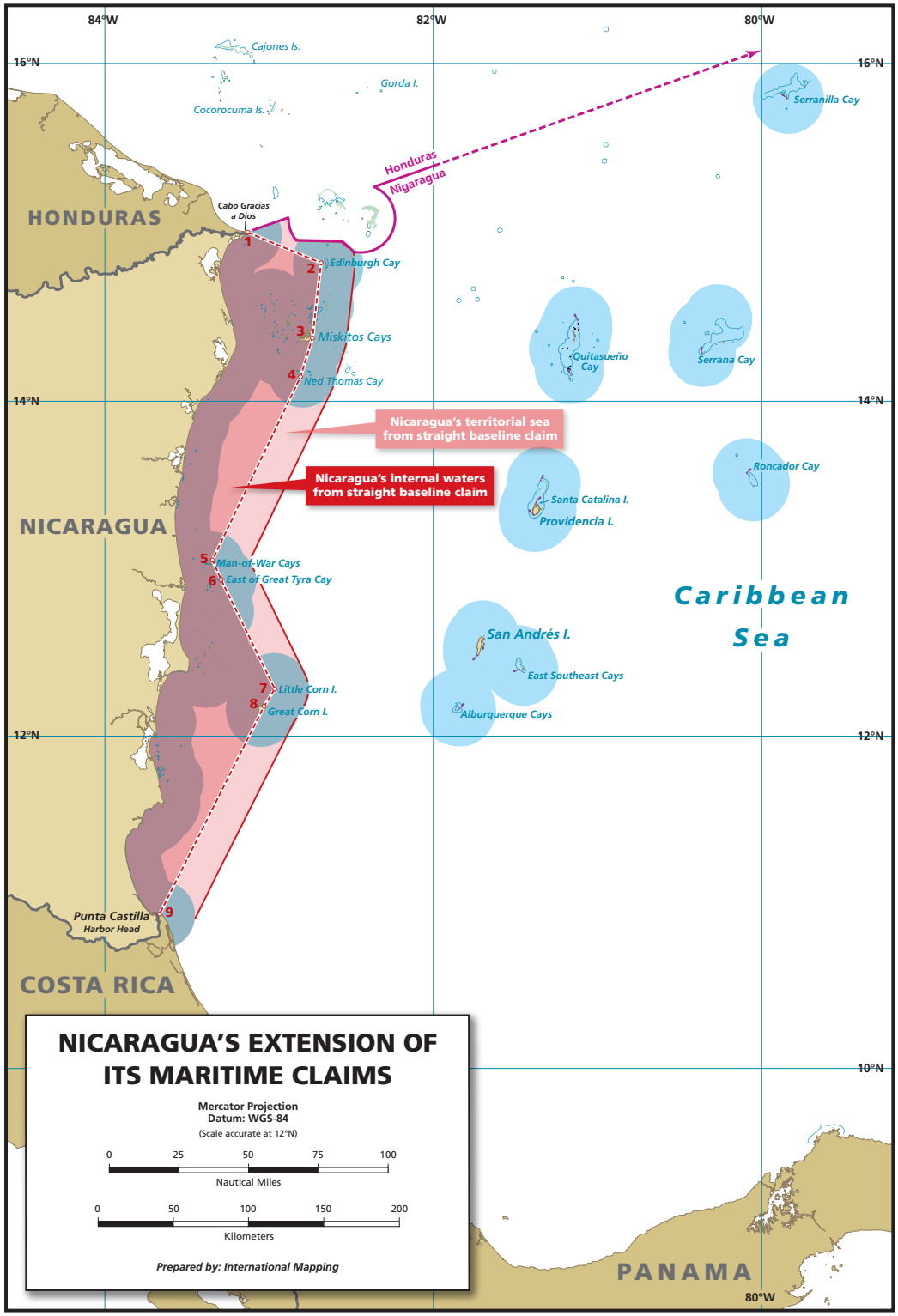
84°W
82°W
80°W
16°N
14°N
12°N
10°N
Cajones Is.
Gorda I.
Cocorocuma Is.
Serranilla Cay
Honduras
Nigaragua
HONDURAS
Cabo Gracias a Dios
1
2
Edinburgh Cay
3
Miskitos Cays
4
Ned Thomas Cay
Quitasueño Cay
Serrana Cay
Nicaragua's territorial sea from straight baseline claim
Nicaragua's internal waters from straight baseline claim
Roncador Cay
Santa Catalina I.
Providencia I.
NICARAGUA
5
Man-of-War Cays
6
East of Great Tyra Cay
Caribbean Sea
San Andrés I.
East Southeast Cays
7
Little Corn I.
8
Great Corn I.
Alburquerque Cays
Punta Castilla
Harbor Head
9
COSTA RICA
PANAMA
NICARAGUA'S EXTENSION OF ITS MARITIME CLAIMS
Mercator Projection
Datum: WGS-84
(Scale accurate at 12°N)
0 25 50 75 100
Nautical Miles
0 50 100 150 200
Kilometers
Prepared by: International Mapping

Figure CR 6.1

6.4 Colombia has submitted that this Decree entails the breach of Nicaragua's customary and conventional international obligations. It directly violates Colombia's rights and entitlements in the region, including but not limited to, its rights as discussed in the present proceedings.

6.5 This counter-claim was declared admissible by the Court in its Order of 15 November 2017.

6.6 In Chapter VII of its Reply, Nicaragua claims that the peculiarities of its Caribbean coast and of the islands located off that coast justify the use of straight baselines, and that their drawing meets the requirements of customary international law. However, Nicaragua's position is untenable since customary and conventional international law do not allow States to draw straight baselines linking specks of islands, located far from one another and far from their mainland coast, or in areas where the coast is not deeply cut into or indented, or that do not reflect the general direction of the coast and other criteria. Section B of this chapter will set out Colombia's response rebutting Nicaragua's arguments in this regard.

6.7 Nicaragua also took the opportunity of its Reply to pursue a new objective: obtaining a judicial acknowledgment of the use of several new alleged basepoints for the delineation of its entitlements to maritime areas in the Southwestern Caribbean Sea. They are posited on what are said to be low-tide elevations located seaward not only from the unlawful straight baselines,

but also from all the nine basepoints previously claimed by Nicaragua. This is the case of the points located on Nee Reef, London Reef and Blowing Rock, none of which had ever been referred to before in the present proceedings. [573]

6.8 Article 16, paragraph 2, of UNCLOS requires State parties, including Nicaragua, to "give due publicity" to the baselines they use for measuring the breadth of their territorial sea, and to "deposit a copy of each such chart or list [of geographical coordinates]" with the Secretary-General of the United Nations.

6.9 But none of the new contended basepoints have been referenced in Nicaragua's own official domestic legal acts. Similarly, the *List of geographical coordinates of points defining the straight baselines from which the breadth of the territorial sea of Nicaragua in the Caribbean Sea is measured* – as contained in Annex I to Decree No. 33-2013 – deposited with the Secretary-General of the United Nations on 26 September

[573] The use by Nicaragua of additional basepoints east of its claimed straight baselines which are in dispute in the current proceedings would have the effect of exacerbating Nicaragua's attempt to encroach into Colombia's maritime zones. The 200-nautical-mile limit from what Nicaragua calls London and Nee Reefs is located at a distance of 3 to 9 nautical miles *east* of the 200-nautical-mile limit measured from the basepoints used by the Court for the purpose of the construction of the provisional median line in its 2012 Judgment. In fact, none of these basepoints were used during the proceedings in the case concerning the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*.

2013, contains no reference to these three contended basepoints.[574]

6.10 Since they are not mentioned in the Nicaraguan Decree the legality of which is disputed by Colombia's counter-claim, Colombia will not discuss the existence – undemonstrated by Nicaragua − nor the relevance, if any, of these newly asserted basepoints, which in any event are not opposable to Colombia.

B. Nicaragua's Claimed Baselines Violate the Principles of International Law Governing the Drawing of Straight Baselines

6.11 Colombia's Counter-Memorial demonstrated that the baselines claimed in Nicaragua's Decree No. 33-2013 violate the customary international law principles governing the drawing of straight baselines.[575] Both Nicaragua's recourse to the straight baselines method – which finds no basis in the 2012 Judgment – and the drawing of straight baselines by the Decree, infringe customary international law. In particular:

- Geographical circumstances permitting recourse to straight baselines – i.e. a fringe of islands in the

[574] CCM, Annex 13. Article 1 of the Decree No. 33- 2013 provides that: "(t)he straight baselines of the Republic of Nicaragua to be used to measure the breadth of its territorial sea, contiguous zone, exclusive economic zone and continental shelf in the Caribbean Sea shall be established [using the geographical coordinates set forth in Annex I]".

[575] CCM, paras. 10.13-10.65.

immediate vicinity of Nicaragua's Caribbean coast – are not met;[576]

- Nicaragua's drawing of straight baselines contravenes the applicable law since they depart significantly from the general direction of its coast;[577]

- The drawing of the straight baselines is unlawful because it encloses sea areas that are not sufficiently closely linked to the land domain;[578]

- The length of the straight baselines segments claimed by Nicaragua far exceeds any reasonable construction under international law;[579] and

- The effect of Nicaragua's Decree is to illegally expand eastwards its internal waters, territorial sea, EEZ and continental shelf, in detriment to the maritime spaces of Colombia and the rights of the international community as a whole.[580]

6.12 In its Reply, Nicaragua takes issue with each of these points, submitting that its Decree No. 33-2013 meets the conditions of paragraphs 1 and 3 of UNCLOS Article 7. However,

576 CCM, paras. 10.33-10.43.
577 CCM, paras. 10.44-.10.45.
578 CCM, paras. 10.46-.10.51.
579 CCM, para. 10.48 and Figure 10.4.
580 CCM, paras. 10.52-10.64.

Nicaragua's arguments are unsupportable in the light of both the relevant geography (Sub-section 1) and the applicable law (Sub-section 2).

(1) The configuration of Nicaragua's islands does not justify the use of straight baselines set by Decree No. 33-2013

6.13 As Colombia will show, contrary to what Nicaragua contends in its Reply, the language and reasoning used by the Court in the 2012 Judgment, whether read alone or in relation with other judgments, cannot be interpreted as recognizing that Edinburgh Cay, Muerto Cay, Miskitos Cays, Ned Thomas Cay, Roca Tyra, Little Corn Island and Great Corn Island form a "fringe of islands" under the rule codified in UNCLOS Article 7. In addition, it will be demonstrated that as a matter of fact the location and features of these features do not satisfy the required criteria for a system of straight baselines.

(a) The Court's case law does not support Nicaragua's claim that its basepoints are posited on a "fringe of islands"

6.14 Nicaragua seems to consider that the existence of a "fringe of islands" cannot be questioned since such qualification would derive from the Court's own words in its 2012 Judgment.[581] But Nicaragua confuses two distinct notions, namely "fringing islands" and a "fringe of islands".

[581] NR, para. 7.22.

6.15 The Court did use the term "fringing islands" to describe certain Nicaraguan islands on which it selected basepoints for the construction of a provisional median line; the paragraphs referred to by Nicaragua read:

> "[T]he Court (…) considers that Nicaragua's entitlement to a 200-nautical-mile continental shelf and exclusive economic zone has to be measured from the islands fringing ["*les îles côtières*", in the French version] the Nicaraguan coast".[582]

6.16 Of course, in the original case the Court was not called upon to rule on any question involving straight baselines because none existed in the relevant area. Thus, the features considered by the Court in 2012 on which individual basepoints could be situated *fringe* Nicaragua's Caribbean mainland coast in the sense that they *lie off* this coast. They are adjacent to Nicaragua's mainland coast, i.e. they can be said to be *fringing* islands. To the extent that they qualify as islands – which Nicaragua does not prove – they can be designated more accurately as "*des îles côtières*".

6.17 But that does not mean that they form a "fringe of islands" ("*un chapelet d'îles*", in French) within the meaning of the rule embodied in UNCLOS Article 7. "Fringing islands" ("*des îles côtières*") and a "fringe of islands" ("*un chapelet d'îles*") are two different notions, corresponding to distinct geographical situations.

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582 *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012*, p. 671, para. 135 and p. 678, para. 145 respectively. See also p. 703, para. 214: "the Nicaraguan mainland and fringing islands, and the Colombian islands, are located on the same continental shelf".

A fringe of islands is not just a set of "fringing islands": it is, as interpreted by the Court, a "cluster of islands" or an "island system".[583] Such qualification is nowhere to be found in the 2012 Judgment. The terms "fringing islands" and "fringe of islands" are therefore not interchangeable, and the Court never used the latter in its 2012 Judgment.

6.18 Nicaragua also asserts that Colombia's Counter-Memorial "ignores the fact that the Court gave Nicaragua's fringing islands a different treatment from Serpents' Island in *Black Sea*";[584] Nicaragua explains that:

> "In *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, basepoints on Nicaragua's fringing islands were used in the construction of a provisional equidistance line. To the contrary, Serpents' Island was ignored by the Court in establishing a provisional equidistance line. The Court justified its choice in Black Sea 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

583 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001*, p. 103, paras. 213-214. See also CCM, paras. 10.37 and 10.38.

584 NR, para. 7.22.

> Serpents' Island as a relevant part of the coast would amount to grafting an extraneous element onto Ukraine's coastline.'"[585]

Based on this, Nicaragua then alleges 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*".[586] What such implications are, Nicaragua does not explain. But it contends that the proof of the awareness of the Court results in the "rejection of Colombia's Quitasueño as a base point. The Court found that its considerations concerning Serpents' Island applied 'with even greater force to Quitasueño'".[587]

6.19 From there, Nicaragua does not draw any conclusion regarding the existence of its alleged fringe of islands, and thus the argument is unintelligible. Colombia can only surmise that Nicaragua suggests that, since the Court found in 2009 that Serpents' Island was "not one of a cluster of fringe islands constituting 'the coast' of Ukraine",[588] and then refused to use it as a basepoint in the construction of a provisional equidistance line, the fact that in 2012 the Court used Edinburgh Reef, Muerto Cay, Miskito Cays, Ned Thomas Cay, Roca Tyra, and the Corn Islands as basepoints in the construction of such a line[589] demonstrates that

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585 NR, para. 7.22.

586 NR, para. 7.23.

587 NR, para. 7.23.

588 *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, pp. 109 and 110, para. 149.

589 *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012*, p. 699, para. 201.

each of these seven features is part of a cluster of islands lying off Nicaragua's mainland coast.

6.20 This *a contrario* argument is untenable.

6.21 *First*, the only analogy that could be drawn from the two cases is that, in both of them, the Court assessed the relevance of using the maritime features as basepoints in the *construction of a provisional equidistance line*. In none of them did the Court address or decide the issue whether straight baselines could join basepoints posited on specific islands.

6.22 *Second*, in the *Maritime Delimitation in the Black Sea* case, the Court, in connection with the *sole* task of selecting basepoints and of identifying the relevant coast of Ukraine, addressed the question whether coastal islands can be considered as part of a State's coast. As the Court noted, depending on the circumstances, they may. The Court then held, in the paragraph Nicaragua quotes, 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".[590] In other words, an island forming part of a cluster of fringe islands is *one of the instances* where it may be regarded as forming part of a State's relevant coast in connection with a maritime delimitation. Contrary to what Nicaragua suggests, this does not imply that any

[590] *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, pp. 109 and 110, para. 149. (Emphasis added).

maritime feature considered by the Court to be part of a State's coastal configuration necessarily forms part of a cluster of fringing islands for straight baselines purposes.

6.23 The need for an island to be part of a *cluster* of fringing islands is not a criterion for choosing a basepoint for the construction of a provisional equidistance line. It is telling that in its 2012 Judgment, when assessing Quitasueño's capacity to contribute to the construction of the provisional median line, the Court recalled the factors that determined its decision to disregard Serpents' Island as a base point without making any reference to the notion of cluster of islands. The Court explained:

> "In the *Maritime Delimitation in the Black Sea* case, for example, the Court held that it was inappropriate to select any base point on Serpents' Island (which, at 0.17 square km was very much larger than the part of Quitasueño which is above water at high tide), because it lay alone and at a distance of some 20 nautical miles from the mainland coast of Ukraine, and its use as a part of the relevant coast 'would amount to grafting an extraneous element onto Ukraine's coastline; the consequence would be a judicial refashioning of geography, which neither the law nor practice of maritime delimitation authorizes' (*Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 110, para. 149). These considerations apply with even greater force to Quitasueño. In addition to being a tiny feature, it is 38 nautical miles from Santa Catalina and its use in the construction of the

provisional median line would push that line significantly closer to Nicaragua."[591]

6.24 The only judicial conclusion that can be drawn from Nicaragua's quotes from the *Maritime Delimitation in the Black Sea* and *Territorial and Maritime Dispute* Judgments is that "[w]hen placing base points on very small maritime features would distort the relevant geography, it is appropriate to disregard them in the construction of a provisional median line".[592] It is this consideration that lead the Court to reject Serpents' Island and Quitasueño as potential basepoints contributing to the construction of the provisional median line, not the fact that they were not part of a cluster of fringing islands.

6.25 *Third*, and more generally, no analogy can be made between the two cases as regards the treatment of islands in the delimitation since their respective geographic contexts are markedly dissimilar. In *Maritime Delimitation in the Black Sea*, the Court proceeded to a delimitation of maritime areas between States with mainly adjacent coasts, Serpents' Island being close to Romania's coast, lying off the Danube's mouth. In contrast, in *Territorial and Maritime Dispute,* the parties' relevant coasts were strictly opposing coasts.

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591 *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012*, p. 699, para. 202.

592 *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012*, p. 699, para. 202.

6.26 In sum, whether read alone or in the light of the Court's findings in the *Maritime Delimitation in the Black Sea*, the 2012 Judgment cannot be used as a precedent as regards the nature of Nicaragua's features (Edinburgh Reef, Muerto Cay, Miskitos Cays, Ned Thomas Cay, Roca Tyra, Little Corn Island and Great Corn Island) under the rules reflected in UNCLOS Article 7 or customary international law.[593]

(b) Nicaragua does not demonstrate that its basepoints are posited on islands constituting "a fringe of islands along the coast in its immediate vicinity"

6.27 In its Counter-Memorial, Colombia demonstrated that the islands Nicaragua designated as basepoints in its Decree No. 33-2013 are not a "fringe of islands" in the sense of UNCLOS Article 7.[594] They are neither a group of "islands forming a unity with the mainland", nor "islands which at some distance from the coast form a screen which masks a large proportion of the coast from the sea", as the United Nations Division for Ocean Affairs and the Law of the Sea (DOALOS) described the two main situations "where a fringe of islands is likely to exist".[595]

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[593] It should be added that the Court did not prejudge the baselines drawing method to be used by Nicaragua when observing that the latter "ha[d] yet to notify the baselines from which its territorial sea is measured" (*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012*, p. 713, para. 237).

[594] CCM, paras. 10.37 and 10.38.

[595] DOALOS, *The Law of the Sea – Baselines: An examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea*, p. 21, available at: http://www.un.org/depts/los/doalos_publications/publicationstexts/The%20Law%20of%20the%20Sea_Baselines.pdf (last visited: 1 November 2018). See also CCM, para. 10.36.

6.28 In its Reply, Nicaragua does not dispute that these are the relevant standards to be used to establish the existence of a fringe of islands. However, it argues that its seven islands form, together with numerous unidentified "islands", a group falling into both of these categories[596] and lying in the immediate vicinity of its mainland coast.[597] Nicaragua's both contentions are unsustainable.

(i) Nicaragua fails to demonstrate that the "group" formed by its adjacent islands constitutes a fringe of islands along its coast

6.29 Nicaragua first contends that the islands forming its alleged fringe of islands are not "relatively small in number", in the sense that the Court used in the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* case, according to which the number of islands is a condition for a "fringe of islands" to exist.[598] There are, Nicaragua alleges, "in total 95

596 NR, paras. 7.23-7.35.

597 NR, paras. 7.37-7.42.

598 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, *Merits, Judgment, I.C.J. Reports 2001*, p. 103, para. 214. See also CCM, para. 10.37. Nicaragua contests the relevance of this case as a precedent because this Judgment refers to the situation of an archipelagic State (Bahrain), which Nicaragua is not (NR, para. 7.27). Such reading of the Judgment is biased. It results from the plain language used by the Court that Bahrain being an archipelagic State had no impact on the *general* principle laid down by the Court according to which a group composed of a few islands cannot be a "fringe of islands" under UNCLOS Article 7. The excerpt Nicaragua cited is only an *obiter dictum* following the affirmation of this principle, in which the Court specifies that the only hypothesis in which a fringe of Bahraini islands would exist in the sense of Article 7 is where the alleged fringe includes, besides the islands "relatively small in number", Bahrain's *main* islands; however, in such hypothesis, Bahrain being a multiple-island State, drawing straight baselines between basepoints posited on all its islands including the main ones is allowed by UNCLOS only if

islands that fringe Nicaragua's Caribbean coast".[599] Nicaragua limits itself to setting out a list of these so-called islands in Annex 31 to its Reply, without justifying their insular nature or characteristics or specifying their location. In Figure 7.3 of its Reply entitled "Nicaragua's fringe of islands",[600] the other "islands" allegedly forming a fringe of islands, along with the maritime features on which Decree No. 33-2013 posited basepoints, are not specified. But judging from the blue segments displayed, these supplementary "islands" seem to be located between the Miskitos Cays and the mainland coast, and between the Corn Islands and the mainland coast. Nicaragua does not give any information about these features, including their name and their nature.

6.30 Despite this vagueness, Nicaragua's position can be inferred from Figure 7.3 of its Reply: the "fringe of islands along [its] coast in its immediate vicinity" which supposedly justifies the drawing of straight baselines between the basepoints defined in Decree No. 33-2013 seems to consist of:

- The seven maritime features on which these basepoints are posited; and

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Bahrain has declared itself to be an archipelagic State under Part IV of the Convention – since Bahrain did not, it is not entitled to draw straight baselines to join its minor islands to each other. The fact that Nicaragua is not an archipelagic State changes nothing to the requirement of a number of islands greater than "relatively small" which is required to qualify a fringe of islands under UNCLOS Article 7.

599 NR, para. 7.26. See also para. 7.20.

600 NR, p. 166.

- Some unidentified features located between the mainland coast and the Miskitos Cays and the Corn Islands.

6.31 This group of features – assuming, *quod non,* that they are islands as defined by customary international law – does not meet, as a whole, the conditions required by UNCLOS Article 7 for the drawing of straight baselines. As the Court has noted, these criteria must be applied "restrictively".[601]

6.32 *First*, this newly defined group of islands *does not form a unity with the mainland.*[602] The only argument made by Nicaragua in its Reply in response is that unity is demonstrated by the fact that, between Nicaragua's mainland coast and, respectively, the Corn Islands and the Miskitos Cays, there are two groups of unidentified maritime features. Since they are unidentified, Nicaragua does not meet its burden of proof.

6.33 Moreover, such a presence, even if it was established and assuming continuity between these features could be demonstrated, would merely illustrate a unity between the mainland and the Miskitos Cays, and between the mainland and the Corn Islands.[603] But the contended fringe of islands at issue is

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601 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001*, p. 103, para. 212.

602 CCM, para. 10.39.

603 The point that Nicaragua is thus making, though without the support of any demonstration, is that the "islands" lying between its mainland and Miskitos Cays on the one hand, and those lying between its mainland and Corn Islands on the other hand, form two fringes of islands each arranged on

not the "Miskitos Cays group" or the "Corn islands group", but the *whole group* of islands that Nicaragua has elected to connect, from Edinburgh Reef in the North to Great Corn Island in the south, by straight baselines.

an axis perpendicular to the mainland coast. But it bears no consequence – and Nicaragua did not draw any in its Decree No. 33-2013 – as regards the case at hand and generally the ability to draw straight baselines between appropriate basepoints posited on islands pertaining to these "fringes": as DOALOS puts it: "[s]ince the fringe has to be 'along the coast' [Article 7(1)] would not, therefore, apply to islands arranged like stepping stones perpendicular to the coast". See DOALOS, *The Law of the Sea – Baselines: An examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea*, p. 21 available at: http://www.un.org/depts/los/doalos_publications/publicationstexts/The%20Law%20of%20the%20Sea_Baselines.pdf (last visited: 1 November 2018). In any event, Nicaragua's Reply does not demonstrate any continuity/unity between the mainland, middle so-called islands and the Miskitos Cays and between the mainland, middle so-called islands and the Corn Islands.

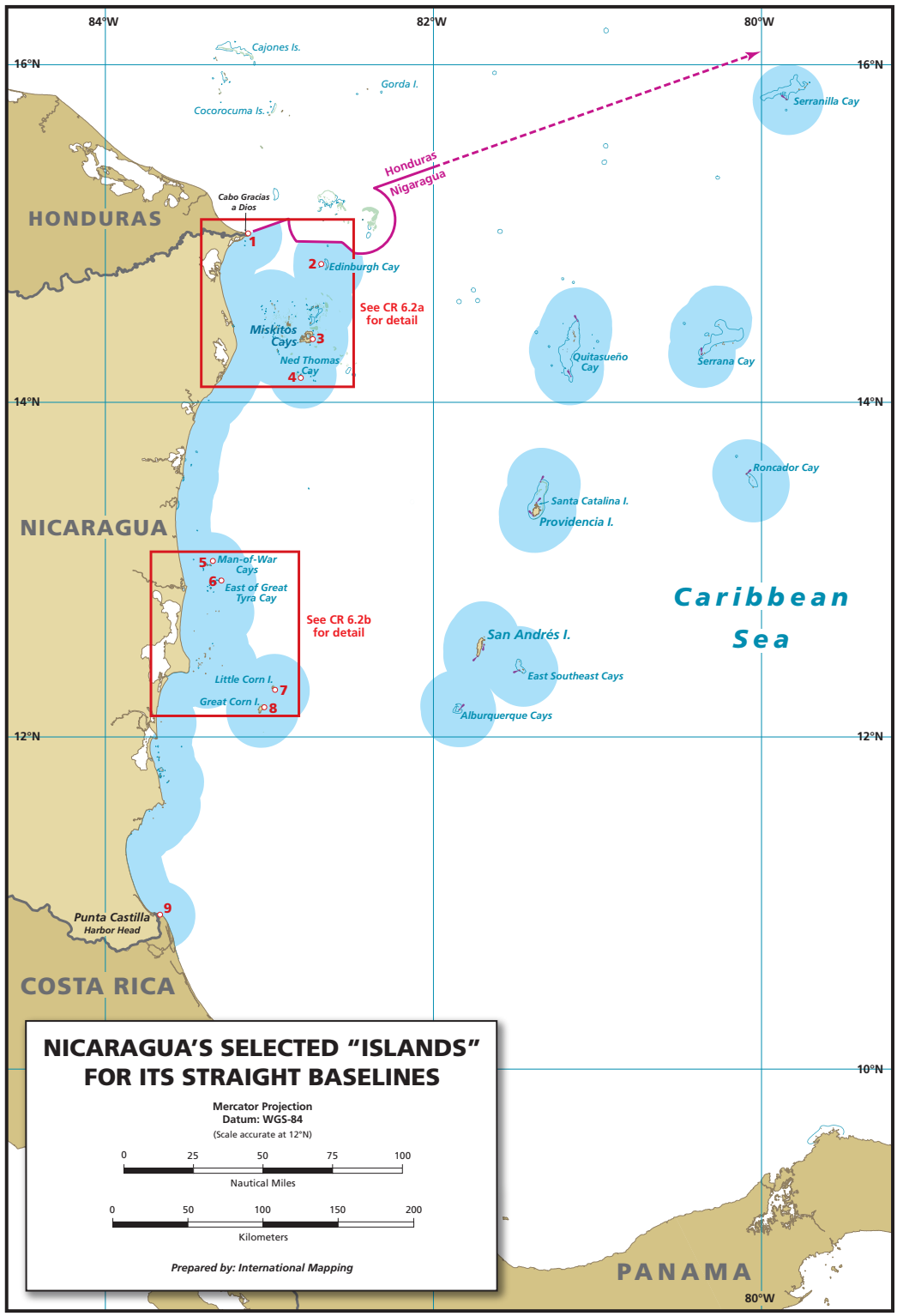
84°W
82°W
80°W
16°N
14°N
12°N
10°N
Cajones Is.
Gorda I.
Cocorocuma Is.
Serranilla Cay
Honduras
Nigaragua
HONDURAS
Cabo Gracias a Dios
1
2
Edinburgh Cay
See CR 6.2a for detail
Miskitos Cays
3
Ned Thomas Cay
4
Quitasueño Cay
Serrana Cay
Roncador Cay
Santa Catalina I.
Providencia I.
NICARAGUA
5
Man-of-War Cays
6
East of Great Tyra Cay
See CR 6.2b for detail
Caribbean Sea
San Andrés I.
East Southeast Cays
Little Corn I.
7
Great Corn I.
8
Alburquerque Cays
Punta Castilla
Harbor Head
9
COSTA RICA
PANAMA
NICARAGUA'S SELECTED "ISLANDS" FOR ITS STRAIGHT BASELINES
Mercator Projection
Datum: WGS-84
(Scale accurate at 12°N)
0 25 50 75 100
Nautical Miles
0 50 100 150 200
Kilometers
Prepared by: International Mapping

Figure CR 6.2

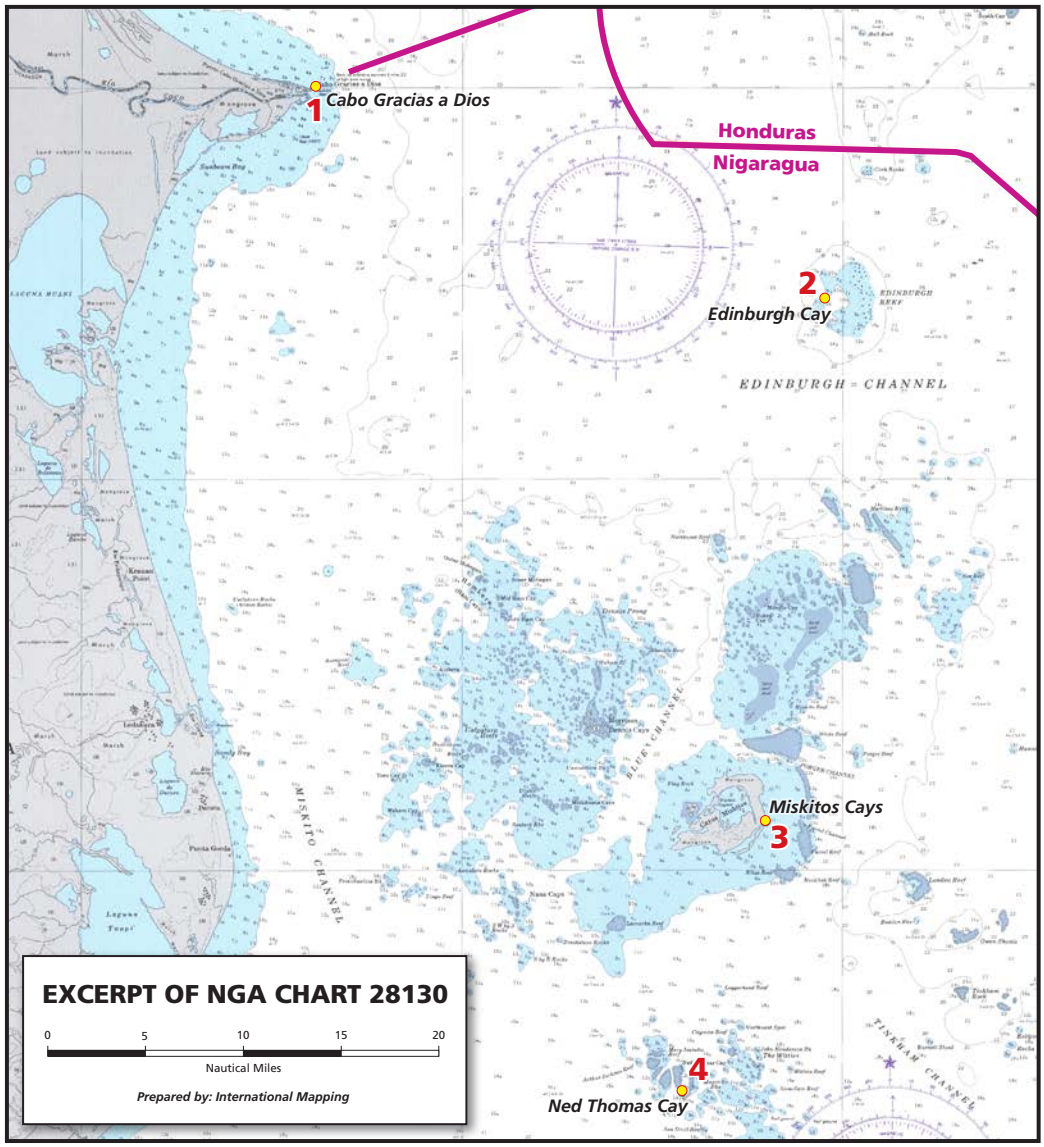

Figure CR 6.2a

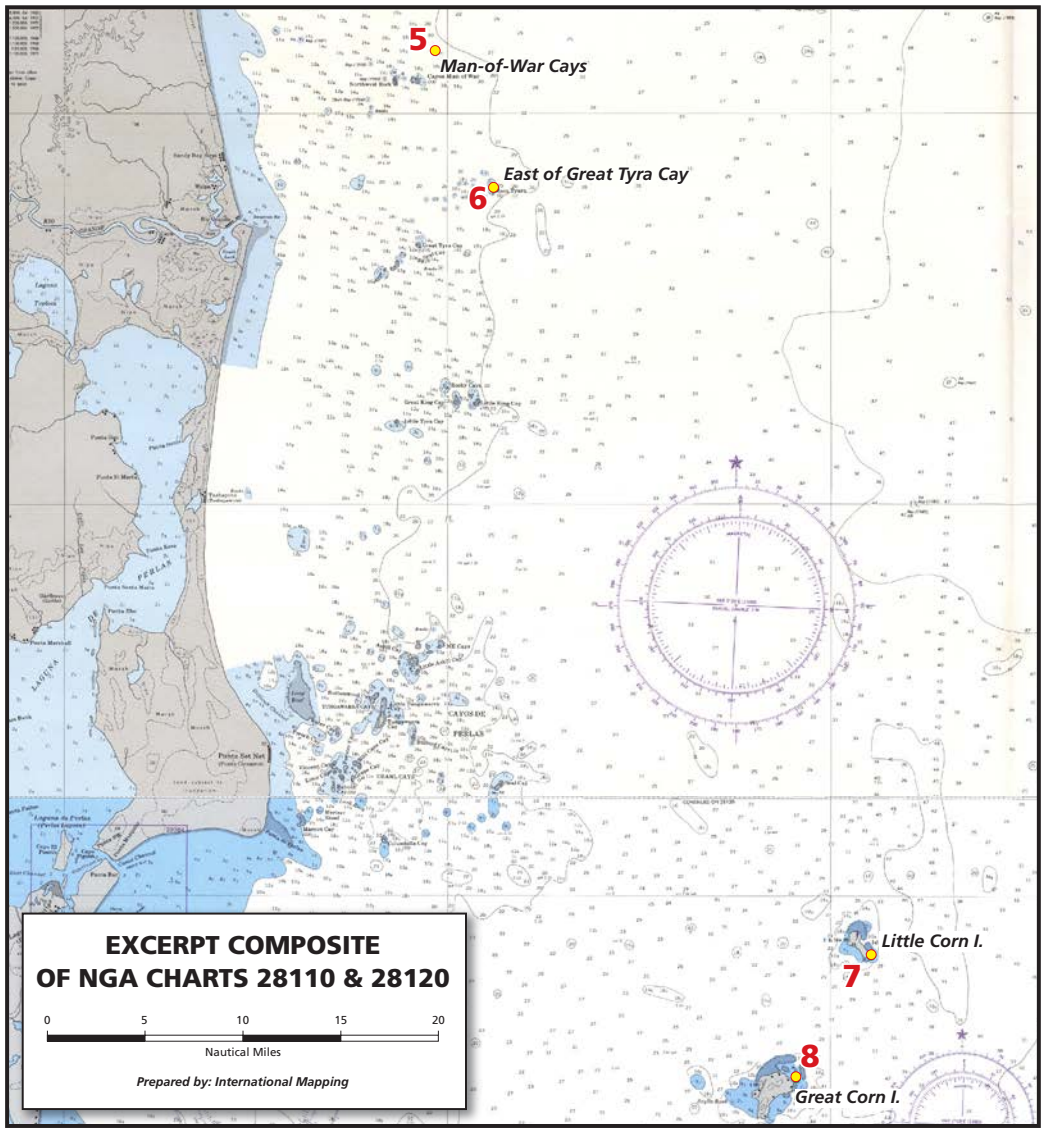

Figure CR 6.2b

6.34 These islands, as a whole, cannot be regarded as forming a unity with the mainland given the large distance between them. Proceeding from north to south, one finds the following features that Nicaragua seeks to join by means of its straight baselines:

- Edinburgh Reef, an isolated and minuscule feature;

- 27 nautical miles from it, the small Miskitos Cays and Ned Thomas Cay to the west of which would be found the unidentified islands relied on by Nicaragua;

- 75 nautical miles to the south, Man-of-War Cays and Great Tyra Cay – also very small features;

- 44 nautical miles further southward, and 85 nautical miles to the north of the next and southernmost basepoint, there are the Corn Islands, a pair of relatively small islands to the west of which the alleged spread unidentified islands would also be found.[604]

As shown on the Figure, the different components of Nicaragua's so-called "fringe of islands" are simply too isolated from each other to be deemed as forming a "unity".

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[604] CCM, Figure 10.4.

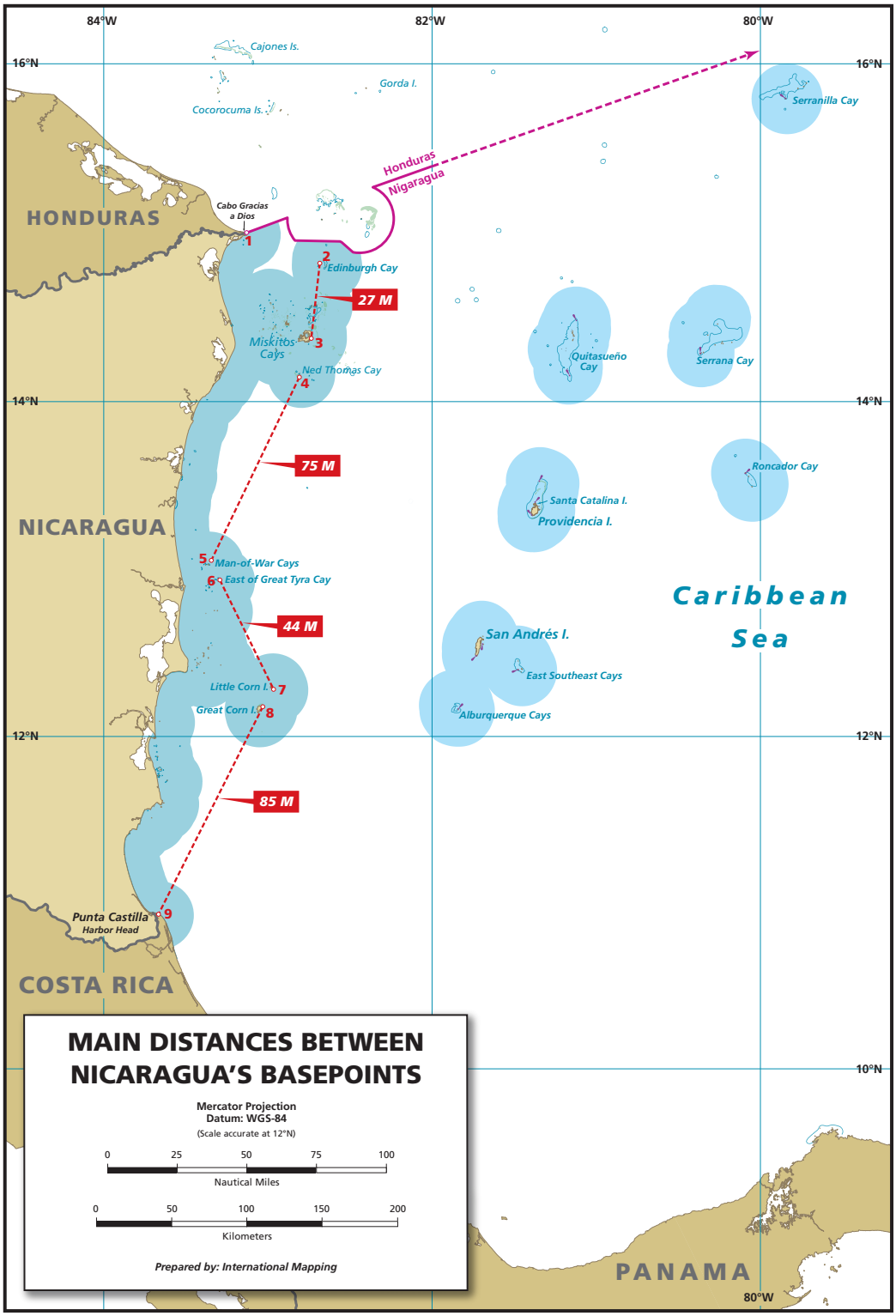
84°W
82°W
80°W
16°N
14°N
12°N
10°N
Cajones Is.
Gorda I.
Cocorocuma Is.
Serranilla Cay
Honduras
Nigaragua
HONDURAS
Cabo Gracias a Dios
1
2
Edinburgh Cay
27 M
Miskitos Cays
3
Ned Thomas Cay
4
Quitasueño Cay
Serrana Cay
75 M
Roncador Cay
Santa Catalina I.
Providencia I.
NICARAGUA
5
Man-of-War Cays
6
East of Great Tyra Cay
Caribbean Sea
44 M
San Andrés I.
East Southeast Cays
Little Corn I.
7
Great Corn I.
8
Alburquerque Cays
85 M
Punta Castilla
Harbor Head
9
COSTA RICA
PANAMA
MAIN DISTANCES BETWEEN NICARAGUA'S BASEPOINTS
Mercator Projection
Datum: WGS-84
(Scale accurate at 12°N)
0 25 50 75 100
Nautical Miles
0 50 100 150 200
Kilometers
Prepared by: International Mapping

Figure CR 6.3

6.35 *Second*, these maritime features do not form, as required by the rule of customary international law reflected in UNCLOS Article 7, a *continuous* fringe along the coast.[605]

6.36 *Third*, the maritime features of this newly defined "group" *have no or a very limited masking effect* on the mainland coast.

6.37 Nicaragua agrees with Colombia that a controlling precedent in this respect is the *Eritrea/Yemen (second stage)* case, where the arbitral tribunal concluded that what it termed "an intricate system of islands, islets and reefs which guard this part of the coast" was indeed a "fringe system" of the kind contemplated by Article 7 of UNCLOS.[606] Nicaragua contends that its islands do have such a guarding or masking effect.

6.38 According to Nicaragua:

- All its fringing islands and features should be taken into account in the assessment of the masking effect;[607]

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605 Virginia Commentary, p. 100: the expression fringing islands "covers the case where a number of islands of various size are spread out near the shore so as to form a continuous fringe along the coast". See also CCM, para. 10.36.

606 *Award of the Arbitral Tribunal in the Second Stage of the Proceedings between Eritrea and Yemen (Maritime Delimitation)*, p. 369, para. 151. See NR, paras. 7.31 and 7.32; see also CCM, paras. 10.41-10.42.

607 NR, para. 7.35.

- As regards the appreciation of the masking phenomenon itself,

> "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";[608]

- The length of the coast with respect to which the masking effect is to be calculated is the total length of the mainland coast minus the indented part of the coast (see *infra*) from Monkey Point up to the terminus of Nicaragua's land boundary with Costa Rica;[609]

- Basing itself on these self-serving factors, Nicaragua submits that, with respect to the northern part of the coast, "more than 50% of that mainland coast is masked";[610] and that when including the segment from Monkey Point up to the terminus of Nicaragua's land boundary with Costa Rica, 46% of its total mainland coast would be masked, on the basis of a 20-degrees projection. Finally, if a strictly

608 NR, para. 7.35.

609 NR, para. 7.36.

610 NR, para. 7.36. Nicaragua purports to illustrate this result by a figure (NR, Figure 7.5) which is notable for lack of any key and incomprehensible: what the pink and green projections are supposed to be representing is not explained, and the names and specifics of the features that are shown as having a masking effect are not identified or documented (the minuscule features just north of Monkey Point, in particular).

frontal projection is used, Nicaragua contends that 25% of the overall coast would be masked.[611]

6.39 These calculations are fanciful. Once again Nicaragua relies on unidentified maritime features, the characteristics of which are simply ignored, thus depriving its calculation of any factual basis.[612] Additionally, Nicaragua relies on a "projection angle" that finds no support in the jurisprudence or international practice. While Nicaragua contends a projection angle of 20% is "reasonable",[613] in reality it is absurd.

6.40 The only element on which Nicaragua relies is a sketch-map (No. 5) used by the Court in the *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine)* case to depict the projection of the parties' relevant coasts along the low-water mark defining the maritime area to be delimited.[614] But this is manifestly irrelevant: the seaward projection of coasts for determining overlapping maritime entitlements says nothing about the masking effect of islands for straight baseline purposes.

6.41 Nicaragua's islands and features do not form an "intricate system of islands"; they do not "guard" the mainland coast (i.e.

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611 NR, para. 7.34.

612 The list of adjacent maritime features Nicaragua produces in Annex 31 to its Reply provides only the names of the features. It explains nothing about the dimensions or characteristics of each feature.

613 NR, para. 7.35.

614 NR, para. 7.35. The sketch-map is reproduced in *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 102.

generate a "masking effect"[615] which covers only 5 or 6% of Nicaragua's entire mainland coast);[616] they do not "cover the coast in such a way as to be considered as its seaward extension";[617] and they do not form a fringe of islands along the mainland coast. Accordingly, they do not justify Nicaragua's system of straight baselines.

(ii) Nicaragua fails to demonstrate that the "group" formed by the maritime features adjacent to its coast lies in its immediate vicinity

6.42 In its Counter-Memorial, Colombia showed that none of the seven islands on which Nicaragua purports to posit its basepoints lies in the "immediate vicinity" of Nicaragua's coast.[618]

6.43 Nicaragua is obviously aware of this deficiency in its claim. In its Reply, therefore, Nicaragua contends that the alleged "fringe of islands" justifying the drawing of straight baselines from Edinburgh Cay up to Great Corn Island not only consists of the seven "main" islands, but also of unidentified maritime

615 As it relates to the measurement of the "masking effect", see for example the method retained by the United States, as illustrated in United States Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, *Limits in the Seas, No. 106, Developing Standard Guidelines for Evaluating Straight Baselines*, pp. 26-27, available at: https://www.state.gov/documents/organization/59584.pdf (last visited: 1 November 2018).

616 CCM, para. 10.41 and Figure 10.2. Even assuming, as Nicaragua claims, that the relevant length of Nicaragua's Caribbean mainland coast was, for the sake of evaluating the masking effect, to be measured from Cabo Gracias a Dios in the north to Monkey Point in the South, this percentage would remain insignificant.

617 S. Kopela, *Dependent Archipelagos in International Law of the Sea*, Brill Nijhoff, 2013, p. 63 (available at the Peace Palace Library).

618 CCM, para. 10.42 and Figure 10.3.

features supposedly lying between the mainland coast and, on the one hand, the Miskitos Cays and, on the other, between the mainland coast and the Corn Islands. Based on this, Nicaragua argues that the "immediate vicinity" requirement applies only to the *inner edge* of the fringe. Since, according to Nicaragua, the westernmost "islands" (not the seven "main" islands) are near the mainland coast, the whole "fringe", including the "main" islands that are not "near" the coast, meets the "immediate vicinity" requirement.

6.44 This argument is wholly unsubstantiated.

6.45 *First*, in both the *Eritrea/Yemen (second stage)* case, and as regards the baselines established by Finland in the area of the Åland islands area and by Norway in the far north of Tromsø, both mentioned by Nicaragua,[619] straight baselines were drawn to enclose an *intricate system of islands,*[620] the inner edge of which is indeed very close to the mainland. This geographical characteristic is absent in the present case, even taking into account all the contended "islands" between the mainland coast and the islands Nicaragua uses as basepoints.

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619 NR, paras. 7.38-7.40.

620 This notion was used in the *Award of the Arbitral Tribunal in the Second Stage of the Proceedings between Eritrea and Yemen (Maritime Delimitation)* to designate the fringing islands considered by the Tribunal. The Åland islands form an archipelago, and the Norwegian islands off Tromsø have a configuration similar to the one of the *Skjaergaard* that the Court regarded in the *Fisheries case (United Kingdom* v. *Norway)* as a fringe of islands justifying the drawing of straight baselines.

6.46 *Second*, Nicaragua does not even attempt to identify those "islands" pertaining to the alleged fringe which are said to be located in the "immediate vicinity" of its mainland coast. As noted earlier, it provides no names, no physical description, no coordinates, no distance to the mainland coast except on a sketch which does not display their names,[621] and no demonstration that these features are indeed islands under international law.

6.47 Likewise, Nicaragua fails to demonstrate that there is a "continuity" between the mainland, the unidentified islands allegedly located in the immediate vicinity of the coast, and the "main" islands. As can be seen in Figure 10.3 of Colombia's Counter-Memorial, the majority of the features on which Nicaragua places its basepoints are located beyond 25 nautical miles from the nearest points on the mainland coast.

6.48 Furthermore, Nicaragua is unable to identify State practice that would be widespread enough to establish as a rule of customary law that a distance ranging from 25 to 30 nautical miles[622] between the coast and the islands is generally accepted as not excessive.

6.49 Suffice it to note that the United States (which protested against Nicaragua's Decree No. 33-2013) considers that the "immediate vicinity" criterion is met when the most landward

621 NR, Figure 7.3.

622 The exception only being Man-of-War Cays and Great Tyra Cay (11.6 and 12.7 M respectively) and Miskitos Cays (22.4 M). See CCM, para. 10.42 and Figure 10.3.

point of each island lies no more than 24 nautical miles from the mainland coastline,[623] and that the DOALOS, in its 1989 study, observed that:

> "The spirit of article 7, in respect of (…) fringing islands, will be preserved if straight baselines are drawn when the normal baseline and closing lines of bays and rivers would produce a complex pattern of territorial seas and when those complexities can be eliminated by the use of a system of straight baselines. *It is not the purpose of straight baselines to increase the territorial sea unduly*".[624]

6.50 But that is precisely the result that is produced by Nicaragua's attempt to posit a fringe of islands in the immediate vicinity of its coast where such a fringe does not exist.[625]

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623 International Law Association, *Baselines under the International Law of the Sea*, *Final Report (2018),* para. 21, available at http://www.ila-hq.org/images/ILA/DraftReports/DraftReport_Baselines.pdf (last visited: 1 November 2018).

624 DOALOS, *The Law of the Sea – Baselines: An examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea*, p. 21, para. 39, available at: http://www.un.org/depts/los/doalos_publications/publicationstexts/The%20Law%20of%20the%20Sea_Baselines.pdf (last visited: 1 November 2018). (Emphasis added).

625 Nicaragua tries to minimize the extent of its claim by stating that "81% of the internal waters that are enclosed by [its] straight baselines already formed part of [its] territorial sea measured from the low-water line" (NR, para. 7.51 and Figure 7.9). But this just highlights the problem. By its newly enacted straight baselines, Nicaragua transforms large areas of what previously formed part of the territorial sea into internal waters, and areas that previously were part of the EEZ into territorial sea.

(iii) The last segment of the claimed straight baselines is inconsistent with Nicaragua's justification for the use of straight baselines in the relevant area

6.51 Nicaragua justifies the southernmost segment of its straight baselines system with the second criterion for drawing straight baselines reflected in UNCLOS, Article 7(1) – namely, the presence of a coastline that is deeply indented and cut into.

6.52 In particular, Nicaragua contends that:

> "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 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."[626]

This is manifestly not the case. A mere glance at the map reveals that the mainland coast lying behind the straight baseline segment between Great Corn Island and Harbour Point is not "deeply indented and cut into".[627] Geography being what it is, Nicaragua cannot demonstrate the contrary.

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626 NR, para. 7.18.

627 Harbour Point is the southernmost of the basepoints posited in Decree No. 33-2013, which Nicaragua announced in its Reply it will amend following the Court's Judgment in the *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica* v. *Nicaragua)* case that determined the terminus of its land boundary with Costa Rica.

6.53. In sum, Nicaragua's Decree drawing straight baselines is not in conformity with international law. Nicaragua's straight baselines simply do not satisfy the geographical conditions imposed by customary or conventional international law.

(2) THE ABSENCE OF A SUFFICIENTLY CLOSE LINK BETWEEN THE SEA AREAS ENCLOSED AND THE LAND DOMAIN

6.54 Nicaragua's Decree No. 33-2013 draws segments of straight baseline of 44 nautical miles (between basepoints 6 and 7), 75 nautical miles (between basepoints 4 and 5), and as much as 85 nautical miles (between basepoints 8 and 9). The resulting baselines lie at certain points some 30 nautical miles off Nicaragua's mainland coast and enclose 21,500 square kilometres of water now claimed as internal waters – i.e. two-thirds the size of Belgium, larger than Slovenia, twice the size of Lebanon or Jamaica, and almost ten times the size of Luxembourg. These large expanses of waters are obviously not "closely linked to the land domain".[628]

6.55 Nicaragua refers in its Reply to the 1989 baselines study of the DOALOS, and submits that no mathematical test has been developed in State practice to assess straight baselines as regards the link to the land domain required by the rule reflected in UNCLOS Article 7(3).[629]

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628 CCM, para. 10.48.

629 NR, para. 7.49.

6.56 This misses the point. The question is not whether a mathematical test applies. Rather, it is whether a straight baselines system leads to a reasonable result, by enclosing as internal waters only parts of the sea that can be legitimately seen as closely linked to the land domain. On this question, as rightly said by Fitzmaurice, the dominant consideration is that the waters enclosed really partake of the character of territory, so that it should be reasonable to treat them as internal waters.[630] Thus, the length of the baselines,[631] their distance from the mainland coast, and the surface of water enclosed within such system are obviously relevant, since they objectively reflect whether there is a close connection between the coast and the waters concerned.

6.57 Nicaragua also argues that its newly designated internal waters are in a "fairly close proximity" with its coast, because "a large part of [these internal waters] is studded with the numerous islands and cays that fringe Nicaragua's Caribbean mainland coast".[632] Notwithstanding the fact that Nicaragua does not substantiate this argument in order to demonstrate that these features are linked with the mainland coast through the sea areas enclosed, it concedes that it concerns only limited parts of the sea area, and that "the remaining parts" are not concerned.[633] But it

630 G. Fitzmaurice, "The Law and Procedure of the International Court of Justice", *British Yearbook of International Law*, Vol. 31, 1954, p. 407 (available at the Peace Palace Library).

631 G. Fitzmaurice, "The Law and Procedure of the International Court of Justice", *British Yearbook of International Law*, Vol. 31, 1954, p. 409 (available at the Peace Palace Library).

632 NR, para. 7.52.

633 NR, para. 7.52.

suffices to observe that those "remaining parts" can by no means be considered internal waters to conclude that Nicaragua's system of straight baselines is inconsistent with international law. These baselines exceed "the bounds of what is moderate and reasonable", as the Court characterized the "overarching" standard of compliance in this matter.[634]

C. Conclusions

6.58 In conclusion, for all of the reasons set out above, Nicaragua's newly enacted system of straight baselines does not comport with international law and prejudices Colombia.

6.59 While Nicaragua claims in Decree No. 33-2013 that it has a deeply indented and cut into coastline, and that there is a fringe of islands along its coast and its immediate vicinity, it has not met the burden of proof as to these requirements for the drawing of straight baselines. In fact, the Caribbean coast of Nicaragua is far from being deeply indented and the scarce insular features referred to by Nicaragua do not constitute a fringe of islands to justify the drawing of straight baselines. As a result, Nicaragua is attempting to misappropriate significant maritime areas as its internal waters, artificially expanding its territorial sea belt and limiting the rights of third States in the Caribbean.

634 *Fisheries case, Judgment of December 18th, 1951: I.C.J. Reports 1951*, p. 142.

Chapter 7

SUMMARY

A. Nicaragua's Claims

7.1 Nicaragua alleges that Colombia violated its sovereign rights and maritime spaces in four ways:

- By interfering with Nicaraguan fishing boats and naval vessels in its EEZ through a series of so-called "incidents" involving alleged acts of Colombian naval vessels and aircraft;

- By licensing oil exploration blocks in parts of Nicaragua's EEZ;

- By licensing fishing boats to operate in Nicaragua's EEZ; and

- By establishing a contiguous zone which overlaps in places with Nicaragua's EEZ, and which provides for jurisdictional powers and a spatial extent that goes beyond what is permitted under international law.

7.2 Colombia has demonstrated in this Rejoinder that none of these allegations is factually or legally sustainable.

7.3 The parties agree that, under customary international law, Colombia enjoys the freedoms of navigation and overflight, and other internationally lawful uses of the sea related to these freedoms. In an effort to deny Colombia these rights, however, Nicaragua conceives of its EEZ as equivalent to a territorial sea, with Colombia only enjoying right of passage to proceed from one point to another. This is flatly contrary to international law, which places no such limitations on Colombia's, or for that matter, any other State's rights.

7.4 Nicaragua, on the other hand, only enjoys sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources within its EEZ, together with other limited jurisdictional powers that are not relevant to this case. None of Colombia's actions have undermined the actual rights of Nicaragua as part of the EEZ regime, as is evidenced by the dramatic increase of Nicaraguan fishing in its EEZ since the 2012 Judgment.

7.5 For its part, Colombia has shown that it has legitimate reasons to be present in the Southwestern Caribbean Sea, including within Nicaragua's EEZ, provided that it has due regard for Nicaragua's sovereign rights.

7.6 Colombia is fully entitled to be on the watch for illegal activities, such as drug trafficking, and environmentally destructive fishing practices that risk damaging the fragile

ecosystem of the region and the healthy environment of the inhabitants of the San Andrés Archipelago, including the Raizales. It is also entitled (and bound) to provide assistance to fishing boats in the area when needed.

7.7 With respect to the "incidents" that Nicaragua claims constituted a breach of its sovereign rights, the Court ruled in 2016 that it has no jurisdiction to consider claims based on the alleged threat to use force. Moreover, of the "incidents" which Nicaragua accuses Colombia of having caused in its EEZ, only 13 are purported to have occurred before the critical date when the Pact of Bogotá ceased to be in force between Nicaragua and Colombia. The Court has no jurisdiction to consider post-critical date events. With respect to the alleged incidents which could fall within the Court's jurisdiction, Colombia has demonstrated that some of them simply did not occur and none could possibly constitute a violation of Nicaragua's sovereign rights, as indeed affirmed by contemporaneous acts and statements of Nicaraguan officials who stressed that Colombia's Navy had been respectful and that there had been no incidents following the rendering of the 2012 Judgment.

7.8 With respect to the allegation that Colombia has offered hydrocarbon blocks in areas within Nicaragua's EEZ, the claim is both inadmissible, having not formed part of the subject-matter of the dispute set out in Nicaragua's Application, and baseless as a matter of fact. Colombia has simply not offered any blocks situated within Nicaragua's EEZ for exploration or

exploitation. Nor has Colombia issued authorisations to fish in Nicaragua's EEZ. Nicaragua's allegations of the issuance of fishing licenses and authorisations has been demonstrated to be based on a distorted reading of the relevant Colombian regulations and without foundation. The resolutions of the Governorship of the Archipelago Department of San Andrés, Providencia and Santa Catalina simply do not authorize fishing activities in Nicaragua's EEZ.

7.9 There are, in short, no incidents which undermined or violated Nicaragua's EEZ rights and jurisdiction. It follows that Nicaragua's submissions on these claims must be rejected.

7.10 With respect to Colombia's contiguous zone, Decree No. 1946 (as amended) established the integral contiguous zone of the Colombian island territories in the Southwestern Caribbean Sea in accordance with Colombia's rights under customary international law. Indeed, the Decree itself states *expressis verbis* that it is intended to be interpreted and applied in full conformity with customary international law. As Colombia established in the Counter-Memorial and in this Rejoinder, under customary international law, the contiguous zone of one State may lawfully overlap and co-exist with another State's EEZ. There is no inherent conflict between the limited jurisdictional powers of one State within its contiguous zone and the sovereign rights and jurisdiction of another State as part of its EEZ entitlement.

7.11 None of the powers in the Decree exceeds those which Colombia is entitled to exercise under customary international law as part of the contiguous zone regime. Wholly apart from the question of the lawfulness of the Colombia's contiguous zone, a State may exercise the residual freedoms of navigation and overflight, and other internationally lawful uses of the sea related to these freedoms, within another State's EEZ which do not interfere with the specified and limited exclusive economic rights of the other State. Accordingly, all the jurisdictional powers provided for in Decree No. 1946 (as amended) are lawful exercises of the freedoms of navigation and overflight, and other internationally lawful uses of the sea, by a State (Colombia) within another State's EEZ (Nicaragua's). In sum, customary international law does not bar Colombia's contiguous zone from co-existing with Nicaragua's EEZ where they overlap; nor does it preclude Colombia from exercising the freedoms of navigation and overflight, and other internationally lawful uses of the sea, within Nicaragua's EEZ.

7.12 As to the profile of the zone, the simplification of the outer limit of the Colombian contiguous zone in the Southwestern Caribbean Sea is dictated by the geographical facts and is justified in law. The contiguous zones of Colombia's islands meet and overlap; each of the islands is less than 48 nautical miles from the nearest island. The simplification of the contiguous zone around the Colombian island territories through the use of geodetic lines is grounded upon the same rationale which led the Court to simplify the delimitation line in respect

of the same islands in the 2012 Judgment. In any event, Colombia's contiguous zone does not, in terms, encroach upon any of Nicaragua's sovereign rights in its EEZ. Under customary international law, the mere enactment of Decree No. 1946 (as amended) does not, in itself, constitute a violation of Nicaragua's rights. Moreover, Nicaragua cannot point to any action taken by Colombia within its contiguous zone that has in any way interfered with the exercise by Nicaragua of its sovereign rights within its EEZ.

B. Colombia's Counter-claims

7.13 Colombia's first counter-claim concerns Nicaragua's violation of the traditional fishing rights of the inhabitants of the San Andrés Archipelago, including the Raizales. Colombia has demonstrated that the inhabitants of the Archipelago, in particular the Raizales, have traditionally engaged in artisanal fishing in maritime areas that have been held to appertain to Nicaragua, as well as in Colombian areas that require navigating through waters of the Nicaraguan EEZ. While Nicaragua, contrary to the public and explicit commitment taken by its President, has denied in these proceedings the existence of these recognized fishing rights, it has failed to identify a single precedent, which in either its operative part or its essential reasoning, stated that non-exclusive traditional fishing rights are extinguished by operation of law in the EEZ. Nicaragua's failure is understandable, since there is no rational explanation as to why traditional fishing rights, which are otherwise recognized as

being capable of existing in the territorial sea, should be deemed to be extinguished, by operation of law, in the EEZ.

7.14 Apart from Nicaragua's misreading of UNCLOS and relevant customary international law, Colombia has shown that the parties to this case expressly and repeatedly recognized these traditional fishing rights and are precluded from now denying them. Despite that recognition and the clear law on the matter, the Nicaraguan Naval Force has repeatedly bullied the artisanal fishermen of the Archipelago, impeding them from reaching their traditional banks and lawfully plying their vocation there. This has had a chilling effect in the ability of the local inhabitants to enjoy their traditional fishing rights.

7.15 By means of this counter-claim, Colombia respectfully requests the Court to find that Nicaragua has infringed the traditional fishing rights of the inhabitants of the San Andrés Archipelago, in particular the Raizales. Colombia also asks the Court to rule that Nicaragua is under an obligation to ensure that the inhabitants of the San Andrés Archipelago, including the Raizales, enjoy unfettered access to: a) the traditional fishing banks located in the maritime areas adjudicated to appertain to Nicaragua; and b) the banks located in the Colombian maritime areas, access to which requires navigating through the maritime areas adjudicated to appertain to Nicaragua. With regard to compensation of the assessable damage, including loss of profit, its form and amount should be determined at a later phase of the proceedings, following established practice.

7.16 Colombia's second counter-claim challenges the legality under international law of Nicaragua's Decree No. 33-2013 establishing straight baselines for the measurement of Nicaragua's maritime areas in the Caribbean. Colombia has shown that this Decree breaches Nicaragua's customary and conventional international obligations and directly violates Colombia's rights and entitlements in the Caribbean. In addition to these violations of the principles of international law governing the drawing of straight baselines, Colombia has also shown that the configuration of Nicaragua's islands off its Caribbean coast does not justify the use of straight baselines. Nor can Nicaragua demonstrate that its basepoints are posited on islands constituting the requisite "fringe of islands along the coast in its immediate vicinity". In addition, the islands, as a whole, cannot be regarded as forming a unity with the mainland, another criterion for the drawing of straight baselines that Nicaragua fails to comply with.

SUBMISSIONS

I. For the reasons stated in its Counter-Memorial and Rejoinder, the Republic of Colombia respectfully requests the Court to reject each of the submissions of the Republic of Nicaragua, and to adjudge and declare that

1. Colombia has not in any manner violated Nicaragua's sovereign rights or maritime spaces in the Southwestern Caribbean Sea.

2. Colombia's Decree No. 1946 of 9 September 2013 (as amended by Decree No. 1119 of 17 June 2014) has not given rise to any violation of Nicaragua's sovereign rights or maritime spaces.

   a. There is nothing in international law that precludes the contiguous zone of one State from overlapping with the exclusive economic zone of another State;
   b. The geodetic lines established in the Decree connecting the outermost points of Colombia's contiguous zone do not violate international law;
   c. The specific powers concerning the contiguous zone enumerated in the Decree do not violate international law;

d. No Colombian action in the contiguous zone has given rise to any violation of Nicaragua's sovereign rights or maritime spaces.

II. Further, the Republic of Colombia respectfully requests the Court to adjudge and declare that

3. The inhabitants of the San Andrés Archipelago, in particular the Raizales, enjoy traditional fishing rights in maritime areas adjudicated to appertain to Nicaragua.

4. Nicaragua has violated the traditional fishing rights of the inhabitants of the San Andrés Archipelago.

5. Nicaragua's straight baselines established in Decree No. 33-2013 of 19 August 2013 are contrary to international law and violate Colombia's sovereign rights and maritime spaces.

III. The Court is further requested to order Nicaragua

6. With regard to submissions 3 and 4, to ensure that the inhabitants of the San Andrés Archipelago engaged in traditional fishing enjoy unfettered access to:

a. Their traditional fishing banks located in the maritime areas adjudicated to appertain to Nicaragua;

b. The banks located in Colombian maritime areas, access to which requires navigating through the maritime areas adjudicated to appertain to Nicaragua.

7. To compensate Colombia for all damages caused, including loss of profits, resulting from Nicaragua's violations of its international obligations, with the amount and form of compensation to be determined at a subsequent phase of the proceedings.

8. To give Colombia appropriate guarantees of non-repetition.

CARLOS GUSTAVO ARRIETA PADILLA
Agent of Colombia

The Hague, 15 November 2018

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