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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2021

Public sitting

held on Friday 24 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 vendredi 24 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
		Robinson
		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
Robinson
Salam
Iwasawa
Nolte, juges
MM. Daudet
McRae, juges *ad hoc*

M. Gautier, greffier

The Government of Nicaragua is represented by:

H.E. Mr. Carlos José Argüello Gómez, Ambassador of the Republic of Nicaragua to the Kingdom of the Netherlands,

as Agent and Counsel;

Mr. Alex Oude Elferink, Director, Netherlands Institute for the Law of the Sea, Professor of International Law of the Sea at Utrecht University,

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

Mr. Lawrence H. Martin, Attorney at Law, Foley Hoag LLP, member of the Bars of the United States Supreme Court, the District of Columbia and the Commonwealth of Massachusetts,

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

Mr. Paul Reichler, Attorney at Law, Foley Hoag LLP, member of the Bars of the United States Supreme Court and the District of Columbia,

as Counsel and Advocates;

Ms Claudia Loza Obregon, Legal Adviser, Ministry of Foreign Affairs of Nicaragua,

Ms Tessa Barsac, Consultant in International Law, Master (University Paris Nanterre), LLM (Leiden University),

as Assistant Counsel;

Mr. Robin Cleverly, MA, DPhil, CGeol, FGS, Law of the Sea Consultant, Marbdy Consulting Ltd,

as Scientific and Technical Adviser;

Ms Sherly Noguera de Argüello, MBA,

as Administrator.

The Government of Colombia is represented by:

H.E. Mr. Carlos Gustavo Arrieta Padilla, former Judge of the Council of State of Colombia, former Attorney General of Colombia and former Ambassador of Colombia to the Netherlands,

as Agent;

H.E. Mr. Manuel José Cepeda Espinosa, former President of the Constitutional Court of Colombia, former Permanent Delegate of Colombia to UNESCO and former Ambassador of Colombia to the Swiss Confederation,

as Co-Agent;

Le Gouvernement du Nicaragua est représenté par :

S. Exc. M. Carlos José Argüello Gómez, ambassadeur de la République du Nicaragua auprès du Royaume des Pays-Bas,

comme agent et conseil ;

M. Alex Oude Elferink, directeur de l'Institut néerlandais du droit de la mer, professeur de droit international de la mer à l'Université d'Utrecht,

M. Vaughan Lowe, QC, professeur émérite de droit international public à l'Université d'Oxford, titulaire de la chaire Chichele, membre de l'Institut de droit international, membre du barreau d'Angleterre et du pays de Galles,

M. Lawrence H. Martin, avocat au cabinet Foley Hoag LLP, membre des barreaux de la Cour suprême des Etats-Unis d'Amérique, du district de Colombia et du Commonwealth du Massachusetts,

M. Alain Pellet, professeur émérite de l'Université Paris Nanterre, ancien président de la Commission du droit international, président de l'Institut de droit international,

M. Paul Reichler, avocat au cabinet Foley Hoag LLP, membre des barreaux de la Cour suprême des Etats-Unis d'Amérique et du district de Colombia,

comme conseils et avocats ;

Mme Claudia Loza Obregon, conseillère juridique auprès du ministère des affaires étrangères du Nicaragua,

Mme Tessa Barsac, consultante en droit international, master (Université Paris Nanterre), LLM (Université de Leyde),

comme conseils adjoints ;

M. Robin Cleverly, MA, DPhil, CGeol, FGS, consultant en droit de la mer, Marbdy Consulting Ltd,

comme conseiller scientifique et technique ;

Mme Sherly Noguera de Argüello, MBA,

comme administrateur.

Le Gouvernement de la Colombie est représenté par :

S. Exc. M. Carlos Gustavo Arrieta Padilla, ancien juge au conseil d'Etat colombien, ancien *Procurador General de la Nación* et ancien ambassadeur de Colombie aux Pays-Bas,

comme agent ;

S. Exc. M. Manuel José Cepeda Espinosa, ancien président de la Cour constitutionnelle de Colombie, ancien représentant permanent de la Colombie auprès de l'UNESCO et ancien ambassadeur de Colombie auprès de la Confédération suisse,

comme coagent ;

H.E. Ms Marta Lucía Ramírez Blanco, Vice-President and Minister for Foreign Affairs of the Republic of Colombia,

H.E. Mr. Everth Hawkins Sjogreen, Governor of San Andrés, Providencia and Santa Catalina, Colombia,

as National Authorities;

Mr. W. Michael Reisman, McDougal Professor of International Law at Yale University, member of the Institut de droit international,

Mr. Rodman R. Bundy, former *avocat à la Cour d'appel de Paris*, member of the Bar of the State of New York, partner at Squire Patton Boggs LLP, Singapore,

Sir Michael Wood, KCMG, member of the International Law Commission, member of the Bar of England and Wales,

Mr. Eduardo Valencia-Ospina, former Registrar and Deputy-Registrar of the International Court of Justice, member and former Special Rapporteur and Chair of the International Law Commission, former Chair of the Latin American Society of International Law,

Mr. Jean-Marc Thouvenin, Professor at the University Paris Nanterre, Secretary-General of the Hague Academy of International Law, associate member of the Institut de droit international, member of the Paris Bar, Sygna Partners,

Ms Laurence Boisson de Chazournes, Professor of International Law and International Organization at the University of Geneva, member of the Institut de droit international,

H.E. Mr. Kent Francis James, former Ambassador of Colombia to Belize, former Ambassador of Colombia to Jamaica,

as Counsel and Advocates;

Mr. Andrés Villegas Jaramillo, LLM, Co-ordinator, Group of Affairs before the International Court of Justice at the Ministry of Foreign Affairs of Colombia, member of the Legal Sub-Commission of the Caribbean Sea Commission, Association of Caribbean States,

Mr. Makane Moïse Mbengue, Professor at the University of Geneva, ~~***Head***~~ ***Director*** of the Department of Public International Law and International Organization, associate member of the Institut de droit international,

Mr. Luke Vidal, member of the Paris Bar, Sygna Partners,

Mr. Eran Sthoeger, ~~***LLM, New York University School of Law,***~~ ***Esq., member of the Bar of the State of New York, Adjunct Professor of International Law at Brooklyn Law School and Seton Hall Law School,***

Mr. Alvin Yap, Advocate and Solicitor of the Supreme Court of Singapore, Squire Patton Boggs LLP, Singapore,

Mr. Lorenzo Palestini, PhD, Lecturer at the Graduate Institute of International and Development Studies and at the University of Geneva,

as Counsel;

S. Exc. Mme Marta Lucía Ramírez Blanco, vice-présidente et ministre des affaires étrangères de la République de Colombie,

S. Exc. M. Everth Hawkins Sjogreen, gouverneur de San Andrés, Providencia et Santa Catalina, Colombie,

comme représentants de l'Etat ;

M. W. Michael Reisman, professeur de droit international à l'Université de Yale, titulaire de la chaire McDougal, membre de l'Institut de droit international,

M. Rodman R. Bundy, ancien avocat à la Cour d'appel de Paris, membre du barreau de l'Etat de New York, associé au cabinet Squire Patton Boggs LLP (Singapour),

Sir Michael Wood, KCMG, membre de la Commission du droit international, membre du barreau d'Angleterre et du pays de Galles,

M. Eduardo Valencia-Ospina, ancien greffier et greffier adjoint de la Cour internationale de Justice, membre et ancien rapporteur spécial et président de la Commission du droit international, ancien président de l'association latino-américaine de droit international,

M. Jean-Marc Thouvenin, professeur à l'Université Paris Nanterre, secrétaire général de l'Académie de droit international de La Haye, membre associé de l'Institut de droit international, membre du barreau de Paris, cabinet Sygna Partners,

Mme Laurence Boisson de Chazournes, professeure de droit international public et organisation internationale à l'Université de Genève, membre de l'Institut de droit international,

S. Exc. M. Kent Francis James, ancien ambassadeur de Colombie au Belize et ancien ambassadeur de Colombie en Jamaïque,

comme conseils et avocats ;

M. Andrés Villegas Jaramillo, LLM, coordonnateur du groupe chargé des affaires portées devant la Cour internationale de Justice au sein du ministère des affaires étrangères de la Colombie, membre de la sous-commission juridique relevant de la Commission de la mer des Caraïbes de l'Association des Etats de la Caraïbe,

M. Makane Moïse Mbengue, professeur à l'Université de Genève, ***~~chef~~ directeur*** du département de droit international public et organisation internationale, membre associé de l'Institut de droit international,

M. Luke Vidal, membre du barreau de Paris, cabinet Sygna Partners,

M. Eran Sthoeger, ***~~LLM, faculté de droit de l'Université de New York,~~ membre du barreau de l'Etat de New York, professeur adjoint de droit international à la Brooklyn Law School et à la faculté de droit de l'université de Seton Hall,***

M. Alvin Yap, avocat et *solicitor* à la Cour suprême de Singapour, cabinet Squire Patton Boggs LLP (Singapour),

M. Lorenzo Palestini, PhD, chargé d'enseignement à l'Institut de hautes études internationales et du développement et à l'Université de Genève,

comme conseils ;

H.E. Mr. Juan José Quintana Aranguren, Head of Multilateral Affairs, former Ambassador of Colombia to the Netherlands,

H.E. Mr. Fernando Antonio Grillo Rubiano, Ambassador of the Republic of Colombia to the Kingdom of the Netherlands and Permanent Representative of Colombia to the Organisation for the Prohibition of Chemical Weapons,

Ms Jenny Sharyne Bowie Wilches, Second Secretary, Embassy of Colombia in the Netherlands,

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

Mr. Sebastián Correa Cruz, Third Secretary,

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

Ministry of Foreign Affairs of Colombia;

Rear Admiral Ernesto Segovia Forero, Chief of Naval Operations,

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

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

Navy of the Republic of Colombia;

Mr. Scott Edmonds, Cartographer, Director of International Mapping,

Ms Victoria Taylor, Cartographer, International Mapping,

as Technical Advisers;

Mr. Gershon Hasin, LLM, JSD, Yale Law School,

as Legal Assistant;

Mr. Mark Taylor Archbold, Consultant for the National Unit of Disaster Risk Management,

Mr. Joseph Richard Jessie Martinez, Consultant for the National Unit of Disaster Risk Management,

as Advisers.

S. Exc. M. Juan José Quintana Aranguren, chef des affaires multilatérales, ancien ambassadeur de Colombie aux Pays-Bas,

S. Exc. M. Fernando Antonio Grillo Rubiano, ambassadeur de la République de Colombie auprès du Royaume des Pays-Bas et représentant permanent de la Colombie auprès de l'Organisation pour l'interdiction des armes chimiques,

Mme Jenny Sharyne Bowie Wilches, deuxième secrétaire, ambassade de Colombie aux Pays-Bas,

Mme Viviana Andrea Medina Cruz, deuxième secrétaire, ambassade de Colombie aux Pays-Bas,

M. Sebastián Correa Cruz, troisième secrétaire,

M. Raúl Alfonso Simancas Gómez, troisième secrétaire, groupe chargé des affaires portées devant la Cour internationale de Justice,

ministère des affaires étrangères de la République de Colombie ;

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

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

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

marine de la République de Colombie ;

M. Scott Edmonds, cartographe, directeur de International Mapping,

Mme Victoria Taylor, cartographe, International Mapping,

comme conseillers techniques ;

M. Gershon Hasin, LLM, JSD, faculté de droit de l'Université de Yale,

comme assistant juridique ;

M. Mark Taylor Archbold, consultant auprès de l'unité nationale de gestion des risques de catastrophe,

M. Joseph Richard Jessie Martinez, consultant auprès de l'unité nationale de gestion des risques de catastrophe,

comme conseillers.

The PRESIDENT: Please be seated. The sitting is open. The Court meets this afternoon to hear the observations of Nicaragua on the counter-claims of Colombia.

I shall now give the floor to the Agent of Nicaragua, His Excellency Mr. Carlos José Argüello Gómez. You have the floor, Your Excellency.

Mr. ARGÜELLO GÓMEZ:

1. Madam President, Members of the Court, good afternoon. Today we will address the two counter-claims filed by Colombia that were admitted by the Court.

2. The first counter-claim requests the Court to declare that Nicaragua has infringed the customary artisanal fishing rights of the local inhabitants of the San Andrés Archipelago, including the indigenous Raizal people, to access and exploit their traditional fishing grounds[1].

3. Colombia has presented to the Court the three classic types of argument identified by Aristotle: the logical appeal *(logos)*, the ethical appeal *(ethos)* and the emotional appeal *(pathos)*.

4. As a starting-point, it must be clear that the only valid argument before this Court is the logical appeal, that is the legal argument, and on that count there are absolutely no legal rights, residual or otherwise, of the Raizal population of the small islands of San Andrés, Providencia and Santa Catalina to any purported fishing in the Nicaraguan EEZ. With respect to the purported infringement of these rights of the local inhabitants, it must be said at the outset that Colombia has failed to offer any credible evidence that Nicaragua has interfered with any fishing by these people, whether or not they have any rights in Nicaragua's EEZ, which Nicaragua denies. This argument or pleading by Colombia will be addressed by Mr. Lawrence Martin. I will say a few words on the other two arguments, or rather appeals.

5. Mr. Valencia explained that his pleading was also addressed to "the inhabitants of the San Andrés Archipelago and, in particular, the Raizales, who are listening very closely in their native Caribbean islands"[2]. So in a certain sense, my words must take that into consideration.

6. Hence, to begin, let me make it clear that I am not underestimating the arguments basically developed by Mr. James and Mr. Valencia but as I will briefly indicate below, if the Raizal

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[1] See CMC, Chap. 9, and RC, Chap. 5.

[2] CR 2021/15, pp. 36-37, para. 1 (Valencia-Ospina).

population is suffering any problems, it is *not* due to Nicaragua or to the Court's Judgment of 2012, but to the Colombian governments.

The Court's 2012 Judgment

7. I will begin with the 2012 Judgment.

8. In this Judgment, the Court attributed sovereignty over all the islands and keys in dispute to Colombia as well as very substantial maritime areas around these small features[3]. The total land area of the islands and keys is approximately 45 sq km with a population today of approximately 80,000, including a minority of Raizales[4]. The land area of the Caribbean coast of Nicaragua, which is about one third of the total land area of the country, is around 45,000 sq km and has a population of approximately 1 million[5].

9. Thus the relevant Nicaraguan continental land area was more than a thousand times larger than all the islands put together, and the population was more than twenty times more extensive. As you can appreciate in the image on the screen**.** ***N***otwithstanding this, Colombia (that is the islands) was awarded approximately 24 per cent of the maritime area that was to be divided. When Nicaragua was presenting its pleadings on delimitation in the 2012 case, it could not present arguments based on this disparity because the jurisprudence of the Court is constant that the land mass or the population is not taken into consideration in a delimitation[6].

10. So, on the basis of the Judgment, the islands and their population came out extremely well. Much better than the Caribbean people of Nicaragua. If the decision had been based on strict equity, *lato sensu*, the Colombian islands would have been attributed at most a territorial sea, and the small rocks or keys a very small token area.

11. Madam President, Mr. James made a very emotional plea based on the situation of his people, the Raizales, that according to a census is presently less than half of the population of the

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[3] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, pp. 718-720.

[4] Secretaría de Planeación Departamental, Gobernación del Archipiélago, "Ficha Técnica de Indicadores Económicos y de Desarrollo", Aug. 2020, p. 9, available at https://www.sanandres.gov.co/index.php/gestion/planeacion/publicaciones/13057-ficha-tecnica-de-indicadores-san-andres-providencia-y-santa-catalina/file (accessed 24 Sept. 2021).

[5] Demographic Data, Pro Nicaragua, available at https://pronicaragua.gob.ni/es/descubre-caribe/ (accessed 24 Sept. 2021).

[6] See for example *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 41, para. 50; *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway), Judgment, I.C.J. Reports 1993*, p. 74, para. 80.

islands. The Government of the Archipelago itself published a census in August 2020 and the Raizal population is a total of 26,076 with 23,396 living in the islands[7].

12. But, as indicated before, it must be pointed out that the problems of the Raizales did not begin with the Court or with Nicaragua. These problems began in the 1950s when the Government of Colombia declared San Andrés a free port and started promoting tourism. There was a massive influx of people from the mainland that sidelined the Raizales. The Raizales have a name for what happened, they call it the "colombianization" of the islands. The newcomers took over the most lucrative businesses and the Raizales were marginalized[8].

13. The Judgment of the Court did not make matters worse. It simply served as an excuse to point the finger away from the Colombian Government for the problems of the Raizal population. The main detrimental impact of the Judgment is supposedly the loss of fishing areas. Let us look briefly on this issue.

Alleged artisanal fishing rights

14. Firstly, the claim is that these fishing areas that have been presumably curtailed by the Judgment are identified as ancestral fishing grounds. Let us go back a bit in history.

15. According to the historical data the population of San Andres in 1843 was 1,285 inhabitants, out of which 56.8 per cent were farmers, 31.8 per cent did domestic work, and the rest were fishermen or other related activities[9].

16. This means that circa 1850, about 11 per cent of the population of 1,285 persons were fishermen; that is, about 130 persons if we include women, children and the elderly. Is it conceivable that these people needed to fish outside the territorial waters of the islands? And by territorial waters I refer to the 3-nautical-mile limit usually accepted in the 19th century. Is it conceivable that this

[7] Secretaría de Planeación Departamental, Gobernación del Archipiélago, "Ficha Técnica de Indicadores Económicos y de Desarrollo", Aug. 2020, p. 9, available at https://www.sanandres.gov.co/index.php/gestion/planeacion/publicaciones/13057-ficha-tecnica-de-indicadores-san-andres-providencia-y-santa-catalina/file (accessed 24 Sept. 2021).

[8] See for example Natalia Guevara, "San Andrés Isla, Memorias de la colombianización y Reparaciones", available at https://repositorio.unal.edu.co/bitstream/handle/unal/2862/09CAPI08.pdf?sequence=23&isAllowed=y#:~:text=En%20los%20a%C3%B1os%20veinte%20se,hablo%20espa%C3%B1ol%2C%20yo%20soy%20colombiano%E2%80%A6 (accessed 24 Sept. 2021).

[9] Adolfo Meisel, *La estructura económica de San Andrés y Providencia en 1846* (2009), p. 5, available at https://repositorio.banrep.gov.co/bitstream/handle/20.500.12134/454/?sequence=1 (accessed 24 Sept. 2021).

small group of people had needed and established fishing rights in an area the size of the Adriatic Sea?

17. In 1925, the population had increased to approximately 5,000 inhabitants[10]. Even with this increase in population, most of them were farmers dedicated to the copra industry and not fishermen. But even if they had all been fishermen, did they need and use the equivalent — and again, I repeat: did they need and use the equivalent extent of the Adriatic Sea to fish?

Present day fishing

18. Madam President, the artisanal fishermen of the islands even today do not go much beyond the area of the main islands. According to a publication of the Colombian Institute of Marine and Coastal Investigations in 2011, most of the artisanal fisheries

> "were concentrated in the areas contiguous to the islands of Providencia and San Andrés and the Cays of Albuquerque and Bolívar. The Cays of Roncador, the Serrana Banks and Quitasueño presented a low frequency of fishing by unit of area, which indicates that artisanal fishing is not frequent in those areas due to their distance from Providencia and San Andres."[11]

19. In Colombia, a government program was set up to support the artisanal fishermen of the islands supposedly to help them out after the Judgment of the Court. According to the published report of 8 April 2013, a total of 275 people were registered and paid[12].

20. In the Caribbean coast of Nicaragua there are hundreds of thousands of people, Afro-descendants like the Raizales, quite a few of them Creoles and even with close family ties with the Creoles or Raizales, living in the islands; there are also the numerous descendants of the different Aborigines in the Mosquito Coast that lived there centuries before the Afro-descendants arrived in

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[10] See for example "Los Raizales del Archipiélago de San Andrés, Providencia y Santa Catalina", available at https://thearchipielagopress.co/los-raizales-del-archipielago-de-san-andres-providencia-y-santa-catalina/ (accessed 24 Sept. 2021)

[11] INVEMAR-ANH, 2011, "Estudio Línea base ambiental y pesquera en la Reserva de Biosfera Seaflower (Archipiélago de San Andrés, Providencia y Santa Catalina) como aporte al conocimiento y aprovechamiento sostenible de los recursos para la región — Fase I", Informe técnico final, Santa Marta, p. 4, available at http://cinto.invemar.org.co/alfresco/d/d/workspace/SpacesStore/06068ed3-6a62-4939-8119-86364328efa6/Estudio%20linea%20base%20ambiental%20y%20pesquera%20en%20la%20reserva%20de%20biosfera%20seaflower%20(Archipielago%20de%20San%20Andres,%20Providencia%20y%20Santa%20Catalina)%20como%20aporte%20al%20conocimiento%20y%20aprovechamiento%20sostenible%20de%20los%20recursos%20para%20la%20region%20-%20FASE%20I?ticket=TICKET_00ba8ac51399410cd995d2e5731889fb33f6721c (accessed 24 Sept. 2021).

[12] See Comité de apoyo, acompañamiento y seguimiento al componente pesquero artesanal del plan archipiélago de San Andrés, Providencia y Santa Catalina, Beneficiarios Aprobados-Listado Definitivo para avalar el segundo pago del subsidio, 8 Apr. 2013, available at https://www.sanandres.gov.co/index.php/170-agricultura/pescadores-artesanales/1183-listado-pescadores-artesanales-subsidio-tercer-pago (accessed 15 Sept. 2021).

the area. All of these Nicaraguan people have depended on fishing for their subsistence: the Afro-descendants including the Creoles or Afro-Europeans, the Miskitos (which is the largest component of the population), the Sumu (Amerindian), Garifuna (Afro-Indians), the Rama (Amerindian), and some Chinese.

Nicaraguan artisanal fishing

21. The Nicaraguan Government is very aware of the ancestral rights of its indigenous and ethnic communities. There is a Nicaraguan law on the Communal Property of the Indigenous People and Ethnical Communities of the Atlantic Coast dating from 2003, that mandates, in Article 33, the following:

> "The indigenous and ethnic communities of the coast, islands and cays of the Atlantic, have exclusive rights to use the maritime resources for communal and artisanal fishing, within the 3 miles adjacent to the coast and 25 miles around the adjacent cays and islands."[13]

22. In parenthesis, Madam President, it could be pointed out that one of the reasons Nicaragua declared straight baselines — the legality of which is also the basis of a counter-claim of Colombia — is because it considered it appropriate in view of the rights of the population to fish and exploit those areas within 25 nautical miles of the adjacent islands and keys. End of parenthesis.

23. In order to regulate the exercise of these rights of artisanal fishing, the Institute of Fisheries of Nicaragua keeps a registry of the artisanal fishermen in the country. On the Caribbean side of Nicaragua, according to the publication of 2018, there are 8,907 artisanal fishermen registered[14]. It is well to recall that the number of registered Colombian artisanal fishermen in the islands was 275 in the year 2013.

President Ortega's statements

24. President Ortega made several statements shortly after the 2012 Judgment about the possibility and even desirability of negotiating a fishing agreement for the benefit of the Raizal

[13] Communal Property Regime Law of Indigenous Peoples and Ethnic Communities of the Autonomous Regions of the Atlantic Coast of Nicaragua and the Rivers Bocay, Coco, Indio and Maiz, Law 445, 2003, available at https://www.poderjudicial.gob.ni/pjupload/costacaribe/pdf/Ley_445.pdf (accessed 24 Sept. 2021).

[14] *Fishery and Aquaculture Yearbook of Nicaragua*, Nicaraguan Institute of Fisheries, 2018, p. 83, available at http://www.inpesca.gob.ni/images/Anuarios%20Pesqueros/Anuario%20Pesquero%20y%20Acuicola%202018.pdf (accessed 24 Sept. 2021).

community. This offer to negotiate was never accepted by Colombia. From the quote of President Ortega, cited by Mr. Valencia, it should be clear that his emphasis is on an agreement.

> "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?"[15]

25. Finally, it should be noted that if there are any people that could point to ancestral fishing rights in all this area, including the islands and the mainland coast, it is the Miskitos, whose presence in the area goes back much further in time than that of the Raizales in the islands.

Colombia's second counter-claim: straight baselines

26. Madam President, the second counter-claim requests the Court to declare that Nicaragua, by adopting Decree No. 33-2013 of 19 August 2013, which established straight baselines and, according to Colombia, had the effect of extending its internal waters and maritime zones beyond what international law permits, has violated Colombia's sovereign rights and jurisdiction[16]. Professor Alex Oude Elferink will address this issue fully. At this point, some short comments.

27. To begin, there is some apparent misconception that the question of Nicaragua's straight baselines is in some way related to the issue of Colombia's creation of a so-called Integral Contiguous Zone (ICZ). There is no connection. Nicaragua's straight baselines are located inside indisputable Nicaraguan waters. Colombia's ICZ is located in Nicaragua's EEZ. The only comparison of Nicaragua's straight baselines could be with the straight baseline system that Colombia has along its coasts and which will be discussed later, in spite of Professor Thouvenin's averment that we should not do so[17].

28. Colombia's rights of innocent passage through the waters enclosed by the straight baselines has not been and cannot be affected. The right of innocent passage is guaranteed in Article 8 of UNCLOS, that states:

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[15] CR 2021/15, p. 40, para. 11 (Valencia-Ospina).

[16] See CMC, Chap. 10; RC, Chap. 6.

[17] CR 2021/15, p. 51, para. 5 (Thouvenin).

> "Where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage as provided in this Convention shall exist in those waters."

29. Indeed customary law cannot be less accommodating for third countries' rights. This right is accorded to vessels of ***all*** states, including non-parties to the Convention.

30. There have been no incidents in that area with Colombia or any other State. It has in no way affected Colombia's rights or is the issue really connected in any way with the present case. If there was a connection, we would also be discussing Colombia's straight baselines and the impact that has had or could have for Nicaragua.

31. Professor Thouvenin has pointed out that the area enclosed by these straight lines is comparable to the size of Belgium and of some other countries[18]. As a legal argument, that is not relevant per se because that depends on the size and configuration of the coastline. UNCLOS, as well as customary law, permits the drawing of straight baselines in the same way it permits archipelagic lines that frequently enclose enormous spaces around a group of small islands.

32. The figure on the screen, helps us to discuss what could be of interest in the allusion made by Professor Thouvenin: the straight baselines used by Colombia — and we refer just to those on its Caribbean coast — enclose areas as large as 21,670 sq km, bigger than El Salvador and more than half the size of The Netherlands[19], as you can appreciate on the screen.

33. Perhaps the most insidious claim of Colombia is that the straight baseline system extended the Nicaraguan EEZ. Any expert on the law of the sea would immediately see through this. It is not a theoretical question but a physical geometrical issue. Straight baselines, almost invariably, do not affect the extent of the EEZ. This could only be affected by the base points used to draw those lines. The base points used by Nicaragua are unimpeachable.

34. Professor Thouvenin attempted to dispute one of the base points, Edinburgh Cay. Professor Oude Elferink will address this but let me point out that a base point on this key was used in the *Nicaragua* v. *Honduras* delimitation and for the drawing of the provisional equidistance line

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[18] CR 2021/15, p. 62, para. 57 (Thouvenin).

[19] Areas taken from worldometers.info (accessed 24 Sept. 2021).

in *Nicaragua* v. *Colombia* by the Court. Even more to the point, it was used by Colombia itself as a base point in its Counter-Memorial in the maritime dispute with Nicaragua[20].

35. Professor Thouvenin also stated that these lines project Nicaragua's exclusive economic zone and continental shelf further east, and that this is what Colombia disputes[21]. But he volunteered no argument on this question besides that simple statement.

36. On the screen are some graphics that show the effect of the baselines on the outer limit of the EEZ.

37. On the slide in the image right now, it shows that 200-nautical-mile limit drawn from the Nicaraguan straight baselines. The next image now on the screen compares the limits measured from the straight and from the normal baselines, and we can see that the normal baseline limit actually extends further east than the limit drawn from the straight baselines.

38. Now, the graphic on screen is taken from the Colombian Counter-Memorial in the *Territorial and Maritime Dispute* and shows the base points used by Colombia to draw its median line between the San Andrés Archipelago and Nicaragua.

39. Now, in this last map, Colombia's base points have been used to draw the 200-nautical-mile limit which is the red line on the screen. The blue line now on screen is the 200-nautical-mile limit drawn from the straight baselines. The two lines are very close; if anything, the line resulting from Colombia's base points lies further to the east.

40. In conclusion, Madam President, the straight baselines of Nicaragua have no practical effect on the outer limit of its EEZ as Colombia claims.

41. Madam President, Members of the Court, thank you for your attention. May I ask you to call Mr. Lawrence Martin, please.

The PRESIDENT: I thank the Agent of Nicaragua. I now invite the next speaker, Mr. Lawrence Martin, to take the floor.

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[20] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, Counter-Memorial of the Republic of Colombia (11 Nov. 2008), p. 393, Figure 9.2.

[21] CR 2021/15, p. 50, para. 2 (Thouvenin).

Mr. MARTIN:

THE RAIZALES DO NOT HAVE TRADITIONAL FISHING RIGHTS IN NICARAGUA'S EEZ AND EVEN IF THEY DID, THEY HAVE NOT BEEN VIOLATED

1. Madam President, distinguished Members of the Court, good afternoon. Like friends before me, let me first note my deep sadness at Judge Crawford's passing. He was a kind teacher, a wise judge, and sometimes an intimidating adversary. Like all of us, I will miss that mischievous twinkle in his eye very much.

2. It falls to me today to respond to Colombia's counter-claim relating to the alleged traditional fishing rights of the Raizales. This counter-claim fails on the facts and the law. The rights Colombia alleges do not exist and even if they did, Nicaragua has not violated them.

3. I will address four points this afternoon. *First*, the traditional fishing rights Colombia claims are fundamentally incompatible with the régime of the exclusive economic zone. Even if, decades ago, the Raizales "traditionally" fished in what is now Nicaragua's EEZ — which has not been shown — the advent of the EEZ gave Nicaragua exclusive rights to the exploitation of the living resources in that zone.

4. *Second*, contrary to what you heard from Colombia on Wednesday, President Ortega never recognized the existence of any such rights. What he did was indicate a willingness to accommodate Colombia's concerns, and the Raizales themselves provided appropriate mechanisms could be worked out between the Parties.

5. *Third*, the evidence Colombia has presented to support this counter-claim, even taken at face value, does not support the existence of the rights it claims.

6. *Fourth*, and finally, even if the Raizales had the rights Colombia asserts — but they do not — the evidence does not support the allegation that Nicaragua violated them.

I. Traditional fishing rights are incompatible with the régime of the EEZ

7. I turn to my first point: traditional fishing rights are inconsistent with the institution of the EEZ. On Wednesday, you heard Mr. Valencia-Ospina say "[n]o doubt this Court will hear from

Nicaragua a plea in favour of exclusivity"[22]. Well, yes. And that really should not be controversial. A coastal State's rights to fish in its EEZ are "exclusive", exactly as the name of the zone indicates. Nobody else has any such rights. Before the EEZ became law, everyone and anyone could fish in the areas that were then high seas. After it became law, only the coastal State could fish in its own EEZ (unless it authorized others to do so).

8. A Chamber of this Court made exactly this point nearly 40 years ago in the *Gulf of Maine* case. I apologize for the length of this quotation, but it is all very much relevant. The Chamber held:

> "Until very recently . . . these expanses were part of the high seas and as such freely open to the fishermen not only of the United States and Canada but also of other countries, and they were indeed fished by very many nationals of the latter. . . . But after the coastal States had set up exclusive 200-mile fishery zones, the situation radically altered. *Third States* ***and their nationals*** *found themselves deprived of any right of access to the sea areas within those zones* and of any position of advantage they might have been able to achieve within them. As for the United States, any mere factual predominance which it had been able to secure in the area was transformed into a *situation* ***of legal monopoly*** to the extent that the localities in question became legally part of its own exclusive fishery zone."[23]

9. We first noted this aspect of the Chamber's Judgment in our May 2018 Reply[24]. Colombia conspicuously had nothing to say about it in its November 2018 Rejoinder. There is only a single citation to the *Gulf of Maine* case in the entire Rejoinder, and that is on an entirely different point[25]. Nor did we hear anything about it on Wednesday. We consider this silence telling. By itself, the Chamber's ruling is fatal to Colombia's case. In its EEZ, Nicaragua is in a "situation of legal monopoly" that deprives "[t]hird States *and their nationals* . . . of any right of access to the sea areas" within that zone.

10. Rather than come to terms with the clear consequences of the *Gulf of Maine* decision, Colombia, at least in its written pleadings, tried a couple of other tactics to avoid it. It argued first that, in effect, that which is not prohibited is permitted[26]. It also argued that there is nothing

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[22] CR 2021/15, p. 49, para. 39 (Valencia-Ospina).

[23] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984* (hereinafter "*Gulf of Maine*"), pp. 341-342, para. 235; emphases added.

[24] RN, para. 6.23.

[25] RC, para. 2.108, fn. 156.

[26] RC, para. 5.13.

incompatible between Nicaragua's exclusive *sovereign* rights and a finding that the Raizales *as individuals* have a traditional right to fish in Nicaragua's EEZ[27].

11. Both arguments are, in the first instance, defeated by the Chamber's plain holding in *Gulf of Maine*. Whereas Colombia said that which is not prohibited is permitted, the Chamber said that coastal States enjoy a "legal monopoly" over fishing in their EEZs. Whereas Colombia said there is nothing inconsistent between sovereign and individual fishing rights, the Chamber said that the institution of the EEZ deprives "third States *and their nationals*" of any right of access.

12. The result, moreover, is plainly the one dictated by the text of UNCLOS, as well as by its context and the *travaux*, all of which equally inform the content of customary international law. We made these points at length in our written pleadings[28] and I will only highlight the essential elements here, all the more because Mr. Valencia-Ospina did not bother to touch on *any of them* on Wednesday.

13. With respect to the text and context, Colombia said in its Rejoinder that "Nicaragua in the end mainly relies on one single paragraph of an UNCLOS provision [i.e. Article 62 (3)] to put forward its thesis that traditional fishing rights have been extinguished in the EEZ"[29]. That, of course, is incorrect. Article 56, which gives coastal States the exclusive "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources" of the zone[30], is the foundation of our case.

14. Article 62 (3) is important, but it is far from the only other provision on which we rely. The Court well knows that Article 62 (3) provides that when the coastal State does not have the capacity to harvest the resources up to the allowable limit (which *the coastal State* sets), one of the factors it should consider in giving access to other States is "the need to minimize economic dislocation in States whose nationals have habitually fished in the zone"[31]. This is the only provision in Part V dealing with the issue of other States' nationals who have traditionally fished in the zone. And it does not give or recognize any rights in respect of other States' nationals.

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[27] RC, para. 5.14.

[28] RN, paras. 6.7-6.21; APN, paras. 2.4-2.11.

[29] RC, para. 5.18.

[30] UNCLOS, Art. 56; see RN, paras. 6.8-6.9.

[31] UNCLOS, Art. 62 (3).

15. The provisions of Part IV dealing with archipelagic States provide a telling contrast. Article 51 (1) states that "an archipelagic State . . . shall recognize traditional fishing rights . . . in certain areas falling within archipelagic waters"[32]. This shows that when the drafters of the Convention wanted to protect traditional fishing rights, they knew how to do so. The absence of an analogous provision in Part V can only mean that traditional fishing rights do not exist in the EEZ.

16. Other provisions on which we rely include Article 58, Article 60, Article 61, Article 62 (4) and Article 73 (1), as made clear in our written pleadings[33].

17. All of these provisions and the rest of Part V make it indisputable that the very purpose of the régime of the EEZ, both conventional and customary, is to make a coastal State's rights over the living resources *exclusive*. According to the Virginia Commentary: "The importance of the concept of exclusivity is that the coastal State, *to the exclusion of other States and entities*, has sole jurisdiction as regards the resources of the zone, and has the right to exercise its discretion in respect of those resources."[34]

18. The *travaux* are to precisely the same effect 17. The *travaux* are to precisely the same effect. This too is another point on which Colombia maintains a very studied silence. Nicaragua showed in its written pleadings that during the UNCLOS negotiations, some States took the view that the Convention should protect their historic fishing practices in waters that were in the process of being transformed into EEZs. To cite just two examples:

— Japan and the Soviet Union took the view that coastal States should not have *exclusive* rights in the EEZ. They proposed instead that they should have only *preferential* rights, which would entitle them to an allocation of resources subject to "duly [taking] into account . . . the interests of traditionally established fisheries of other States"[35]; and

— Malta and Zaire proposed that historic fishing rights should be preserved in the EEZ[36].

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

[33] RN, paras. 6.10-6.12; APN, para. 2.6.

[34] Myron H. Nordquist, Satya N. Nandan & Shabtai Rosenne (eds.), *United Nations Convention on the Law of the Sea, 1982: A Commentary*, Vol. II (1993), p. 519; emphasis added.

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

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

19. In contrast, a larger number of States, particularly developing States, strenuously objected to the protection of other States' alleged historic fishing practices in the waters adjacent to their coasts[37]. The latter position received widespread support at the 1974 Caracas Session[38] and ultimately prevailed. The "Main Trends" working paper produced that year recognized that the coastal State would have exclusive sovereign rights and jurisdiction over the natural resources in the EEZ[39]. That principle was subsequently embodied in Article 56 of the Convention.

20. Colombia does not deny any of this. They said nothing about the *travaux* on this point in their written pleadings. We also heard nothing about it on Wednesday. Colombia, it seems, is well aware that this point too is fatal to its case.

21. Instead of grounding its analysis in the text, context and *travaux* of UNCLOS, Colombia points to irrelevancies. In its Rejoinder, it says: "If traditional rights can subsist within areas where States enjoy sovereignty, *a fortiori* they can also exist within areas in which States merely enjoy sovereign rights."[40] In Colombia's view, a contrary result would somehow be "disingenuous"[41]. Mr. Valencia-Ospina tried to raise a similar point when he put a quotation from the *Abyei* arbitration on the screen on Wednesday[42].

22. We do not agree. In the first place, the question of whether or not traditional fishing rights can exist in the territorial sea is not before the Court and need not be addressed. In the second place, and in any event, there would be nothing "disingenuous" about finding that such rights could exist in the territorial sea but not the EEZ.

23. To state the obvious, the territorial sea and the EEZ are different legal animals. The former has an ancient history and the applicable legal régime is a hybrid; it is governed by both UNCLOS

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[37] See e.g. Declaration of Latin American States on the Law of the Sea (8 Aug. 1970); Montevideo Declaration on the Law of the Sea (8 May 1970), in *American Journal of International Law (AJIL)*, Vol. 64, No. 5 (1970); Declaration of Santo Domingo, UN doc. A/AC.138/80 (7 June 1972).

[38] J. Stevenson and B. Oxman, "The Third United Nations Convention on the Law of the Sea: The 1974 Caracas Session", *AJIL*, Vol. 69, No. 1 (1975), p. 2.

[39] Third United Nations Conference on the Law of the Sea (UNCLOS III), "Working Paper of the Second Committee: Main Trends", UN doc. A/CONF.62/L.8/Rev. 1, Ann. II, App. I (1974), p. 120.

[40] RC, para. 5.15.

[41] RC, para. 5.3.

[42] CR 2021/15, pp. 44-45, para. 27 (Valencia-Ospina).

and general international law. Article 2 (3) of the Convention provides: "The sovereignty over the territorial sea is exercised subject to this Convention *and to other rules of international law*."

24. The legal régime of the EEZ is very different. It is a creation of UNCLOS and governed by the provisions of Part V of the Convention. There is no reason to think the customary régime is any different and Colombia has made no effort to demonstrate that it is. While Article 2 (3) makes room for "other rules of international law" to apply broadly in the territorial sea, the same is not true in the EEZ. Under Article 58 (2), "other pertinent rules of international law apply to the exclusive economic zone" only *"in so far as they are not incompatible with this Part"*. And since Part V of UNCLOS gives the coastal State *exclusive* rights to the fish and other living resources in its EEZ, any derogation from that exclusivity, unless explicitly included in Part V, would plainly be incompatible with that Part of the Convention.

25. At the end of the day, the only authority that Colombia can even try to point to, to support its position, is the *Eritrea-Yemen* arbitration[43]. As we made clear in our written pleadings, that case was very different from this one. It was unique in that the applicable law included more than just UNCLOS[44]. More important still, in that case, there was actually an express agreement between the parties to respect traditional fishing rights in the EEZ. Specifically, Eritrea and Yemen had concluded a Memorandum of Understanding (MOU) prior to the arbitration that stated in relevant part that they "shall permit fishermen who are citizens of the two States . . . to fish in the territorial waters of the two States, *the contiguous zone and the Exclusive Economic Zone* of the two countries in the Red Sea . . . provided that the fishermen of the two countries . . . be granted official licenses" upon application[45]. That case therefore cannot serve as any kind of precedent in this one.

II. President Ortega never recognized such rights

26. I turn now to the second of my four points. Colombia also argues that whatever the status of traditional fishing rights under customary international law, Nicaragua's President Ortega has

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[43] CR 2021/15, p. 49, para. 39 (Valencia-Ospina).

[44] RN, paras. 6.25-6.29; *Eritrea/Yemen*, Award of the Arbitral Tribunal in the First Stage —Territorial Sovereignty and Scope of the Dispute, 9 Oct. 1998, para. 7.

[45] Memorandum of Understanding between the State of Eritrea and the Republic of Yemen for Cooperation in the Areas of Maritime Fishing, Trade, Investment, and Transportation (15 Nov. 1994), para. 1; emphasis added, reproduced in *Eritrea/Yemen*, PCA Case No. 1996-04, Award of the Arbitral Tribunal in the Second Stage—Maritime Delimitation, 17 Dec. 1999, Ann. 3.

expressly recognized the existence of these alleged rights in five public statements made between 2012 and 2015.

27. Colombia is plainly conscious of the weakness of its case on this score. According to the Rejoinder: "Colombia's main argument is that traditional fishing rights are protected under international law regardless of the maritime area involved and irrespective of any form of recognition from coastal States."[46] Its argument about President Ortega's statements is, in other words, offered only by way of back-up, although Mr. Valencia-Ospina did seem to try and make it the centre of Colombia's case on Wednesday.

28. In any event, President Ortega's statements very obviously do not themselves constitute a concession of the rights Colombia alleges. To the contrary, read both on their face and in light of the context in which they were made, they are very obviously not the words of an international lawyer, but those of a Head of State trying to grapple, as diplomatically as possible, with the fallout from Colombia's furious rejection of the Court's 2012 Judgment.

29. Nicaragua's Agent, Mr. Reichler, both recalled on Monday that when the Court issued its unanimous decision on delimitation in November 2012, the response from Bogotá was less than welcoming. Rather than inflame this delicate situation, President Ortega sought to de-escalate it and nudge Colombia in the direction of respecting the Court's Judgment by indicating that there was room to accommodate Colombia's stated concerns.

30. Indeed, then President Santos expressly recognized this reality. Following a meeting with President Ortega in Mexico City in December 2012, he stated:

> "We will continue seeking for the rights of Colombians to be restored, that The Hague judgment seriously affected. We met with President Ortega. We explained our position very clearly: we want that the rights of Colombians and the Raizal population, not only in terms of artisanal fishermen rights but other rights, be guaranteed and restored. *He understood*. We told him that we need to handle this situation with [a] cold head, in a diplomatic and friendly fashion, as this kind of issues should be handled to avoid incidents. *He also understood. We agreed to establish communication channels to address all these points.*"[47]

31. President Ortega "understood" Colombia's concerns. That does not mean he "agreed" with them. According to President Santos himself, the only point on which the two Presidents "agreed"

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[46] RC, para. 5.26.

[47] CMC, Ann. 74; emphases added.

was that they would "establish communication channels to address all these points". This is an express acknowledgment that, rather than being agreed, Colombia's concerns about the Raizal fishermen remained to be addressed.

32. It should therefore not be surprising that President Ortega's public statements fall far short of the "explicit recognitions"[48] of the Raizales' alleged fishing rights in Nicaragua's EEZ that Colombia says they are. All of his statements expressly condition Nicaragua's willingness to accommodate Colombia's concerns on appropriate "authorization", or on "agreements" or "mechanisms" being worked out.

33. Specifically:

— In the 26 November 2012 statement in which President Ortega stated that Nicaragua would respect the rights of the inhabitants "to fish and navigate those waters, which they ha[d] historically navigated", he also indicated that "*artisanal fishermen would require an authorization from the relevant Nicaraguan authorities*"[49].

— In the 1 December 2012 statement in which he said that Nicaragua would "respect the ancestral rights of the Raizales", President Ortega noted that *"mechanisms"* would have to be established in order to "ensure the right of the Raizal people to fish"[50]. (I note that both of these statements were made before the meeting between the two Presidents, at which President Santos characterized President Ortega's position as "understanding" Colombia's concerns, not "agreeing" to them.)

— In his February 2013 statement, the first one after the bilateral meeting, President Ortega expressed openness to working with Colombia, and proposed a bilateral commission to "work on an agreement between Colombia and Nicaragua to regulate this situation"[51].

— In his November 2014 statement, President Ortega indicated that "while the 2012 delimitation will have to be implemented, guarantees to the Raizal communities of the Archipelago *will also have to be included in the agreement to be negotiated with Colombia*"[52]; and, finally,

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[48] CMC, para. 3.93.

[49] MN, Ann. 27, emphasis added; see CMC, paras. 3.93-3.94.

[50] CMC, Anns. 73, 74, emphasis added; see CMC, para. 3.94.

[51] CMC, Ann. 76, emphasis added; see CMC, para. 3.94.

[52] CMC, Ann. 77, emphasis added; see CMC, para. 3.94.

— in his November 2015 statement, President Ortega declared that Nicaragua "understand[s] that patience is necessary in order to finally reach the conditions for the Court's Judgment to be ratified by the Colombian Parliament. And there we have engagements, as I said, with the Raizales Brothers regarding their fishing rights, *which will have to be arranged later*."[53]

34. Now, here before the Court, Colombia seeks to avail itself of President Ortega's ostensible "recognition" of the Raizales' traditional fishing rights, but without also accepting the conditions he specified.

35. As Colombia sees it, by insisting that there are no rights without also appropriate mechanisms, we are "blur[ring] the distinction between recognition of the traditional fishing rights and the separate question of the conclusion of technical agreements to define their exact contours"[54]. We disagree. We are not blurring any distinction. Our point is that Nicaragua has been consistent in stating that it would be willing to formally recognize the Raizales' alleged historic fishing practices, but only as part of an agreement in which Colombia recognizes and accepts the boundary delimited by the Court in 2012. Indeed, the two issues cannot be separated. Any negotiation concerning Raizal fishing rights is necessarily dependent on Colombia's recognition of the boundary established by the Court.

III. Colombia has not proven the existence of the rights it claims

36. That brings me to the third part of my presentation, concerning the evidence Colombia offers to prove the existence of the alleged traditional fishing rights it claims. We say that evidence not only fails to demonstrate that the rights claimed ever existed: it actually proves they do not.

37. In its written pleadings, and again on Wednesday, Colombia claimed that the Raizales' alleged traditional fishing rights arose as a matter of local custom[55]. Colombia is therefore required to establish the existence of facts showing a "constant and uniform practice" by the Raizales that was "accepted as law by the Parties"[56]. Colombia has come nowhere close to meeting this burden.

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[53] CMC, Ann. 78, emphasis added; see CMC, para. 3.94.

[54] RC, para. 5.30.

[55] See CMC, p. 140 (Chap. 3, argument heading D(1)); CR 2021/15, p. 41, para. 15 (Valencia-Ospina).

[56] *Right of Passage over Indian Territory (Portugal* v. *India), Merits, Judgment, I.C.J Reports 1960*, p. 40; see also *Asylum (Colombia/Peru), Judgment, I.C.J Reports 1950*, p. 276.

38. One might ask in the first instance whether, even if it were shown that the Raizales has historically fished up to the 82nd meridian *(quod non)*, how it could possibly have been accepted as law by Nicaragua? At all times before, and still now after, the 2012 Judgment, Colombia has claimed that it alone has sovereign rights and jurisdiction up to that line. Nicaragua, for its part, has at all times disagreed. Indeed, the very purpose of the first case, as well as this one, is to challenge Colombia's right to exercise such rights. Nicaragua has therefore never accepted Colombian fishing up to the 82nd meridian as law.

39. In any event, Colombia relies exclusively on affidavits from 11 fishermen collected over a 13-day period, less than a month before it submitted its Counter-Memorial in November 2016. We first challenged the sufficiency of that evidence in our May 2018 Reply. Colombia thus had ample opportunity to supplement the record if it had anything else to offer. It did not. By itself, that conspicuous omission underscores the poverty of Colombia's case.

40. Before addressing the content of Colombia's affidavits, however, it may be more useful to start with Colombia's own words. In February 2013, a Colombian labour syndicate complained to the ILO Committee of Experts on the Application of Conventions and Recommendations — or CEACR — that the 2012 Judgment had negative implications for the Raizales' traditional fishing rights[57]. Colombia defended itself against the complaint by stating, in part, that the "traditional fishing sites are precisely located in the vicinity of areas *not affected by the ICJ judgment* since it is a question of territorial sea"[58].

41. This was not a mere slip of the tongue. After the labour syndicate restated its complaint to the Committee in 2014, Colombia reiterated the same point, stating:

> "With regard to the right of the inhabitants of San Andrés to have access to traditional fishing areas, . . . *such fishing areas are located precisely around the keys and that these areas were not affected by the ICJ ruling*, as they consisted of territorial

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

[58] ILO, CEARC, "Observation (CEACR), adopted 2013, published 103rd ILC session (2014)", Indigenous and Tribal Peoples Convention, 1989 (No. 169), Colombia (Ratification: 1991), available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:3141200.

> waters awarded to Colombia, together with the sovereignty of the islands and the seven keys."[59]

42. The Court does not need me to remind it of the evidentiary weight it has historically placed on statements against interests like these[60]. Nicaragua finds it particularly disingenuous for Colombia to take one position before the ILO but then take precisely the opposite position in these proceedings.

43. Colombia is very obviously embarrassed about this. In its Rejoinder, it tries to explain away its own admissions as "cavalier[] conclu[sions]"[61]. It says the office that made these statements, the Ministry of Labour's Office of Co-operation and International Relations, "failed to provide even a shred of evidence to support its assertion that the traditional fishing sites were precisely located in the vicinity of areas not affected by the decision"[62].

44. These statements are not so easily dismissed. They were made by an organ of the State, and thus attributable to Colombia itself. Moreover, these were not the only times that Colombia took this same position. It did so also before this Court in the earlier case between the Parties. Specifically, the portion of Colombia's 2008 Counter-Memorial in the *Territorial and Maritime Dispute* case discussing the issue of "access to resources" states that

> "it is important to point out that since mid-nineteen [sic] century the population of San Andrés and Providencia have relied for their subsistence on the fisheries, turtle hunting, guano exploitation and other food resources in *Roncador, Quitasueño, Serrana, Serranilla and Bajo Nuevo*"[63].

45. But, of course, none of Roncador, Quitasueño, Serrana, Serranilla or Bajo Nuevo is located in Nicaragua's EEZ.

46. In light of these multiple admissions, it is perhaps not surprising that Colombia's hurriedly gathered affidavits, even if they are credited, actually tend to disprove its case. Consistent with the position that Colombia took before the ILO Committee and before this Court in the previous case,

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[59] ILO, CEARC, "Observation (CEACR), adopted 2013, published 103rd ILC session (2014)", Indigenous and Tribal Peoples Convention, 1989 (No. 169), Colombia (Ratification: 1991), available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:3141200.

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

[61] RC, para. 5.55.

[62] RC, para. 5.56.

[63] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, Counter-Memorial of the Republic of Colombia (11 Nov. 2008), para. 9.78.

the affidavits show that the Raizales' principal fishing activities were near shore around the features over which Colombia has sovereignty.

47. On Wednesday, Mr. Valencia-Ospina said that "there can be no effective substitute for the careful examination of the" affidavits[64]. We cannot agree more. Nicaragua therefore invites the Court to read them carefully. Although some of the younger affiants do assert that they have more recently fished in what are now Nicaraguan waters, the clear story that emerges from their affidavits is that some Raizales started venturing further from shore only in recent years as a result of improving technology and the depletion of fish stocks in their traditional, near-shore fishing grounds[65]. That is, the areas *historically* fished are those close to shore, in the territorial seas of Colombia's insular features. There was no "constant and uniform practice" of the Raizales fishing in areas falling within Nicaragua's EEZ.

48. Given Colombia's assertion that the Raizales have been fishing in waters that the Court determined appertain to Nicaragua in 2012 since "time immemorial"[66], it is instructive to look at the affidavits of the two oldest fishermen: Mr. Jonathan Archibald Robinson, born in or around 1928[67], and Mr. Alfredo Rafael Howard Newball, born in or around 1930[68].

49. Mr. Robinson states:

> "I began to fish when I was 18 years old [that is, circa 1946] . . . My father was a fisherman. *I fished most of my life in Serrana, Roncador and Quitasueño*. I used to go in long fishing expeditions of even one month in these cays to lay traps for turtles, fishing and collecting seabirds' eggs. . . . In 1950 I arrived in Providencia again and I started to fish, *I raised eight children selling salted fish from Serrana, Roncador and Quitasueño*, up to this day."[69]

He also speaks of "fish[ing] around the island" of Providencia[70].

50. To be sure, Mr. Robinson does say: "I have fished in Nicaraguan waters; we fished in Quenna [that is, Quitasueño] and all that zone because in those days there were no limits."[71] But

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[64] CR 2021/15, p. 41, para. 14 (Valencia-Ospina).

[65] RN, paras. 6.55-6.57 (citing CMC, Anns. 62, 63, 67).

[66] CMC, para. 3.102.

[67] CMC, Ann. 66.

[68] CMC, Ann. 67.

[69] CMC, Ann. 66.

[70] *Ibid.*

[71] *Ibid.*

Quitasueño, of course, is a Colombian feature and the reference to "all that zone" is far too vague to be given any legal significance.

51. He also says: "I have fished between Serrana and Quitasueño, and between Quitasueño and Roncador, fishing in deep waters."[72] In the first instance, this is purely an individual statement: *he* has fished. He does not speak of these areas as being a common fishing area for others. Moreover, in contrast to the way he describes fishing around Serrana, Roncador and Quitasueño, he conspicuously does not say that he habitually fished in these areas, merely that he "has" done so.

52. Mr. Newball's affidavit is to similar effect. He states: "My grandfather taught me to be a sailor since I was 8 years old [that is, circa 1938] . . . In those old days, we would go to the North Cays [i.e. Quitasueño, Roncador, Serranilla and Serrana] to do artisanal fishing . . . The fishing more often took place in the banks where there were cays in order to be able to sleep [there] at night."[73] In other words, the fishing typically took place around the features over which Colombia has sovereignty, exactly as Colombia itself represented to the ILO Committee.

53. Interestingly, a bit further down in his affidavit, Mr. Newball states: "Fish are more scarce nowadays. Artisanal fishermen have to go farther more often to survive."[74]

54. The same themes emerge in the affidavit of Mr. Domingo Sánchez McNabb, who was born much later, in or around 1960[75]. He states: "I have personally had experiences fishing in the North Cays for up to 42 days without seeing dry land; we used to go up to Cabo Gracias a Dios in Honduras or to Bajo Nuevo *in search of new fishing banks*."[76] What is interesting is that when speaking about locations other than the "North Cays", it is for the purpose of finding "new" — not traditional — fishing banks.

55. Mr. McNabb then goes on to describe the changes that he has seen over time, first in the 1970s when outboard engines were introduced and then when they started using new kinds of boats called "Kingfivers". Even then, however, the focus was still very much on Colombia's cays. He describes the new Kingfivers as being

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[72] CMC, Ann. 66.

[73] CMC, Ann. 67.

[74] *Ibid.*

[75] CMC, Ann. 69.

[76] *Ibid.*

> "very fast and adapted for outboard engines. Besides, they had an autonomy of 4 to 5 days for travelling to the *South Cays (Bolívar and Alburquerque)* and the *North Cays (Quitasueño, Roncador, Serranilla and Serrana). Fishing in the North Cays* began by the artisanal fishermen living on the islands of Providencia. First, they used to go in search of sea turtles and eggs, and later they began to fish for conch, lobster and deep-sea fish of higher value in the islands markets."[77]

56. Things began to change, he says, when "[t]he demand for fishing products due to the increase in tourism, commerce and population growth led to fishing in the farther zones of the North of the Archipelago more often"[78]. These more recent, distant expeditions were greatly facilitated he said by the advent of radios, radars and GPS. According to Mr. McNabb: "These technological improvements greatly facilitated the fishing expeditions going farther, to the 82nd meridian and even close to cape Gracias a Dios."[79]

57. On Wednesday, Mr. Valencia-Ospina spent a great deal of time talking about Cape Bank and arguing that "[t]he artisanal fishermen have navigated and exploited every ground of Cape Bank". In its Rejoinder, Colombia pointed to six affidavits that expressly mention Cape Bank to support that proposition[80]. But a review of those six affidavits shows that, while they may "mention" Cape Bank, *none of them* actually state that Cape Bank is a traditional fishing ground, much less one of the most important ones[81]. We made this point at some length in our Additional Pleading on Colombia's Counter-Claims and rather than further burdening the Court now, I respectfully refer to the relevant paragraphs in footnote[82].

58. Colombia's contention that its fishermen have fished in Nicaragua's EEZ "since time immemorial" is thus unsupported by Colombia's own evidence, even taking it at face value. Even accepting that these facts have been established, *quod non*, such scant practice beyond the 12-nautical-mile limits of Colombia's insular possessions over just a few decades at most is not nearly enough to give rise to the traditional fishing rights that Colombia claims.

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[77] CMC, Ann. 69.

[78] *Ibid.*

[79] *Ibid.*

[80] RC, para. 5.42.

[81] See CMC, Anns. 62, 65, 68, 70, 71, 72.

[82] APN, paras. 2.51-2.57.

IV. Colombia has also not proven that Nicaragua violated those rights

59. Madam President, that brings me to the final part of my intervention this afternoon. Even if the Raizales had the rights that Colombia claims — which they do not — Colombia has not met its burden of proving that Nicaragua has done anything to violate them.

60. The evidence Colombia submits to prove its case consists of the same affidavits of the fishermen it used to try to prove the existence of the rights in the first place. Before discussing the content of those affidavits, it is useful to pause a moment to consider what Colombia has *not* submitted. There is not a single piece of contemporaneous evidence proving that Nicaragua ever interfered with the Raizales' alleged rights. No incident reports, no transcripts of any radio calls, nothing. Nor are there even any diplomatic Notes from Colombia to Nicaragua protesting the latter's supposed actions. Surely, if Nicaragua had conducted the campaign of "harassment"[83], "pillaging"[84] and "intimidation"[85] that Colombia alleges, someone in Bogotá would have spoken up. No one did.

61. Perhaps Colombia will say that we are being formalistic, that it is unreasonable to expect contemporaneous incident reports from or about artisanal fishermen operating in the middle of the Caribbean. To that potential objection, I would point out that, according to a publicly available book — published by the Central Bank of Colombia in 2016, the same year Colombia's affidavits were produced — artisanal fishermen are required to submit detailed paperwork to the Fish & Farm Coop:

> "The fishermen plan their fishing activity like this: they send a request to the cooperative with the budget . . . Once they return, they report to the port captaincy and the cooperative, where they take the product, value it, deduct expenses and collect surpluses."[86]

62. Inasmuch as fishermen are specifically required to report on their fishing trips when they return, including to the port captaincy, it is not at all unreasonable to expect contemporaneous reports of incidents if they actually occurred.

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[83] CMC, para. 9.7.

[84] CMC, para. 9.5.

[85] *Ibid.*

[86] María Aguilera Díaz, "Geografía económica del archipiélago de San Andrés, Providencia y Santa Catalina", in Adolfo Meisel Roca & María Aguilera Díaz (eds.), *Economía y medio ambiente del archipiélago de San Andrés, Providencia y Santa Catalina* (2016), pp. 101-102, available at https://repositorio.banrep.gov.co/bitstream/handle/20.500.12134/456/?sequence=1 (accessed 23 Sept. 2021; free translation).

63. Indeed, one of Colombia's affiants, Mr. Orlando Francis Powell, specifically states that incident reports, albeit of a different sort, exist. Specifically, he states: "There have been incidents with illegal fishermen from other countries, they have been reported to the local authorities (the Department's [provincial] Fishing Secretariat, Port Captaincy, Coast Guard), through the action of the co-operatives or associations."[87] The absence of similar reports relating to Nicaragua's alleged conduct is revealing.

64. In any event, turning to the content of the affidavits themselves, there is nothing that might genuinely be considered proof of the very serious allegations that Colombia makes. Of the 11 affidavits Colombia presented, nine refer in some way to the alleged bad behaviour on the part of Nicaragua[88]. And, of these, three mention only that they are "afraid" of potential interference from Nicaragua, without mentioning any specific conduct that is alleged to have taken place[89].

65. The specific references, with page numbers, are included in footnotes to this speech. Again, we invite the Court to examine each of these nine affidavits carefully. *Not a single one* describes incidents of harassment or pillaging that are alleged to have occurred to the affiant himself. They address things that are said to have happened to other people, sometimes in exceedingly general terms. They are, in other words, pure hearsay. Mr. Valencia-Ospina tried to dismiss this concern by stating that "second-hand accounts do constitute admissible evidence before the Court"[90]. That may technically be true, but the Court has previously made clear that such statements are not to be given "much weight"[91].

66. Take the allegation of Mr. Newball for example. He says only: "After the 2012 decision, we do hear — *we do hear* — that the fishermen have difficulties with the Nicaraguan coastguard. They stop them, they take away their products, their equipment and they threaten them and mistreat

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[87] CMC, Ann. 68.

[88] CMC, Ann. 62, pp. 374-375; Ann. 64, p. 386; Ann. 65, pp. 391-392; Ann. 67, p. 404; Ann. 68, p. 408; Ann. 69, p. 413; Ann. 70, p. 416; Ann. 71, pp. 420-421; Ann. 72, p. 426.

[89] CMC, Ann. 68, p. 408, Ann. 70, p. 416, Ann. 71, pp. 420-421.

[90] CR 2021/15, p. 47, para. 33 (Valencia-Ospina).

[91] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 78, para. 197.

them."[92] The affiant himself did not experience any such difficulties. No specific incidents involving others are identified, and no evidence of them is provided.

67. Or take the statement of Mr. Eduardo Steele Martínez, who says: "I do not go to the North Cays because I fear to fish in these areas. The fear relates to the fact that artisanal fishermen sometimes get stopped by the Nicaraguan coastguards that take their food when they try to reach Cape Bank or the North Cays."[93] Again, no personal experience, no specific incidents are identified, and no evidence about any of them is provided.

68. Tellingly, when there are references to incidents that are alleged to have happened to specific people, they are always in the third person[94]. For instance, Mr. Robinson states: "I know that Minival Ward, a member of the co-operative, was attacked by Nicaraguan fishermen when going to the North Cays."[95] Not only is this hearsay, it refers to alleged conduct by private Nicaraguan citizens, not Nicaraguan authorities. And there is no direct evidence from Mr. Ward himself.

69. Another example is Mr. Ornuldo Rodolfo Walters Dawkins, who says: "I know that apart from what we hear in the media, there is the one with [the] *Condorito*, who[se] [crew] were taken to Nicaragua and mistreated 5 years ago."[96] This one is not only hearsay, it concerns an event said to have happened in 2011, before the Court even issued its 2012 Judgment. No statement from any of those allegedly mistreated has been provided.

70. There is one affiant who alleges that he had direct interaction with what he believed to be the Nicaraguan coastguard. It is Mr. Ligorio Luis Archbold Howard, who describes the following "incident": "A few years ago, while I was navigating on a sailboat northwest of Quitasueño, towards Honduras, I was stopped by a fast *lancha* with people that were armed. They identified themselves as the coastguard of Nicaragua."[97] That is it. He was "stopped". He was not harassed, nothing was stolen; he does not say he was even prevented from fishing. This is not the stuff of which serious international cases are made.

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[92] CMC, Ann. 67.

[93] CMC, Ann. 70.

[94] CMC, Ann. 62, p. 374; Ann. 64, p. 386; Ann. 65, p. 391; Ann. 69, p. 413.

[95] CMC, Ann. 62.

[96] CMC, Ann. 64.

[97] CMC, Ann. 65.

71. For all these reasons, Madam President, Colombia's counter-claim relating to the alleged traditional fishing rights of the Raizales must be rejected. The rights not only do not exist; they have also not been violated.

72. Madam President, thank you for your customary courtesy and kind attention. May I ask that you invite Professor Oude Elferink to the podium?

The PRESIDENT: I thank Mr. Martin, and I shall now give the floor to Professor Alex Oude Elferink. You have the floor, Sir.

Mr. OUDE ELFERINK:

NICARAGUA'S BASELINES

A. Introduction

1. Madam President, Members of the Court, it is an honour to appear before you today, and a privilege to speak on behalf of the Republic of Nicaragua. I would like to associate myself with the remarks that have been made regarding the untimely passing of Judge Crawford. He will be sorely missed.

2. Madam President, today I will be addressing Colombia's counter-claim concerning Nicaragua's straight baselines, which issue was pleaded by Professor Thouvenin this Wednesday.

B. Colombia's graphics

3. Madam President, at the outset I would like to briefly discuss Professor Thouvenin's use of graphics. On screen, we have his Figure 1, which he showed at the very outset of his presentation, on the left[98]. We have replicated that figure on the right-hand side of the slide, which is at tab 13 of the judges' folder. As a preliminary point, it may be noted that Colombia's figure uses an incorrect location of Nicaragua's base point 9. Nicaragua adjusted that base point in 2018 to bring it in line with the Judgment of 2 February 2018 in the case between Nicaragua and Costa Rica concerning their land and maritime boundary[99]. The bright red colouring on Figure 1 no doubt was chosen to

[98] See CR 2021/15, p. 50, para. 2.

[99] Presidential Decree No. 17-2018, Decree of Reform to Decree No. 33 2013, "Baselines of the Maritime Spaces of the Republic of Nicaragua in the Caribbean Sea", Ann. I (reproduced in Ann. 2 to this pleading). The text of the decree is also available on the website of the Division for Oceans and the Law of the Sea of the United Nations' Secretariat (http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/NIC.htm) (accessed 21 Feb. 2019).

heighten its dramatic effects. Later in his presentation, Professor Thouvenin compared the extent of the waters enclosed by Nicaragua's straight baselines to the territory of Jamaica, El Salvador, Belgium and the Netherlands[100]. Now, what his figure did not show, and what his comparison ignored, is that most of the waters that are inside Nicaragua's straight baselines previously formed part of Nicaragua's territorial sea. You now see this illustrated in the figure on the right-hand side of the screen; it is the area that is now in white. This actually concerns 81 per cent of the maritime area inside Nicaragua's straight baselines. The remaining area is just over 3,800 sq km.

4. The extent of Nicaragua's territorial sea prior to the establishment of its straight baselines also puts the claim that Nicaragua is limiting the navigational rights of other States in a different perspective[101]. There are two points to be made in that respect. First, straight baselines may indeed change the navigational régime of sea areas. That is inherent to the régime of straight baselines. Second, the change is not near as dramatic as has been suggested. As the applicable law indicates, the right of innocent passage is maintained in the internal waters inside the straight baselines, to the extent they previously did not have that status[102]. That concerns all of the area that was coloured in red on Professor Thouvenin's Figure 1.

5. Let me point you to one other misleading figure that Professor Thouvenin used to build his argument. This is Figure 14 at tab 58 of Colombia's judges' folder. It shows Nicaragua's mainland and Miskito Cay. Professor Thouvenin used this figure to argue that there was no connection between the two[103]. Well, that first of all completely ignores that Miskito Cay is in the immediate vicinity of the mainland coast. They are less than 24 nautical miles apart. Even more importantly, this figure does not include any of the other cays and drying reefs that are situated in the Cayos Miskitos. We have added these to the figure. This figure is at tab 13 of today's judges' folder. As may be appreciated, this provides a completely different picture of the situation. There is an intricate system of islands and reefs in close proximity to the mainland.

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[100] CR 2021/15, p. 62, para. 57.

[101] See CR 2021/15, p. 50, para. 2.

[102] See UNCLOS, Art. 8.

[103] CR 2021/15, p. 63, para. 61.

6. Madam President, allow me to also mention a figure that Professor Thouvenin did not show you. He submitted that Nicaragua's straight baselines have pushed the outer limit of Nicaragua's exclusive economic zone to the east[104]. I am sure the Court would be interested in seeing that explained in a figure. Well, he did not do so. The reason is simple. It is not possible to produce such a figure. The establishment of Nicaragua's straight baselines, as was also pointed out by the Agent earlier today, has had no effect whatsoever on the 200-nautical-mile limit. For further details, I respectfully refer the Court to Nicaragua's written pleadings on this matter[105]. The absence of an effect of Nicaragua's straight baselines on its 200-nautical-mile line can be illustrated by a figure. The figure on screen, which is at tab 13 of your judges' folder, shows the 200-nautical-mile limit that would result from using the straight baselines as a blue dotted line and the 200-nautical-mile limit measured from the low-water line as a magenta line. At no point is the 200-nautical-mile limit that would be generated by the straight baselines seaward of the actual 200-nautical-mile limit that is generated by Nicaragua's normal baseline along the low-water line.

7. To conclude this argument on graphics, Colombia's graphics and related argument should be treated with much caution. I will be reverting to some of these graphics subsequently.

C. Nicaragua's combined use of the normal baseline and straight baselines is permitted

8. I do need to elaborate a little further on Professor Thouvenin's argument in relation to Nicaragua's 200-nautical-mile limit. He made two points. First, he submitted that the base points on Nicaragua's low-water line had nothing to do with Colombia's counter-claim on straight baselines and that as such they are beyond the jurisdiction of the Court. Columbia's counter-claim indeed did not impugn the validity of Nicaragua's baseline along its low-water line. But that is not the point. Colombia claims that Nicaragua's straight baselines pushed Nicaragua's 200-nautical-mile limit east[106]. To be able to assess that point, the Court has to take cognizance of all of Nicaragua's baselines, not only its straight baselines.

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[104] See CR 2021/15, p. 50, para. 2.

[105] See APN, paras. 3.15-3.26.

[106] See CR 2021/15, p. 50, para. 2.

9. Professor Thouvenin's second point to reject the use of the normal baseline in combination with straight baselines was that a State cannot use two types of baseline at the same time[107]. Although, Colombia's Co-Agent this Wednesday was adamant that "Colombia has been consistent in its approach, identifying rules of customary international law on the basis of State practice and *opinio juris*"[108]. Professor Thouvenin offered nothing to demonstrate the existence of an alleged rule of customary international law prohibiting the use of different baselines at the same time. To be frank, it is an absurd proposition. The normal baseline is the default rule, and nothing in Article 7 of the Convention indicates that a normal baseline cannot be located seaward of a straight baseline that is drawn landward of the feature on which that normal baseline is located.

D. Nicaragua's straight baselines

10. I now turn to the discussion of Nicaragua's straight baselines. I will first discuss the applicable law. Although Colombia and Nicaragua are in agreement that Article 7 of the United Nations Convention on the Law of the Sea reflects customary international law[109], they do not agree about the specific implications of its provisions. Next, I will be discussing the different elements of the law that are relevant for assessing the validity of Nicaragua's straight baselines. These elements in particular concern the following. First, the length of Nicaragua's straight baselines. Second, the complementary requirements of the presence of either a fringe of islands or a coast that is deeply indented or cut into[110]. Third, the requirement that the fringe of islands has to be in the immediate vicinity of the coast[111]. Fourth, the requirement that straight baselines must not depart to any appreciable extent from the general direction of the coast[112]. And, finally, the requirement that the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters[113].

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[107] CR 2021/15, p. 51, para. 6.

[108] CR 2021/14, p. 24, para. 7.

[109] See e.g. RC, para. 6.45; APN, para. 3.64.

[110] United Nations Convention on the Law of the Sea, Art. 7 (1).

[111] *Ibid.*

[112] *Ibid.*, Art. 7 (3).

[113] *Ibid.*

(a) **The applicable law and its interpretation**

11. I now turn to a brief discussion of the applicable law. Since the Parties are in agreement that the applicable law is provided by customary international law, which is identical to Article 7 of the Convention, it might seem that I could be very brief indeed. There is, however, one point that needs to be brought to the attention of the Court. Colombia during these pleadings at times suggests that Nicaragua is required to prove the existence of quite specific rules of international law, which go beyond the language of Article 7 of the Convention[114]. This raises a point of principle that merits emphasizing. The determination of a rule of customary international law that is more specific than Article 7 of the Convention requires the presence of *opinio juris* and a settled practice. It is upon Colombia to prove the existence of such a rule of customary law. As a Chamber of the Court observed in the *Gulf of Maine* case, the presence of customary rules "in the *opinio juris* of States can be tested by induction based on the analysis of a sufficiently extensive and convincing practice, and not by deduction from preconceived ideas"[115]. Colombia has not engaged in this kind of analysis of State practice. Its claims concerning rules of customary law that go beyond the language of Article 7 of the Convention are deduced from Colombia's idea of what the law should be, not what the law is.

12. In this connection, it is also pertinent to briefly refer to Colombia's own straight baseline practice. Nicaragua in its written pleadings has provided a detailed comparison of its straight baselines and those of Colombia[116]. In summary, from this comparison it may be concluded that Colombia's own practice on all counts reflects a more expansive interpretation of the law than Nicaragua's practice. This Wednesday, Colombia finally engaged with Nicaragua's argument. Or, I should rather say, desperately sought to avoid doing so. Professor Thouvenin submitted that an internal act of Colombia — he was referring to Colombia's straight baselines legislation — had nothing to do with Colombia's counter-claim concerning Nicaragua's straight baselines[117]. However, it has everything to do with this matter. One has to assume, Colombia being the law-abiding nation it claims to be, that Colombia's straight baselines have been established in accordance with the

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[114] See e.g. RC, para. 6.48.

[115] *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 299, para. 111.

[116] Reply of Nicaragua (RN), Chap. 7 *passim*, and APN, para. 3.9.

[117] CR 2021/15, p. 51, para. 5.

applicable rules of customary international law. Colombia's straight baselines thus illustrate how Colombia considers the law has to be interpreted and applied. Colombia cannot now adopt a different and self-serving standard to assess the legality of Nicaragua's straight baselines.

(b) The length of Nicaragua's straight baselines

13. I will now turn to a discussion of the different elements of Article 7 as they relate to Nicaragua's straight baselines along its Caribbean coast. Let me first briefly address the length of these straight baselines. The individual segments of Nicaragua's straight baseline system measure between 44 and 83 nautical miles. This makes these straight baselines unexceptional as regards their length in the light of State practice in the application of the straight baseline provisions of Article 7 of the Convention and customary international law. Colombia itself has established straight baselines along its mainland coast in the Caribbean Sea and the Pacific Ocean, which include baselines measuring respectively 130.5, 81.6 and 76.8 nautical miles in length[118].

(c) The presence of a fringe of islands

14. I now turn to the question of whether there is a fringe of islands along Nicaragua's coast that allows the drawing of straight baselines.

15. During these proceedings, Colombia has had difficulty in identifying the islands that are located along Nicaragua's coast[119]. This Wednesday, Professor Thouvenin again raised this point[120].

16. Let me start by showing you a figure. The figure that is now on screen is included in Nicaragua's Additional Pleading on Colombia's Counter-Claims[121]. It is taken from the Colombian Rejoinder in the *Territorial and Maritime Dispute*. As this figure from that prior case indicates, Colombia had no difficulty ***then*** in identifying the islands fringing Nicaragua's coast. It may, moreover, be observed that this figure clearly illustrates that all of Nicaragua's islands generate overlapping territorial sea entitlements, confirming their close proximity and interconnectedness with Nicaragua's mainland coast. That the islands are in the immediate vicinity of the mainland, as

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[118] Figures included in "Straight Baselines: Colombia", *Limits in the Seas*, No. 103, United States Department of State, Office of the Geographer, 30 Apr. 1985 (available at https://www.state.gov/documents/organization/58565.pdf), pp. 4-5 and 7.

[119] APN, paras. 3.31 *et seq*.

[120] CR 2021/15, para. 28 *et seq.*

[121] APN, Figure 5.

is required by Article 7, is confirmed by the baselines study of the United Nations Office for Ocean Affairs and the Law of the Sea, which observes that with a 12-nautical-mile territorial sea, a distance of 24 nautical miles would satisfy the conditions of "in the immediate vicinity". The study adds that "[i]t is important to realize that this concept applies to the inner edge of the fringe of islands because the fringe itself might be of considerable width"[122]. It may be noted that the outermost islands enclosed by Nicaragua's straight baselines are just over 24 nautical miles from Nicaragua's mainland.

17. Professor Thouvenin in his discussion on islands also questioned the status of Edinburgh Cay, which is one of the islands that has been used by Nicaragua as a base point for its system of straight baselines. He pointed to a nautical chart that indicated that Edinburgh Cay was not charted as an island[123]. However, charts of the United Kingdom Hydrographic Office (UKHO) that were part of Nicaragua's case files in *Territorial and Maritime Dispute between Nicaragua and Honduras* show that there are several islands on Edinburgh ~~***Cay or***~~ Reef[124]. You will find this figure at tab 14 of the judges' folder. In its Judgment in that case, the Court placed a base point for delimiting the territorial sea between Nicaragua and Honduras on Edinburgh Cay[125].

18. Professor Thouvenin also submitted that there were three separate groups of fringing islands along Nicaragua's mainland coast, implying that straight baselines may not be used to connect such allegedly separate groups. Before looking into that argument in more detail, let me remind you of Colombia's own practice on this point. As you may appreciate from the figure that is now on screen and at tab 14 of the judges' folder, in the Pacific, Colombia has drawn straight baselines to a fringe of islands consisting of just two islands. These islands are also more distant from the Colombian coast than many of the islands of Nicaragua that are inside Nicaragua's system of straight baselines.

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[122] United Nations, Office for Ocean Affairs and the Law of the Sea, *The Law of the Sea. Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea* ,1989, New York, para. 46.

[123] CR 2021/15, pp. 57-58, paras. 32-34.

[124] See *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras),* Vol. III.

[125] See *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007*, pp. 760-763, para. 321 (3).

19. Returning to Professor Thouvenin's argument on fringing islands, he relied on the study on baselines of the United Nations Office for Ocean Affairs and the Law of the Sea. The study refers to two types of fringing islands. First, he discussed the "skjærgaard" of the Norwegian coast, emphasizing that the "skjærgaard" forms a barrier. As he said, the "skjærgaard" forms "une sorte de barrière d'îles difficilement franchissable entre la côte et le large"[126].

20. In discussing the "skjærgaard" along Norway's coast, Professor Thouvenin used a figure of the Norwegian straight baselines in the Trondheim area. Now, if the "skjærgaard" is such a defining feature that acts as a barrier between the coast and the sea, one would expect that the straight baselines would conform to that barrier. Well, they do not. Please have a look at base point 50. If the Norwegian system of straight baselines had been intended to delineate the barrier that the "skjærgaard" constitutes, the straight baselines would have turned east to link to the islands forming the "skjærgaard" in that area, as identified by Colombia itself, and would have followed that barrier. This is illustrated by the red lines that have been added to the figure which is at tab 14 of the judges' folder. Well, the straight baseline does not turn east. It continues approximately in the same direction to link to base point 49. To give you some further perspective, which Professor Thouvenin did not, these two base points are around 46 nautical miles apart. And a large part of the straight baseline connecting these two points is located beyond the outer limit of the territorial sea, measured from the low-water line along the coast. This makes it completely untenable, especially if one were to adopt the restrictive view that Colombia has adopted for the purposes of these proceedings, to argue that base points 49 and 50 are located in the same group of fringing islands. The Norwegian approach indicates that the term fringe of islands does not have the restrictive scope that Colombia now seeks to attach to it. A fringe of islands may include separate groups of islands, as is the case for the islands along the coast of Norway and of Nicaragua.

21. Professor Thouvenin also referred to another type of fringing islands that are also discussed in the study on baselines of the United Nations Office for Ocean Affairs and the Law of the Sea[127]. The study observes that a fringe of islands may be constituted "by a swarm of small islands which

[126] CR 2021/15, p. 55, para. 20.

[127] CR 2021/15, p. 56, para. 56.

by their number justify consideration as a fringe"[128]. As an example, the study refers to the myriad islands of the Archipelago of the Recherche, off the western coast of Australia[129]. This example was not discussed this Wednesday, and it is instructive to have a closer look at it.

22. According to a number of sources, the myriad islands in the Archipelago of the Recherche number around one hundred[130]. As Nicaragua's Reply detailed, there are 95 islands off Nicaragua's Caribbean coast[131].

23. The baselines study of the United Nations Office for Ocean Affairs and the Law of the Sea observes that the mainland coast of Western Australia is "screened" by the islands of the Archipelago of the Recherche. The figure on screen, which is at tab 15 of the judges' folder, shows the straight baselines along the Archipelago of the Recherche. In particular, to the west of the town of Esperance, there is only a limited number of small islands, but they are all included in the Australian system of straight baselines. This example again belies the high threshold Colombia is now seeking to impose on Nicaragua in relation to the criterion of fringing islands.

(d) A deeply indented and cut-into coast

24. Madam President, I now turn to the discussion of the second condition that allows the drawing of straight baselines, namely a coast that is deeply indented and cut into. This condition is in particular relevant for the southern part of Nicaragua's mainland coast, between the Corn Islands and Nicaragua's land boundary with Costa Rica. Colombia, in its written pleadings and again this Wednesday, had no difficulty in submitting that this condition was not met by Nicaragua's coast[132].

25. While running the risk of seeming to be repetitive, it is pertinent to again draw the Court's attention to Colombia's own practice. A number of Colombia's straight baselines are drawn between points on the mainland coast of Colombia where there are no fringing islands. Colombia in those

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[128] United Nations, Office for Ocean Affairs and the Law of the Sea, *The Law of the Sea. Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea*, 1989, New York, para.45.

[129] *Ibid.*

[130] Rebecca Brewin, "A look around the Recherche Archipelago", ABC Local, available at (https://www.abc.net.au/local/photos/2015/01/23/4167422.htm (accessed 20 Aug. 2021); "Attraction Archipelago of the Recherche", available at https://www.westernaustralia.com/en/Attraction/Archipelago_of_the_Recherche/56b2669daeeeaaf773cf9316 (accessed 20 Aug. 2021).

[131] RN, Ann. 31.

[132] See also APN, para. 3.58.

instances must have relied on the assumption that its coast is deeply indented and cut into. One of these areas is now on screen. This concerns Colombia's Caribbean coast between base points 5 and 6. This part of the coast of Colombia actually is less indented and cut into than the coast of Nicaragua between Monkey Point and the terminus of the land boundary with Costa Rica, which you now have on screen, alongside Colombia's Caribbean coast. This figure is at tab 16 of the judges' folder.

(e) The general direction of the coast

26. Article 7 (3) of the Convention requires that "[t]he drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast". As the Judgment of the Court in the Anglo-Norwegian *Fisheries* indicates, the focus in this connection should be on the overall direction of the coast under consideration, not that of specific localities[133]. That leaves the question how to determine whether this requirement has been met.

27. The baselines study of the United Nations Office for Ocean Affairs and the Law of the Sea observes in this connection that a maximum departure of no more than 20 degrees has been suggested as a general rule[134]. The study qualifies this figure by observing that the geographical situation of a fringe of islands may be such that "the lines joining it to the coast must form an angle greater than 20 degrees"[135].

28. Nicaragua has prepared an assessment of its straight baselines in light of the criterion proposed by the baselines study of the United Nations Office for Ocean Affairs and the Law of the Sea. An illustration of this assessment is now on screen. As is also recognized by the study, determining the general direction of the coast is not without difficulty[136]. However, it is considered that a straight line between the termini of Nicaragua's land boundaries with Costa Rica and Honduras provides a reasonable representation of the general direction of that coast. That general direction results in an angle of between 1 and 22 degrees with the individual baseline segments of Nicaragua, which is in the range of the 20 degrees figure. The only exceptions are, first, the straight baseline

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[133] For a further discussion see RN, paras. 7.44-7.48.

[134] United Nations, Office for Ocean Affairs and the Law of the Sea, *The Law of the Sea. Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea* (1989), New York, para. 54.

[135] *Ibid*.

[136] *Ibid*., para. 55.

running from the southern bank of the boundary river with Honduras to the Miskito Cays and, second, the straight baseline between Man of War Cays and the Corn Islands. However, the Miskito Cays themselves constitute the relevant coast and the baseline closely follows the general direction of that coast. A relevant analogy is provided by Finland's Åland Islands. Finland's straight baselines are aligned with the general configuration of the Åland Islands, and not Finland's mainland coast[137]. In the case of the straight baseline between Man of War Cays and the Corn Islands, that line is drawn in such a way as to allow the inclusion of all islands fringing Nicaragua's mainland coast in its system of straight baselines.

29. In conclusion, none of Nicaragua's straight baselines depart to any appreciable extent from the general direction of the coast, meeting the requirement contained in this respect in Article 7 (3) of the Convention and customary international law.

30. This is also yet another instance in which Colombia's current parsimonious interpretation of the law is in stark contrast with its own straight baseline practice. This concerns the straight baseline between base points 6 and 7 on Colombia's Caribbean coast. The coast behind the straight baseline consists of two segments that are almost at a straight angle. The angles of these two segments with the straight baseline between point 6 and 7 are respectively 64 and 40 degrees. This figure is at tab 16 of the judges' folder.

31. Professor Thouvenin, this Wednesday, tried to graphically illustrate the divergence of Nicaragua's straight baselines from the general direction of the coast. Yet another example of the opportunistic use of graphics. He discussed three sections of Nicaragua's system of straight baselines[138]. As regards the first section he discussed, in the area of the Miskito Cays, I already explained some moments ago that one should not only look at the general direction of the mainland coast, but also the islands themselves, which Professor Thouvenin did not do. He also did not mention the angle that the third sector he discussed makes with the general direction of the coast. As I just mentioned it is 22 degrees, within the range of 20 degrees mentioned in the study on baselines of the United Nations Office for Ocean Affairs and the Law of the Sea.

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[137] See further RN, para. 7.40, and Figure 7.7.

[138] See CR 2021/15, pp. 61-62, paras. 51-55, and Colombia's judges' folder, 22 Sept. 2021, tab 56, Figure 9, and tab 57, Figure 10.

32. Furthermore, one may question whether the 20-degrees range provides a general criterion that is applicable in all cases. Let me again revert to the Archipelago of the Recherche. The two westernmost straight baselines make angles of respectively 17 and 36 degrees to the general direction of the Australian mainland coast. This figure is at tab 17 of the judges' folder.

(f) **Close linkage of the enclosed waters with the land domain**

33. A further requirement contained in Article 7 of the Convention and customary law is that "the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters". In its written pleadings, Colombia applied a mathematical test of its own design to test this requirement. As regards the deficiencies of Colombia's mathematical test, I respectfully refer you to Nicaragua's written pleadings, cited in the footnote[139]. Let me just remind the Court of Figure 3 of Nicaragua's Additional Pleading on Colombia's counter-claims that is at tab 17 of the judges' folder. Applying Colombia's mathematical test to Colombia's own straight baselines reveals a much more expansive approach than is the case for Nicaragua. Thirty-two per cent of the internal waters enclosed by Colombia's straight baselines in the area on screen would not be part of Colombia's territorial sea measured from the low-water line. On the other hand, only 19 per cent of the internal waters enclosed by Nicaragua's straight baselines would not be part of Nicaragua's territorial sea measured from the low-water line. This again confirms that Colombia seeks to impose a standard on Nicaragua that it did not apply to itself.

34. This Wednesday, Professor Thouvenin also observed that Nicaragua has relied on the fact that the waters enclosed by Nicaragua's straight baselines had been used by its indigenous peoples[140]. Well, that was not exactly the main thrust of Nicaragua's argument. Nicaragua, in its written pleadings, relied on anthropological research that evidenced that most of the waters concerned had been divided in traditional tenure areas. A figure illustrating these areas is now on screen and at tab 18 of the judges' folder. Their location is compared to Nicaragua's straight baselines on the right-hand side. The division in tenure areas is comparable to similar management approaches on

[139] RN, paras. 7.43-7.53; APN, para. 3.59.

[140] CR 2021/15, p. 63, para. 60.

land. It has nothing to do with an open-access régime that would have been applicable under a State-centred law of the sea approach.

E. Colombia's rights are not infringed by Nicaragua's baselines

35. Colombia, in its written pleadings, and this Wednesday, has contended that Nicaragua, by establishing its system of straight baselines, has infringed Colombia's rights in two ways[141]. First, the régime of internal waters enclosed by straight baselines is different from the régime of the territorial sea and the exclusive economic zone. Second, following the establishment of Nicaragua's straight baselines, the territorial sea in part extends into areas that were formerly part of Nicaragua's exclusive economic zone. As a consequence, Colombia alleges, other States have more limited rights in Nicaragua's maritime domain.

36. As I have argued during my presentation, Nicaragua's straight baselines are in conformity with Article 7 of the Convention and customary international law. Moreover, Colombia's current interpretation of the law is contradicted by its own practice on straight baselines. That Colombian practice instead supports Nicaragua's application of the law.

37. Nicaragua is entitled to determine the status of the waters landward and seaward of its straight baselines in accordance with international law: internal waters landward of the straight baselines, and territorial sea, contiguous zone, exclusive economic zone and continental shelf seaward of the straight baselines. During these proceedings, Colombia has not provided any evidence that Colombia's rights in the waters enclosed by Nicaragua's straight baselines have been infringed. In particular, Colombia has not reported any single incident concerning the alleged violation of Colombia's rights in these waters.

38. Colombia also claims that Nicaragua's straight baselines have moved the outer limit of Nicaragua's exclusive economic zone seaward[142]. It is clear from my presentation that no such thing has happened. The outer limit of Nicaragua's exclusive economic zone in the Caribbean Sea has remained unaltered because Nicaragua has base points seaward of the straight baselines. These base

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[141] CMC, para. 10.52; RC, para. 1.43.

[142] CMC, para. 10.52.

points on Nicaragua's low-water line have been determined in accordance with the Convention's Articles 5 and 13, which reflect customary international law.

39. Unless I can be of further assistance, Madam President, Members of the Court, that brings me to the end of my submissions, and of Nicaragua's submissions on Colombia's counter-claims in the first round of oral pleadings. I thank you for your attention.

The PRESIDENT: I thank Professor Oude Elferink, whose statement brings to an end the first round of oral argument. The Court will reconvene on Monday 27 September at 3 p.m. to hear Nicaragua's second round of pleadings.

Nicaragua will present its final submissions on its own claims on the afternoon of Monday 27 September. For its part, Colombia, on the afternoon of Wednesday 29 September, following its second round, will present its final submissions on the claims of Nicaragua and on its own counter-claims. On the afternoon of Friday 1 October, Nicaragua will present its final submissions on the counter-claims of Colombia.

As the Parties and their counsel turn to their preparation for the second round of these oral proceedings, I take this opportunity to remind them of Article 60, paragraph 1, of the Rules of Court, pursuant to which the oral statements are to be as succinct as possible. The Court has emphasized this requirement in Practice Direction VI. The Parties should not use the second round to repeat statements that they have previously made. The second round is an opportunity to respond to points that were made earlier in these oral proceedings. Moreover, the Parties are not obliged to use all the time allotted to them.

The sitting is adjourned.

The Court rose at 4.45 p.m.