Corrigé
Corrected

CR 2021/14

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2021

Public sitting

held on Wednesday 22 September 2021, at 11 a.m., at the Peace Palace,

President Donoghue presiding,

***in the case concerning* Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua *v.* Colombia)**

VERBATIM RECORD

ANNÉE 2021

Audience publique

tenue le mercredi 22 septembre 2021, à 11 heures, au Palais de la Paix,

sous la présidence de Mme Donoghue, présidente,

***en l'affaire relative à des* Violations alléguées de droits souverains et d'espaces maritimes dans la mer des Caraïbes (Nicaragua c. Colombie)**

COMPTE RENDU

Present:	President	Donoghue
	Vice-President	Gevorgian
	Judges	Tomka
		Abraham
		Bennouna
		Yusuf
		Sebutinde
		Bhandari
		Salam
		Iwasawa
		Nolte
	Judges *ad hoc*	Daudet
		McRae
	Registrar	Gautier

Présents : Mme Donoghue, présidente
M. Gevorgian, vice-président
MM. Tomka
Abraham
Bennouna
Yusuf
Mme Sebutinde
MM. Bhandari
Salam
Iwasawa
Nolte, juges
MM. Daudet
McRae, juges *ad hoc*

M. Gautier, greffier

The Government of Nicaragua is represented by:

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Mr. Vaughan Lowe, QC, Emeritus Chichele Professor of Public International Law, University of Oxford, member of the Institut de droit international, member of the Bar of England and Wales,

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Mr. Alain Pellet, Emeritus Professor of the University Paris Nanterre, former Chairman of the International Law Commission, President of the Institut de droit international,

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Le Gouvernement du Nicaragua est représenté par :

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Ms Viviana Andrea Medina Cruz, Second Secretary, Embassy of Colombia in the Netherlands,

Mr. Sebastián Correa Cruz, Third Secretary,

Mr. Raúl Alfonso Simancas Gómez, Third Secretary, Group of Affairs before the International Court of Justice,

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Rear Admiral Ernesto Segovia Forero, Chief of Naval Operations,

CN Hermann León, Delegate of Colombia to the International Maritime Organization,

CN William Pedroza, National Navy of Colombia, Director of Maritime and Fluvial Interests Office,

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Le contre-amiral Ernesto Segovia Forero, chef des opérations navales,

Le capitaine de vaisseau Hermann León, représentant de la Colombie auprès de l'Organisation maritime internationale,

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The PRESIDENT: Please be seated. The sitting is open. For reasons duly made known to me, Judges Xue and Robinson are unable to join us for this morning's sitting. The Court meets today to hear the first round of oral argument of Colombia, both on the claims of Nicaragua and on its own counter-claims. Colombia has two sittings in which to present its arguments, this morning, from 11 a.m. to 1 p.m., and this afternoon, from 3 p.m. to 6 p.m. I shall now give the floor to the Co-Agent of Colombia, H.E. Mr. Manuel José Cepeda Espinosa. You have the floor, Your Excellency.

Mr. CEPEDA ESPINOSA:

1. Madam President, distinguished judges, it is a great honour to represent the Republic of Colombia before the International Court of Justice in this Great Hall of Justice.

2. Madam President, allow me to convey to you my deepest gratitude for having rendered homage to the late James Crawford, a renowned professor and admired judge of this Court. He was well known to Colombia; as you noted, prior to acceding to the Bench, he was lead counsel for Colombia in a case involving our territorial and maritime interests before this same tribunal. My country joins in the tribute to his memory, regrets his loss and honours his legacy.

3. Let me start by addressing upfront what we heard on Monday from the Agent of Nicaragua, Mr. Carlos Argüello. He attempted to present an image of Colombia as a rogue country that does not care about the law or this high court. If this were the case, why would Colombia be here pleading before you? The presence of Colombia before this Court is an indication of my country's old tradition of respect for international law and the procedures for the peaceful settlement of disputes.

4. On Monday, Nicaragua drew a picture of Colombia that completely distorts our legal tradition, our constitutional law and Colombia's position and policy.

5. Nicaragua's Agent is of course not obliged to know Colombian constitutional law. Obviously, he is not aware that Article 101 of the Colombian Constitution expressly states since 1991, that is, ten years before Nicaragua filed its first application against Colombia, that Colombia's limits "can only be modified by virtue of a treaty".

6. On the other hand, his assertion that Colombia has invoked its domestic law as "simply an excuse for not complying"[1] is clearly extravagant. This is not the position of Colombia.

[1] CR 2021/13, p. 20, para. 16.

7. This wild accusation compels me to dwell on the attempts that Colombia has made to resolve the differences with Nicaragua through diplomatic channels.

8. Allow me to remind you that in 1977, 1995 and 2001 Colombia proposed to Nicaragua to resolve their differences through a treaty. Nicaragua refused. It preferred to litigate before this Court. It was Nicaragua's right to do so. But what Nicaragua cannot do is hide extremely relevant facts and later declare itself surprised because Colombia had not invoked before the need for a treaty. In its Judgment on preliminary objections of 13 December 2007, the Court referred to those negotiations. The Court highlighted that "Nicaragua emphasizes, in this connection, that the negotiations concerned, *inter alia*, the delimitation of the respective maritime area of the Parties"[2].

9. Nicaragua knows this. Nicaragua alleged this before this Court. And now Nicaragua declares itself surprised. How convenient for Nicaragua!

10. Colombia's willingness to initiate conversations was also publicly expressed after the 2012 ruling of this Court.

11. Colombia took the initiative to start conversations with Nicaragua with a view to signing a treaty on various issues, including some of which are now the subject of these judicial proceedings, such as fishing rights and the environment. Colombia expressed its willingness to Nicaragua early and publicly, in a meeting held between the two Heads of State while in Mexico during the inauguration of President Enrique Peña Nieto on 1 December 2012. Afterwards, in furtherance of this announcement, a list of topics to be discussed and a *modus operandi* were preliminarily agreed upon. Nicaragua decided to abruptly end the conversations in 2015. Colombia left the door open. Nicaragua slammed it shut.

12. Nicaragua refused to continue the talks in 2015 and, in this way, it self-servingly created the circumstances to accuse Colombia of rejecting the 2012 Judgment because a treaty has not been concluded. And then it invokes the absence of such a treaty as proof of Colombia's violation of Nicaragua's economic rights. The Court very well knows that the absence of a treaty proves nothing regarding the alleged incidents at sea.

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[2] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II),* p. 867, para. 113.

13. I should underline that these talks were unilaterally interrupted by Nicaragua before its domestic political situation deteriorated so dramatically that the Organization of American States has condemned the actions of the Nicaraguan Government and the European Union has imposed sanctions on Nicaragua's highest officials.

14. On Monday, Nicaragua also omitted something that, this time, Nicaragua should have known, because it is in the case file. When the Constitutional Court, in its decision of May 2014, referred to the need for a treaty to "incorporate" the 2012 Judgment, it also said that the rulings of the International Court of Justice had binding international effects and that Colombia had a "duty to comply [with it] in good faith"[3], until a treaty was concluded. The Constitutional Court went on to say that Colombia "recognizes the binding character of the decisions adopted by an international court in the performance of treaties previously entered into, approved and ratified by Colombia"[4].

15. In sum, Colombia is a dualist country in matters of territorial and maritime boundaries. This does not mean that Colombia does not or cannot abide by international judicial decisions. What it means, as in any other dualist system, is that certain steps must be fulfilled for the judgment to have domestic legal effects. This does not undermine the judgment's binding force in the *international* legal order.

16. Nicaragua has stated that the Constitutional Court's decision was opportunistic, and that Colombia acted in bad faith. That, simply, is not true. This decision followed a precedent that had existed for many years. Actually, in 1999, two years before Nicaragua's first Application against Colombia, the Constitutional Court had stated that "the modification of boundaries, which entails a transfer of territory with respect to the existing consolidated boundaries at the time the Constitution of 1991 was approved, requires . . . an international treaty" [5].

17. This is a separate question to that of whether Colombia requires a treaty to respect the 2012 Judgment. In fact, Colombia does not need a treaty to refrain itself from violating Nicaragua's sovereign rights.

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[3] Preliminary Objections of the Republic of Colombia (POC), Vol. II, Ann. 4, para. 9.9.

[4] *Ibid.*, para. 9.11.

[5] Constitutional Court of Colombia, Decision C-1022 of 1999, available at https://www.corteconstitucional.gov.co/relatoria/1999/C-1022-99.htm (accessed 21 Sept. 2021).

18. Colombia's position has been open and clear from the outset. It is well recorded in the Court's Judgment on preliminary objections in 2016, in which it is stated:

> "Colombia accepts that the Judgment [of 2012] is binding upon it in international law. The Colombian Constitutional Court took the same position in its decision of 2 May 2014. The question that has arisen in Colombia is how to implement the 2012 Judgment domestically, having regard to the relevant constitutional provisions and the nature of Colombia's legal system with respect to boundaries."[6]

19. In conclusion, two things must be distinguished. In the light of Colombia's domestic law, a treaty is necessary to modify boundaries, but this does not mean that the judgments of this Court have no effects at the international level, even in the absence of a treaty. Most of these effects have actually to do with the international rights and freedoms of the Parties to the present case.

20. We return, then, to the subject-matter of this case and the real questions at issue here: has Colombia infringed the sovereign rights of Nicaragua? Can Nicaragua ignore the sovereignty of Colombia over the islands of the Archipelago by denying them the right to a zone contiguous to its territorial sea? Has Nicaragua violated the traditional fishing rights of artisanal fishermen from the San Andrés Archipelago? Can Nicaragua by decree convert into internal waters 21,500 sq km of sea far away from its continental coast?

21. Nicaragua seeks not only to distort Colombia's domestic law, but to deny Colombia's basic rights and freedoms recognized by international law.

22. If Nicaragua had continued the discussions started in 2012, we would not be in these judicial proceedings that deal with Nicaragua's claims and Colombia's counter-claims.

23. The Court would recall that Nicaragua came before it to contend that Colombia was threatening or using force against Nicaragua in violation of the Charter of the United Nations and customary law. That was pure invention. In its Judgment on preliminary objections, the Court unanimously decided there was simply no dispute on this matter[7]. Since then, and putting aside for the time being the counter-claims of Colombia, only the claims related to the alleged violations of the rights invoked by Nicaragua fall under the jurisdiction of the Court. I recall that these claims are essentially grounded on alleged "incidents" that no one heard about at the time of Nicaragua's

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[6] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 28, para. 57.

[7] *Ibid.*, p. 42, para. 111 (1) *(c)*.

Application. All information pertaining to these events magically emerged after the filing of the Application and shortly before Nicaragua's Memorial in the present case was due.

24. Aware of its poor arguments and evidence, Nicaragua has tried to make up for the defects in its claims with rhetorical and political arguments. Madam President, permit me to remind the Court that Colombia is a country committed to peace, respect for the rule of law, international co-operation, and the defence of democratic principles. Nicaragua, in contrast, uses the language we have heard, a language which would not be used by the representative of a democratic country where the separation of powers is an effective principle.

25. In its pleadings, Nicaragua insists on quoting, and misquoting, out of context statements attributed to Colombian officials or former officials, including some found in recent Colombian press, in an effort to discredit Colombia. With regard to some of them, Nicaragua did not even provide a translation, as required by Practice Direction IX*bis*. If anything, the statements resulting from internal political debates in Colombia are evidence of the vigour of a democratic and pluralistic society. Nothing more.

26. Obsessed with atmospherics, Nicaragua tries to make a storm in a teacup full of words. Nicaragua is alarmed by the words "cloak and sword", a pure rhetorical figure used by a former president. Then, Nicaragua quotes more words from the current President, taken imprecisely from a weekly magazine but has failed to point to any presidential order to violate Nicaragua's rights. In Colombia, presidents, as well as other officials and politicians, are accustomed to being in the eye of the political storms. Yes, we debate a lot. We debate all the time. We debate about everything. A democratic reality that apparently escapes Nicaragua's comprehension. Words, particularly in a political argument quoted out of context, are not illicit acts under international law. Peaceful navigation and overflight are not either.

27. Colombia, like any other State, enjoys freedom of navigation and overflight, and other internationally lawful uses of the sea related to these freedoms, throughout the Caribbean Sea. Nicaragua, at odds with international law, purports to deny Colombia these essential freedoms.

28. Nicaragua unsuccessfully tries to build a case to support its Application — an Application, I would remind the Court, filed just one day before Colombia's denunciation of the Pact of Bogotá took effect. In fact, Nicaragua attaches negative connotations to the exercise of the right of Colombia

to withdraw from this treaty. Nicaragua does not accept that Colombia has even this basic prerogative.

29. Of the 13 so-called incidents which occurred before the critical date, Nicaragua has not proven any violation of its rights by Colombia. Nicaragua did not even protest them before filing the Application. Nicaragua did not protest these alleged "incidents" earlier because, in fact, they were neither incidents, nor did Colombia's actions constitute any violation of Nicaragua's sovereign rights. Nicaragua did not even mention one of them, on Monday, even though they were the origin of its Application and are the only ones that fall under the jurisdiction of this Court. To compensate for the precariousness of its case, Nicaragua has attempted four times to add post-critical date events, all inconsequential.

30. Moreover, the official fishing statistics released by Nicaragua itself confirm that Colombia's alleged systematic policy of violating Nicaragua's sovereign rights has never existed. If anything, these statistics show that Nicaragua's fishing activity has increased exponentially[8]. Nicaragua can only point to a few fishing-related alleged "incidents" during each year. As Colombia will explain, these were actually "non-events". And these "incidents", if we take the year 2013, would have represented a mere 0.021 per cent of the total fishing days carried out by Nicaragua's fishing fleet. This means that 99.98 per cent of Nicaraguan fishing activities in the Caribbean during that year were not affected by Colombia, according to Nicaragua. The statistics for the following years lead to similar conclusions. Moreover, from 2017 until now they amount to zero. That, certainly, demonstrates the absence of any Colombian policy to impede their activities; on the contrary, they show a policy of respect for international law.

31. Furthermore, throughout the course of these proceedings Nicaragua has failed to prove that its flagged or licenced vessels could not continue fishing or that the catch was confiscated. It has failed to prove, case by case, that Colombia violated Nicaragua's sovereign rights. That is why it has tried to bundle those events together and has sought to portray them as a pattern of conduct by Colombian authorities. However, adding nothing to nothing results in nothing. That, Madam President, distinguished judges, it is scarcely a "pattern" of illegal conduct.

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[8] CMC, Vol. II, Ann. 71.

32. Madam President, judges of the Court, such precarious evidence, so many late attempts to amend it, so many distortions of what happened, make one thing clear: neither in 2013 nor now does Nicaragua have a serious case.

33. Colombia has exercised its freedoms of navigation and overflight, and other internationally lawful uses of the sea related to these freedoms, which are guaranteed by international law. All States can benefit from these freedoms, including Colombia. However, Nicaragua seeks to curtail the scope of these freedoms, which is equivalent to subverting a cardinal principle of international law. The profound and disruptive implications of equating these freedoms to mere passage are self-evident.

34. Throughout the course of these proceedings, Nicaragua has denied that "the rights and duties of the Parties with respect to the preservation and protection of the environment . . . are relevant to the present case"[9]. In fact, this statement has been backed by its actions, particularly by systematically engaging in predatory fishing practices under inhumane conditions[10].

35. This is a shocking position when the international community awaits, urgently, international action to avoid ecological disasters. The preservation of the marine environment is a duty of all States, especially when the habitat of the communities of the Archipelago and the region is at stake. The Seaflower Biosphere Reserve constitutes the habitat within which thousands of Colombian inhabitants of the Archipelago live.

36. In addition to the preservation of the marine environment, the presence of Colombia in the Caribbean Sea, especially in the south-western sector, is due to other imperatives, such as the interdiction of drug trafficking and other illegal activities. Colombia is present in the area in compliance with its international duties. Colombia plays a leading role in joint operations against drug trafficking in which France, the Netherlands, the United States, Costa Rica, and other Caribbean and Central American countries participate, including Nicaragua. Thirty-eight States take part in Operation Orion, a multilateral effort against drug trafficking. It is unclear, to say the least, why Nicaragua maintains that all these countries can be present in the area, but Colombia cannot.

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[9] RN, para. 1.12.

[10] *The New York Times*, "For Nicaragua's Lobstermen, Deadly Dives Are All Too Common", 24 Jan. 2021, available at https://www.nytimes.com/2021/01/24/world/nicaragua-lobsters-fishing.html (accessed 21 Sept. 2021).

37. Madam President, distinguished judges, it is worth recalling that Colombia has sovereignty over all the islands that make up the Colombian Archipelago. International law extends the exercise of sovereignty to the territorial sea of the islands and allows for the exercise of certain protective functions in a zone contiguous to the territorial sea. By claiming that Colombia cannot exercise contiguous zone functions around the islands of our Archipelago, Nicaragua is contradicting international law.

38. All the above leads to a simple conclusion: all of Nicaragua's claims are unsubstantiated and artificial. They are founded on words, not conduct.

39. Consequently, what remains of this case initiated by Nicaragua are Colombia's legitimate rights at sea and our two counter-claims.

40. Colombia considers that Nicaragua is infringing the traditional fishing rights of the Raizal people who inhabit the Archipelago of San Andrés, Providencia and Santa Catalina. It is doing so first and foremost by seeking to deny the existence of these rights, a denial which is the underlying main point of contention between the Parties.

41. Not only has Nicaragua prevented the Raizales from fishing, but it has also intimidated them by intercepting their modest boats. This abuse is one more injustice that the Raizal people have had to suffer. This is a community whose members are descendants of slaves brought from Africa to be exploited during the colonial period and who, more than two centuries ago, found in these islands a space of freedom in which to live in harmony with the sea. Two centuries after they found their freedom, Nicaragua seeks to curtail the Raizales' access to their traditional fishing grounds on which their culture and subsistence as a fishing community depends.

42. Finally, Colombia also considers that Nicaragua has acted in manifest violation of international law by drawing a system of straight baselines far away from its continental coast without fulfilling the international law requirements for doing so. Colombia and other States have sent corresponding notes of protest.

43. Madam President, Members of the Court, the order in which Colombia's counsel will address you in the first round will be as follows:

— First, Mr. Kent Francis James will recall the traditional rights of the Raizal people, to which Colombia attaches paramount importance.

— He will be followed by Sir Michael Wood, who will address the content of the applicable international law in the context of this case and highlight the serious legal flaws upon which Nicaragua builds its arguments.

— Professor Laurence Boisson de Chazournes will speak about the importance of Colombia's activities of observation and information for environmental purposes and their legality.

— Mr. Rodman Bundy will come next. He will explain that Colombia has not violated any of Nicaragua's sovereign rights. We expect Mr. Bundy to begin his statement shortly before the lunch break and to continue in the afternoon.

— Professor Michael Reisman will then show why the contiguous zone of the Colombian islands in the Archipelago and its extent, far from illegal, are in harmony with customary international law.

— Turning to our first counter-claim, Mr. Eduardo Valencia Ospina will describe Nicaragua's infringement of the traditional fishing rights of the inhabitants of the San Andrés Archipelago.

— And to conclude our first round, Professor Jean-Marc Thouvenin will demonstrate the blatant illegality of Nicaragua's straight baselines.

44. Madam President, distinguished judges, I thank you for your attention. May I ask Madam President to now give the floor to Mr. Kent Francis James, who will deliver the first pleading on behalf of Colombia. Thank you.

The PRESIDENT: I thank the Co-Agent of Colombia for his statement. I now invite H.E. Mr. Kent Francis James to take the floor. You have the floor, Sir.

Mr. JAMES:

THE TRADITIONAL RIGHTS OF THE RAIZAL PEOPLE

Introduction

1. Madam President, distinguished judges, it is an honour to appear before the principal judicial organ of the United Nations, and to do so as a member of Colombia's legal team in this important case.

2. Colombia's Co-Agent has just outlined Colombia's response to the arguments that Nicaragua has advanced during these proceedings and the basic elements of Colombia's counter-claims. In my brief presentation, I will make references to the human, historical, social and environmental context which informs the various elements of this case, and which need to be taken into account when assessing the claims and counter-claims of the Parties.

3. Both claims and counter-claims involve matters relating to the south-western Caribbean Sea. The Court's decision in this case will have an important impact on the people that inhabit this area.

Who are the Raizales?

4. The name Raizales comes from the word "roots" in Creole[11]. For almost 400 years, the Raizales have inhabited and derived economic sustenance from the Archipelago of San Andrés and the associated maritime areas.

5. The Raizales from the Archipelago of San Andrés, Providencia and Santa Catalina are Colombian. And within Colombia's diversity they are also Caribbean people, whose lives are intimately connected with the sea.

6. The Raizales depend on traditional fishing rights extending over large maritime areas at issue in this case. This is clear from Colombia's first counter-claim. Because of that dependence on the sea, the Raizales' livelihood can only be preserved if the maritime areas are protected and conserved without being subject to harmful and destructive fishing practices.

7. Over the centuries, the Raizales have established a stable community with footprints in the Archipelago of San Andrés, Providencia and Santa Catalina. But not only there. The Raizales' movements throughout the region have never been constrained.

8. When the Dutch arrived in the Archipelago, they established commercial relations with the inhabitants of the Mosquito coast. Also, in the first decades of the seventeenth century, the English arrived. Then there was a mixture of indigenous people from the Caribbean, together with enslaved Africans, and British, Dutch, French, German, Spanish and Chinese, among others. Currently, the Raizales are mostly Creole — Black Kriols to be precise.

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[11] CMC, para. 2.64.

9. African men and women were brought in large numbers to the Archipelago through enslavement — owing to the customs of human trafficking of the time. But in many aspects (language, religion, customs) the British markedly influenced the Raizales. Hence the Puritan heritage.

10. Almost 200 years ago, when the United Kingdom ended the trade of slaves, a son from the island of Providencia, Philip Beekman Livingston Jr., of British parents, in his early twenties, also began in 1834 a campaign for the emancipation of Blacks in the area[12], which included the Mosquito coast and the Corn Islands. He freed the slaves from his family, giving them property and land, instructing them to read, write and in mathematics, as well as organizing entrepreneurial activities for their own benefit. His acts of humanity influenced others to also emancipate all those enslaved on the islands.

11. The Raizales then began planting coconut for export to the United States of America. Other products, such as bird eggs and guano, were also of economic interest. But the main livelihood for the Raizales has always come from the sea[13].

The Raizales' relationship with the sea

12. For the Raizales the sea is home, shelter, livelihood and support. The Raizales have worked the sea as artisanal fishermen and sailors. While based ~~***on***~~ ***in*** the islands of the Archipelago, they have always maintained contact with the continent and with other islands in the Caribbean.

13. The Raizales generally navigate without having sight of land, with minimal instruments for this purpose; this is part of the ancestral knowledge of the Raizal people. The Raizales have always sailed and enjoyed the products of the sea without any restrictions from the political limits established by man.

14. The sea is a vital space for the Raizales, a trade route for Creole peoples in the south-western Caribbean. It is their economic heritage.

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[12] M. Aguilera, *Geografía económica del archipiélago de San Andrés, Providencia y Santa Catalina*, Banco de la República, Centro de Estudios Económicos Regionales, Documentos de trabajo sobre economía regional, No. 133, 2010, p. 5.

[13] J. Bond and R. Meyer de Schauensee, "The Birds", *The Academy of Natural Sciences of Philadelphia*, Monographs, No. 6, Results of the Fifth George Vanderbilt Expedition (1941), Wickersham Printing Company, 1947, p. 10.

15. The sea is also their cultural heritage. In fact, followers of the Raizales' faith are baptized in the sea. It is a cemetery for those who left and have not returned. It is the source of true and fictional stories, of tales, of fables, of adventures**,** of amusement and sadness. As the Raizales say: it is a gift of God.

16. The habitat of the Raizales is formed by islands, islets, cays, atolls and banks. These range from San Andrés and the islands in its proximity, which include South South-West Cays and East South-East Cays to the islands of Serranilla and Bajo Nuevo; passing through Roncador, Serrana and Quitasueño; and the islands of Old Providence and Kathleena. This habitat is an essential part of the Raizales' history, their livelihood, their culture.

The importance of fishing and the environment

17. Madam President, distinguished judges, the sea provides the Raizal people and the people of the Archipelago with food security. The banks and areas that are traditionally fished are reference points that are essential to the Raizales' livelihood and habitat. They include banks close to the Colombian islands. They also include, but are not limited to banks farther out, such as Luna Verde, Cape Bank, Julio Bank, North-East Bank and Far Bank. These are much more than 12 nautical miles from the coast, and since 2012, problems have arisen for the Raizales when they sail to fish in these areas. Eduardo Valencia-Ospina will address these matters in detail.

18. The Raizales are artisanal fishermen who use environmentally friendly techniques such as "handlining" and "breath-hold diving". These are sustainable methods and practices geared to the special characteristics of the western Caribbean maritime area. By contrast, other methods, such as fishing with divers who use scuba tanks, oxygen compressors or explosives, cause serious harm.

19. Unsustainable extraction of marine resources is a threat to all communities' survival and specially the Raizal people. International developments such as Sustainable Development Goal 14, which calls on States to conserve the oceans, seas and marine resources, are very much in line with the Raizales' ethos and traditions.

20. Also, because of its importance, the protection and preservation of the sea with its fisheries is engrained in the Raizales' fishing practices. The Raizales participated in promoting the designation by UNESCO of a world biosphere reserve — the Seaflower Reserve[14].

21. The maritime spaces covered by the reserve also contain one of the most extensive coral reef ecosystems on the planet[15]. The reserve took its name in honour of the *Seaflower*, a ship that carried some of the first Britons to settle on the island of Providencia. The *Seaflower* had a sister ship — the *Mayflower* — whose history is well known. Professor Boisson will address in detail the importance of the environment for this case.

22. Your Excellencies, as we have said, the Raizal people of San Andrés, Providencia and Santa Catalina have a natural bond with the sea: they live off it and consider it part of their natural habitat. Any restrictions of their historical and cultural traditions would have a significant and negative impact on their way of life and identity.

23. Madam President, distinguished judges, I thank you for your attention and I would be grateful if the floor could now be given to Sir Michael Wood. Thank you.

The PRESIDENT: I thank Mr. James. I now invite Sir Michael Wood to take the floor.

Sir Michael WOOD:

THE APPLICABLE LEGAL RÉGIME AND THE RIGHTS OF THE PARTIES

1. Madam President, Members of the Court, it is an honour to appear before you on behalf of Colombia. On a personal level, may I say that it is a pleasure to be in The Hague and to be once again in the Peace Palace. May I first join in the tributes that have been paid to Judge Crawford. His passing is a great loss to the Court and to all of us.

2. My statement will be in two parts. First, I shall recall the basic elements of the specific legal régime at issue in this case. It is necessary to do so because Nicaragua presents the Court with a false picture in its pleadings. Second, I will explain that Colombia's activities fall squarely within the

[14] UNESCO, Man and the Biosphere (MAB) Programme, Sixteenth session, 6-10 Nov. 2000, Final Report, doc. SC.2000/CONF.208/CLD.16, p. 21, para. 122, available at https://unesdoc.unesco.org/ark:/48223/pf0000122703_fre (in French) and https://unesdoc.unesco.org/ark:/48223/pf0000122703 (in English) (accessed 21 Sept. 2021).

[15] Colombia's National Natural Parks, Old Providence McBean Lagoon National Natural Park, available at https://www.parquesnacionales.gov.co/portal/en/ecotourism/caribbean-region/old-providence-mcbean-lagoon-national-natural-park/ (in English) (accessed 21 Sept. 2021).

freedoms and rights enjoyed by all States in the areas in question. Colombia has at all times had due regard to Nicaragua's rights and duties and has not violated any of Nicaragua's rights.

3. Madam President, it is important to bear in mind the complex nature of the maritime area at issue in this case — the south-western Caribbean. As perhaps you can see on the screen, but anyway it is at tab 2 in your folders, the south-western Caribbean is a semi-enclosed sea bordered by seven coastal States: to the south and west, Colombia, Panama, Costa Rica and Nicaragua, with Jamaica, Haiti and the Dominican Republic to the north.

4. Colombia is not some distant maritime power; it is a coastal State in the south-western Caribbean, with an extensive mainland coast and numerous islands, including those of the San Andrés Archipelago. Colombia's activities and presence in the south-western Caribbean are a natural consequence of these geographical realities. In this context, Nicaragua's references on Monday to maps depicting the "area of operation" of the Colombian Navy or to statements about having a presence in various maritime areas are of no significance[16]. States' navies regularly operate in areas beyond their maritime jurisdiction, even globally, to protect their interests[17]. There is nothing unique or remarkable about Colombia having maritime interests and presence outside its jurisdictional waters. The peace and environmental sustainability of the south-western Caribbean are essential components of Colombia's well-being and form part of its national identity.

5. Madam President, the applicable law in this case is closely related to this geographical situation. Account needs to be taken not only of the customary international law of the sea but also of a range of conventional and customary rules applicable to the Caribbean Sea, not least the Cartagena Convention[18], to which both Colombia and Nicaragua are parties. These particular rules, in turn, assist a correct understanding of the customary international law of the sea, which applies between the Parties (since of course Colombia is not a party to UNCLOS).

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[16] CR 2021/13, p. 48 (Reichler); p. 29 (Pellet).

[17] E.g. French Navy 2021, Information file, available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjr_4-e-o3zAhVl_rsIHVm2BF8QFnoECAIQAQ&url=https%3A%2F%2Fwww.defense.gouv.fr%2Fcontent%2Fdownload%2F612927%2F10259719%2FDIM_2021_ANGLAIS.pdf&usg=AOvVaw0JyrdXDKRtNx75E7CSvtR1.

[18] Convention for the Protection and Development of the Marine Environment in the Wider Caribbean Region, CMC, Ann. 17.

I. The specific legal régime applicable to the areas at issue in this case

6. Madam President, Members of the Court, the present case raises a number of important issues. A central question, and the one on which I shall focus today, concerns the nature, scope and content of the specific legal régime applicable under customary international law. This régime governs the rights, duties and jurisdiction of coastal States, and the freedoms, rights and duties of other States[19]. In the end, the question before the Court is whether any of Colombia's specific actions that are within the scope of this case have in fact violated Nicaragua's sovereign rights and jurisdiction. The case is not about determining the international responsibility of the State for political statements made by its officials. It is about actions taken, not determining abstract legal questions.

7. On Monday, Professor Pellet devoted a large part of his intervention to abstract and generalized criticisms of Colombia's approach to the law. He himself nowhere described the specific legal régime applicable to the maritime area in question. Professor Pellet accused Colombia of being opportunistic in identifying the rules of customary international law and "taking advantage" of UNCLOS to impose obligations on Nicaragua, even though Colombia is not a party to UNCLOS[20]. In fact, Madam President, unlike Nicaragua, Colombia has been consistent in applying the correct methodology for identifying rules of customary international law, as it derives from your case law and as was recognized in the recent work of the International Law Commission. Colombia has been consistent in its approach, identifying rules of customary international law on the basis of State practice and *opinio juris*. Unlike Nicaragua, Colombia does not just "presume" that a treaty rule necessarily reflects customary international law. Moreover, notwithstanding the fact that Colombia is not a party to UNCLOS, it is obvious that Nicaragua must comply with its obligations thereunder, as this Court itself recognized[21].

8. In its pleadings, Nicaragua adopts a wholly mistaken approach to the specific legal régime applicable within an EEZ, and seeks to deny Colombia the rights and freedoms recognized by international law. Professor Pellet did nothing to correct that on Monday. The essence of the applicable régime is that the coastal State has "sovereign rights *for the purpose of exploring and exploiting, conserving and managing the natural resources*, whether living or non-living, of the

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[19] Cf. UNCLOS, Art. 56.

[20] CR 2021/13, p. 31 (Pellet).

[21] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 669, para. 126.

waters superjacent to the sea-bed and of the sea-bed and its subsoil"[22]. All other States enjoy the high seas freedoms of navigation and overflight, and other internationally lawful uses of the sea related to those freedoms[23]. In addition, the rules of international law concerning the high seas and other pertinent rules of international law apply[24].

9. Thus, the specific legal régime gives the coastal State certain rights and duties but they are limited in scope and nature, and relate mainly to the exploration, exploitation, conservation and management of natural resources. As for the coastal State's jurisdiction with regard to the protection and preservation of the marine environment, it too is specific and limited; it is not exclusive[25]. Under customary international law, all States have environmental rights and duties in the area in question. This basic legal framework has to be read with more specific rules, including those set out in the Cartegena Convention.

10. Nicaragua challenges all this. It does not accept the EEZ for what it is, a specific legal régime essentially concerned with natural resources. Nicaragua apparently takes the wholly mistaken view that the area in question is to be equated to sovereignty and to the territorial sea. This can be seen from the statements of its high officials.

11. As you will see on the screen and at tab 3 in your folders, already in late 2012, President Ortega spoke of "exercising this aerial and maritime *sovereignty*"[26]. And in 2015, he spoke of "a New Territorial Sea"[27] awarded by the Court to Nicaragua. The Head of the Nicaraguan Naval Force also spoke about "exercising *sovereignty* in the Sea and Jurisdictional Airspace"[28]. The Head of Nicaragua's Army spoke of "Sovereign Seas, particularly of our waters in the Caribbean restored by the Judgment of the International Court of Justice of November 2012"[29]. And in its Note Verbale of 16 February 2021, which Nicaragua has just introduced into these proceedings, Nicaragua described "the waters on which the Nicaraguan Caribbean Biosphere Reserve is found" as being

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[22] Cf. UNCLOS, Art. 56.1 *(a)* (emphasis added).

[23] Cf. UNLCOS, Art. 58.1.

[24] Cf. UNCLOS, Art. 58.2.

[25] Cf. UNCLOS, Art. 56.1 *(b)* (i); see also Arts. 193-194, 205-208.

[26] RC, Ann. 1 (emphasis added).

[27] RC, Ann. 5.

[28] *Ibid.* (emphasis added).

[29] *Ibid.*

"indisputably part of our Caribbean *territory*". These are just a few examples[30]. Earlier this year, even the Agent of Nicaragua made statements to the media confirming that Nicaragua views the waters in question as *territory under its sovereignty*[31].

12. Madam President, these are not just loose words. They reflect a deep-seated Nicaraguan attitude, a Nicaraguan position with practical implications, as we shall see.

13. Nicaragua continues to assert 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"[32]. In other words, it seeks to argue that other States do not enjoy the same liberties as it does in and over the waters off its coast, because the area is not a "residual regime"[33].This wilful misunderstanding seeks to reverse the burden of showing that an activity is not permitted. Also, according to Nicaragua, freedom of navigation merely encompasses a right of "passage" — sailing from one point to another and nothing more[34]. According to Nicaragua, it is for Colombia to show that it has other rights. But that is not how the specific legal régime works. All States enjoy the freedoms of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to those freedoms. And they also benefit from the rules of international law concerning the high seas and other pertinent rules of international law.

14. Madam President, Nicaragua's vision of the specific legal régime recalls 200-nautical-mile territorial sea claims from the 1940s and 1950s. But the law developed in a different direction. State practice evolved in the 1970s, in parallel with the negotiations at the Third United Nations Conference on the Law of the Sea. A specific legal régime extending 200 nautical miles from baselines emerged. This régime did not grant sovereignty to the coastal State. Rather, the coastal State enjoyed certain exclusive rights with respect to natural resources[35]. By the late 1970s, this régime had gained general acceptance[36]. A coastal State's zone is *not* sovereign territory, it is *not*

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[30] See RC, Anns. 1-5, 7 (emphasis added).

[31] Dr. Carlos Argüello, Representative of Nicaragua before the International Court of Justice in The Hague, interview with Alberto Mora, Live Magazine, Channel 4, 2 Feb. 2021, available at http://nicaraguasandino.com/ley-que-declara-y-define-reserva-de-biosfera-del-caribe/.

[32] RN, para. 2.10.

[33] RN, paras. 2.08, 2.16.

[34] RN, paras. 2.38 and 2.40.

[35] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 33, para. 34.

[36] See Virginia Commentary, Vol. II, pp. 548-550.

territorial sea. The zone is subject to a régime that was painstakingly negotiated in the 1970s, to balance the interests of coastal States and the interests of all other States. "The coastal State's rights relate essentially to the natural resources"[37] — that is a quote, and a correct quote in my view, from the book by Professors Churchill and Lowe on the Law of the Sea. The other side of that coin is that the coastal State enjoys no special rights with respect to other matters. And, at the same time, it has a positive obligation to have due regard to the rights of other States[38].

15. Due regard must be given also to the coastal State's particular rights. Subject to that, the rights of all other States are no different from their rights on the high seas. High seas freedoms and the rules of international law applicable to the high seas apply within the zone. In other words, those activities relating to freedom of navigation and overflight that do not fall within the exclusive rights of the coastal State can be freely exercised by other States while navigating in or flying over its zone, subject to having due regard to the coastal State's rights and to the high seas rights exercised by other States. The rights of all States there include the right to conduct activities that do not involve any sailing at all. For example, "bunkering on the high seas is part of the freedom of navigation to be exercised under the conditions laid down by the Convention and other rules of international law"[39]. That is a quote from the Law of the Sea Tribunal.

16. In short, Madam President, Members of the Court, the freedoms of navigation and overflight, and other internationally lawful uses of the sea, in and over the coastal State's zone, are the same as those freedoms anywhere on the high seas. They apply to all ships and aircraft. They go beyond "passage". They include the right to navigate and overfly for any purpose.

17. As with freedom of navigation, freedom of overflight is the same as that enjoyed over the high seas[40]. As has been stated by the International Civil Aviation Organization (ICAO) — and is now on your screens, and at tab 4: "For all practical and legal purposes, the status of the airspace

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[37] R. R. Churchill and A. V. Lowe, *The Law of the Sea*, 3rd ed., Manchester University Press, 1999, p. 166: see also RC, para. 2.32; D. P. O'Connell, *The International Law of the Sea*, Vol. 1, p. 552(1982).

[39] *M/V "Norstar" (Panama* v. *Italy), Judgment, ITLOS Reports 2018-2019*, p. 10, para. 2.19; See also *M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014*, p. 70, para. 223.

[40] Cf. UNCLOS, Art. 58.

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"[41].

18. Nicaragua has tried to make much of alleged incidents involving overflight by Colombian aircraft. Mr. Bundy will demonstrate later today that these allegations are factually groundless, as has already been shown in Colombia's written pleadings[42]. But in any event, Madam President, the basis of these allegations is Nicaragua's misconceived understanding of the law relating to overflight over the zone. Nicaragua repeatedly purports to exercise what it calls "sovereignty" in the airspace over waters beyond its territorial sea[43]. But the freedom of overflight is not limited under international law; as ICAO explained, the airspace above the zone has essentially the same status as the airspace over any other area where high seas rights and freedoms apply. A coastal State's sovereignty over its airspace extends only to the airspace above its territorial sea.

19. To make a broader point, Madam President, Nicaragua's written pleadings focus less on what it claims Colombia actually did, but more on what it says was Colombia's "intent" and whatever general significance Nicaragua reads into Colombia's presence in the south-western Caribbean[44]. Forgive me for stating the obvious, but this is a court that adjudicates between States based on law and facts, not on speculation.

II. The presence of the Colombian Navy is an exercise of the freedoms of navigation and overflight and other internationally lawful uses of the sea

20. Madam President, Members of the Court, I now turn to the second part of my statement and will say a few words about the factual background to this case. Those who follow me will go into these matters in more detail. As we have seen, under international law, in a coastal State's zone all ships and aircraft enjoy the high seas freedoms of navigation and overflight and other internationally lawful uses of the sea related to these freedoms[45].

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[41] International Civil Aviation Organization, "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, Netherlands Institute for the Law of the Sea (ed.), *International Organizations and the Law of the Sea Documentary Yearbook 3*, 1987, p. 243.

[42] CMC, Chap. IV.A (2); RC, Chap. 3.C.

[43] RC, Ann. 3, Reading of Order No. 0061-2013 by the Commander-in-Chief of the Nicaraguan Army. See RC, Anns. 1-5 and 7 for similar statements on Nicaraguan sovereignty over the maritime areas in question; See also RC, para. 2.12.

[44] See, for example, MN, paras. 2.02-2.21; RN, paras. 2.1, 2.35, 4.36, 4.45, 4.112 and 4.130.

[45] Cf. UNCLOS, Art. 58.

21. To find State practice to this effect we need look no further than the Caribbean Sea, where Caribbean and non-Caribbean States alike routinely conduct maritime surveillance and other operations. As the Co-Agent has already mentioned this morning, Colombia's Navy and coast guard are by no means the only ones operating in the area. As has been shown in detail in our written pleadings, Belize, Canada, Chile, Colombia, Costa Rica, El Salvador, France, Guatemala, Honduras, the Netherlands, Panama, Spain, the United Kingdom and the United States, among others, all conduct activities in this area, unilaterally, bilaterally and jointly[46].

22. This established practice in the south-western Caribbean confirms that Nicaragua cannot claim "exclusive jurisdiction" so as to deny Colombia and all other States the rights and freedoms recognized by international law. The suggestion that Colombia and other States violate Nicaragua's sovereign rights simply because they carry out certain observing and informing activities in the area, that is, observing what is happening there and informing those involved of the consequences of their actions[47], that suggestion is untenable. Such activities fall squarely within all States' rights to exercise the freedoms of navigation and overflight and other internationally lawful uses of the sea. How this presence, how these activities, have violated Nicaragua's rights is left unanswered by Nicaragua.

23. Nicaragua repeatedly refers to this as "policing", or as Professor Pellet put it on Monday, "contrôles et contrainte"[48]. This is an attempt to convey a false image of the activities concerned, to create the impression that Colombia is omnipresent and a threatening force in the Caribbean. The reality is completely different. The Colombian "presence", in fact, normally consists of a single coast guard vessel. Occasionally a second Colombian coast guard vessel may also navigate in the area at the same time. This is the "presence" Nicaragua goes on and on about: one, or occasionally two, vessels in a vast maritime area.

24. In any event, the presence of naval vessels from many nations in the south-western Caribbean is unsurprising, given the challenging circumstances in the area, circumstances which Nicaragua has so far not seen fit to address in these proceedings.

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[46] CMC, paras. 2.101-2.109; RC, paras. 2.23-2.29.

[47] RN, para. 2.10.

[48] CR 2021/13, p. 34 (Pellet).

25. It should be noted that Nicaragua itself was largely absent from the south-western Caribbean at the time when that maritime area was, as it still is, experiencing significant challenges. The nature and extent of these challenges have been thoroughly explained in our written pleadings[49]. I will highlight just a few points concerning transnational organized crime and drug trafficking, assistance to vessels at sea, and the protection of the environment.

Transnational organized crime and drug trafficking

26. Madam President, Members of the Court, Colombia is one of the Caribbean States taking appropriate measures to prevent transnational organized crime at sea, including in co-operation with other States. In fact, Colombia's actions are an absolute necessity in the Caribbean Sea; the area was and continues to be particularly afflicted by drug trafficking[50], arms trafficking and other serious criminal activities. Nicaragua itself concedes, in its Reply, that Colombia has a right to take action in the area "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"[51].

27. As we explained in our Counter-Memorial, Colombia's Navy has a base on San Andrés, which performs a vital role in the efforts against illicit drug trafficking. In addition, on Serrana, Serranilla, Roncador and Cayo Bolívar, Colombia has built accommodation for naval detachments, including solar panels and water collection facilities for the use of the navy infantry corps and the fishermen who inhabit or visit the islands and cays. It has also built radio stations and lighthouses[52]. These efforts place Colombia at the forefront of the fight against drug trafficking in the Caribbean, a fact that is well recognized internationally[53].

28. Colombia has entered into some 88 bilateral arrangements to fight drug trafficking[54]. It is also a party to international coalitions established to that end. These have included, for example, Operation Martillo. Launched in 2012 and only recently terminated, that operation was a coalition of

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[49] CMC, Chap. 2; RC, paras. 2.34-2.108.

[50] CMC, para. 2.97 and the accompanying Figure 2.6; RC, paras. 2.41-2.49.

[51] RN, para. 2.34.

[52] CMC, paras. 2.98-2.100.

[53] CMC, paras. 2.104-2.108.

[54] CR, para. 2.46, referring to Ministry of Foreign Affairs of Colombia, Virtual Library of Treaties, available at http://apw.cancilleria.gov.co/tratados/SitePages/BuscadorExternoForm.aspx (accessed 12 May 2019).

14 countries, including, I note, Nicaragua[55]. This successful operation depended on the presence of vessels from some 14 countries in the relevant maritime areas. As was stated by the United States Department of Defense: "In support of the operation [Operation Martillo], U.S., partner nation and allied forces' ships and aircraft provide *persistent presence* in select maritime zones"[56].

29. The presence of Colombia's vessels in the south-western Caribbean is no different from the presence of vessels from other States, including non-Caribbean States, and is part of vital anti-narcotics co-operation. In fact, it is the presence of naval vessels from a range of States that is the cornerstone of these indispensable efforts. For Nicaragua to come before this Court, and single out Colombia in order to paint this presence as some evil plot, is incomprehensible.

30. Madam President, Colombia takes the threat of drug trafficking seriously. This was true in 2013 when Nicaragua initiated these proceedings, as Operation Martillo demonstrates, and it remains true today. That is why Colombia invited the Nicaraguan Navy to participate in the new multilateral Operation Orion, launched in April 2018. Phase VII of that operation was carried out earlier this year and was co-ordinated by the Colombian Navy. Thirty-eight States (including Nicaragua) participated[57]. The Chief of the Nicaraguan Army applauded the "high level of cooperation" with the Colombian Navy against drug trafficking, through participation in Operation Orion[58].

31. Under customary international law, beyond its territorial sea a coastal State has no sovereign rights or jurisdiction that are specifically relevant to action against drug trafficking. But like all States, Nicaragua is obliged under specific conventions to co-operate with other States in the suppression of drug trafficking at sea[59].

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[55] CMC, paras. 2.101-2.102.

[56] US Southern Command, "Operation Martillo Still Hammering Away at Illicit Trafficking", available at https://www.southcom.mil/MEDIA/NEWS-ARTICLES/Article/985770/operation-martillo-still-hammering-away-at-illicit-trafficking/ (emphasis added).

[57] Naval Campaign press release of 3 Aug. 2021, available at https://www.cgfm.mil.co/en/blog/naval-campaign-orion-vii-largest-multilateral-operation-against-drug-trafficking-history-has; Presidency of the Republic press release of 3 Aug. 2021, available at https://www.cgfm.mil.co/en/blog/results-operation-orion-vii-show-together-we-are-more-effective-against-international-drug.

[58] Speech of General Julio César Avilés, Chief of the Nicaraguan Army, of 21 Feb. 2020, available at https://www.lavozdelsandinismo.com/nicaragua/2020-02-21/acto-en-conmemoracion-del-86-aniversario-del-transito-a-la-inmortalidad-del-general-de-hombres-y-mujeres-libres-augusto-c-sandino-21-2-2020-texto-integro/.

[59] See UNCLOS, Art. 108 and Art. 58 (2).

Assistance to vessels at sea

32. Madam President, Members of the Court, I now turn to assistance to vessels at sea. As explained in our written pleadings, there is significant maritime traffic in and around the San Andrés Archipelago and beyond. These vessels include, of course, Colombian flagged and licenced vessels.

33. The weather in this part of the Caribbean Sea is increasingly unpredictable, creating a high risk for vessels navigating in the area — and not only for the Raizales. Colombia has rights and obligations towards all vessels, Colombian and others alike, including to protect and provide relief in cases of security or technical difficulty.

34. As was pointed out in our Rejoinder[60], Colombia is a State party to the International Convention on Maritime Search and Rescue, the primary international agreement on search and rescue at sea. Under the Annex to the Convention, excerpts of which are in your folders at tab 5, States are required to "provide the most appropriate assistance available" within their designated search and rescue region[61]. Moreover, all parties to the Convention are under an obligation to provide assistance to any person in distress at sea, regardless of nationality or circumstances[62].

35. On your screen now — and at tab 6 — you can see Colombia's designated search and rescue region. It covers parts of many States' EEZs. Colombia is acting in accordance with its obligations under the Convention when it provides technical and humanitarian assistance to vessels in distress in the south-western Caribbean. Several examples of such assistance provided by the Colombian Navy to Nicaraguan vessels in distress may be found in Appendix A of our Counter-Memorial.

36. Let me recall in this context that coastal States have both rights and *duties* under international law. But Nicaragua, for its part, is not sufficiently equipped at present to ensure the safety of vessels in the southern Caribbean. This explains why Nicaraguan fishermen rely on the Colombian Navy at times of distress[63].

37. Most importantly, Colombia — like Nicaragua and all coastal States — has an obligation to promote the establishment, operation and maintenance of "an adequate and effective search and

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[60] RC, paras. 2.50-2.56.

[61] International Convention on Maritime Search and Rescue 1979, Annex, Art. 2.1.9.

[62] *Ibid.*, Annex, Art. 2.1.10.

[63] CMC, Chap. 8, see also Appendix A; RC, para. 2.55.

rescue service regarding safety on and over the sea"[64]. It is hard to see how Colombia's humanitarian actions in helping others have harmed Nicaragua's rights in any way. If anything, they should be welcomed by Nicaragua as they were by its distressed fishermen.

Protection of the environment

38. Madam President, and lastly, I turn briefly to the protection of the environment. The relevant rights and obligations of Colombia and Nicaragua for protecting the environment, particularly in the context of the fragile south-western Caribbean, have been explained in our written pleadings[65]. International law imposes upon States *obligations* as well as granting them rights with respect to the environment. Under customary international law, States are obliged to "protect and preserve the marine environment".

39. This obligation of conduct, a "due diligence" obligation[66], requires a State to proactively ensure that the relevant rules are enforced. The Court explained this in *Pulp Mills*; the text is on the screens (tab 7), but given the time, I will not read it out aloud.

40. In addition to this due diligence obligation, under international law, States must exercise their sovereign rights "in accordance with their duty to protect and preserve the marine environment"[67]. Measures are to "include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life"[68]. Moreover, States are under a positive obligation to "endeavour . . . to observe, measure, evaluate and analyse . . . the risks or effects of pollution of the marine environment"[69].

41. Colombia's environmental activities in the south-western Caribbean are limited to observing, evaluating and informing others of environmental risks, and the need to protect the fragile ecosystem and natural habitat of vulnerable communities, such as the Raizales. They are in no way contrary to international law and are fully compatible with the rights and obligations of the coastal

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[64] As reflected in UNCLOS, Art. 98 (2).

[65] RC, paras. 2.57-2.108.

[66] *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015*, p. 40. para. 129.

[67] Cf. UNCLOS, Art. 193.

[68] Cf. UNCLOS, Art. 194 (5).

[69] Cf. UNCLOS, Art. 204 (1).

State. Professor Boisson de Chazournes will explain this in more detail shortly. Nicaragua, for its part, seems indifferent to the potential negative impact of the deterioration of fragile ecosystems on the livelihood of vulnerable communities, such as the Raizales.

42. Madam President, Members of the Court, the international community cannot ignore the scourge of drugs, the well-being of those in peril at sea, or irreversible damage to the environment, including to significant and unique ecosystems, especially when these ecosystems are the habitat of a vulnerable community. Instead of addressing the fact that it is failing to meet its own obligations, Nicaragua points the finger at Colombia's proportionate and limited actions to safeguard the essential interests of the international community from grave and imminent damage to the environment, as well as from other harm. Nicaragua's passiveness has contributed to unimpeded drug trafficking and to the danger posed to the environment in the south-western Caribbean — and to the well-being of those dependent on it, including the Raizales. By contrast, Colombia's actions in no way impair Nicaragua's essential interests.

43. Madam President, that concludes my intervention and I request that you invite Professor Boisson de Chazournes to the podium. I thank you.

The PRESIDENT: I thank Sir Michael and I now invite Professor Laurence Boisson de Chazournes to take the floor.

Mme BOISSON DE CHAZOURNES :

L'IMPORTANCE DES ACTIVITÉS D'OBSERVATION ET D'INFORMATION DE LA COLOMBIE À DES FINS ENVIRONNEMENTALES ET LEUR LICÉITÉ

1. Madame la présidente, Mesdames et Messieurs les juges, c'est un honneur pour moi de me présenter devant vous aujourd'hui au nom de la République de Colombie. Permettez-moi tout d'abord de rendre un hommage appuyé au professeur, juge et ami James Crawford.

2. Le moins que l'on puisse dire c'est que, durant son premier tour de plaidoiries, le Nicaragua a confirmé les craintes maintes fois exprimées par la Colombie devant la Cour de céans quant à son mépris flagrant des considérations environnementales. Dans ***~~sa~~ la*** fable concoctée par les conseils du

Nicaragua, l'environnement ne serait qu'un instrument de «contrôles»[70], de «contrainte»[71]**, ~~et~~ *ou encore*** de «désinvolture»[72] visant à nier les droits reconnus aux Etats côtiers par le droit international. En plus d'être inquiétantes, de telles élucubrations juridiques sont anachroniques et en total déphasage avec ce qui est requis des Etats membres de la communauté internationale en vertu du droit international contemporain. Mais pis, ces élucubrations ont pour effet de réduire à néant l'importance des considérations environnementales dans l'appréciation par la Cour de la licéité des actions menées par la Colombie.

3. Et pourtant, la Colombie n'aura cesse de le répéter : l'environnement est bel et bien au cœur du présent différend. Et si la Cour venait à faire abstraction des considérations environnementales, comme l'y invite le Nicaragua et cela sans aucune base juridique, elle ignorerait un élément intégral du différend dont elle est saisie.

4. Mesdames et Messieurs les juges, c'est dans un espace maritime *particulier* que le différend porté devant vous s'inscrit : celui de la mer des Caraïbes. Cette mer semi-fermée se caractérise par la fragilité de ses écosystèmes, lesquels écosystèmes servent d'habitat naturel, social, économique et culturel à une communauté non moins vulnérable, à savoir les Raizals, ainsi que M. Kent Francis James vient de l'expliquer. Ces deux dimensions — environnementale et humaine — font de l'espace en cause dans le présent différend un espace particulier à protéger et à préserver.

5. C'est ce souci à la fois de protection et de préservation qui a conduit des membres de la communauté internationale, notamment les Etats qui «sont particulièrement intéressés»[73], à élaborer un *corps de règles spéciales* pour garantir la durabilité de la mer des Caraïbes. Le corpus en question trouve assise dans la convention de Carthagène. Le Nicaragua et la Colombie, tous deux parties à cet instrument conventionnel, sont tenus d'agir conformément à ce régime juridique spécifique mis en place dans le contexte de l'espace environnemental et humain particulier que constitue la mer des Caraïbes. Ce régime doit prendre toute sa place au cœur de l'écheveau des droits et obligations en cause dans la présente affaire.

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[70] CR 2021/13, p. 34, par. 25 (Pellet).

[71] *Ibid.*

[72] *Ibid.*, p. 35, par. 28 (Pellet).

[73] *Plateau continental de la mer du Nord (République fédérale d'Allemagne/Danemark) (République fédérale d'Allemagne/Pays-Bas), arrêt, C.I.J. Recueil 1969*, p. 43, par. 74.

6. La convention de Carthagène fait partie des sept conventions administrées par le Programme des Nations Unies pour l'environnement (PNUE). ~~***Et le PNUE***~~ ***L'organisation onusienne*** a interpellé, à maintes reprises, la communauté internationale sur les menaces qui pèsent sur les habitats sensibles de la mer des Caraïbes[74].

7. Partant, il ne fait point de sens, comme le fait le Nicaragua, de reprocher à la Colombie d'agir avec toute la diligence requise en menant des activités d'observation et d'information afin de sauvegarder les écosystèmes de la mer des Caraïbes, des écosystèmes connus tant pour leur fragilité que pour leur importance dans la réalisation des besoins vitaux des Raizals et de la préservation de leur habitat. Le régime spécial mis en place à travers la convention de Carthagène, de pair avec les obligations qui pèsent tant sur le Nicaragua que la Colombie en vertu du droit international coutumier de la mer comme l'a souligné Sir Michael Wood, requièrent la protection et la conservation de ces écosystèmes, et notamment des ressources halieutiques qui les peuplent.

8. Je démontrerai, tout d'abord, que la protection des écosystèmes de la mer des Caraïbes et, par ricochet, la préservation de l'habitat des Raizals, font bel et bien partie du différend qui oppose le Nicaragua à la Colombie (**I**). Pour prendre la mesure des accusations infondées du Nicaragua, la Cour se doit d'accorder une attention singulière à la particularité de l'espace maritime que constitue la mer des Caraïbes, et plus précisément les écosystèmes fragiles et les habitats sensibles du sud-ouest de la mer des Caraïbes (**II**). L'appréhension de ces aspects permettra ainsi à la Cour de constater que la Colombie a conduit des activités d'observation et d'information à des fins environnementales dans la mer des Caraïbes en plein respect du droit international, et notamment de la convention de Carthagène. Ce faisant, la Colombie ne saurait avoir enfreint les droits souverains du Nicaragua (**III**).

I. Les aspects environnementaux font partie intégrante du présent différend

9. Contrairement à ce que le Nicaragua a prétendu dans ses écritures[75] et lors du premier tour des plaidoiries orales, les aspects environnementaux du présent différend sont loin d'être artificiels

[74] Voir, par exemple, PNUE, *Une stratégie de survie pour nos océans et nos côtes*, Genève, 2000, p. 11, disponible à l'adresse suivante : https://unep.ch/iuc/info/seas/RSbooklet-F.pdf.

[75] RN, par. 1.19-1.20.

ou marginaux. Les hésitations et volt***e***-face***s*** du Nicaragua témoignent par elles-mêmes du manque total d'assurance du Nicaragua sur la question.

10. Dans sa réplique, le Nicaragua se réfugiait principalement derrière le fait que la Cour a déclaré inadmissibles les demandes reconventionnelles de la Colombie en relation avec l'environnement, afin de nier toute pertinence aux aspects environnementaux[76]. Le Nicaragua semble s'être rendu enfin à l'évidence puisqu'aucun de ses conseils n'a réitéré ces arguments fort douteux à l'oral.

11. Il va de soi que la Cour n'a jamais indiqué que la protection de l'environnement et de l'habitat naturel des Raizals est exclue du présent différend. Ce n'est qu'à présent que la Cour *peut* et *doit* apprécier «la licéité de la conduite éventuelle [de la Colombie] au regard des obligations que le droit international [lui] impose»[77] ; ce n'est qu'à présent que la Cour *peut* et *doit* s'exprimer sur le fait de savoir si la Colombie est en mesure, en vertu du droit international, d'observer si les écosystèmes fragiles de la mer des Caraïbes sont menacés par les navires, y inclus tout navire nicaraguayen, et le cas échéant informer lesdits navires du caractère illicite et dommageable de leurs activités ou opérations.

12. Afin d'esquiver les aspects environnementaux, le Nicaragua est demeuré silencieux sur les écosystèmes de la mer des Caraïbes durant son premier tour de plaidoiries. Nulle mention n'a été faite de la mer des Caraïbes ; et nulle référence n'a été faite aux écosystèmes. Quel silence assourdissant !

13. En plus d'être assourdissant, c'est un silence qui en dit long sur l'absence de perspective environnementale du Nicaragua. Et, en agissant de la sorte, le Nicaragua a fait fi des questions environnementales et n'a pas répondu aux arguments factuels et juridiques précis que la Colombie a soulevés tout au long de ses écritures. La Cour doit en tirer toutes les conséquences juridiques dans la mesure où le Nicaragua, pour paraphraser votre juridiction, refuse d'assister la Cour dans le règlement du différend, *dans toute sa dimension*[78].

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[76] RN, par. 1.21 et par. 2.15.

[77] *Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé, avis consultatif du 9 juillet 2004, C.I.J. Recueil 2004 (I)*, p. 155, par. 41.

[78] *Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay), arrêt, C.I.J. Recueil 2010 (I)*, p. 71, par. 163.

14. Les préoccupations légitimes de la Colombie sur la protection des environnements concernés ne constituent pas un «prétexte pour s'adjuger … des «obligations» de protection de l'environnement»[79] comme le soutient à tort le professeur Pellet. Ces préoccupations découlent de la sensibilité et de la vulnérabilité des écosystèmes et des habitats qui composent ces environnements, et en particulier celui des Raizals.

II. La particularité des écosystèmes et des habitats de l'environnement marin du sud-ouest de la mer des Caraïbes et de l'habitat des Raizals

15. L'espace en cause dans le présent différend est celui de l'environnement marin du sud-ouest de la mer des Caraïbes. Il n'est point réduit au territoire du Nicaragua et encore moins à sa mer territoriale ou à sa zone économique exclusive (ZEE) ; les écosystèmes qui en dépendent ne sont pas la propriété du Nicaragua. L'environnement marin en cause repose sur des écosystèmes qui sont interdépendants, interreliés et formant un tout naturel. C'est l'interdépendance et la fragilité de ces écosystèmes qui requièrent que tout Etat riverain de la mer des Caraïbes y prête une attention particulière (**A**). A cette vulnérabilité écosystémique est liée une vulnérabilité humaine. En effet, les écosystèmes en question sont également particuliers et sensibles du fait de la fonction qu'ils remplissent : ils servent d'habitat, de cadre de vie et de subsistance pour les communautés autochtones vivant dans l'espace marin du sud-ouest de la mer des Caraïbes, et notamment pour les Raizals (**B**).

A. La fragilité des écosystèmes de l'environnement marin du sud-ouest de la mer des Caraïbes

16. Le Nicaragua est sans doute frappé d'amnésie juridique lorsqu'il affirme, comme il l'a fait dans ses écritures, de manière péremptoire, que l'environnement marin du sud-ouest de la mer des Caraïbes ne présente pas de caractéristiques spéciales[80]. En effet, il s'inscrit en porte-à-faux avec la convention de Carthagène, à laquelle il est partie. Le préambule de cette convention, que vous trouvez à l'onglet n° 9 du dossier des juges, évoque avec force «les caractéristiques hydrographiques et écologiques *spéciales* de la région»[81]. L'une des caractéristiques spéciales a trait aux écosystèmes.

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[79] CR 2021/13, p. 36, par. 32 (Pellet).

[80] RN, par. 1.13.

[81] Dossier des juges, onglets n^{os} 8 et 9, convention de Carthagène (les italiques sont de moi).

En particulier, une réserve de biosphère dont l'importance est reconnue par l'UNESCO[82] se trouve naturellement interconnectée à cette portion de la mer des Caraïbes[83]. Il s'agit du Seaflower Biosphere Reserve, inscrit par les instances de l'UNESCO dans son réseau mondial des réserves de biosphère à la demande de la Colombie en septembre 2000[84].

17. Les préoccupations environnementales de la Colombie sont donc loin d'être inédites et n'ont aucun lien avec les questions de délimitation maritime comme l'a sous-entendu l'agent du Nicaragua. Ces préoccupations ne sont d'ailleurs pas propres à la Colombie.

18. L'Assemblée générale des Nations Unies a, par exemple, depuis 1999, pleinement reconnu la fragilité des écosystèmes de cette région, en incluant l'environnement marin du sud-ouest de la mer des Caraïbes à son agenda. Dès la première de ces résolutions sur la question, ainsi que vous le verrez à l'onglet n° 10 du dossier des juges, l'Assemblée générale a mis en relief le caractère semi-fermé de la mer des Caraïbes et la vulnérabilité qui en résulte pour les écosystèmes[85].

19. Les résolutions subséquemment adoptées soulignent toutes la fragilité des écosystèmes en réitérant que la mer des Caraïbes «renferme une diversité biologique exceptionnelle et des écosystèmes extrêmement fragiles»[86]. Comme cela apparaît à l'onglet n° 11 du dossier des juges, les résolutions de l'Assemblée générale prennent également note du fait que les chefs d'Etat et de gouvernement de l'Association des Etats de la Caraïbe — dont le Nicaragua et la Colombie sont

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[82] DC, par. 2.110-2.111. Voir aussi, 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, disponible à l'adresse suivante : http://www.unesco.org /new/fileadmin/MULTIMEDIA/HQ/SC/pdf/SC-14-CONF-226-14- Information_on_Seaflower-eng-rev.pdf.

[83] CMC, vol. II, fig. 2.2, p. 676.

[84] International Co-ordinating Council of the Man and the Biosphere (MAB) Programme, Sixteenth session, 6-10 November 2000, Final Report, Document SC.2000/CONF.208/CLD.16, p. 21, disponible à l'adresse suivante : (français) https://unesdoc.unesco.org/ark:/48223/pf0000122703_fre ; (anglais) https://unesdoc.unesco.org/ark:/48223/pf0000122703 (dernière consultation le 20 septembre 2021).

[85] Dossier des juges, onglet n° 10, résolution 54/225 du 22 décembre 1999 :

> «la zone de la mer des Caraïbes, qui est presque totalement séparée de la haute mer par des masses continentales ou insulaires, est caractérisée par une diversité biologique exceptionnelle et des écosystèmes très fragiles, tels que le deuxième système corallien du monde, le fait que la plupart des Etats, pays et territoires sont fortement tributaires de leurs zones côtières et du milieu marin en général pour répondre à leurs besoins et réaliser leurs objectifs en matière de développement durable».

[86] Voir la résolution 73/229 du 20 décembre 2018. Voir également résolutions 55/203 du 20 décembre 2000, 57/261 du 20 décembre 2002, 59/230 du 22 décembre 2004, 61/197 du 20 décembre 2006, 63/214 du 19 décembre 2008, 65/155 du 20 décembre 2010, 67/205 du 21 décembre 2012, 69/216 du 19 décembre 2014 et 71/224 du 21 décembre 2016.

membres — se sont fermement engagés à prendre les mesures requises pour garantir que la mer des Caraïbes soit désignée «zone spéciale dans le contexte du développement durable»[87].

20. La Cour, en tant qu'organe judiciaire principal des Nations Unies, et conformément à sa pratique jurisprudentielle, se doit d'accorder une attention particulière à ces nombreuses résolutions de l'Assemblée générale des Nations Unies. Ces résolutions ont pour dénominateur commun d'encourager *tous* les Etats côtiers de la mer des Caraïbes et de la communauté internationale dans son ensemble à protéger les écosystèmes fragiles de cette mer semi-fermée.

21. Les positions du Nicaragua s'inscrivent ainsi à contre-courant des positions de la communauté internationale telles que reflétées dans ces résolutions mais aussi dans les rapports du Secrétaire général de l'ONU. Et vous trouverez dans l'onglet nº 12 du dossier des juges, un extrait du Rapport du Secrétaire général dans lequel il est fait état du fait que cette mer semi-fermée représente «le plus complexe, sur le plan géopolitique, des grands écosystèmes marins dans le monde» et «le patrimoine commun des peuples de la région des Caraïbes»[88].

22. Afin de minimiser, dans le contexte du présent différend, l'importance des caractéristiques spéciales de l'environnement marin du sud-ouest de la mer des Caraïbes, le Nicaragua a soutenu dans ses écritures que les caractéristiques en cause ne sont pertinentes qu'à des fins de délimitation et ont déjà été prises en compte par la Cour dans l'affaire du *Différend territorial et maritime*[89].

23. Toutefois, le Nicaragua se trompe. Les caractéristiques spéciales de la mer des Caraïbes existent en dehors des questions de délimitation. Les écosystèmes demeurent des écosystèmes indépendamment des frontières tracées ci et là et des questions de souveraineté. En d'autres termes, et pour paraphraser la Cour, il convient «d'appréhender l'écosystème *dans son ensemble*»[90].

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[87] Dossier des juges, onglet nº 11, résolution 71/224 du 21 décembre 2016, par. 2. Voir aussi le paragraphe 11 de la même résolution, dans laquelle l'Assemblée générale «*[s]e félicite*, à cet égard, de la désignation de la région des Caraïbes comme zone spéciale, laquelle a pris effet en mai 2011».

[88] Dossier des juges, onglet nº 12, «Vers le développement durable de la mer des Caraïbes pour les générations présentes et à venir» et son annexe «Progrès réalisés dans l'application de la résolution 71/224 de l'Assemblée générale, rapport de la Commission de la mer des Caraïbes de l'Association des Etats de la Caraïbe», doc. A/73/225, 24 juillet 2018, par. 1 de l'annexe.

[89] RN, par. 1.13.

[90] *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua), indemnisation, arrêt, C.I.J. Recueil 2018 (I)*, p. 37, par. 78 (les italiques sont de moi).

24. La convention de Carthagène s'inscrit dans cette logique écosystémique. Son objet et son but sont d'encourager les Etats parties à adopter une approche d'ensemble en matière de protection de l'environnement de la mer des Caraïbes, notamment pour préserver son «équilibre écologique»[91].

25. C'est du fait de l'objectif de préservation de l'équilibre écologique que la Colombie mène des activités d'observation et d'information à des fins environnementales dans la mer des Caraïbes en conformité avec l'objet et le but de la convention de Carthagène, ainsi qu'avec le droit international coutumier. La Colombie n'enfreint d'aucune manière les droits du Nicaragua. Je reviendrai sur ce point.

B. La vulnérabilité de l'habitat des Raizals

26. Les écosystèmes de l'environnement marin du sud-ouest de la mer des Caraïbes constituent un habitat dans lequel évoluent les Raizals, et dont la qualité de leur vie ainsi que de leur santé dépend. Dans plusieurs de ses résolutions sur la mer des Caraïbes, l'Assemblée générale des Nations Unies a mis en exergue le lien intrinsèque entre la protection des écosystèmes et la préservation des habitats des communautés[92]. Pour les Raizals, leur habitat n'est pas qu'une «source régulière» de subsistance… Il remplit une fonction *vitale*. Ainsi que l'a souligné avec autorité la Cour interaméricaine des droits de l'homme dans un avis consultatif pionnier,

> «[there is] an undeniable relationship between the protection of the environment and the realization of other human rights, in that environmental degradation … affect[s] the real enjoyment of human rights»[93].

27. Mesdames et Messieurs de la Cour, là encore que peut reprocher le Nicaragua à la Colombie ? Tout simplement, rien. La Colombie a le devoir, cela notamment en vertu de ses obligations découlant de la convention interaméricaine des droits de l'homme, de respecter, de

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[91] Voir dossier des juges, onglet n° 8, préambule de la convention de Carthagène, qui met l'accent sur «la menace que la pollution et le fait que l'environnement ne soit pas suffisamment pris en compte dans le processus de développement font peser sur le milieu marin, son équilibre écologique, ses ressources et ses utilisations légitimes».

[92] Voir résolution 73/229 du 20 décembre 2018.

[93] Dossier des juges, onglet n° 13, Cour interaméricaine des droits de l'homme, avis consultatif OC-23/17, 15 novembre 2017, demandé par la République de Colombie, *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity: interpretation and scope of Articles 4(1) and 5(1) in relation to Articles 1(1) and 2 of the American Convention on Human Rights)*, par. 47.

protéger et promouvoir le droit à un environnement écologiquement sain des Raizals, et ce au-delà de sa juridiction nationale[94].

28. Le droit des Raizals à vivre dans un habitat écologiquement sain est étroitement lié à la préservation des écosystèmes de l'environnement marin du sud-ouest de la mer des Caraïbes et à la lutte contre les pratiques de pêche déprédatrices. Cela est d'autant plus vrai dans le contexte latino-américain que la Cour interaméricaine des droits de l'homme dans l'avis consultatif que je viens de mentionner, s'appuyant à maintes reprises sur la jurisprudence de la Cour de céans, a reconnu le lien inextricable et intrinsèque entre les droits de l'homme, la protection de l'environnement et le développement durable[95].

29. Il apparaît clairement que, dans le contexte latino-américain, le facteur humain joue un rôle considérable dans la protection de l'environnement, et surtout lorsque les communautés en cause dépendent pour leur existence et leur mode de vie d'un environnement particulier, comme c'est le cas des Raizals. La Cour est donc invitée, comme elle l'a fait dans l'affaire *Diallo,* à interpréter les droits et obligations en question à la lumière de la jurisprudence constante de la Cour interaméricaine des droits de l'homme relative au droit à un environnement sain des communautés autochtones[96]. Plus spécifiquement, il est important que la Cour garde à l'esprit que, dans le contexte du système interaméricain des droits de l'homme, la notion de «compétence» («jurisdiction» en anglais), interprétée de bonne foi en tenant compte du contexte ainsi que de l'objet et du but de la convention interaméricaine, signifie «that it is not limited to the concept of national territory, but covers a broader concept that includes certain ways of exercising jurisdiction beyond the territory of the State in question»[97].

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[94] Dossier des juges, onglet nº 13, Cour interaméricaine des droits de l'homme, avis consultatif OC-23/17, 15 novembre 2017, demandé par la République de Colombie, *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity: interpretation and scope of Articles 4(1) and 5(1) in relation to Articles 1(1) and 2 of the American Convention on Human Rights)*, par. 104 *a)* et *c)*.

[95] *Ibid.*, par. 59.

[96] Voir, par exemple, CMC, par. 3.80-3.82.

[97] Dossier des juges, onglet nº 14, Cour interaméricaine des droits de l'homme, avis consultatif OC-23/17, 15 novembre 2017, demandé par la République de Colombie, *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity: interpretation and scope of Articles 4(1) and 5(1) in relation to Articles 1(1) and 2 of the American Convention on Human Rights)*, par. 74.

30. Cela permettra à la Cour de se rendre à l'évidence : aucun droit souverain du Nicaragua n'a été violé par les activités d'observation et d'information à des fins environnementales ; ces dernières relèvent de la «compétence» de la Colombie à l'aune de la jurisprudence établie de la Cour interaméricaine des droits de l'homme.

31. En accordant «une grande considération à l'interprétation adoptée par cet organe indépendant, spécialement établi en vue de superviser l'application de ce traité»[98], la Cour contribuera au renforcement de la protection des communautés locales dans l'archipel des Caraïbes ainsi qu'à «la nécessaire clarté et … l'indispensable cohérence du droit international»[99].

32. Il va donc de soi que les considérations expansionnistes de souveraineté invoquées par le Nicaragua ne peuvent pas éclipser les «considérations élémentaires d'humanité»[100]. Les zones économiques exclusives (ZEE) de chacun des Etats côtiers de la région font partie d'un environnement écosystémique et humain particulier et sensible. Elles n'existent pas en isolation clinique du reste de l'environnement marin de cette mer.

III. Les activités d'observation et d'information de la Colombie à des fins environnementales s'inscrivent dans le cadre de la convention de Carthagène

33. Madame la présidente, Mesdames et Messieurs les Membres de la Cour, en présence d'un environnement marin caractérisé par une vulnérabilité écologique et humaine, le problème qui se pose à la Cour est celui de l'étendue des droits et obligations des Etats riverains de la mer des Caraïbes en matière de protection de l'environnement marin.

34. Lesdits droits et obligations concourent tous vers un seul et même objectif : la protection des écosystèmes et des habitats fragiles du milieu marin ***de la mer des Caraïbes***.

35. Cette exigence de protection découle, de prime abord, de l'obligation coutumière de diligence qui est «requise» de tous les Etats en matière environnementale et dont la jurisprudence de la Cour de céans s'est faite l'écho à plusieurs occasions[101]. Elle découle également, comme je l'ai

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[98] *Ahmadou Sadio Diallo (République de Guinée c. République démocratique du Congo), fond, arrêt, C.I.J. Recueil 2010 (II)*, p. 663-664, par. 66.

[99] *Ibid.*

[100] *Détroit de Corfou (Royaume-Uni c. Albanie), fond, arrêt, C.I.J. Recueil 1949*, p. 22.

[101] Voir, par exemple, *Projet Gabčíkovo-Nagymaros (Hongrie/Slovaquie), arrêt, C.I.J. Recueil 1997*, p. 41, par. 53, et p. 78, par. 140 ; *Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay), arrêt, C.I.J. Recueil 2010 (I)*, p. 55-56, par. 101.

évoqué, de l'obligation de protection de l'environnement marin reflétée dans la partie XII de la convention du droit de la mer, à laquelle, je le rappelle, le Nicaragua est partie.

36. Mais ce n'est pas que le droit international coutumier qui est en jeu. L'obligation de protection des écosystèmes de la mer des Caraïbes *dans son ensemble* repose en outre sur le régime spécial qui découle de la convention de Carthagène. Cette dernière sert de pilier majeur au régime juridique régissant la protection de l'environnement marin dans la région des Caraïbes. La Cour se doit d'apprécier les obligations de fond de la Colombie et du Nicaragua à l'aune de la convention de Carthagène comme elle l'a fait récemment entre le Costa Rica et le Nicaragua en tenant compte des conventions régionales applicables dans les relations entre les parties au différend[102]. La convention de Carthagène est un «accord détaillé et complet englobant la protection et le développement de l'environnement marin»[103]. Cet accord est *self-executing* et loin d'être un traité-cadre au sens où veut l'entendre le professeur Pellet ! En le qualifiant de la sorte, c'est le Nicaragua et non la Colombie qui fait «totalement fi de son texte et de sa portée»[104].

37. Le préambule de la convention de Carthagène indique clairement que les Etats qui l'ont négociée et ratifiée étaient tout à fait conscients «du *devoir* qui leur incombe de protéger le milieu marin de la mer des Caraïbes dans l'intérêt et pour l'agrément des générations présentes et futures»[105]. Et c'est à cette fin que les mêmes Etats se sont fixé comme «l'un de leurs principaux objectifs»[106] la «protection des écosystèmes du milieu marin» de la mer des Caraïbes[107].

38. Mesdames et Messieurs les juges, la convention de Carthagène a bel et bien été conclue dans l'idée que chaque Etat partie a un devoir de protection et de préservation de l'environnement marin dans sa globalité et son ensemble, y compris pour l'habitat des communautés vulnérables.

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[102] *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua)* et *Construction d'une route au Costa Rica le long du fleuve San Juan (Nicaragua c. Costa Rica), arrêt, C.I.J. Recueil 2015 (II)*, p. 726, par. 174 : «La Cour examinera à présent les allégations concernant la violation, par le Costa Rica, des obligations de fond lui incombant au titre du droit international coutumier et des conventions internationales applicables.»

[103] Convention pour la protection et la mise en valeur du milieu marin dans la région des Caraïbes, 2012, p. 12, disponible à l'adresse suivante : https://wedocs.unep.org/bitstream/handle/20.500.11822/27875/SPAWSTAC5_2012-fr.pdf?sequence=2&isAllowed=y.

[104] CR 2021/13, p. 35, par. 27 (Pellet).

[105] Dossier des juges, onglet n° 8, préambule de la convention de Carthagène (les italiques sont de moi).

[106] Dossier des juges, onglet n° 8, préambule de la convention de Carthagène.

[107] *Ibid.*

39. Cette interprétation est corroborée par le contexte de la convention qui permet de donner aussi un effet utile aux termes minutieusement choisis par les rédacteurs de la convention.

40. Comme cela apparaît à l'écran, l'article 10 de la convention de Carthagène prévoit la possibilité pour les parties d'adopter des mesures «individuelles» en vue de la protection des écosystèmes. Les mesures «individuelles» prises par la Colombie dans le cadre de ses activités d'observation et d'information à des fins environnementales ne constituent pas des mesures «unilatérales» comme l'entend le Nicaragua. Ce sont des mesures autorisées par ledit régime conventionnel mais aussi par le droit international coutumier contemporain.

41. Par conséquent, il ne fait pas de doute que la Colombie a le devoir, mais aussi est en droit — en vertu de la convention de Carthagène ainsi que du droit international général —, de mener des activités d'observation et d'information à des fins environnementales en vue de la préservation des écosystèmes fragiles du sud-ouest de la mer des Caraïbes et de l'habitat des Raizals, y compris dans la zone économique exclusive du Nicaragua, laquelle est indissociable de ces écosystèmes.

42. Madame la présidente, Mesdames et Messieurs de la Cour, qu'y a-t-il de mal à ce que la Colombie observe et informe lorsque des bateaux battant différents pavillons, y compris nicaraguayen, s'engagent dans des pratiques déprédatrices des ressources halieutiques, composantes essentielles de la biodiversité ? Qu'y a-t-il de mal à ce que la Colombie observe et informe en cas d'activités de pêche illégale, non reportée et non régulée susceptibles d'affecter de manière significative les écosystèmes fragiles de la mer des Caraïbes et le droit des Raizals de vivre dans un habitat écologiquement sain et durable ?

43. L'argument du Nicaragua qui consiste à dire qu'il a des droits exclusifs dans sa zone économique exclusive et que ces droits exclusifs empêcheraient tout autre Etat, et en particulier la Colombie, de procéder à des activités licites en relation avec l'environnement dans ladite zone n'est pas fondé. Le régime de la zone économique exclusive n'a jamais eu pour ***~~objet~~ objectif*** d'exclure la possibilité pour des Etats tiers de mener des activités licites dans le cadre de la liberté de navigation et des autres usages pacifiques qui leur sont reconnus par le droit international coutumier.

44. Dans sa zone économique exclusive, un Etat doit s'assurer que ladite zone ne soit pas utilisée «aux fins d'actes contraires aux droits d'autres Etats»[108]. Le droit de protéger l'environnement marin du sud-ouest de la mer des Caraïbes et le droit des populations raizales à vivre dans un habitat sain font sans aucun doute partie de ces droits que le Nicaragua doit respecter et veiller à préserver.

Conclusion

45. Pour conclure, Madame la présidente, je crois pouvoir dire sans me tromper que rarement un Etat a été accusé gratuitement de la sorte devant la Cour. Le Nicaragua n'y est pas allé de main morte. Il a parlé sans cesse dans ses écritures et de façon quasi obsessionnelle de harcèlement et de «policing». Faute de pouvoir prouver ses dires, il décrit désormais la Colombie comme ayant le pouvoir de créer des «droits imaginaires»[109] dans les espaces maritimes du Nicaragua.

46. Mais, si imagination il y a, c'est du côté du Nicaragua qu'il faut aller la chercher. Comme je l'ai souligné, les activités d'observation et d'information à des fins environnementales de la Colombie s'inscrivent dans le cadre de ce que le droit international applicable au présent différend permet, notamment lorsque des écosystèmes fragiles et des habitats vulnérables comme celui des Raizals sont en cause. De telles activités ne violent en aucun cas les droits souverains du Nicaragua.

47. Mesdames et Messieurs les juges, en considérant les faits invoqués par le Nicaragua, la Colombie vous demande respectueusement de prendre dûment compte des instruments et principes juridiques qui vous ont été présentés, et en particulier le régime spécial de la convention de Carthagène et les principes de droit international coutumier applicables.

48. La Colombie aurait souhaité qu'un climat de coopération entre le Nicaragua et la Colombie s'instaure afin de protéger au mieux les écosystèmes de l'environnement du sud-ouest de la mer des Caraïbes et l'habitat des Raizals. Le régime spécial mis en place à travers la convention de Carthagène invite en effet les Etats parties à cette convention à identifier de manière proactive des solutions et stratégies en vue de la préservation de ces écosystèmes fragiles et essentiels pour l'environnement global. L'arrêt de pratiques déprédatrices de pêche qui ont sans aucun doute un effet

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[108] *Détroit de Corfou (Royaume-Uni c. Albanie), fond, arrêt, C.I.J. Recueil 1949*, p. 22.

[109] CR 2021/13, p. 40, par. 46 (Pellet).

nocif sur l'environnement compte parmi ces solutions et stratégies. Malheureusement, l'attitude du Nicaragua durant le premier tour de plaidoiries orales traduit son manque de volonté à s'engager de bonne foi dans cette voie. Espérons que la Cour pourra jouer un rôle décisif dans l'instauration d'un tel climat de coopération.

49. Je vous remercie de votre attention. Madame la présidente, puis-je vous demander de donner la parole à M. Rodman Bundy ?

The PRESIDENT: I thank Professor Boisson de Chazournes for her remarks, and I invite Mr. Bundy to take the floor now. Mr. Bundy, we started a few minutes late this morning, so if you wish to continue until approximately five minutes after the hour, that would be fine.

Mr. BUNDY:

COLOMBIA DID NOT VIOLATE NICARAGUA'S SOVEREIGN RIGHTS

1. Thank you very much. Madam President, Members of the Court. ***As*** always, I am aware of the honour of appearing before the Court — I am glad to be in the Great Hall — and the opportunity to represent the Republic of Colombia. I would also like to associate myself with the remarks of others regarding the untimely passing of Judge Crawford. He was a good friend and colleague, and even a good opponent, and he will be sorely missed.

Introduction

2. My colleagues having dealt with the legal framework within which Nicaragua's claims fall to be assessed, my task this morning and continuing into the afternoon is to address the first part of Nicaragua's claim. This principally involves the assertion that the conduct of Colombia's naval vessels and aircraft have violated Nicaragua's sovereign rights and maritime spaces under customary international law.

3. This aspect of the case relates to a number of events — or, to put it another way — a number of alleged wrongful acts that Nicaragua has referred to in its written pleadings. *Thirteen* of these events are said to have taken place *before* 27 November 2013, the day that Colombia's denunciation of the Pact of Bogotá took effect. That was one day after Nicaragua lodged its Application on 26 November 2013. In other words, these 13 events formed the main basis on which Nicaragua filed

its Application alleging a violation of its sovereign rights. They inevitably constituted the subject-matter of the Application because there was nothing else. That being the case, it was astonishing, to say the least, that none of Nicaragua's counsel made the slightest reference to any of these events in their first-round presentations on Monday. While Colombia was accused of trying to "erase" events that took place after the Pact of Bogotá ceased to be in force for Colombia[110], it is Nicaragua that seeks to erase the very elements that formed the basis of its Application.

4. The rest of the events adduced by Nicaragua relate to matters that allegedly transpired *after* the critical dates of 26 and 27 November 2013. As I will explain, quite apart from the fact that these events did not form part of the subject-matter of the Application, the Court lacks jurisdiction *ratione temporis* under the Pact of Bogotá to consider any events claimed to have occurred after 27 November 2013.

5. In order to demonstrate the ill-founded nature of Nicaragua's claims, my presentation will be in three parts.

6. In the first part, I will address the 13 elements of Nicaragua's claim over which the Court has jurisdiction because they relate to events that are said to have occurred at a time when Colombia was still bound by the Pact of Bogotá. But I will show that these are not really "incidents" — as Nicaragua calls them — at all. They are "non-events" unsupported by any contemporary evidence, which at the time were not viewed by Nicaragua as having the slightest impact on its sovereign rights, and which did not in any manner violate those rights. As I said, it was striking that none of Nicaragua's counsel made any reference to these events on Monday, although there was nothing else on which Nicaragua's Application could be based.

7. In the second part of my presentation, I will turn to matters referred to by Nicaragua that took place *after* the critical date when Colombia was no longer a party to the Pact of Bogotá. Contrary to what was asserted on Monday, Colombia has shown in Appendix 1 to its Rejoinder that none of these events can be deemed to rise to the level of a violation of Nicaragua's sovereign rights.

8. Notwithstanding that, the key threshold point is that the Court lacks jurisdiction to consider whether any of these so-called "post-critical-date incidents" violated Nicaragua's sovereign rights,

[110] CR 2021/13, p. 59, para. 50 (Reichler).

because as of 27 November 2013, Colombia was no longer bound by the Pact of Bogotá. Under Articles XXXI and LVI of the Pact — Nicaragua only mentioned Article LVI on Monday, but XXXI, as I will show, is crucial — under Articles XXXI and LVI of the Pact, Colombia did not consent to the Court's jurisdiction to rule on any dispute concerning the existence of facts, if established, that are claimed to have taken place *after* the Pact was no longer in force.

9. In the third part of my pleading, I will briefly address two new Nicaraguan claims that were not mentioned in the Application, and not even mentioned in the Memorial, which Nicaragua now advances as violations of its sovereign rights. These concern the allegation and the assertion that Colombia has entered into petroleum contracts for the exploration and exploitation of hydrocarbons in maritime areas where Nicaragua has sovereign rights, and its claim that Colombia has licensed fishing boats to fish in violation also of Nicaragua's sovereign rights. And as I shall show, neither of these allegations is true[111].

I. Alleged events prior to the critical date

10. With that introduction, Madam President, I think if I could start for a couple of minutes more, I could give a flavour of the pre-critical-date events: the events on which the Application must have been based, that are said to have occurred before 26 November 2013 when Nicaragua filed its Application. So I am dealing with the events that allegedly occurred before the critical date, between the Court's 2012 Judgment and 26-27 November when the Pact of Bogotá ceased to be in force for Colombia. These are the events which I have said that Nicaragua is clearly embarrassed to discuss even though they must have formed the basis of the Application. Now, to assist, I have had placed in tab 20 of your folders a chronological list of these events together with the dates of certain key statements made by Nicaraguan officials, which provide very important context for Nicaragua's claims and represent clear admissions against interest. Given that Colombia has addressed the details of each event in its written pleadings, I will limit myself to summarizing the main points[112].

11. My first point is that Nicaragua has not filed a single piece of first-hand evidence for any of these so-called "incidents". There are no contemporary reports of any such events; no documented

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[111] CMC, para. 4.46; RC, paras. 3.111-3.123.

[112] See CMC, pp. 168-186, and RC, pp. 111-128.

facts; no complaints by Nicaraguan fishermen or the Nicaraguan Naval Force at the time; and no protests to Colombia. In itself, this is a strong indication that Nicaragua did not consider that Colombia was violating its sovereign rights. And it undoubtedly explains Nicaragua's silence on these matters on Monday.

12. For example, the first two events (Nos. 1 and 2 on the list in tab 20) are based on no more than vague media reports emanating from *Colombian* sources that do not evidence any violation of Nicaragua's sovereign rights. Given that there is no first-hand evidence or complaints from Nicaragua, it is not surprising that Nicaragua has not, despite several rounds of written pleadings, been able to specify where the matters of which it complains took place or how its sovereign rights were supposedly violated.

13. The third item on the list is based on a statement referred to on a Colombian website in September 2013, reportedly made by former President Santos when he visited the island of San Andrés to the effect that Colombia was carrying out a "sovereignty exercise" "off the coast of San Andrés"[113], a Colombian island, *in Colombian waters*. However, Nicaragua has again not submitted any evidence showing how Nicaragua's sovereign rights were violated.

14. Apart from these deficiencies, it is appropriate to recall the Court's observation in the *Croatia* v. *Serbia* case that evidence such as press articles are merely of a secondary nature and may only be used to confirm the existence of facts established by other evidence[114]. With respect to Nicaragua's assertions, there is no other evidence.

15. As for the next ten items on the list — Nos. 4 through 13 — the only so-called "evidence" Nicaragua has submitted is an account attached to a letter dated 26 August 2014 —, almost a year after the Application — sent by Rear Admiral Marvin Corrales, who was the Head of Nicaragua's Naval Force, to the Nicaraguan Ministry of Foreign Affairs in response to a query from the Ministry asking whether there had been any "incidents". This single source, prepared almost a year *after* Nicaragua filed its Application and to which no contemporaneous supporting documentation was attached, was filed as Annex 23-A to Nicaragua's Memorial. Given that Admiral Corrales' letter was

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[113] MN, para. 2.27.

[114] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 87, para. 239. See also *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.

sent just a few weeks before Nicaragua filed its Memorial, and long after the events complained of allegedly occurred, it is pretty clear that it was prepared for purposes of this litigation.

16. But that is scarcely sufficient to prove any violations on Colombia's part. As the Court observed in its Judgment in the *Armed Activities* case between the Democratic Republic of the Congo and Uganda: "The Court will treat with caution evidentiary materials specially prepared for this case and also materials emanating from a single source. It will prefer contemporaneous evidence from persons with direct knowledge."[115] In the present case, there is no such evidence.

Thank you, Madam President, distinguished judges, I think that may be an appropriate point to pause.

The PRESIDENT: I thank Mr. Bundy, whose statement — the beginning of his statement — brings to an end this morning's sitting. Oral argument in the case will resume this afternoon at 3 p.m.

The sitting is adjourned.

The Court rose at 1.05 p.m.

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[115] *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.