Corrigé
Corrected

CR 2021/15

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2021

Public sitting

held on Wednesday 22 September 2021, at 3 p.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 15 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
		Xue
		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
Mmes Xue
Sebutinde
MM. Bhandari
Salam
Iwasawa
Nolte, juges
MM. Daudet
McRae, juges *ad hoc*

M. Gautier, greffier

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

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Le capitaine de vaisseau William Pedroza, marine nationale de Colombie, chef de la direction chargée des intérêts maritimes et fluviaux,

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The PRESIDENT: Please be seated. The sitting is open. For reasons duly made known to me, Judge Robinson is unable to join us for this afternoon's sitting. The Court meets this afternoon to hear the continuation of Colombia's first round of oral argument, including ***on*** its own counter-claims.

I shall now give the floor to Mr. Bundy to continue the statement that he began this morning. Go ahead, Mr. Bundy.

Mr. BUNDY:

COLOMBIA DID NOT VIOLATE NICARAGUA'S SOVEREIGN RIGHTS (CONTINUED)

17. Thank you very much, Madam President. Before the break I discussed the fact that the first three of Nicaragua's 13 pre-critical-date allegations are supported by no more than vague media accounts — actually published in Colombia, not Nicaragua — with no supporting evidence to corroborate them or to prove any violation on Colombia's part. I also mentioned that the rest of the 13 pre-critical-date allegations are also unsupported by any contemporary evidence, only a 26 August 2014 internal letter prepared shortly before Nicaragua filed its Memorial, which also had no supporting documentation. But aside from these deficiencies in Nicaragua's claims, during precisely the time when these events were claimed to have occurred in 2013, Nicaragua's senior-most military and political officials were on record as repeatedly affirming that there had been *no incidents* with Colombia.

18. For example, on 14 August 2013, a couple of months before the Application was filed, President Ortega publicly stated that Colombia's Navy "has been respectful and there has not been any kind of confrontation between the Colombia and [the] Nicaraguan Navy"[1]. Three months later, on 18 November 2013 — this was just eight days before the Application was filed and *after* the first ten of Nicaragua's alleged "incidents" — Admiral Corrales, the Head of the Navy, said the following, and you can also find this in tab 21: "There have not been any conflicts and that is why I want to highlight that in one year of being there we have not had any problems with the Colombian

[1] POC, Ann. 11.

Navy"[2]. And he went on to say: "Yes, we have not had any conflicts in those waters. I even think our presence has strengthened the security stability for the fishing vessels, which if at the beginning were few, now are 16 fishing boats"[3].

19. And on 18 March 2014, well after *all* of the pre-critical-date events that Nicaragua relies on and *after* the filing of its Application, Nicaragua's Chief of the Army, General Avilés, said the same thing. You will see this at tab 22 and on the screen: "There are no incidents."[4]

20. On Monday, Mr. Reichler struggled with these admissions against interest. He claimed that the statements of Nicaragua's senior-most officials were simply trying to minimize tensions with Colombia[5]. With respect, however, this post-facto attempt to explain away the obvious is specious. None of the statements that I just referred to even intimate that Nicaragua considered that Colombia was violating its sovereign rights, or that Nicaragua did not react out of self-restraint in order not to raise tensions. To the contrary, all of the statements clearly affirmed in straightforward terms: there were no incidents.

21. Coupled with the absence of evidence, these statements fundamentally undermine Nicaragua's entire claim. They also contradict any notion of a Colombian "policy" to interfere with Nicaraguan vessels or Nicaragua's sovereign rights. If anything, as Admiral Corrales himself noted, Nicaragua's fishing in the area increased significantly after the Court's 2012 Judgment, which certainly does not suggest that Nicaraguan fishermen considered themselves impeded by Colombia's presence in the area.

22. In this connection, it is worth recalling the Court's Judgment in the *Military and Paramilitary Activities* case between Nicaragua and the United States where the Court stated the following — and you will find this in tab 23 and on the screen:

> "The Court takes the view that statements of this kind, emanating from high-ranking official political figures, sometimes indeed of the highest rank, are of particular probative value when they acknowledge facts or conduct unfavourable to the

[2] POC, Ann. 43, p. 355; judges' folder, tab 21.

[3] POC, Ann. 43, p. 356; judges' folder, tab 21.

[4] POC, Ann. 46, p. 367; judges' folder, tab 22.

[5] CR 2021/13, p. 59, para. 49 (Reichler).

> State represented by the person who made them. They may be then construed as a form of admission."[6]

The same point was repeated by the Court in its 2005 Judgment in the *Democratic Republic of the Congo* v. *Uganda* case[7].

23. Now if we turn to the allegations Nos. 4-13: in these cases, too, there is no evidence to back up the claims. Let me go through them briefly.

No. 4

24. Item No. 4 supposedly concerned a Colombian vessel claimed by Nicaragua to have interfered with its own vessels on 13 October 2013. But Colombia showed in its written pleadings that its naval ship was not even in the area on the day in question[8]. And while Nicaragua alleges in its pleadings that some Colombian vessel warned a Nicaraguan ship that it was sailing "in Colombian waters"[9], this is a distortion of Admiral Corrales' own 23 August 2014 letter, because that document stated that the Colombian vessel warned that the Nicaraguan boat was sailing "towards Colombian waters" — not that it was in Colombian waters, in other words, towards Colombia's territorial sea around Quitasueño only a few miles away[10]. That scarcely constitutes a violation of Nicaragua's sovereign rights.

Nos. 5, 6, 7 and 8

25. Items 5, 6 and 7 on the list are claimed to have involved low-flying Colombian aircraft that are said to have intimidated Nicaraguan fishing and naval vessels in October 2013. But once again, Nicaragua has no contemporary evidence to support its assertions. Moreover, the statements of its military leaders, coupled with the lack of any protest whatsoever from Nicaragua, belie the claim.

26. Event No. 8 involved a Colombian helicopter that is said to have landed on a nearby Colombian vessel on 31 October 2013. Nicaragua argues in its Reply that the helicopter "could

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[6] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 41, para. 64.

[7] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 210, para. 61.

[8] CMC, para. 4.26; RC, para. 3.71.

[9] MN, para. 2.40 and Ann. 18.

[10] MN, Ann. 23-A; see also RC, para. 3.73.

have" — those were Nicaragua's words, "could have" — harassed a Nicaraguan naval vessel[11]. But that is pure speculation with no evidence to back it up, quite apart from the fact that the Nicaraguan vessel again made no complaint.

Nos. 9 and 10

27. With respect to the next item on the list, Item 9, Nicaragua asserts that Colombia harassed a Nicaraguan fishing boat. But once again, Madam President and distinguished judges, Nicaragua simply falls back on its 26 August 2014 letter — the Admiral Corrales letter — a single source, without supporting documentation, prepared for the case well after the event was alleged to have occurred, but shortly before Nicaragua filed its Memorial.

28. The same lack of evidence characterizes item No. 10 on the list, which is another allegation that Colombia interfered with a Nicaraguan fishing boat. The allegation is also unsupported by the facts. In fact, it was a Colombian vessel — a Colombian naval vessel — that had to rescue two Nicaraguan fishermen, who had been abandoned by the crew of a Nicaraguan fishing boat, and then deliver them safely to a different Nicaraguan vessel[12]. Far from constituting a violation of Nicaragua's sovereign rights, this was an example of co-operation by the Colombian Navy.

Nos. 11, 12 and 13

29. And as for the last three pre-critical-date events said to have taken place in November 2013 — these were Nos. 11, 12 and 13 — Nicaragua's treatment is, to say the least, economical, even in its written pleadings. It asserts that, in each instance, Colombian aircraft flew low over Nicaraguan vessels in an act of intimidation. But, again there is no contemporary evidence to support the claims. And as for the other events I have discussed, there were no Nicaraguan complaints that its sovereign rights were violated, only statements from the Head of Nicaragua's Naval Force affirming that there were no problems with the Colombian Navy.

30. Madam President, distinguished judges, I scarcely need to belabour the point. Nicaragua has simply not come close to sustaining its burden of proving that any of these alleged events amounted to a violation of its sovereign rights. Hence, I would suggest, Nicaragua's total silence on

[11] RN, para. 4.78.

[12] CMC, para. 4.40; RC, para. 3.87.

this on Monday. The only truly probative evidence that exists is found in the contemporary statements from Nicaragua's senior-most military and political figures affirming that there were no "incidents" or problems to complain about. Those statements are consistent with the absence of any contemporary complaints from Nicaragua to Colombia or evidence to back the claims up. But they fundamentally undermine the claim that Colombia violated Nicaragua's sovereign rights or maritime spaces.

II. The lack of jurisdiction to consider the post-critical date event

31. ~~***Now,***~~ ***G***iven the weakness of its case, Nicaragua has also introduced a number of post-critical-date events in an attempt to save its case. And this brings me to the second part of my presentation, in which I will explain why the Court lacks jurisdiction to consider any events that are alleged by Nicaragua to have taken place in violation of its sovereign rights *after* the critical date of 27 November 2013.

32. There is no doubt that the bedrock of the Court's jurisdiction lies in the principle of consent. As the Court underscored in its Judgment on jurisdiction and admissibility in the *Congo* v. *Rwanda* case: "When that consent is expressed in a compromissory clause in an international agreement, any conditions to which such consent is subject must be regarded as constituting the limits thereon"[13]. Now the Pact of Bogotá contains such limits, and they are critical in this case, but they have been ignored by Nicaragua, including in its pleadings on Monday.

A. No jurisdiction under the Pact of Bogotá

33. It is undisputed that the Pact of Bogotá ceased to be in force for Colombia on 27 November 2013 — one year after Colombia denounced it. Because Nicaragua's Application was filed the day before the Pact lapsed for Colombia, the Court ruled in its Judgment on Colombia's preliminary objections that it had jurisdiction under the Pact over the dispute that was the subject-matter of the Application, which involved by necessity pre-critical-date events. As the Court noted in its 2016 Judgment:

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[13] *Armed Activities in the Territory of the Congo (New Application: 2002 (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 39, para. 88. See also the *Order of 10 July 2002* in the same case, *I.C.J. Reports 2002*, p. 241, para. 57.

> "it is not the denunciation *per se* that is capable of having an effect upon the jurisdiction of the Court under Article XXXI of the Pact, but the termination of the treaty (as between the denouncing State and the other parties) which results from the denunciation"[14].

34. Given the termination of the Pact for Colombia, the situation is different for Nicaragua's post-critical-date alleged wrongful acts. Colombia's consent to jurisdiction no longer existed after the Pact of Bogotá terminated for it. As the Court will recall, Article LVI of the Pact provided that it could be "may be denounced upon one year's notice, at the end of which it shall cease to be in force with respect to the state denouncing it" (tab 24 of the judges' folder). As I shall now explain, no jurisdictional basis exists for the Court to rule on any of the facts alleged to have occurred *after* the Pact ceased to be in effect for Colombia.

35. But it is not simply Article LVI that is relevant here. The question of jurisdiction over post-critical-date alleged wrongful acts also falls to be considered under Article XXXI of the Pact. This is the key compromissory clause, but it was conspicuously ignored by both Professor Pellet and Mr. Reichler on Monday. They never very mentioned that clause. They only focused on Article LVI. Yet it is Article XXXI that not only contains the Contracting Parties' consent to the Court's jurisdiction, but equally importantly, the *limits* of that consent, including consent to the Court's jurisdiction *ratione temporis* to decide disputes referred to in that Article. To demonstrate the point, it may assist if I place the text of Article XXXI on the screen and you will also find it in tab 25.

36. Now, as can be seen, Colombia declared that it recognized the compulsory jurisdiction of the Court in relation to any other Contracting Party without the need for special agreement "*so long as the present Treaty is in force*, in all disputes of a juridical nature that arise among them concerning" — and here I refer to subparagraphs *(b)* and *(c)* — "*(b)* [a]ny question of international law" and "*(c)* [t]he existence of any fact which, if established, would constitute the breach of an international obligation" (emphasis added).

37. Under Articles XXXI and LVI of the Pact, therefore, there was a clear temporal limitation to Colombia's consent to the Court's jurisdiction over a dispute concerning the existence of any fact which, if established, could constitute the breach of an international obligation. That consent only existed "as long as the present Treaty is in force". As the Court stated in its Judgment on jurisdiction

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[14] *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. 20, para. 38.

in the *Armed Actions* case between Nicaragua and Honduras, the Pact "defines with precision the obligations of the parties", and "it remains valid *ratione temporis* for as long as that instrument itself remains in force between those States" [15].

38. In the present case, after the critical date of 27 November 2013, the Pact was no longer in force for Colombia and there was thus no longer any such consent. And that is why Colombia maintains that the Court does not have jurisdiction *ratione temporis* to rule on events that are alleged to have occurred after that date.

39. In the *Certain Property* case between Liechtenstein and Germany referred to by Professor Pellet on Monday[16], Liechtenstein relied on a compromissory clause that bears similarity to Article XXXI, subparagraph *(c)* of the Pact of Bogotá. In the *Certain Property* case, Article 1 of the European Convention for the Peaceful Settlement of Disputes provided that the Contracting Parties submitted to the Court's jurisdiction all international legal disputes which may arise between them concerning, *inter alia*, "the existence of any fact which, if established, would constitute a breach of an international obligation": the same as Article XXXI *(c)* of the Pact of Bogotá. Now the Court in that case found that the "facts or situations" that were the real source of the dispute *predated* the entry into force of the European Convention and that it therefore lacked jurisdiction *ratione temporis*[17]. Here, the facts that Nicaragua relies on for all of the alleged "incidents", except for the first 13, relate to a period *after* the Pact was no longer in force for Colombia. Just as the Court had no jurisdiction to rule on whether pre-treaty facts constituted a breach of an international obligation in the *Certain Property* case, so also it lacks jurisdiction to rule on whether *post-treaty facts* constitute a breach of an international obligation in this case. ~~***And***~~ ***C***ontrary to Professor Pellet's contention on Monday, there are no reasons for treating the two situations differently with respect to jurisdiction *ratione temporis*.

40. ~~***Now***~~ ***F***or his part, Mr. Reichler referred to the *Legality of Use of Force* case between Yugoslavia and Belgium, and he argued that it makes no difference that the title of jurisdiction in

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

[16] CR 2021/13, p. 38, para. 38 (Pellet).

[17] *Certain Property (Liechtenstein* v. *Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, pp. 26-27, para. 52.

this case lapsed after Nicaragua submitted its Application because, to use the words from Nicaragua's Reply, "the only relevant question is whether the 'dispute' arose within the temporal limitations of the jurisdictional title"[18].

41. But once again, this argument is misplaced. For counsel ignores the fact that Yugoslavia's Article 36 (2) optional clause declaration was drafted in a very different manner than Article XXXI of the Pact of Bogotá. In its optional clause declaration, Yugoslavia recognized the Court's jurisdiction over all disputes "*arising or which may arise* after the signature of the present Declaration". ~~***And T***~~**T**he question before the Court was therefore whether the *dispute* arose before or after Yugoslavia's optional clause declaration. And since the Court concluded that the dispute arose before that declaration was made, it ruled that there was no prima facie jurisdiction allowing for the indication of provisional measures.

42. In contrast however, Article XXXI of the Pact contains no language conditioning jurisdiction on when the dispute arose. Rather, it provides for jurisdiction over disputes concerning facts that, if established, could constitute a breach of an international obligation only "so long as the present Treaty is in force". In these circumstances, the ruling in *Yugoslavia-Belgium* that Nicaragua tries to rely on is simply not apposite. The compromissory clauses are different.

43. Mr. Reichler also referred to the *Fisheries Jurisdiction* case *(Germany* v. *Iceland)* to support his argument that the Court has jurisdiction over alleged violations that post-date the Application[19]. Once again, this case is of no assistance to Nicaragua.

44. In the *Fisheries Jurisdiction* case, the Court had jurisdiction under Article 36, paragraph 1, of the Statute pursuant to an Exchange of Notes between the parties dated 19 July 1961. That Exchange provided that, in the event Iceland extended its fisheries jurisdiction, and upon giving six months' notice of such extension, the matter shall be referred to the Court at the request of either party.

45. Counsel relies on a passage from the Court's Judgment in that case[20], holding that it had jurisdiction over one of Germany's submissions that was based on facts subsequent to the filing of

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[18] CR 2021/13, pp. 60-61, paras. 53-54, and see RN, para. 4.26.

[19] CR 2021/13, p. 61, para. 55 (Reichler).

[20] *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 203, para. 72.

the Application but arising directly out of the question which was the subject-matter of the Application[21]. But that's not our situation here. The question is not whether facts subsequent to the Application can be added. The fact is that Nicaragua fails to take into account that, unlike the Pact of Bogotá, the Exchange of Notes between Germany and Iceland conferring jurisdiction on the Court did not contain any conditions other than the prior giving of six months' notice of any extension of Iceland's fisheries limits. In particular, there was no temporal limit to matters that the Court could rule on as there is in Article XXXI of the Pact.

46. Madam President, distinguished judges, the bottom line is that neither Professor Pellet nor Mr. Reichler pointed to a single case where the Court or its predecessor has ever ruled on the legality of a State's conduct when that conduct occurred at a time when there was no applicable jurisdictional title between the parties to the case. No example. Given the terms in which Article XXXI of the Pact of Bogotá is drafted, there is no jurisdictional basis for the Court to consider whether facts that occurred after the Pact ceased to be in force for Colombia, even if established, constituted a breach by Colombia of international law or an international obligation.

B. Nicaragua's claims are unsupported in any event

47. Yet, even if the Court had jurisdiction over post-critical-date events *(quod non)*, Nicaragua has failed to prove that these events amount to a violation of its rights. Since Colombia addressed each of these post-critical-date events in detail in Appendix 1 to its Rejoinder, I will simply draw your attention to some of the basic problems undermining Nicaragua's claims.

48. First, if we go back to the slides that Mr. Reichler presented on Monday and included in the folders, there is not a single reference to Nicaraguan fishing vessels being prevented from exercising their activities by Colombia's Navy. You may recall that in most of the exchanges, the Colombian vessels indicated that they were protecting Colombia's historical fishing rights, providing security for all vessels, and implementing measures against transnational crimes.

49. With respect to historical fishing, the Colombian Navy's statements are in no way inconsistent with the position of Nicaragua's own Head of State, President Ortega, who had clearly stated that Nicaragua "will authorize their fishing in that area, where [the Colombian fishermen] have

[21] CR 2021/13, p. 61, para. 55 (Reichler), and see RN, para. 4.16.

historically practiced fisheries, both artisanal and industrial fisheries"[22], and President Ortega also said: "I have told President Santos, and I have said publicly, that the Raizales can continue fishing. That Nicaragua will not affect them in their rights."[23] Regrettably, it was Nicaragua's Naval Force that did not respect what their own President had affirmed, but Colombia's allegations in the light of those affirmations by the Head of State of Nicaragua would not constitute a violation of any rights. Mr. Valencia-Ospina will come back to this later this afternoon. As for providing security for all vessels, this did not constitute any violation of Nicaragua's sovereign rights. And with respect to implementing measures against transnational crimes, Nicaragua itself conceded in its Reply that it "does not contest Colombia's right to take action in Nicaragua's EEZ if it happens to encounter a ship suspected of the illegal transportation of narcotics, or to search a ship if it has reason to suspect it is there"[24].

50. The key point is that at no time did Colombia interfere with the navigation of Nicaraguan vessels, board any vessels or carry out enforcement actions. If anything, the contemporaneous evidence shows that, even when Nicaraguan fishing vessels were observed to be carrying out predatory fishing practices in environmentally sensitive areas, Colombia simply informed them of that fact and invited them to change their practices, which, unfortunately, they did not do. Mere advisory statements of this kind without any physical interference, particularly when they are made in the face of blatantly illegal fishing practices, do not remotely rise to the level of a violation of Nicaragua's rights.

51. In other words, any such alleged incidents — even if one assumes for purposes of argument that they took place, and fall within the jurisdiction of the Court — did not affect the ability of Nicaraguan fishing boats to operate or constitute a violation of Nicaragua's sovereign rights.

52. Counsel for Nicaragua also harped on the *Observer* incident in their first round. But Colombia has shown in its written pleadings that our opponents' version of events is demonstrably misleading and incorrect.

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[22] MN, Ann. 27.

[23] RC, Ann. 6.

[24] RN, para. 2.34.

53. First, Colombia submitted video evidence — you have it on the record — video evidence of the incident that shows that it was Nicaragua that engaged in blatantly illegal activities contrary to international rules of navigation, including the ~~***coal rigs***~~ ***COLREGS***, when it attempted to approach the *Observer* vessel.

Second, the vessel was not caught fishing in violation of Nicaragua's sovereign rights. It was apprehended in the middle of the night, in a location where the depths of the water precluded fishing and when no fishing activities were taking place. As Colombia showed in its written pleadings, the *Observer* was merely transiting on route between Colombia's islands.

Third, contrary to what Mr. Reichler said on Monday[25], there was no fishing licence on the *Observer* to fish in Nicaraguan waters. There was only a permit to leave port and another authorization to operate in the waters of the San Andrés Archipelago with no mention of any other areas.

Fourth, and again contrary to counsel's assertion[26], the captain of the *Observer* never admitted that he was caught fishing in Nicaraguan waters without a Nicaraguan license. The captain, who was actually on the ship, never admitted that.

54. While time does not permit me to engage in a point-by-point rebuttal of counsel's intervention on Monday, let me just briefly mention two other matters raised in Nicaragua's first round. If necessary, I will come back in the second round on these.

55. With respect to the assertion that Colombia licensed an "industrial commercial" fishing vessel to fish in contravention of Nicaragua's sovereign rights, counsel also unfortunately misstates the facts. Under tab 29 of Monday's folders, Nicaragua only produced extracts from a resolution of Colombia's General Maritime Directorate in order to assert that a Ms Vianova Forbes James received a commercial fishing permit to fish in the Luna Verde bank. This is incorrect. The document in question is not a fishing permit; it is a permit for a different Honduran-flagged vessel, the *Saga*, to be affiliated with Ms James' fleet. The reference to Luna Verde is in the preamble in this document and does not purport to license Ms James to fish there.

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[25] CR 2021/13, p. 54.

[26] CR 2021/13, p. 56, para. 43 (Reichler).

56. And as for Nicaragua's remarks about a Mexican research vessel, the *Dr. Jorge Carranza Fraser*, being escorted away by Colombia[27], this is another "non-event". Suffice it to note that the Mexican Government never raised the slightest complaint to Colombia.

III. Nicaragua's allegations regarding petroleum concessions and fishing permits

57. Madam President, this brings me to the final part of my presentation in which I shall respond to Nicaragua's contention that Colombia has violated its sovereign rights by issuing licenses to companies to explore for and exploit petroleum, and boats to fish, in violation of Nicaragua's rights. I can be relatively brief because, once again, the so-called evidence adduced by Nicaragua does not support the claim.

58. With respect to petroleum activities, I have two principal points to make. First, the claim is a new one, not raised in the Memorial let alone the Application. ~~***And***~~ ***A***s the Court has often emphasized, it is the Application that defines the subject-matter of the dispute. And the Memorial, "though it may elucidate the terms of the Application, must not go beyond the limits of the claim as set out therein"[28]. ~~***And***~~ ***T***his new claim regarding petroleum contracts goes well beyond the subject-matter of the dispute as circumscribed by the Application. It does not deal with any alleged interference with Nicaraguan vessels by Colombia's Navy. And it does not deal with Colombia's contiguous zone; those were the subject-matter of the Application. It deals with an entirely different matter — the alleged licensing of commercial petroleum contracts. ~~***And***~~ ***A***s such, Colombia submits the claim is not admissible.

59. But be that as it may, my second point is that the factual assertion by Nicaragua that Colombia continues to license petroleum blocks in areas where Nicaragua possesses sovereign rights is wrong. Now we have explained this in the Rejoinder[29], but let me just reiterate that any offshore blocks that were designated before the Court's 2012 Judgment were suspended in 2011, and contracts were never signed by Colombia and have not been pursued. Moreover, Colombia's courts have

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[27] CR 2021/13, pp. 57-58, paras. 46-47 (Reichler).

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

[29] RC, paras. 3.101-3.107.

prohibited any petroleum activities within the Seaflower Reserve. Other blocks that Nicaragua refers to are based on a map produced by the Colombian National Agency of Hydrocarbons. But these too have not been implemented and will not be pursued, and will not be offered. In short, there are no existing contracts covering petroleum activities in any areas where Nicaragua has sovereign rights, and no proposals for any of the blocks shown on the map to be awarded. Indeed, on Monday, Nicaragua's counsel accepted that Colombia has not awarded any concessions in those areas[30]. There is no possible violation of Nicaragua's rights in these circumstances.

60. And as for the allegation that Colombia has authorized fishing in violation of Nicaragua's sovereign rights, this also has no merit. Nicaragua's claim was based on a number of resolutions issued by the Colombian General Maritime Direction, which is known as DIMAR, and the Governorship of the Archipelago Department of San Andrés, Providencia and Santa Catalina. However, contrary to Nicaragua's contentions, none of those documents purports to authorize fishing beyond Colombia's EEZ.

61. In Colombia's Rejoinder, Colombia explained very carefully how, notwithstanding that these resolutions on which Nicaragua purports to rely post-date the critical date of 27 November 2013, Nicaragua has misread what they say[31]. First, DIMAR has no competence to issue fishing licences and does not do so. Competence for issuing fishing permits rests with the Secretariat of Agriculture and Fishing of San Andrés. Second, none of the resolutions relied on by Nicaragua stipulate that fishing is permitted in Nicaraguan waters. They mention banks around the Colombian islands of Roncador, Serrana, Serranilla and Quitasueño as places where fishing is authorized, but they do not purport to authorize fishing anywhere else. And third, the resolutions only authorize fishing vessels to operate "in the jurisdiction of the San Andrés and Providencia Harbor Master's Office" and they grant certain financial relief to the fishing fleet registered in San Andrés and Providencia. In sum, they provide no support for the claim that Colombia violated Nicaragua's sovereign rights.

62. Madam President, distinguished judges, I believe I have shown that there is not a scintilla of evidence to support any of the pre-critical-date claims of Nicaragua despite the fact that these

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[30] CR 2021/13, pp. 57-58, para. 23 (Reichler).

[31] RC, paras. 3.108-3.123.

alleged wrongful acts must have formed the basis of the Application. Similarly, the evidence does not support the assertion that Colombia engaged in wrongful acts that violated Nicaragua's rights *after* the Pact ceased to be in force for Colombia, notwithstanding the *ratione temporis* jurisdictional problem. ~~***And***~~ ***I***n these circumstances, there are no grounds for the contention advanced by Nicaragua's Agent, and again by Professor Pellet, that Colombia has engaged in a continuing violation of Nicaragua's rights[32]. It has not.

63. What Nicaragua has done is to introduce claims against Colombia by means of an Application dated 26 November 2013 for which there is absolutely no supporting evidence and with respect to alleged events that Nicaragua did not even deem fit to address on Monday. Nicaragua then tried after the Application in subsequent pleadings, and again on Monday, to manufacture a case based on alleged wrongful acts that were said to have occurred *after* the Pact of Bogotá was no longer in force for Colombia — in other words, at a time when there was no jurisdictional title between the Parties. And it did this based on its "continuous wrongful acts" theory. But there can be no continuity between what is nothing, i.e. the events leading up to the Application before the critical date, and post-critical date allegations that are equally unfounded and over which the Court lacks jurisdiction.

Conclusions

64. Madam President, distinguished judges: let me conclude with a summary of Colombia's position with respect to the first strand of Nicaragua's claim. I have five brief points.

(i) First, all of the so-called "incidents" on which Nicaragua relies that are said to have taken place before the critical date of 27 November 2013, and which must have formed the basis of the Application, are in reality non-events that involved no violation of Nicaragua's sovereign rights. They are unsupported with any direct or contemporary evidence. And they are flatly contradicted by the statements of Nicaragua's political and military leaders at the time and the failure of Nicaragua to raise the slightest protest. No wonder they were not discussed on Monday.

(ii) Second, with respect to the elements of Nicaragua's claim that took place after Colombia ceased to be bound by the Pact, the Court lacks jurisdiction *ratione temporis* under

[32] CR 2021/13, p. 21, para. 19 (Argüello); CR 2021/13, p. 27, para. 6 (Pellet).

Articles XXXI and LVI of the Pact to consider whether, even if such facts were to be established, they amounted to a violation of Nicaragua's sovereign rights. Nicaragua has simply ignored the temporal limits of the compromissory clause contained in Article XXXI of the Pact.

(iii) Third, even if jurisdiction existed over post-critical date events — *quod non* — Nicaragua has not sustained its burden of proving that Colombia's conduct violated its rights.

(iv) Fourth, Nicaragua's contentions that Colombia licensed petroleum and fishing activities in violation of Nicaragua's sovereign rights are incorrect.

(v) And fifth, and finally, Nicaragua's "continuing wrongful acts" theory is jurisdictionally flawed in law, and unsupported in fact.

Madam President, that concludes my presentation. I thank the Court for its attention, and I would be grateful if the floor could now be given to Professor Reisman, who will be presenting virtually. Thank you very much.

The PRESIDENT: I thank Mr. Bundy. I now invite the next speaker, Professor Michael Reisman, to take the floor. You have the floor, Sir.

Mr. REISMAN:

THE CONTIGUOUS ZONE

1. Thank you, Madam President. Madam President, Members of the Court, it is an honour to appear before you on behalf of the Republic of Colombia. I too would like to take a moment to express my respect and admiration for Judge James Crawford and to recognize the profound loss that his death means to our profession.

2. Madam President, in my presentation, I will explain why Colombia's contiguous zone Decree No. 1946, as amended, is lawful and does not infringe any Nicaraguan right[33]. For brevity, I will refer to the Colombian Decree as "Decree 1946" or "the Decree".

3. As a preliminary point, it was quite puzzling to see Nicaragua manoeuvring around the fact that the Decree of which it complains has been amended. Especially since Nicaragua recognized this

[33] The Decree's disputed Article 5 is entitled "The Contiguous Zone of the Island Territories in the Western Caribbean Sea".

fact in the written pleadings[34], and even limited its claims in the Reply to the powers in the amended Decree[35]. Therefore, as far as Nicaragua's claims against Decree 1946 rest on its quotes from the obsolete version, they have become theoretical. And the Court does not deal with theoretical questions[36].

4. As Colombia's submissions clarify, the map it produced in the record is the most accurate illustration of the contiguous zone[37]. Colombia will publish official charts depicting its contiguous zone when ready. In its pleadings, Nicaragua repeatedly emphasized the word "integral", as if its use under Colombian domestic law conveys some ominous spatial conveyance. But it is simply "integral" because the geography of the area dictates so. It is not a new type of zone.

5. It is also important to underline that Colombia has sovereignty over all the islands composing the Archipelago of San Andrés, Providencia and Santa Catalina. Each island, great or small, is entitled, under customary international law, as a matter of right, to a territorial sea and a contiguous zone. It is not for Nicaragua to decide which of Colombia's archipelagic islands and their territorial seas are entitled to be protected by contiguous zone powers.

6. And contrary to Nicaragua's rhetoric, this case is not about a purported "repudiation" of the 2012 Judgment — which, we should say, is not in issue — but about whether Colombia violates Nicaragua's enumerated rights or jurisdictions. And the Decree is a lawful exercise of Colombia's sovereignty.

A. The controlling legal issues

7. Madam President, Nicaragua raises four objections to the Decree. First, it contends that, as a general rule, customary international law denies a State a protective contiguous zone if its territorial sea abuts another State's EEZ. Second, it contends that a State may not resort to *any* reasonable geodetic lines to simplify the jagged and indented contours of its contiguous zone. Third, it contends that customary international law confines contiguous zone powers to those enumerated in UNCLOS

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[34] RN, para. 2.59, submission 1 *(c)*.

[35] RN, para. 3.41.

[36] *Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 37.

[37] RC, p. 212, Figure CR 4.3.

Article 33 and that, unlike the rest of customary international law, or indeed the terms of treaties, the substance of these powers cannot evolve to adjust to new circumstances. Finally, Nicaragua contends that Colombia's mere enactment of the Decree *ipso facto* violated its rights.

8. Each of Nicaragua's contentions is wrong. The powers in the Decree are lawful under customary international law, and do not conflict with any right Nicaragua might have. The modest use of geodetic lines to smooth out and simplify the otherwise impractical outer limits of the contiguous zone is dictated by geography. The rights and the simplification cause no injury to Nicaragua.

9. Inasmuch as Colombia is not party to UNCLOS, customary international law is the applicable law. But instead of adducing State practice and *opinio juris* to evidence its restrictive interpretation, Nicaragua simply assumes that UNCLOS provisions on the contiguous zone mirror a static, and restrictive, rule of customary international law, as of 1956, 1982 and the present.

B. The relationship between the exclusive economic zone and the contiguous zone

10. Within the EEZ, high seas freedoms of other States continue in effect, as do customary contiguous zone rights of an adjacent State, for an EEZ is not a State's "waters", even less is it its territorial sea. As Sir Michael Wood has shown, the exclusive economic zone is not a territorial sea. All the EEZ State has are the enumerated economic rights and accompanying jurisdictions for "exploring and exploiting, conserving and managing the natural resources" of the zone. An EEZ does not displace pre-existing customary contiguous zone rights.

11. UNCLOS Article 56 (1) *(b)*, which is in your folders, does not itself bestow any general jurisdiction upon the EEZ State. Rather, it provides the EEZ State with such jurisdiction "as provided for in the relevant provisions of this Convention". Such jurisdiction is not residual or general but is only what is specified in the text of the Convention.

12. To argue that Decree 1946, as amended, somehow violated or "appropriated" rights or jurisdictions which Nicaragua might claim, Nicaragua must show precisely which resource rights or which jurisdictions the Decree violates. Instead, Nicaragua claims a violation of unspecified "sovereign rights". I will demonstrate that Decree 1946, as amended, does not violate or displace any of Nicaragua's rights or jurisdictions.

13. A copy of UNCLOS Article 33, entitled "Contiguous zone", is in tab 27 of your folders. You will note that Article 33 is located in Part II of UNCLOS, entitled "Territorial sea and contiguous zone", and not in Part V, entitled "Exclusive economic zone".

14. Conceptually, the protective powers which may be exercised in the contiguous zone form part of the territorial sea régime which itself originated in customary international law as a protective zone. Contiguous zone rights remain protective rights which a coastal State may lawfully call into operation in the waters adjacent to its territorial sea. None of these protective powers displaces any of a neighbouring EEZ State's rights. As the ILC recognized in 1956, "this power of control does not change the legal status of the waters over which it is exercised"[38]. This power existed in customary international law when that area was high seas and it remains so, as Article 58 makes clear, after the EEZ régime assigned a coastal State specific resource rights there.

15. A State's contiguous zone powers are all for the protection of the State's territory and territorial sea. They are distinct from the rights and jurisdictions of a coastal State in its EEZ and do not contradict them, as was recognized at the Conference. The Proelss Commentary explains that

> "the prevailing view at the Conference, however, was that, first, an enlarged territorial sea would in no way compromise the rationale of creating an adjacent 'prevent and punishment zone', and second, the envisaged legal régime of the EEZ was intended to cover entirely different subjects, and that there were thus no overlaps in substance between these two maritime zones."[39]

16. An EEZ State may not prevent and punish infringements of its *own* customs, fiscal, immigration or sanitary laws and regulations in its territory or territorial sea, beyond its own contiguous zone. *A fortiori*, Nicaragua, in the name of asserted EEZ rights, may not prevent or punish violations of *Colombia's* customs, fiscal, immigration or sanitary laws and regulations. Only Colombia may exercise such powers in a zone contiguous to its territorial sea.

17. Madam President, in certain geographical circumstances, the contiguous zones of two States or a contiguous zone and an EEZ of another State overlap. If the coasts of the two States are less than 24 nautical miles apart, each State will have only a territorial sea and neither State may exercise contiguous zone powers in the territorial sea of its neighbour, for this would, indeed, infringe a coastal State's sovereignty. That is the only impermissible overlap. As the United States explained

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[38] *Yearbook of the International Law Commission (YILC)*, 1956, commentary to Article 66, para. 1.

[39] Alexander Proelss, *The United Nations Convention on the Law of the Sea: A Commentary* (2017), p. 262.

when it proclaimed its contiguous zone: "The contiguous zone of the United States extends to 24 nautical miles from the baselines of the United States determined in accordance with international law, but in no case within the territorial sea of another nation."[40]

18. As much as Nicaragua would wish it, the western Caribbean is not its territorial sea.

19. When the coasts of two States lie 48 or more nautical miles apart, and they apply equidistance to delimit their respective maritime entitlements, each State will have a 12-nautical-mile contiguous zone which entirely overlaps with its own EEZ. The overlap is not duplicative or legally redundant, as its EEZ rights and contiguous zone rights are different.

20. But if the two States' coasts are between 48 and 24 nautical miles apart — let's say, 40 nautical miles apart — the two States' contiguous zones overlap, as you can see on the screen. If equidistance is applied to delimit their EEZs, the contiguous zone of each State will also overlap with the contiguous zone and the EEZ of the other. The nature of contiguous zone powers allows for such overlaps.

21. As the Virginia Commentary explains:

> "Since the nature of control to be exercised in the contiguous zone does not create any sovereignty over the zone or its resources, it is possible for two states to exercise control over the same area if their zones should overlap, for the purpose of prevention or punishment for infringement of their respective customs, fiscal, immigration or sanitary laws and regulations within their respective territories or territorial sea."[41]

This is why the provision on the delimitation of contiguous zones was removed, not because it was "superfluous" as Nicaragua suggests.

22. Nicaragua's proposition that an overlap is inconsistent with potential conflicts over the regulation of archaeological objects, is misconceived, as is Nicaragua's own reliance on the Virginia Commentary[42]. The Commentary did not suggest that the delimitation of contiguous zones was necessary. Rather it recognized that contiguous zones may overlap and referred any theoretical disputes to the dispute settlement mechanism. The Virginia Commentary says: "Since the Convention did not adopt any provision regarding the delimitation of the contiguous zone, the

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[40] Proclamation 7219 of 2 September 1999, https://www.govinfo.gov/content/pkg/CFR-2000-title3-vol1/pdf/CFR-2000-title3-vol1-proc7219.pdf.

[41] Virginia Commentary, pp. 273-274, quoting Commonwealth Group of Experts, *Ocean Management: A Regional Perspective — The Prospects for Commonwealth Maritime Co-operation in Asia and the Pacific*, Commonwealth Secretariat, 1984; emphasis added.

[42] CR 2021/13, p. 67, para. 22 (Lowe).

possibility of disputes arising out of conflicting claims by states whose coasts are opposite or adjacent to each other cannot be ruled out, and Part XV, therefore, will be applicable."[43]

23. It is difficult to see why Nicaragua believes this passage supports its proposition that contiguous zones may not overlap, for it clearly supports the contrary position. But even if such theoretical conflicts occur, and the objects are not related to the cultural heritage of one of the States, UNCLOS Article 303 (1) imposes a duty of co-operation between the States, which may simply resolve any disagreement.

24. An overlap of ***a*** contiguous zone~~***s and an EEZ***~~ may ~~***also***~~ occur when the territorial sea of an island of one State borders the EEZ of the other State. Then the island's contiguous zone, ordinarily 12 nautical miles in breadth, extends perforce into the other State's EEZ.

25. Madam President, this is the situation before you. Because Colombia's archipelagic islands have a territorial sea, their contiguous zone adjacent to this territorial sea extends into the adjoining waters, regardless of whether Nicaragua claims resource rights in the overlapping area.

26. Bear in mind that the term "zone", whether used for the exclusive economic zone or the contiguous zone, does not designate comprehensive or residual rights *to* a body of water, but rather specific rights *in* a body of water which otherwise retains its character of high seas. For these powers, the term "zone" is descriptive of specific powers within a space rather than constitutive of a comprehensive spatial conveyance. Thus, it is wrong to say that a contiguous zone right "violates" the EEZ of another State. Because a contiguous zone right does not displace any of the rights of the EEZ State, the only possible claim could be that it has been applied in a particular instance without "due regard" to a specific EEZ right of the other State. Yet even then that would not undermine the overall legality of the contiguous zone powers.

27. The fact that contiguous zone powers were not "delimited" by the Court in 2012 does not mean, as Nicaragua would have it, that they were implicitly denied. Rather, the Court's decision is consistent with the fact that a contiguous zone does not require a delimitation as these powers are non-exclusive and do not conflict with any resource-related rights and jurisdictions of another State.

[43] Virginia Commentary, para. 303.6.

The primary audience for indicating the contiguous zone is the coast guard or navy of the State concerned.

28. Madam President, for these reasons Colombia submits that under customary international law, when circumstances so require, it may lawfully exercise contiguous zone powers within the space in which its contiguous zone extends into an area where Nicaragua claims to exercise certain resource rights.

C. The simplification of the seaward limit of the contiguous zone

29. Nicaragua's second contention concerns Colombia's simplification of the contours of the seaward limit of its contiguous zone.

30. Because of the proximity of the islands comprising the Archipelago, their contiguous zones overlap. As can be seen, the overlap is dictated by geography, not legislative initiative.

31. The adoption of lines to simplify maritime jurisdiction is recognized in international law as a pragmatic and lawful technique.

32. Madam President, Members of the Court, when you recognized the complexity created by the modified arcs, you replaced them with a simplified line. The management difficulties which concerned you apply to the 24-nautical-mile intersecting arcs around the islands. The practical, navigational and administrative difficulties led Colombia to employ a similar simplification for the extent of its contiguous zone powers.

33. Colombia submits that the simplification of a maritime jurisdiction, when employed on a reasonable, contextually appropriate and not excessive scale, may be a lawful method, akin, *mutatis mutandis*, to the power under international law to draw straight baselines in appropriate circumstances[44]. Simplification then ensures the orderly management of the oceans[45].

34. As is evident from the map, without simplification, the contiguous zone of Colombia would be a tangle of interconnected arcs, representing difficulties in its practical application.

35. Not only can a simplification be lawful under international law but, in contrast to straight baselines which have *exclusionary* effects on international users, smoothing the contours of

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[44] See e.g. *Fisheries (United Kingdom* v. *Norway), Judgment, I.C.J. Reports 1951*.

[45] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II),* p. 710, para. 235.

contiguous zone powers has no adverse effects on the rights or interests of other States and no effects whatsoever on Nicaragua's rights. Should circumstances require it, it enables Colombia to effectively protect these legitimate interests in a fragile area such as the San Andrés Archipelago.

36. Colombia submits that the simplification of the contours of its contiguous zone promotes the public order and efficient management of a legitimate use of the oceans and, on the law and facts, is justified. Colombia thus requests the Court to reject Nicaragua's argument against the use of a simplified geodetic line for its contiguous zone.

D. Contiguous zone powers

37. Madam President, Nicaragua distorts the powers claimed in Decree 1946, as amended, by repeatedly quoting from a version it knows to be obsolete[46]. I will proceed assuming that what Nicaragua meant to argue is that the powers in Decree 1946, *as amended*, exceed what UNCLOS Article 33 allows. Nicaragua misses the point. It is customary international law that determines the rights of Colombia in its contiguous zone in accordance with *current* State practice and *opinio juris*. Colombia's study of State practice, found in Appendix B to the Counter-Memorial, shows that States have claimed powers in their contiguous zones for security and defence matters, environmental concerns and effects on cultural heritage.

38. Even assuming, for the sake of argument, that the contiguous zone powers of a coastal State under customary international law are confined *stricto sensu* to those in Article 33, the question becomes the current meaning of the treaty's generic terms: "customs", "fiscal", "immigration" and "sanitary". You have instructed that when interpreting generic terms in long-term treaties, it should, as a general rule, be presumed that the Parties "have intended those terms to have an evolving meaning"[47].

39. That instruction applies to the generic terms in Article 33 which date back, over 60 years, to the ILC's 1956 Draft Articles on the Law of the Sea. Such terms should be interpreted in an evolutionary manner to enable a coastal State to protect its territorial sea and land domain from changing inbound threats without compromising the correlative rights of other States.

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[46] E.g. CR 2021/13, pp. 46 and 71.

[47] *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 243, para. 66.

40. Scholars have voiced support for an evolutionary interpretation of Article 33 to ensure their relevance to evolving threats. The Proelss Commentary admonished that: "[a]n all too narrow interpretation of the purposes enumerated in Article 33 should therefore not stand in the way of effectively combating new and serious threats, for example those originating in vessel source pollution"[48].

41. The powers set out in Decree 1946 are:

1. to safeguard the security of the islands including from piracy and drug trafficking;
2. to protect against conduct contrary to security at sea;
3. to defend its national maritime interests, customs, fiscal, migration and sanitary matters;
4. to preserve the islands' marine environment; and
5. to guard the Archipelago's cultural heritage.

42. As Colombia's survey of State practice shows, for many of these powers there is evidence of an emerging custom. Moreover, the contingent exercise of these powers, should the necessity arise, would deprive Nicaragua of nothing as the powers are neither incompatible with nor displace any of Nicaragua's rights and jurisdictions. As Nicaragua lacks the powers to protect and preserve *Colombia's* islands' environment, security or cultural heritage, and, of course, no rights to act in a manner which violates Colombia's protective laws and regulations, the Decree neither conflicts with nor displaces a corresponding Nicaraguan power. The powers in Decree 1946 are, it is submitted, consistent with customary international law on the contiguous zone and the EEZ.

43. Decree 1946 provides, that the application of these powers "will be carried out in conformity with international law". On Monday, Nicaragua attempted to downplay Colombia's commitment in this regard. That may reflect the attitude of others, but not Colombia's for whom this solemn commitment is not undertaken lightly.

44. In 1956, the ILC deemed it unnecessary to include "security" because "[t]he enforcement of customs and sanitary regulations will be sufficient in most cases to safeguard the security of the State"[49]. Other security related threats would concern circumstances that would be covered under self-defence. At the first UNCLOS conference, the motion to include "security" did not attain the

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[48] Alexander Proelss, *The United Nations Convention on the Law of the Sea: A Commentary* (2017), p. 267.

[49] *YILC*, 1956, Commentary to Article 66, para. 4.

necessary two-thirds support, but Colombia submits that under modern conditions an evolving interpretation of Article 33 may now include Decree 1946's types of security concerns: specifically, "piracy and trafficking of drugs and psychotropic substances".

45. These concerns would, in any event, come under the protection of the coastal State's "customs", "fiscal" and "sanitary" laws and regulations. Nicaragua seems to forget that these activities fall under the rights of third States through the operation of the principle set forth in UNCLOS Article 58, paragraph 2.

46. Nicaragua's objection to the Decree's inclusion of cultural heritage is ironic, as its own law on its contiguous zone claims such a power. As Colombia's survey of State practice demonstrated, multiple States have claimed powers to protect cultural heritage in their contiguous zone, reflecting the presumption in UNCLOS Article 303.

47. Nicaragua objects to Colombia's power to protect the Archipelago's marine environment from threats or acts emanating from the contiguous zone. Nicaragua has failed to show which of its enumerated environmental jurisdictions in Part XII the Colombian Decree violates. For instance, UNCLOS Article 220, paragraph 6, empowers a State within its EEZ, to address marine pollution to its coastline, but not to the coastline of another State. It is UNCLOS Article 221 which provides an example of the allocation of jurisdiction in one such scenario. Both provisions are in your folders at tab 35.

48. Article 221 provides that, consistent with customary and conventional law, a State may "take and enforce measures beyond the territorial sea proportional to the actual or threatened damage to protect their coastline or related interests, including fishing, from pollution or threat of pollution following upon a maritime casualty or acts relating to such a casualty". Article 221, paragraph 2, sets no spatial limit for this power and the events activating this right are cast in broad terms. In any event, none of the provisions in Part XII or anywhere else in the UNCLOS grant an EEZ State the jurisdiction to protect the environment of another State's territorial sea and land territory. That right and responsibility rests with Colombia, as part of its contiguous zone powers, none of which violates Nicaragua's specific environmental jurisdictions.

49. The control necessary to protect the marine environment and to respond to environmental threats in general is included within UNCLOS Article 33's "sanitary" power. The etymology of the

word "sanitary", the Latin "sanitas", means "health". Recently, the Inter-American Court of Human Rights confirmed that a healthy environment is a human right which States have a duty to protect. Indeed, Nicaragua's own contiguous zone law employs the term "health".

50. At this moment, Madam President, one hardly need marshal authority for the right and obligation of States to take appropriate actions to protect the health of their populations. If a threat to a State's territory and territorial sea is emanating from events in the contiguous zone and portends adverse effects on the health of its population, must the State wait for the threat to materialize in its territory or its territorial sea, before acting to abate it? Many States exercise environmental protection measures as part of their contiguous zone powers, as set out in Colombia's survey of State practice.

51. For example, in 1999, the United States, a non-State party subject only to customary international law, proclaimed, in its contiguous zone, powers to control drug smuggling, pollution, and underwater artifacts[50].

52. Both the customary law on the contiguous zone and the interpretation of Article 33 have evolved in response to the changing perils to the members of the international community. Nicaragua urges an obsolete construction of the customary international law on the contiguous zone. Obsolete and even hypocritical, as the scope of its own contiguous zone law shows.

53. Earlier this week, Nicaragua criticized Colombia for describing its contiguous zone powers as protecting "vital interests". Yet Colombia's Decree 1946, as amended, provides for a closed list of these vital interests, each subject to evolutionary interpretation. By contrast, consider the breadth and scope of Nicaragua's Law No. 420, which defines the extent of *its* contiguous zone powers[51].

54. As you can see, in its contiguous zone, Nicaragua claims the unqualified right to prevent and punish violations of its "criminal" laws and regulations in its territory or territorial sea. Apparently, domestic criminal laws may extend, at the State's will, to include prohibitions far beyond the generic terms of UNCLOS Article 33. The sincerity of its objection to mere evolutionary interpretation of generic terms is cast into doubt by its own, unlimited, version of contiguous zone powers. Nicaragua complains that "only" 16 States claimed security powers in their respective

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[50] The White House, Office of the Vice President, "Extension of Federal Enforcement Zone in U.S. Coastal Waters Will Help Prevent Violations of Environmental, Customs, or Immigration Laws", 2 Sept. 1999, available at https://clintonwhitehouse4.archives.gov/CEQ/990902a.html.

[51] Nicaragua Law No. 420, Art. 6.

contiguous zone. Nicaragua is the *only* State claiming the unlimited power to control infringements of its criminal law.

55. For these reasons, Nicaragua's objection to Decree 1946's specific powers should be rejected.

E. Decree 1946 is not *ipso facto* an internationally wrongful act

56. Madam President, Nicaragua claims that Colombia's mere enactment of Decree 1946 constitutes an internationally wrongful act. But as the ILC explains, the applicable standard depends on the primary obligation, which, in this case, is one of conduct. Therefore "whether there is a breach will depend on whether and how the legislation is given effect"[52].

57. Nicaragua argues that the obligation which the Decree violated is "the preservation of the exclusive sovereign rights belonging to Nicaragua in its EEZ in accordance with Articles 56 and 58 of the UNCLOS"[53]. Its argument is misconceived. Should an occasion require Colombia to *exercise* its rights or *perform* its duties in any overlapping area, the applicable standard of conduct is to have "due regard" to Nicaragua's rights, in accordance with UNCLOS Articles 56 and 58 (3).

58. The "due regard" obligation, as the arbitral tribunal in *Chagos Marine Protected Are*a recently explained, would not be an obligation to "avoid any impairment" of a State's right within the EEZ but to balance the competing rights[54]. And, indeed, Decree 1946, which provides expressly that its application "will be carried out in conformity with international law", represents such a commitment.

59. Colombia's obligation with regard to Nicaragua's rights may only be violated, if at all, through the *mis-application* of the Decree, not its *enactment*.

60. The lawfulness of the Decree cannot be evaluated based solely on whether its application, in a specific incident, has failed the "due regard" obligation. The powers enumerated in Decree 1946 are, as has been shown, consistent with international law. Moreover, Nicaragua has failed to prove that it suffered any injury by the enactment of Decree 1946 or by any purported failure by Colombia

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[52] *YILC*, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, 2001, Vol. II, Part Two, Art. 12, para. 12.

[53] RN, para. 3.56 (emphasis omitted).

[54] *Chagos Marine Protected Area Arbitration (Mauritius* v. *United Kingdom), Award of 18 March 2015*, para. 519.

to accord "due regard" to any of its rights. As to the question of whether the Decree, in itself, is inconsistent with or impedes Nicaragua's claimed rights, the answer is simple. It does not.

F. Conclusion

61. Madam President, all of Nicaragua's arguments against Decree 1946 have been shown to fail. Colombia's contiguous zone and its spatial extent are lawful under customary international law. So are the powers which may be exercised therein. Nicaragua cannot extinguish the legal effects of Colombia's sovereignty over each one of the Archipelagic islands, great or small.

62. Madam President, Members of the Court, thank you for your attention. Madam President, unless this is an appropriate moment for a break, may I ask you to call on my colleague Eduardo Valencia-Ospina, to commence Colombia's counter-claims.

The PRESIDENT: I thank Professor Reisman. It is indeed a suitable time for a coffee break, so the Court will observe a coffee break of 10 minutes before giving the floor to the next speaker. The sitting is adjourned.

The Court adjourned from 4.20 p.m. to 4.35 p.m.

The PRESIDENT: Please be seated. The sitting is resumed and I shall now give the floor to Mr. Eduardo Valencia-Ospina. You have the floor.

Mr. VALENCIA-OSPINA: Madam President, distinguished judges, may I be permitted to join the Court and others who have paid tribute to the late Judge James Crawford, whose memory I had the occasion to publicly exalt at the recent session of the International Law Commission.

COUNTER-CLAIM: NICARAGUA'S INFRINGEMENT OF THE TRADITIONAL FISHING RIGHTS OF THE INHABITANTS OF THE SAN ANDRÉS ARCHIPELAGO

I. Introduction

1. It is an honour for me to appear before you on behalf of my country, the Republic of Colombia. It is also a privilege to do so in the interest of the inhabitants of the San Andrés Archipelago and, in particular, the Raizales, who are listening very closely in their native Caribbean

islands. This morning Mr. Kent Francis James set the background against which to properly appreciate the importance of fishing for their survival.

2. This afternoon, Colombia takes the floor to reassert their rights in the context of two counter-claims, one of which is of *immediate relevance* and *paramount importance* to the artisanal fishermen and communities of the San Andrés Archipelago, hereinafter referred to as "the artisanal fishermen", who rely on fishing for their sustenance and livelihood. Colombia firmly believes that the two counter-claims, declared admissible in 2017[55], are well founded in law and in fact. They are not, as Nicaragua dismissively puts it, "an attempt to distract the Court's attention from the real core issue"[56]. The counter-claims touch upon crucial questions such as the basic needs of the inhabitants of the San Andrés Archipelago, as well as Nicaragua's straight baselines decree, which caused the unlawful extension of the Nicaraguan internal waters, territorial sea and EEZ. Their assessment by the Court, rather than impeding it, will greatly contribute to the sound administration of justice.

3. Although Colombia raised the question of Nicaragua's infringement of the traditional fishing rights, what is the underlying main point of contention is *the very existence* of these traditional rights[57]. Nicaragua does not simply ask to be cleared of all responsibility for the bullying of the artisanal fishermen. It asks for more. Nicaragua wants this Court to find that there are *no* traditional fishing rights whatsoever or, in other words, that the fishermen *cannot* fish where they have been doing so customarily, even before the coming into existence of Colombia and Nicaragua as independent States more than 200 years ago.

4. Nicaragua's two-tiered strategy is both unexpected and unfortunate. Unexpected because the highest representatives of both Parties have *explicitly* recognized the existence of these traditional fishing rights. Unfortunate, because we are dealing with an extremely delicate issue pertaining to social necessity, which Nicaragua "is ready to accommodate", as it has remarkably written, although of course not today before this Court[58].

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[55] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Counter-Claims, Order of 15 November 2017, I.C.J. Reports 2017*, p. 289.

[56] Additional Pleading of Nicaragua on Colombia's Counter-Claims (APN), para. 1.5.

[57] APN, pp. 5-27, paras. 2.3-2.58; RN, pp. 121-145, paras. 6.3-6.76.

[58] RN, para. 6.76; APN, para. 2.41.

5. Nicaragua "denies that the inhabitants of the San Andrés Archipelago have a vested 'right' to conduct artisanal fishing". Yet at the same time it not only recognizes the "fishing needs of the Raizales", but declares that "it remains open, in the spirit of brotherhood and good neighbourly relations" to reach a bilateral agreement on this matter[59]. With due respect, Nicaragua's judicial strategy reveals the weakness of its argument. The traditional fishing régime obviously needs to be fleshed out. However, the conclusion of technical arrangements should not be confused with *the existence* and *recognition of the existence* of the traditional fishing rights. Nicaragua struggled to diminish the relevance and value of its President's statements[60]. Likewise, Nicaragua struggled to distort and play down the affidavits of the artisanal fishermen annexed to Colombia's written pleadings[61]. Nicaragua's repeated assertion that it "remains open" to find a solution that includes "the fishing needs of the Raizales" does not strengthen its case based on the alleged non-existence of the traditional fishing rights. It does the exact opposite.

6. My presentation will be divided in two parts. The *first* is devoted to the existence and scope of the traditional fishing rights of the inhabitants of the San Andrés Archipelago. The *second* addresses the infringement of those rights by the Nicaraguan Naval Force.

II. The existence and scope of the traditional fishing rights of the artisanal fishermen

7. Colombia must embark anew in the examination of the affidavits annexed to its Counter-Memorial[62]. Unfortunately, Nicaragua has deemed it appropriate to rely on selective quotations from those affidavits in order to put forward two unsustainable propositions, which convey the wrong picture about the geographic and temporal scopes of the traditional fishing rights at stake. However, before going into the affidavits, it is important to stress once more that Nicaragua's assertions are disproved by the words of its *own* President, who indeed has recognized the existence of the traditional fishing rights. Three statements he made after the delivery of the 2012 Judgment must be considered in succession.

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[59] RN, para. 6.76.

[60] RN, paras. 6.63-6.76; APN, paras. 2.29-2.41.

[61] RN, paras. 6.47-6.62; APN, paras. 2.47-2.58.

[62] CMC, Anns. 62-72.

8. On 26 November 2012, in the immediate aftermath of the Judgment, President Ortega stated with reference to the fishermen of the San Andrés Archipelago that

> "Nicaragua will authorize their fisheries in that area, where they have historically practiced fisheries, both artisanal and industrial fisheries, in that maritime area, in that maritime space, where even before the ruling by the Court, the permit was granted by Colombia and now, the permit is granted by Nicaragua"[63].

This first statement constitutes an *explicit* recognition that the fishermen of the San Andrés Archipelago have *historically* fished in an artisanal manner in maritime areas located off the coast of Nicaragua. This brings us to the second statement, the very next month.

9. On 2 December 2012, when President Ortega met with Colombian President Santos during the inauguration of Mexican President Peña Nieto, the Nicaraguan President adopted a *more concrete* stance, recognizing *not only* the artisanal and historical fishing practices at stake, *but also* the traditional *rights* vested in the Raizales. He stated:

> "Be sure that we will respect the historical rights that they (the Raizals) have had over those territories. We will find the mechanisms to ensure the right of the Raizal people to fish, in San Andrés, so we can protect those people that live of the territorial sea"[64].

10. Remarkably, President Ortega spoke of "historical *rights*" of the Raizales. He stated that mechanisms will have to be established *"to ensure"*, that is, to make certain or guarantee that those rights *already existing* are effective instead of purely theoretical. His reference to the "territorial sea" is inaccurate. It again reflects Nicaragua's tendency to equate the EEZ with the territorial sea[65]. What matters, however, is that Nicaragua's President had clearly in mind traditional rights to navigate and exploit banks in maritime areas located off the coast of Nicaragua. Let me stress again that, if the first statement of November 2012 amounts to an *explicit* recognition of the long-standing artisanal fishing *practices*, the ensuing statement in December of that same year *elevates* those practices to the *higher level of rights* protected by law. The third relevant statement confirms this.

11. On 21 February 2013, during the commemoration of the death anniversary of General Sandino, President Ortega was even more precise by declaring before the whole Nicaraguan nation:

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[63] MN, Ann. 27.

[64] CMC, Anns. 73 and 74.

[65] Cf. CR 2021/14, pp. 22-34 (Wood).

> "I told President Santos, and I have said publicly, that the [Raizales] can continue fishing. That Nicaragua will not affect them in their Rights as Original people, that they can continue fishing. And that we work an Agreement, an Agreement between the Government of Colombia and Nicaragua, so that we can regulate this well. Because how do we know that all the boats that are fishing there are from the Raizal Community, and which ones are fisheries not related to the Raizal Community, or even has to do with industrial fishing?"[66]

12. As stressed by President Ortega, the bottom line is that the Raizales have the right to "fish freely"[67]. As the Nicaraguan President puts it, while "[i]ndustrial fishing . . . has to request permission from INPESCA [the Nicaraguan Institute for Fishing and Aquaculture]", the Raizales, as well as their companies, "can fish freely" because, he says, these waters "are their original areas as Original People, the same as of our Brothers on the Caribbean Coast"[68]. He then asks: why can the artisanal fishermen fish "once and for all"? "Because", says President Ortega, "they already have a permanent permit there". "Because they are in their lands, they are in their waters, they are in their natural habitat"[69]. This statement constitutes an *explicit* and *indisputable* recognition of the traditional fishing rights of the artisanal fishermen.

13. Nicaragua has put forward two propositions in its written pleadings, which directly contradict its President's recognition of the traditional fishing rights.

— According to the first, the artisanal fishermen only fish in the waters surrounding the islands of San Andrés, Providencia and Santa Catalina, and when they engage in longer fishing expeditions, they merely do so in the waters immediately adjacent to the other Colombian islands, such as Quitasueño, Serrana and Roncador[70]. In other words, Nicaragua alleges that they do not sail to Cape Bank and Luna Verde, despite the fact that these banks, which are *largely* more significant in terms of size and resources, are located at a similar, if not shorter, distance from San Andrés and Providencia than the distance between these two islands and Quitasueño, Serrana and Roncador.

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[66] RC, Ann. 6.

[67] *Ibid.*

[68] *Ibid.*

[69] *Ibid.*

[70] RN, paras. 6.51-6.54.

— According to the second, the artisanal fishermen *do fish* in Cape Bank and Luna Verde, but they started doing so only in the 1970s, that is to say fifty years ago[71]. There is apparently nothing traditional in what constitutes, according to Nicaragua's misguided perception, a contemporary phenomenon, the logical outcome of technological developments[72].

14. Nicaragua's partial reading of the affidavits shows that there can be *no effective substitute* for the careful examination of the annexes at pages 373 to 427 of the Counter-Memorial. Obviously, those affidavits are replete with references to traditional fishing in the surroundings of what the artisanal fishermen sometimes call the "Northern Islands", that is to say, Quitasueño, Serrana and Roncador. It is, therefore, *extremely* convenient for Nicaragua to "cherry-pick" those excerpts from the affidavits which allow it to convey the erroneous impression that artisanal fishing mainly took place in Colombian maritime areas.

15. Likewise, it can be easily understood why the artisanal fishermen's affidavits often focus on the time period they have directly witnessed, that is, up to the last six decades. But at the same time those fishermen vividly recall that, prior to the 1960s, artisanal fishing by their forebears did take place in waters situated off the coast of Nicaragua. Before outboard and inboard engines became increasingly common in the San Andrés Archipelago, artisanal fishermen relied on catboats, schooners and sloops to reach Cape Bank, Luna Verde *and* the other traditional banks. Such expeditions certainly required more preparation, time and effort, but they nevertheless occurred regularly during the appropriate seasons. This is not surprising, considering that the Raizales are a seafarer coastal community that has held close connections with its sister communities based in the Mosquito Coast, Panama, Costa Rica, Jamaica and the Colombian mainland. In other words, Colombia does not deny that improvements in technology *facilitate* the fishing expeditions of the artisanal fishermen. Colombia, however, *does refute* Nicaragua's assertion that, prior to these developments, traditional fishing did not take place in Cape Bank and Luna Verde in a manner sufficient to give rise to a customary practice.

16. To further elucidate the thrust of my presentation, I must turn to the bathymetric Figure 4 included for illustration purposes in the judges' folders at tabs 41 to 43, which depicts the shallow

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[71] RN, paras. 6.55-6.58; APN, para. 2.47.

[72] RN, para. 6.55.

banks in blue as well as the deep-sea banks in purple. It provides an accurate visual representation of the banks mentioned by the artisanal fishermen.

17. When I speak of shallow banks, I refer to areas where the sea-bed is located at *less* than 200 metres of depth. In this zone, there is enough light for photosynthesis to take place. It is in these nutrient-rich inshore waters that fishermen find the highest concentration of biodiversity, in particular the fish that thrive and form an essential resource of these sunlit waters.

18. On the other hand, when I speak of deep-sea banks, as the artisanal fishermen call them, I am not referring to the open-ocean offshore waters but to banks located at sea-bed depths greater than those that characterize the shallow banks. They are nevertheless at depths usually well under the 500-metre isobath. They are adjacent to the shallower nutrient-rich waters and, overall, present more commonalities with inshore rather than offshore waters. There are, of course, small shallow banks in the maritime areas located on the Colombian side, but *nothing* compares, even remotely, to the shallow and deep-sea banks located off the coast of Nicaragua.

19. Turning to the Colombian maritime areas, there exists, west of San Andrés, Providencia and Santa Catalina, two contiguous troughs each of which reaches depths *greater* than 2,000 metres, resulting in only narrow shelf areas. The situation does not improve towards the east. On the contrary, east of San Andrés, Providencia and Santa Catalina, we mainly find open-ocean offshore waters, that is, depths much greater than 500 metres. The sole limited exceptions are the banks surrounding Roncador and the East South-East Cays, but the size of these banks, like the size of the banks surrounding San Andrés, Providencia and Santa Catalina, again *pales* in comparison to the shallow and deep-sea banks located near the Archipelago and midway between Colombia and Nicaragua.

20. Admittedly, there are larger shallow and deep-sea banks located around Quitasueño and Serrana, two of the Northern Islands. Yet, they are not by themselves capable of meeting the food security needs of the inhabitants of the San Andrés Archipelago, which brings me to address the other side of the equation, that is, the Nicaraguan side.

21. Cape Bank is *by far* one of the most quoted banks in the affidavits[73]. Cape Bank is in fact *massive*. It is an area around 30 nautical miles in width, that extends for more than 100 nautical miles

[73] CMC, Anns. 62, 65, 68, 70, 71 and 72.

offshore from the entire Mosquito Coast. To the north, it reaches areas located well beyond 100 nautical miles from Cabo Gracias a Dios. East of Puerto Cabezas, Cape Bank extends beyond the 82nd west meridian in the area known as Luna Verde. Luna Verde extends significantly farther east of that meridian, at a distance of approximately 100 nautical miles from Nicaragua's mainland. From Luna Verde, the eastern edge of Cape Bank then follows a south-south-west direction. This limit, the green line on the figure, is commonly referred to as La Esquina by the artisanal fishermen. This is where the shallow grounds of Cape Bank give place to its deep-sea grounds.

22. La Esquina constitutes one of the *most* important points of reference for the artisanal fishermen. West-north-west of Providencia, La Esquina largely follows the 82nd west meridian in the south, but curves eastwards towards the north, in a north-north-east azimuth. This explains why that Meridian is also mentioned by the artisanal fishermen in their affidavits. To the north, in the area known as Luna Verde, La Esquina is located significantly east of that meridian. To the south, on the other hand, La Esquina follows a north-east to south-west direction that brings it west of the 82nd west meridian.

23. The artisanal fishermen have navigated and exploited *every ground* of Cape Bank. There are in the affidavits common references to fishing in the waters surrounding Bobel Cay, Cabo Gracias a Dios and Rosalind Bank, as well as the Corn Islands[74]. But when the artisanal fishermen speak of La Esquina, Luna Verde or the 82nd west meridian, when they broadly mention Cape Bank, they are *generally* referring to fishing grounds that are located around the eastern edge of Cape Bank. The artisanal fishermen thus fish in the shallow and deep-sea banks located, respectively, to the west and to the east of the green line shown in the figure.

24. Aside from the eastern edge of Cape Bank, the artisanal fishermen commonly refer to traditional banks north of Providencia, again in maritime areas located off the coast of Nicaragua. These banks include, but are not limited to, those discovered and named by the Raizales as Julio Bank, North East Bank and Far Bank[75]. They are located between the Northern Islands and, in particular, between Quitasueño and Providencia, as well as north of Quitasueño, not far from Luna Verde. The artisanal fishermen living in Providencia are those who most often refer to them. It

[74] CMC, Anns. 63, 64, 65, 69 and 71.

[75] CMC, Anns. 62, 63, 64, 65 and 66.

is there, instead of closer to the shallow banks of the Northern Islands, that the artisanal fishermen find the fish of particular interest to the communities living in the San Andrés Archipelago[76].

25. Instead of going now through each of the affidavits individually, I will focus on key findings that can be gathered by reading the sworn statements as a whole.

26. Let me start by recalling that the Raizales who were interviewed in San Andrés, Providencia and Santa Catalina were artisanal fishermen long before they became adults. Their parents, grandparents, uncles and aunts taught them the arts of their trade before they could reach adulthood and the same is true with regard to these ancestors. Artisanal fishermen are part of something bigger than their individual selves because, each time they set sail, they carry the traditions of their forebears with them. The south-western Caribbean Sea thus represents much more than a source of subsistence to the artisanal fishermen. To the inhabitants of the Archipelago and, in particular, the Raizales, the sea constitutes an ancestral vital maritime space *as important as* the islands that it surrounds. The relationship that the artisanal fishermen entertain with the sea could be described in part as semi-mystical and it involves a great deal of emotions[77].

27. Nicaragua stated in its Reply that it is "revealing that Colombia did not see fit during the previous *[Territorial and Maritime Dispute]* case to even advert to the existence of the rights it now claims"[78]. This is not true. In his very opening speech at the merits hearing of 2012, the Agent of Colombia stressed, "[s]ince the nineteenth century, the population of the San Andrés Archipelago had been conducting fishing activities up to the Mosquito Coast", which "have always been so essential for the archipelago's inhabitants that depriving them of these resources would entail serious consequences for their livelihood"[79]. In any event, what matters is what Colombia has explicitly stated in the present case. While the practice of private individuals *does not* affect the course of maritime and land boundaries, maritime and land boundaries, in turn, *do not* affect traditional rights vested on the inhabitants of border regions[80]. The jurisprudence in this regard, an excerpt of which

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[76] CMC, Ann. 65.

[77] Cf. in particular CMC, Ann. 69.

[78] RN, para. 6.41.

[79] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, CR 2012/11, p. 14, para. 24 (Londoño).

[80] CMC, paras. 3.98-3.111.

you can see on the screen, *decisively* favours Colombia[81], an inconvenient reality that Nicaragua seeks to circumvent by relying exclusively on another argument, the alleged specificity of the EEZ, the *one and only* maritime area where, *according to Nicaragua*, traditional rights have been superseded. This issue has been amply dealt with in the written pleadings[82].

28. What the Court will also find in the affidavits is an explanation of what constitutes artisanal fishing, as distinguished from subsistence and industrial fishing, as well as a description of its evolution in terms notably of means and methods. Artisanal fishing is a form of commercial fishing[83], which also entails, in addition to direct consumption, selling part of the catch. In this regard, artisanal fishing is different from subsistence fishing, which only aims to provide food on the fisherman's family table. However, *despite* its commercial connotations, artisanal fishing has *much* in common with subsistence fishing. As stated in most affidavits, artisanal fishing ensures food security in the San Andrés Archipelago[84]. As the artisanal fishermen so often stress, artisanal fishing plays a crucial role for the subsistence of the inhabitants of San Andrés, Providencia and Santa Catalina. The line separating artisanal from subsistence fishing is overall a thin and blurry one. What differentiates artisanal from industrial fishing are the methods involved and the two activities' production scales[85].

29. One can usually tell whether a fisherman is engaged in artisanal fishing simply by looking at his boat and fishing gear. Artisanal fishermen use lines with up to approximately ten hooks, harpoons and sometimes traps. Artisanal fishing is *not*, however, an activity frozen in time. It has *inevitably* evolved and, no doubt, will continue to do so with technological developments. The affidavits give ample account of the evolution of the artisanal fishermen's boats[86], who first adapted

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[81] *Award in the Arbitration regarding the delimitation of the Abyei Area between the Government of Sudan and the Sudan People's Liberation Movement/Army, Award of 22 July 2009, Reports of International Arbitral Awards (RIAA)*, Vol. XXX, p. 408, para. 753; *Award of the Arbitral Tribunal in the First Stage of the Proceedings between Eritrea and Yemen (Territorial Sovereignty and Scope of the Dispute), Decision of 9 October 1998, RIAA*, Vol. XXII, p. 244, para. 126; *Award of the Arbitral Tribunal in the Second Stage of the Proceedings between Eritrea and Yemen (Maritime Delimitation), Decision of 17 December 1999, RIAA*, Vol. XXII, p. 361, paras. 110-111; *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the Delimitation of the Exclusive Economic Zone and the Continental Shelf between Them, RIAA*, Vol. XXVII, p. 227, para. 292; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 400, para. 66; *German Settlers in Poland, Advisory Opinion, 1923, P.C.I.J., Series B, No. 6*, p. 36.

[82] RC, pp. 246-257, paras. 5.11-5.24.

[83] CMC, Anns. 62 and 65.

[84] Cf. in particular CMC, Anns. 65 and 71.

[85] CMC, Anns. 62, 65 and 68.

[86] CMC, Anns. 62, 63, 64, 65 and 67.

their wooden sailing boats to leave space for outboard engines and, later, replaced many of these vessels with fiberglass *lanchas*[87]. Some of the artisanal fishermen's boats nowadays have inboard engines, as well as small refrigeration systems instead of boxes filled with ice and salt. The navigation equipment also evolved: sextants and other instruments have been replaced by GPS and other electronics.

30. Despite the evolution of the means and methods involved, artisanal fishermen have kept to their artisanal practices and remained faithful to the main aim of their activity, which is to sell products to *their* community living in the Archipelago. There is clearly a social component to artisanal fishing, which is highlighted, among other things, by the policies adopted by the fishing co-operatives and associations based in the San Andrés Archipelago[88]. Artisanal fishermen often share their boats and fishing gear with other artisanal fishermen. They likewise borrow the boats and gear of the co-operatives to which they are often affiliated. Theirs is *first of all* a community-driven activity, one which aims at filling the needs of the inhabitants of the San Andrés Archipelago and, in particular, the Raizales, who, as you know by now, are the descendants of the enslaved Africans and the original European settlers, who have acquired their own specific culture in the last four centuries.

31. Contrary to the statements of its President, Nicaragua disputes that the artisanal fishermen of the San Andrés Archipelago have traditionally fished in waters situated off its coast. It asserts that artisanal fishing occurs within close distance of the Colombian islands and that fishing that takes place in Cape Bank and Luna Verde is a recent phenomenon. Counsel for Nicaragua of course know that it is impossible to pinpoint the precise moment when artisanal fishermen started venturing in and exploiting the grounds of Cape Bank, Luna Verde or the banks located between the Northern Islands. One point with ancestral traditions is that it is difficult to determine with precision when they originated. But for the artisanal fishermen interviewed, it is absolutely clear that, as much as themselves, their forebears navigated and exploited those banks.

32. There is nothing exceptional for artisanal fishermen based in San Andrés, Providencia and Santa Catalina to sail to Cape Bank, be it La Esquina or some of its internal banks located closer to the Miskito Cays or the Corn Islands. In fact, the route to Cape Bank, which *time and time again*

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[87] Cf. in particular CMC, Ann. 91.

[88] CMC, Anns. 62 and 65.

must have been used by the sister communities living both in the Archipelago and on the Mosquito Coast, is *shorter* than the route to the Northern Islands. The artisanal fishermen have fished in all the waters surrounding these features, be it statically or while navigating from an island to another, trolling with one or a few lines. Likewise, they have fished in the waters of Luna Verde which, when compared to the waters of Roncador and Serrana, are in fact located *significantly* closer to Providencia.

III. The infringement of the traditional fishing rights by the Nicaraguan Naval Force

33. Regarding the affidavits, Nicaragua asserts that all the accounts relating to the bullying of the artisanal fishermen by its Naval Force amount to hearsay[89]. In its written pleadings, Nicaragua stressed that Colombia has adopted a *tu quoque* fallacy to justify its own claims, implying that Colombia's evidence appears to Nicaragua as equally inadequate as Colombia asserts that the evidence put forward by Nicaragua is[90]. Yet, the truth of the matter is that, under the conditions provided for by the Court's jurisprudence, affidavits and second-hand accounts *do constitute* admissible evidence before the Court[91]. Those conditions are amply met in relation to the affidavits and accounts from the Raizales.

34. The affidavits are consistent. Besides, the International Labour Organization's (ILO) recommendations, which Nicaragua cites only when it deems them convenient to its cause, are also consistent[92]. As the ILO has put it, "Raizal fishers have to cross Nicaraguan maritime territory, which is reported to give rise to difficulties and the payment of fines"[93]. Moreover, Nicaragua's own annexes, No. 12 of its Memorial and No. 20 of its Reply, are likewise consistent. They do refer to certain occurrences that have taken place[94]. And it will be recalled that President Ortega *himself* had

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[89] APN, para. 2.60.

[90] APN, para. 2.62.

[91] Cf. for example *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 731, para. 244.

[92] RC, para. 5.69.

[93] ILO, Committee of Experts on the Application of Conventions and Recommendations, "Observations (CEACR) — adopted 2014, published 104rd ILC session (2015)", Indigenous and Tribal Peoples Convention, 1989 (No. 169), Colombia (Ratification: 1991).

[94] RC, para. 5.70.

to instruct General Avilés *not* to detain or otherwise interfere with the artisanal fishing activities of the inhabitants of the San Andrés Archipelago[95].

35. Yet, Nicaragua asserts that "the most that Colombia's affidavits might be said to establish is that fishermen from San Andrés and Providencia have experienced some uncertainty in the wake of the 2012 Judgment, and that they are reluctant to fish in Nicaragua's waters"[96]. This is an egregious understatement. What the affidavits, the ILO recommendations and Nicaragua's own annexes all indicate is that there have been occurrences between the artisanal fishermen and the Nicaraguan Naval Force. It is the latter that has instilled a climate of fear among the artisanal fishermen. This is confirmed in recent press articles that attest *not only* to the difficult situation of the artisanal fishermen[97], *but also* to the aforementioned occurrences, which include the arrest and detention of the fishermen by the Nicaraguan Naval Force[98].

36. As portrayed in the affidavits, artisanal fishermen are approached and *boarded* by the Nicaraguan Naval Force. In the best-case scenario, the Nicaraguan agents take food, cigarettes and coffee from the fishermen who, of course, cannot refuse. But in the worst-case scenario, the Nicaraguan Naval Force takes the GPS, VHF radios, the products and all the fishing and navigation gear of value, leaving them adrift without the proper equipment[99].

37. The artisanal fishermen have stopped going to many of their traditional banks due to these occurrences with the Nicaraguan Naval Force. The encounters take place on the way to Cape Bank, when the artisanal fishermen are navigating along La Esquina, or when the Raizales are navigating and fishing between the Northern Islands.

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[95] CMC, Ann. 76.

[96] RN, para. 6.92.

[97] "Siete años del fallo de La Haya: la crisis de los pescadores de San Andrés", press report by Radio Nacional de Colombia, 19 Nov. 2019, available at https://www.radionacional.co/cultura/siete-anos-del-fallo-de-la-haya-la-crisis-de-los-pescadores-de-san-andres (accessed 22 Sept. 2021); "La voz de las mujeres isleñas sobre el fallo de La Haya", press report by Radio Nacional de Colombia, 23 Nov. 2018, available at https://www.radionacional.co/cultura/la-voz-de-las-mujeres-islenas-sobre-fallo-de-la-haya (accessed 22 Sept. 2021); "La penosa situación de los pescadores de San Andrés", press report by Semana, 8 Feb. 2014, available at https://www.semana.com/nacion/articulo/pescadores-de-san-andres/376713-3/ (accessed 22 Sept. 2021).

[98] "San Andrés: entre la corrupción y el riesgo sanitario", press report by RCN, 16 Nov. 2019, available at https://www.noticiasrcn.com/nacional/san-andres-entre-la-corrupcion-y-el-riesgo-sanitario-349613 (accessed 22 Sept. 2021); "El fallo de la Haya se acató y se aplicó", press report by Caracol, 9 Oct. 2019, available at https://caracol.com.co/programa/2019/10/09/6am_hoy_por_hoy/1570633564_762159.html (accessed 22 Sept. 2021).

[99] Cf. in particular CMC, Anns. 67 and 71.

38. Quite apart from Nicaragua's *irrelevant* assessment of the jurisprudence relating to the drawing of maritime delimitations, such as the *Gulf of Maine* case, Colombia has demonstrated that traditional rights vested on indigenous people run with the land, as well as with the sea. In other words, while the practice of private individuals *does not* affect the course of maritime and land boundaries, maritime and land boundaries, in turn, *do not* affect traditional rights vested on indigenous people[100].

39. No doubt this Court will hear from Nicaragua a plea in favour of exclusivity, the idea that there can be no limitations whatsoever to its sovereign rights as a coastal State. The notion of exclusivity, however, is in no way specific to the EEZ. States enjoy full-fledged sovereignty, which is also exclusive, within their territory and territorial sea. Yet, nobody, *not even* Nicaragua, suggests that traditional rights are incompatible with the exclusive rights that a State enjoys within its territory. As shown in the screen, the Eritrea-Yemen Tribunal rightly found that traditional fishing régimes are not limited by the maritime zones specified under UNCLOS[101]. On the contrary, this Tribunal, which was composed of *no less* than three former Presidents of the International Court of Justice, rightly found that the traditional fishing régime operated *beyond* the territorial waters of the parties to the proceedings[102].

40. In its written pleadings Colombia has already addressed in depth this argument. I can, therefore, limit myself to pointing out that this whole debate — as to whether traditional fishing rights have been superseded by the appearance of the EEZ — becomes *purely theoretical* when it can be shown, as my pleading has done, that in any event both Parties have recognized the existence of such traditional rights.

41. For the reasons stated in this pleading, Colombia has demonstrated that the artisanal fishermen of the San Andrés Archipelago enjoy traditional fishing rights in the maritime areas off the coast of Nicaragua. It has also shown that, notwithstanding the Nicaraguan President's

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[100] Cf. *supra* fn. 83 and 84.

[101] *Award of the Arbitral Tribunal in the Second Stage of the Proceedings between Eritrea and Yemen (Maritime Delimitation), Decision of 17 December 1999, RIAA*, Vol. XXII, p. 361, para. 109.

[102] *Ibid.*

recognition of these rights, the Nicaraguan Naval Force has bullied the artisanal fishermen of the San Andrés Archipelago, thus breaching the rights of this vulnerable community.

Madam President, distinguished judges, this concludes my presentation. I thank you for your attention and request that you invite Professor Thouvenin to the podium.

The PRESIDENT: I thank Mr. Valencia-Ospina, and I now invite the next speaker, Professor Jean-Marc Thouvenin, to take the floor.

M. THOUVENIN : Merci beaucoup, Madame la présidente.

DEMANDE RECONVENTIONNELLE : ILLÉGALITÉ DU DÉCRET N° 33-2013

1. Madame la présidente, Mesdames et Messieurs les juges, c'est un honneur de paraître devant vous aujourd'hui, pensant avec émotion au temps où le juge Crawford siégeait parmi vous. Et ce, pour présenter les arguments de la Colombie au soutien de sa demande reconventionnelle relative au décret nicaraguayen n° 33-2013 fixant ses lignes de base attachées à sa côte caribéenne. Ce décret est reproduit à l'onglet n° 46 du dossier des juges.

2. Droites, et fort éloignées de la côte, ces lignes de base ont pour effet mécanique de repousser les limites des espaces maritimes du Nicaragua vers l'est, et d'empiéter sur les droits de la Colombie. Comme on l'a vu depuis le début de ces plaidoiries, ce qui est en jeu dans cette affaire, c'est la liberté de navigation, en particulier celle des navires colombiens dont le Nicaragua s'évertue à contester la simple présence en mer. Or, les lignes de base droites nicaraguayennes procèdent de la même démarche en portant un coup supplémentaire à la liberté de navigation. Elles transforment en mer territoriale, sous le régime du passage inoffensif, de vastes espaces de zone économique exclusive où la liberté de navigation devrait prévaloir. Elles apparaissent en orange sur la carte projetée. Ces lignes de base transforment aussi en eaux intérieures des espaces de mer territoriale ou même de zone économique exclusive. On les voit en rouge vif sur la carte. Ces lignes projettent tout aussi mécaniquement la zone économique exclusive et le plateau continental du Nicaragua plus à l'est. C'est cela que le Nicaragua conteste.

3. Madame la présidente, après un débat assez tendu entre les Parties à propos de la recevabilité de cette demande reconventionnelle, la Cour s'est dite compétente pour en connaître à raison du lien

de connexité entre, d'une part, les demandes au principal du Nicaragua concernant le décret colombien établissant une zone contiguë, et, d'autre part, le décret nicaraguayen établissant des lignes de base. La Cour a souligné à cet égard : «à travers leurs demandes respectives, les Parties poursuivent le même but juridique puisque chacune espère voir la Cour déclarer le décret de l'autre contraire au droit international»[103].

4. La question posée à la Cour par la demande reconventionnelle de la Colombie est donc circonscrite. Elle est de savoir, et elle est uniquement de savoir, si le décret nicaraguayen n° 33-2013, par lequel cet Etat a fixé ses lignes de base droites en mer des Caraïbes, est contraire au droit international. Selon la Colombie, c'est le cas, et c'est ce que je vais démontrer.

5. Ce faisant, je ne discuterai pas de ce dont le Nicaragua voudrait faire le cœur du débat, et sur quoi j'imagine, hélas, que la Cour va devoir consacrer un temps d'écoute inutile, à savoir des actes de droit interne colombiens fixant ses propres lignes de base[104]. Il est évident que la demande reconventionnelle est limitée à la seule question de savoir si le décret nicaraguayen d'août 2013 est conforme ou non aux exigences du droit international.

6. Je ne discuterai pas davantage des prétentions nouvelles que le Nicaragua fait valoir quant à des points de base qu'il entendrait poser sur de prétendus hauts-fonds découvrants qui se situeraient à l'est des lignes de base droites établies par le décret contesté[105]. Cette question est hors sujet et hors de la juridiction de la Cour puisqu'elle est sans aucun lien avec le décret dont la contestation par la Colombie a été acceptée par la Cour comme recevable au titre de la demande reconventionnelle[106]. Au demeurant, rien ne soutient la thèse exposée dans la plaidoirie additionnelle du Nicaragua, selon laquelle cet Etat pourrait proclamer, comme point de départ de la mesure de l'étendue de ses zones maritimes en rapport avec une portion spécifique de sa côte, *à la fois* une ligne de base droite reliant deux points de base posés sur des îles, *et, en même temps,* des points de base prétendument posés sur des hauts-fonds découvrants se situant au large de cette ligne de base droite[107]. Le Nicaragua ne peut

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[103] *Violations alléguées de droits souverains et d'espaces maritimes dans la mer des Caraïbes (Nicaragua c. Colombie), demandes reconventionnelles, ordonnance du 15 novembre 2017, C.I.J. Recueil 2017*, p. 307, par. 53.

[104] RN, par. 7.19 et 7.53 ; pièce additionnelle du Nicaragua relative aux demandes reconventionnelles de la Colombie (ci-après «PAN»), par. 3.6 à 3.11.

[105] RN, par. 7.8 et 7.57 ; PAN, par. 3.15 à 3.26.

[106] DC, par. 6.10.

[107] PAN, notamment, par. 3.19 à 3.22.

pas avoir deux lignes de base *au même endroit* de sa côte, tout comme il ne peut pas avoir deux lignes de délinéation de sa mer territoriale, ou encore deux lignes de délinéation de sa zone économique exclusive.

7. En tout état de cause, la Colombie a présenté une demande reconventionnelle à propos du seul décret proclamant des lignes de base droites. J'en resterai donc, comme je le dois, à la question dont la Cour est saisie. Pour l'aborder il est opportun de commencer par rappeler le droit applicable, avant de constater que les lignes de base consignées dans le décret nicaraguayen n'y sont nullement conformes.

I. Droit applicable

8. Madame la présidente, c'est suffisamment rare pour être souligné : les Parties semblent en accord sur les règles de droit international coutumier qui président à la détermination des lignes de base[108]. La règle de principe pose que c'est la laisse de basse mer le long de la côte qui doit servir de fondement au tracé de la ligne de base. Mais le Nicaragua a préféré faire valoir l'exception à cette règle, bien qu'elle ne soit invocable qu'à propos des côtes dont les abords sont les plus tourmentés. Cette exception coutumière, dont l'existence a été relevée par la Cour internationale de Justice dans l'affaire des *Pêcheries anglo-norvégiennes* jugée en 1951[109], se reflète dans l'article 4 de la convention de Genève de 1958 sur la mer territoriale et la zone contiguë, dont le texte est reproduit presque mot à mot à l'article 7 de la convention des Nations Unies sur le droit de la mer. Selon ces textes :

> «[Dans les régions où la ligne côtière présente de profondes échancrures et indentations] (texte de 1958), [Là où la côte est profondément échancrée et découpée] (texte de 1982), ou s'il existe un chapelet d'îles le long de la côte, à proximité immédiate de celle-ci, la méthode des lignes de base droites reliant des points appropriés peut être employée pour tracer la ligne de base à partir de laquelle est mesurée la largeur de la mer territoriale (textes de 1958 et 1982).»

9. Il est donc constant que la possibilité de recourir à des lignes de base droites, évidemment plus avantageuses que des lignes de base normales pour l'Etat côtier, et plus désavantageuses pour tous les autres Etats, n'est reconnue par le droit international coutumier que dans des cas véritablement exceptionnels. Dans l'affaire *Qatar c. Bahreïn*, la Cour a constaté

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[108] CMC, par. 10.24 à 10.29 ; RN, par. 7.13.

[109] *Pêcheries (Royaume-Uni c. Norvège), arrêt, C.I.J. Recueil 1951*, p. 116.

> «que la méthode des lignes de base droites, qui déroge aux règles normales de détermination des lignes de base, ne peut être appliquée que si plusieurs conditions sont remplies. Cette méthode doit être appliquée de façon restrictive.»[110]

10. Il faut, je crois, conserver cette précision bien claire à l'esprit : la «méthode doit être appliquée de façon restrictive», seulement lorsque les conditions requises sont objectivement réunies. Mais même lorsque tel est le cas, les lignes de base droites que l'Etat côtier peut alors tirer doivent être conformes à certaines exigences. La règle coutumière à cet égard est codifiée par le texte du paragraphe 2 de la convention de 1958, repris à l'identique au paragraphe 3 de l'article 7 de la convention de 1982 :

> «Le tracé des lignes de base droites ne doit pas s'écarter sensiblement de la direction générale de la côte et les étendues de mer situées en deçà doivent être suffisamment liées au domaine terrestre pour être soumises au régime des eaux intérieures.»

II. Le décret du Nicaragua ne respecte pas les règles relatives au recours et au tracé des lignes de base droites

11. Madame la présidente, Mesdames et Messieurs les juges, la Colombie soutient que le décret nicaraguayen n'est pas conforme à ces règles. D'autres Etats partagent ce constat : le Costa Rica a élevé une protestation[111] ; et il en va de même des Etats-Unis qui contestent avec force arguments les «excessive straight baselines» du Nicaragua[112]. Vous trouverez le texte de ces protestations au dossier des juges, à l'onglet n° 49.

12. Comme je vais maintenant le montrer, ces protestations sont justifiées car, non seulement les conditions ne sont pas réunies pour que le Nicaragua soit autorisé à tracer des lignes de base droites, mais, au surplus, à supposer même que les conditions soient réunies — *quod non* —, les lignes droites revendiquées par le Nicaragua ne sont pas conformes aux règles se rapportant à leur tracé.

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[110] *Délimitation maritime et questions territoriales entre Qatar et Bahreïn (Qatar c. Bahreïn), fond, arrêt, C.I.J. Recueil 2001*, p. 103, par. 212.

[111] Nations Unies, lettre datée du 23 octobre 2013, adressée au Secrétaire général par le représentant permanent du Costa Rica auprès de l'Organisation des Nations Unies, Assemblée générale des Nations Unies, 25 octobre 2013, doc. A/68/548 (disponible à l'adresse suivante : documents-dds-ny.un.org/doc/UNDOC/GEN/N13/531/15/pdf/N1353115.pdf).

[112] U.S. diplomatic note No. 070 of 6 March 2014, 2014 Digest chapter 12, pp. 542-543 (disponible à l'adresse suivante : 2009-2017.state.gov/documents/organization/244504.pdf) ; U.S. Department of Defense, *Freedom of Navigation Report for Fiscal Year 2014*, p. 2 (disponible à l'adresse suivante : policy.defense.gov/Portals/11/Documents/gsa/cwmd/20150323%202015%20DoD%20Annual%20FON%20Report.pdf) ; voir aussi le *Freedom of Navigation Report for Fiscal Year 2015*, p. 1 (disponible à l'adresse suivante : policy.defense.gov/Portals/11/Documents/gsa/cwmd/FON_Report_FY15.pdf).

A. Les conditions ne sont pas réunies pour que le Nicaragua puisse recourir à des lignes de base droites

1. La côte nicaraguayenne n'est pas «profondément échancrée et découpée»

13. Madame la présidente, Mesdames et Messieurs les juges, il vous suffira sans doute de jeter un regard à la configuration de la côte caraïbe du Nicaragua pour percevoir que les conditions ne sont manifestement pas réunies pour que des lignes de base droites soient tirées par le Nicaragua tout au long de sa côte. Permettez-moi tout de même, au risque d'enfoncer des portes ouvertes, d'en administrer la démonstration.

14. La première des deux situations géographiques dans lesquelles un Etat peut prétendre tracer des lignes de base droites est celle dans laquelle sa façade maritime présente une ligne de côte particulièrement tourmentée. La côte doit, selon l'exception coutumière codifiée aux articles 4 et 7 des conventions de 1958 et 1982, présenter de profondes échancrures et indentations, c'est-à-dire être profondément échancrée et découpée.

15. Le type de côte visé ici ressort de manière particulièrement frappante de la description faite de la côte norvégienne par la Cour dans l'affaire des *Pêcheries anglo-norvégiennes*. Cette côte est, selon la Cour :

> «[p]rofondément découpée sur tout son parcours, [et] ouvre à tout instant des échancrures qui pénètrent dans les terres, sur une distance souvent très considérable : le Porsangerfjord, par exemple, pénètre à l'intérieur du continent sur une longueur de 75 milles marins»[113].

Elle est encore, ajoute la Cour : «découpée en fjords larges et profonds»[114].

16. La formule des textes codificateurs que l'on trouve tant dans la convention de 1958 que dans celle de 1982 n'est donc pas une figure de style. Elle reflète correctement la règle coutumière selon laquelle, exception faite de la seconde hypothèse sur laquelle je reviendrai dans un instant, seule une côte profondément échancrée et découpée de tout aussi profondes indentations est susceptible de donner droit au tracé de lignes de base droites. Des échancrures, des concavités, des failles, ne sauraient suffire : les tourments de la côte doivent être *profonds*.

17. Il suffit de regarder la ligne de la côte caraïbe du Nicaragua — qui est maintenant projetée — pour percevoir qu'elle ne répond en rien à cette exigence. Elle n'est ni tourmentée, ni

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[113] *Pêcheries (Royaume-Uni c. Norvège), arrêt, C.I.J. Recueil 1951*, p. 127.

[114] *Ibid.*

profondément échancrée et découpée, et personne n'y verra de profondes indentations. Elle est tout au contraire remarquablement stable.

18. On voit, bien sûr, qu'elle change légèrement de parcours vers le sud, de Punta Perlas à Monkey Point puis jusqu'à la frontière avec le Costa Rica. Mais cette portion de côte n'est pas pour autant profondément échancrée et découpée. Ses légères concavités sont des figures géographiques dont la règle ne dit nullement qu'elles autorisent à recourir à la ligne de base droite sans lien avec la côte proclamée par le Nicaragua à cet endroit.

2. L'introuvable chapelet d'îles le long et à proximité immédiate de la côte

19. Passant à la seconde hypothèse, vous constaterez, Madame la présidente, Mesdames et Messieurs les juges, qu'il n'y a pas davantage de chapelets d'îles le long et à proximité immédiate de cette côte que de profonds tourments.

***a)* Le critère**

20. Les termes «chapelet d'îles le long de la côte, à proximité immédiate de celle-ci»[115] retranscrivent fidèlement la jurisprudence de la Cour dans l'affaire des *Pêcheries anglo-norvégiennes*[116]. A l'époque, selon la Cour, le critère à remplir pour pouvoir tirer des lignes de base droites entre des îles situées en face d'une côte était que cette côte soit «bordée par un archipel tel que le «skjærgaard»»[117]. En français, «skjærgaard» signifie «barrière», et, en anglais, «rock rampart». L'image est particulièrement juste puisque cette formation est constituée d'environ 120 000 éléments insulaires[118]. Ceci suggère que pour qu'il soit permis de déroger aux lignes de base normales, la configuration côtière et insulaire doit présenter un aspect exceptionnel[119], laissant apparaître une sorte de barrière d'îles difficilement franchissable entre la côte et le large.

21. La règle coutumière codifiée depuis lors se formule très légèrement différemment, sans plus de référence à la notion d'archipel, laquelle pourrait peut-être donner lieu à controverses, mais

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[115] Convention des Nations Unies sur le droit de la mer, art. 7, par. 1.

[116] *Pêcheries (Royaume-Uni c. Norvège), arrêt, C.I.J. Recueil 1951*, p. 116.

[117] *Ibid.*, p. 129.

[118] C. Lathrop, «Baselines», *in* Donald R. Rothwell, Alex G. Oude Elferink, Karen N. Scott, Tim Stephens, *The Oxford Handbook of the Law of the Sea*, Oxford, 2015, p. 85.

[119] *Ibid.*, p. 86.

l'esprit reste le même. De par le nombre, la forme et la disposition des îles en question, la formation insulaire qui en résulte doit en effet ressembler, ou à tout le moins, inspirer la comparaison avec un *chapelet*, c'est-à-dire, pour prendre une image comparable, avec un «collier» d'îles tenant fermement ces dernières dans un alignement relativement cohérent.

22. Ce chapelet d'îles doit, selon l'exception coutumière, être disposé «le long de la côte, à proximité immédiate de celle-ci»[120]. *A contrario*, les chapelets d'îles qui ne sont pas «le long de la côte», c'est-à-dire ceux qui lui sont plutôt perpendiculaires ou, autrement dit, qui s'éloignent de la côte, sont sans pertinence et ne sauraient justifier d'exception.

23. Sont également dénués d'effet les chapelets d'îles qui ne sont pas «à proximité immédiate» de la côte. Du reste, les dernières îles d'un chapelet d'îles perpendiculaire à la côte perdent progressivement tout rapport de proximité immédiate avec cette dernière, ce qui confirme qu'elles ne sauraient satisfaire le critère permettant de tirer des lignes de base droites.

24. Le Bureau du droit de la mer et des affaires maritimes de l'Organisation des Nations Unies a fort utilement décliné cette règle à des cas concrets dans son étude de 1989 sur les lignes de base, et son travail sur ce point précis est tout à fait remarquable. Il avait conclu à l'existence de deux types pertinents de chapelets d'îles permettant de déroger à la règle relative à la ligne de base «normale».

25. Le premier cas se présente :

> «lorsque les îles semblent constituer un tout avec la terre ferme. Ces îles paraissent imbriquées dans la côte et, sur les cartes à petite échelle, sont représentées comme un prolongement de la terre ferme.»[121]

26. Alternativement, le second cas est observé lorsqu'existe :

> «une formation d'îles-barrières située à quelque distance de la côte et masquant une grande partie du littoral depuis la mer. … La côte peut aussi être masquée par une multitude d'îlots qui, du seul fait de leur nombre, pourraient être comparées à un chapelet.»[122]

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[120] Convention des Nations Unies sur le droit de la mer, art. 7, par. 1.

[121] Bureau des affaires maritimes et du droit de la mer, *Lignes de base : examen des dispositions relatives aux lignes de base dans la Convention des Nations Unies sur le droit de la mer*, New York, 1989, p. 41, par. 44 (disponible à l'adresse suivante : www.un.org/Depts/los/doalos_publications/publicationstexts/f_88v5_baselines_highres.pdf) ; voir aussi Virginia Commentary, p. 100, cité in CMC, par. 10.36.

[122] *Ibid.*, p. 23, par. 45.

b) **Les prétendues îles nicaraguayennes**

27. Madame la présidente, Mesdames et Messieurs les juges, ceci posé, j'en viens au cas d'espèce.

28. Le Nicaragua prétend que le nombre d'îles se trouvant au large de ses côtes est très élevé puisqu'il s'établirait à pas moins de 95[123]. Ces dernières îles se trouveraient entre la côte et les îles principales à partir desquelles ses lignes de base droites sont tracées[124]. C'est cet ensemble d'îles qui, selon le Nicaragua, formerait un chapelet d'îles le long et à proximité immédiate de sa côte.

29. Cette thèse est sans fondement, pour trois raisons déterminantes.

30. *En premier lieu*, le Nicaragua n'apporte aucunement la preuve des faits qu'il allègue. Il se borne à donner une liste de ses prétendues îles en annexe 31 à sa réplique. Or, l'existence de ces prétendues îles doit se prouver, une liste de noms n'étant manifestement pas une preuve[125].

31. D'autant moins que la simple lecture de cette liste soulève des doutes. Ainsi, «Pigeon Cay», «White Rock», «Guano Cay», «Frenchman's Cay» et «Sister Cays» y apparaissent chacune deux fois, et sont donc comptabilisées deux fois.

32. Le doute s'épaissit davantage, pour dire le moins, lorsque l'on regarde d'un peu plus près ce qu'il en est de la première des îles revendiquées par le Nicaragua pour poser ses points de base, à savoir Edinburgh Cay. Cette prétendue île est d'une particulière importance puisque, comme on le sait, le décret contesté trace 8 segments de lignes de base droite à partir d'une série de 9 points de base, Edinburgh Cay étant le deuxième d'entre eux. Ceci est représenté sur la carte en haut à gauche de votre écran, qui est un extrait de l'annexe 2 au décret contesté.

33. L'ennui est qu'Edinburgh Cay n'est pas une île, selon les cartes marines à grande échelle qu'utilise le Nicaragua, comme la carte «NGA Nautical Chart 28130, Cabo Gracias a dios to Puerto Isabel», produite en annexe 5 à sa plaidoirie additionnelle. En effet, comme vous pouvez le constater en regardant l'extrait présenté en bas à gauche de l'écran, que l'on ne peut comprendre qu'à la lumière de la légende de la carte que nous avons reproduite à droite de l'écran[126], Edinburgh Cay n'a

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[123] RN, par. 7.20.

[124] PAN, par. 3.33.

[125] DC, par. 6.29.

[126] «U.S. Chart No. 1 – Symbols, Abbreviations and Terms used on Paper and Electronic Navigational Charts», NGA, 13th ed., 15 avril 2019 (accessible à l'adresse suivante : msi.nga.mil/Publications/Chart1).

rien que l'on puisse légalement qualifier d'île. Pourtant, le Nicaragua prétend y poser un point de base.

34. Le Nicaragua n'a donc aucunement prouvé la géographie marine dont il se prévaut.

35. *En deuxième lieu*, il est manifestement inexact que les 95 prétendues îles forment *un* chapelet d'îles «le long de la côte, à proximité immédiate» de cette dernière, de la frontière avec le Honduras jusqu'à hauteur de Monkey Point.

36. En effet, même en admettant, pour les besoins de la discussion, que les 95 prétendues îles existent, elles seraient localisées dans *trois* zones géographiques distinctes[127], indépendantes et éloignées les unes des autres ; la disposition des îles et îlots au sein de ces zones serait en outre largement orientée perpendiculairement à la côte, en direction du large. Au demeurant, il suffit de regarder la carte pour voir que ces îles ne produisent aucun effet masquant. A supposer même que leur existence soit prouvée, elles ne donneraient donc pas à voir un chapelet d'îles situées le long et à proximité immédiate de la côte du Nicaragua en mer des Caraïbes[128].

37. C'est dire que là où le critère pour tracer des lignes de base droites requiert que la côte concernée soit «masquée par une multitude d'îlots qui, du seul fait de leur nombre, pourraient être comparées à un chapelet»[129] d'îles, le Nicaragua ne présente que quelques îles, rochers et hauts-fonds découvrants concentrés dans trois zones géographiques distinctes et éloignées les unes des autres.

38. Le Nicaragua défend sa thèse en faisant valoir la pratique norvégienne qui montrerait que relier des groupes d'îles séparées de dizaines de milles marins ne serait pas incompatible avec l'existence d'*un* chapelet d'îles le long de la côte[130].

39. Mais, outre que la pratique norvégienne à laquelle le Nicaragua se réfère n'est pas constitutive de la règle de droit, il est clair que la côte norvégienne en cause est radicalement différente de celle qui nous occupe. Là encore, il suffit de la regarder pour voir qu'elle illustre parfaitement la première hypothèse dans laquelle un chapelet d'îles est susceptible d'autoriser le recours à des lignes de base droites, celle dans laquelle les îles :

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[127] RN, fig. 7.5.

[128] CMC, par. 10.39 à 10.43 ; DC, par. 6.32 à 6.41.

[129] Bureau des affaires maritimes et du droit de la mer, Lignes de base : examen des dispositions relatives aux lignes de base dans la Convention des Nations Unies sur le droit de la mer, New York, 1989, p. 23, par. 45 (disponible à l'adresse suivante : www.un.org/Depts/los/doalos_publications/publicationstexts/f_88v5_baselines_highres.pdf).

[130] PAN, fig. 8.

> «semblent constituer un tout avec la terre ferme. Ces îles paraissent imbriquées dans la côte et, sur les cartes à petite échelle, sont représentées comme un prolongement de la terre ferme.»[131]

40. Comme on le voit sur cette carte à petite échelle, la configuration de la côte norvégienne donne l'impression que les îles sont tellement imbriquées avec la côte qu'elles forment une baie que la ligne de base droite viendrait fermer. Ici, les eaux intérieures se situant entre la côte et la ligne apparaissent nettement comme *«inter fauces terrarum»*, selon le critère posé par la Cour dans son arrêt de 1951 dans l'affaire des *Pêcheries*[132], c'est-à-dire «entre les mâchoires de la côte», ou, en anglais, «in the jaws of the land»[133].

41. On ne peut certainement pas en dire autant des îles nicaraguayennes, lesquelles ne semblent nullement former un tout avec la terre, et ne sont d'ailleurs jamais représentées comme un prolongement de la terre ferme. Il n'y a ici rien qui ressemble, même de loin, à des «mâchoires» de la côte, entre lesquelles les eaux revendiquées par le Nicaragua comme intérieures seraient enferrées.

42. *En troisième et dernier lieu*, si les îles nicaraguayennes ne forment pas *un* chapelet d'îles, puisqu'elles forment à l'évidence trois groupes distincts, elles ne forment pas davantage *trois* chapelets d'îles, qui, chacun, s'étendrait le long des portions de la côte au large desquelles elles sont situées, justifiant des lignes de base droites à ces endroits.

43. En effet, leur orientation générale n'est pas parallèle à la côte, mais lui est perpendiculaire[134]. Elles sont positionnées non pas comme le serait un chapelet étendu parallèlement à la côte, mais, pour prendre là encore une image, comme le seraient des osselets jetés au large par un enfant positionné sur la côte[135]. C'est pourquoi leur effet masquant est pratiquement insignifiant puisque, par hypothèse même, l'effet masquant de dix petites îles perpendiculaires à la côte n'a aucun effet cumulatif de ce point de vue.

44. C'est d'ailleurs l'un des éléments, l'un des éléments *seulement* car il y en a bien d'autres, qui distingue la configuration en discussion ici de celle qui était examinée dans l'affaire

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[131] Bureau des affaires maritimes et du droit de la mer, Lignes de base : examen des dispositions relatives aux lignes de base dans la Convention des Nations Unies sur le droit de la mer, New York, 1989, p. 22, par. 44.

[132] *Pêcheries (Royaume-Uni c. Norvège), arrêt, C.I.J. Recueil 1951*, p. 130.

[133] Coalter G. Lathrop, «Baselines», *in* Donald R. Rothwell, Alex G. Oude Elferink, Karen N. Scott, Tim Stephens, *The Oxford Handbook of the Law of the Sea*, Oxford, 2015, p. 80.

[134] CMC, par. 10.42.

[135] Allant apparemment dans le même sens, voir PAN, par. 3.39.

Erithrée/Yemen. Dans cette affaire, les îles discutées par le tribunal, notamment Tiqfash, Kutama et Uqban, se situent dans le prolongement de la presqu'île de Ras Isa, selon une projection presque parallèle à la côte. Le tribunal y a spontanément vu un «intricate system of islands, islets and reefs which guard this part of the coast»[136], c'est-à-dire une formation correspondant non pas à une, mais aux deux hypothèses formulées par le Bureau du droit de la mer que j'ai évoquées tout à l'heure. Et pour cause : non seulement ces îles yéménites paraissent en effet «imbriquées dans la côte», parce qu'avec la grande île de Kamaran, elles se situent dans le prolongement exact de la presqu'île de Ras Isa, le long de la côte, et donnent l'impression de prolonger cette presqu'île, mais encore, parce qu'elles ont un effet très masquant à raison de leur nombre et de leur disposition le long de la côte et non pas vers le large.

45. La côte nicaraguayenne et ses îles ne présentent *aucune* ressemblance avec ce cas.

46. Il faut ajouter que la disposition des îles vers le large interdit au Nicaragua de prétendre que ses îles les plus éloignées, jusqu'à 24 milles marins de la côte, sont à «proximité immédiate» de la côte[137].

47. La Cour notera, bien sûr, que les Parties ont déjà fait valoir leurs vues sur la question de savoir si plus de 20 milles marins des côtes est**,** ou non**,** une distance incompatible avec l'idée d'une «proximité immédiate». La Colombie admet que la règle de la proximité immédiate n'est pas mathématique. Elle a cependant un sens. Elle traduit l'exigence que le chapelet d'îles le long de la côte forme une certaine unité avec cette dernière, même si ce chapelet ne s'y imbrique pas mais au contraire s'en détache. Or, plus une île est éloignée de la côte, moins il est possible de prétendre qu'elle forme une unité avec cette dernière. En l'espèce, on ne perçoit *aucune* unité géographique entre la côte et les îles nicaraguayennes par lesquelles passent les lignes de base contestées.

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[136] *Sovereignty and Maritime Delimitation in the Red Sea (Eritrea/Yemen)*, PCA Case No. 1996-04, Award of the Arbitral Tribunal in the Second Stage - Maritime Delimitation, 17 décembre 1999, par. 151, p. 45.

[137] CMC, par. 10.42.

B. Les lignes de base droites tirées par le Nicaragua ne sont pas conformes aux exigences du droit international

48. Madame la présidente, Mesdames et Messieurs de la Cour, à supposer, contrairement à ce que je viens de démontrer, que les conditions géographiques soient réunies pour que le tracé de lignes de base droites soit possible, ces dernières doivent assurer deux résultats :

— d'une part, le tracé des lignes de base droites ne doit pas s'écarter sensiblement de la direction générale de la côte[138] ;

— d'autre part, les étendues de mer situées en deçà doivent être suffisamment liées au domaine terrestre pour être soumises au régime des eaux intérieures[139].

49. Le système de lignes de base du Nicaragua échoue sur ces deux aspects, que j'aborderai tour à tour.

1. Les ruptures avec la direction générale de la côte

50. L'exigence que les lignes de base droites suivent la direction générale de la côte correspond au principe selon lequel le recours à de telles lignes doit demeurer exceptionnel et ne viser qu'à simplifier le tracé des lignes de base[140]. Il n'autorise pas l'Etat côtier à tracer n'importe quelle ligne, qui serait trop éloignée de ce qu'est la ligne de base «normale», laquelle suit les méandres de la côte.

51. En l'espèce, les lignes tracées par le Nicaragua ne sauraient être considérées comme suivant la direction de la côte, laquelle est simplement ignorée à au moins trois endroits.

52. Entre Cape Gracias a Dios et Edinburgh Cay — Edinburgh Cay dont j'ai indiqué tout à l'heure qu'elle n'est pas une île selon les cartes utilisées par le Nicaragua —, la prétendue ligne de base du Nicaragua, qui prend une direction est-sud-est sur environ 30 milles marins, fait un angle presque droit avec la ligne de la côte qui se dirige au sud-ouest. Non seulement cette ligne n'a-t-elle rien en partage avec la direction de la côte, mais elle démontre à elle seule que le système de lignes de base droites nicaraguayen est artificiel et non conforme aux prescriptions du droit international.

53. Entre Man of War Cay et Little Corn Island — c'est l'image au centre —, la ligne prend une direction sud-est alors que la côte suit une direction sud. Ceci conduit la prétendue ligne de base nicaraguayenne à s'éloigner de 17 milles marins supplémentaires de la côte, puisque Man of War

[138] CMC, par. 10.44.

[139] CMC, par. 10.46 et 10.47.

[140] CMC, par. 10.44.

Cay est à environ 12 milles marins de la côte, tandis que Little Corn Island se trouve à 30 milles marins de la côte.

54. Enfin, entre Great Corn Island et le point terminal du système de lignes de base droites du Nicaragua — il s'agit du point 9 tout au sud, l'image est celle de droite à l'écran —, la ligne n'a strictement rien à voir avec la direction de la côte.

55. C'est d'ailleurs ce que le Nicaragua semblait faire valoir dans le cadre de son différend avec le Costa Rica. A gauche, vous voyez la direction générale de la côte dans la partie sud, telle que montrée par le Nicaragua à la page 95 de son contre-mémoire du 8 décembre 2015 dans l'affaire de sa délimitation maritime avec le Costa Rica. A droite, vous voyez la ligne de base, qui *en principe* devrait être fidèle à la direction générale de la côte, mais qui ne l'est pas du tout. Le décalage est patent.

2. L'absence de lien avec le domaine terrestre pour justifier d'une soumission au régime des eaux intérieures

56. J'en viens au dernier test, celui du lien avec le domaine terrestre des eaux que le Nicaragua entend réclamer comme étant ses eaux intérieures.

57. Ce lien devrait en l'espèce être fermement établi, j'allais dire «sauter aux yeux», vu les étendues d'eau concernées. La Cour notera d'ailleurs que la surface de mer revendiquée par le Nicaragua au large de ses côtes continentales comme relevant de ses eaux intérieures, c'est-à-dire soumises à sa souveraineté au même titre que son territoire terrestre, représente environ 21 500 kilomètres carrés[141]. C'est l'équivalent de plus de deux fois le territoire de la Jamaïque, de la totalité du territoire terrestre d'El Salvador ou de Bélize, des deux-tiers de la surface du territoire de la Belgique, et de la moitié de la surface du pays où nous nous trouvons[142]. Dans un cas aussi extrême, les éléments attestant que les eaux revendiquées sont suffisamment liées au domaine terrestre pour être soumises au régime des eaux intérieures doivent être patents. Ils sont, en l'espèce, inexistants.

58. Sur le plan purement géographique, aucun lien particulier n'existe entre les eaux revendiquées comme intérieures et la configuration de la côte et des prétendues îles côtières. La surface insulaire présente dans ces eaux est quantité négligeable par rapport à la très grande surface

[141] CMC, par. 10.48.

[142] DC, par. 6.54.

desdites eaux. Ces prétendues îles n'enclavent nullement les eaux en cause de manière à en faire des eaux susceptibles d'être soumises au régime des eaux intérieures[143]. Elles ne forment aucune des «mâchoires» insulaires qui, ensemble avec la côte, enclaveraient ces eaux. Le très faible effet masquant des prétendues îles nicaraguayennes ne fait d'ailleurs que souligner que ces eaux sont bien davantage liées à la mer qu'à la terre. Quant aux lignes de base droites artificiellement tirées entre Mistikos Cay et Man of War Cay, et entre Corn Islands et le point 9, elles ne sauraient justifier, à elles seules, d'un lien entre les eaux qu'elles englobent et la côte.

59. Au demeurant, le Nicaragua n'avance aucun argument sérieux justifiant d'un quelconque lien entre les eaux revendiquées comme intérieures et son territoire. Il se borne à prétendre que 81 % de ces eaux relèverait de ce qui serait sa mer territoriale s'il traçait des lignes de base normales le long de sa côte[144]. La belle affaire ! Que l'on sache, cela ne justifie en rien de les réclamer comme *eaux intérieures*.

60. Le Nicaragua allègue que ces eaux ont été exploitées par les Nicaraguayens, qui les utilisent comme lieux de pêche et d'autres activités[145], ou encore qu'une zone biologique protégée a été établie au nord de la zone[146]. Mais il n'explique nullement en quoi ces pratiques pourraient justifier qu'il exerce une souveraineté pleine, entière et exclusive sur les vastes espaces maritimes qui s'étendent entre les lignes de base normales et les lignes de base droites qu'il revendique comme étant ses eaux intérieures.

61. Accessoirement, un regard sur la carte représentant la zone de la réserve biologique couvrant Miskitos Cay, d'une part, et la bande côtière adjacente, d'autre part, telle qu'elle figure sur le site Internet recensant les sites couverts par la convention Ramsar sur les zones humides, montre l'absence de lien entre les deux sites[147]. On le voit sur cette carte du site couvert par la convention Ramsar au niveau de Miskitos Cay : ledit site ne rencontre pas la côte. Il en reste détaché et ne forme nullement une unité avec elle.

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[143] CMC, par. 10.50.

[144] RN, par. 7.51.

[145] PAN, par. 3.60 à 3.63.

[146] PAN, par. 3.60.

[147] Disponible à l'adresse suivante : rsis.ramsar.org/RISapp/files/666/pictures/NI1135map2001.pdf.

62. Madame la présidente, Mesdames et Messieurs les juges, j'en viens à la conclusion, à vrai dire fort simple, de ma plaidoirie. Elle est que rien ne justifie que le Nicaragua soit autorisé à recourir à un système de lignes de base droites pour établir sa ligne de base dans la mer des Caraïbes, et qu'en tout état de cause les lignes qu'il établit sont dénuées de tout fondement en droit international. Le décret contesté est donc bien contraire au droit international.

Madame la présidente, Mesdames et Messieurs les juges, je vous remercie de votre patiente attention. J'ai le plaisir de vous rendre trois minutes sur l'horaire puisque ces mots concluent, du côté de la Partie colombienne, son premier tour de plaidoiries orales.

The PRESIDENT: I thank Professor Thouvenin, whose statement brings to an end this afternoon's sitting. Oral argument in the case will resume on Friday 24 September at ***3*** p.m., when Nicaragua will present its observations on the counter-claims of Colombia.

The sitting is adjourned.

The Court rose at 6 p.m.

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