Non corrigé
Uncorrected

CR 2021/19

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2021

Public sitting

held on Friday 1 October 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 1er octobre 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
		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. 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, 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,

Eran Sthoeger, Esq., member of the Bar of the State of New York,

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, 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, membre du barreau de l'Etat de New York,

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. For reasons duly made known to me, Judge Bhandari is unable to join us for today's sitting. The Court meets this afternoon to hear Nicaragua's second round of oral argument on Colombia's counter-claims. I invite Mr. Lawrence Martin to address the Court.

Mr. MARTIN:

COLOMBIA'S COUNTER-CLAIM RELATING TO THE ALLEGED TRADITIONAL FISHING RIGHTS OF THE RAIZALES FAILS

1. Madam President, distinguished Members of the Court, good afternoon. My task today, as it was last Friday, is to respond to Colombia's arguments concerning the alleged traditional fishing rights of the Raizales. I am mindful of your admonition not to repeat points already made. I will therefore try to be as brief and to the point as possible. For the avoidance of doubt, however, we stand by our prior arguments in their entirety.

I. President Ortega's statements do not have the effects Colombia claims

2. You will have noticed from Mr. Valencia-Ospina's intervention on Wednesday that Colombia has gone all in on President Ortega's statements relating to the Raizales' alleged traditional fishing rights. Colombia now relies on those statements to support its *entire* case, both on the facts and the law. President Ortega's statements cannot, however, support the weight Colombia tries to place on them.

3. I explained many of those reasons last Friday. I do not intend to reiterate those points now. On Wednesday, Sir Michael and Mr. Valencia-Ospina helpfully hinted at a different way to think about the issue. They referred to President Ortega's statements as a form of "unilateral declaration"[1] capable of having legal effect. Looking at the question that way and examining President Ortega's statements through the lens of the law relating to unilateral undertakings only further underscores the fact that they do not have the effects that Colombia might wish.

[1] CR 2021/18, p. 14, para. 18 (Wood); CR 2021/18, p. 50, para. 6 (Valencia-Ospina).

4. In the *Nuclear Tests* cases, the Court stated:

> "It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations.
>
> . . . . . .
>
> Of course, not all unilateral acts imply obligation; but a State may choose to take up a certain position in relation to a particular matter with the intention of being bound — the intention is to be ascertained by interpretation of the act. *When States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for*."[2]

5. Guiding Principle 7 of the International Law Commission's 2006 *Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations* (hereinafter *"Guiding Principles"*) echoes the Court's language. According to Guiding Principle 7:

> "A unilateral declaration entails obligations for the formulating State only if it is stated *in clear and specific terms*. In the case of doubt as to the scope of the obligations resulting from such a declaration, such obligations *must be interpreted in a restrictive manner*."[3]

6. To the extent that President Ortega's statements were made "in clear and specific terms", they were clearly and specifically conditioned on appropriate "authorization"[4] being given in the future, or on "agreements"[5] or "mechanisms"[6] being worked out later. Colombia cannot casually seize on the alleged obligation assumed without also accepting the express conditions placed thereon.

7. Moreover, in the case concerning the *Frontier Dispute (Burkina Faso* v. *Republic of Mali)*, the Chamber of the Court was careful to point out that when it comes to determining the effect of an alleged unilateral undertaking "it all depends on the intention of the State in question"[7]. Guiding Principle 3 of the ILC's *Guiding Principles* is to similar effect. It states: "To determine the legal effects of such declarations, it is necessary to take account of their content, of *all the factual circumstances in which they were made*, and of the reactions to which they gave rise."[8]

---

[2] *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 267, paras. 43-44; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, pp. 472-473, paras. 46-47. Emphasis added.

[3] ILC, *Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations*, 2006, Guiding Principle 7; emphasis added.

[4] CMC, para. 3.94 (citing MN, Ann. 27).

[5] CMC, para. 3.94 (citing CMC, Anns. 73 and 74).

[6] CMC, para. 3.94 (citing MN, Ann. 77).

[7] *Frontier Dispute (Burkina Faso v. Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 573, para. 39.

[8] *Guiding Principles*, Guiding Principle 3; emphasis added.

8. Here, considering all the circumstances in which President Ortega's statements were made, it could not be more clear that they do not reflect an unqualified intent to be bound. As we explained — and Colombia does not seriously deny — they were made in the context of the highly fraught political situation created by Colombia's rejection of the Court's 2012 Judgment (a rejection that remains Colombia's policy to this day). President Ortega was simply, and very obviously, trying to entice Colombia back to the table by offering to take account of its expressed concerns as part of an agreement that would confirm Nicaragua's rights under the Court's 2012 Judgment.

9. This is not a question of conducting a "psychological inquiry into the real will of [Nicaragua's] President"[9], as Mr. Valencia-Ospina would have it. It is objective reality. The Court delivered its unanimous delimitation Judgment in November 2012 and Colombia rejected it. Nicaragua wanted to see it implemented but understood the only way that was possible, given Colombia's defiant reaction to it, was by seeking an agreement with Colombia that would allow it to save face and say that its concerns had been addressed. President Ortega was plainly seeking a solution that would be politically acceptable to both Parties.

10. Thus, accepting Colombia's invitation to view the issue through the prism of the law relating to unilateral undertakings and considering whether President Ortega's statements are sufficiently "clear and specific" to create the effects that Colombia says they do, the answer is clear: they do not.

11. Two final points on this issue, if I may. *First*, I would be remiss if I did not point out that Colombia itself has effectively admitted in its written pleadings that President Ortega's statements are insufficient to create any rights. Specifically, in its Counter-Memorial, in the context of setting out President Ortega's statements, Colombia itself rightly acknowledged that requiring mechanisms to be put in place "would have deprived the recognition of the Raizales' historic [fishing] rights of any meaning"[10]. Exactly right. A "right" subject to "authorization", conditioned on the adoption of "mechanisms" or subject to subsequent "agreement", is no right at all.

12. *Second*, Mr. Valencia-Ospina was not the only counsel for Colombia who tried to read more into President Ortega's statements than they actually say. Mr. Bundy went even further and

---

[9] CR 2021/18, p. 51, para. 6 (Valencia-Ospina).

[10] CMC, para. 3.94.

argued that President Ortega's statements not only granted fishing rights to Colombian fishermen, but also effectively invited the Colombian Navy into Nicaragua's EEZ to protect those rights[11]. As he did in the first round, Mr. Bundy admitted that Colombia's naval vessels were exercising police powers, in what was indisputably Nicaragua's waters under the Court's 2012 Judgment, to protect what they claimed were the Colombian State's historic fishing rights[12]. On Wednesday, his argument seemed to be that when Colombia's Navy intervened to stop Nicaragua's coast guard from approaching Colombian and foreign-flagged fishing boats, they did so pursuant to the authority conferred on them by President Ortega.

13. But that argument is directly contradicted by what the Colombian Navy said in its radio communications to the Nicaraguan coast guard, as the Court saw for itself during our presentation on 20 September. At no time did any Colombian naval vessel claim that it was acting pursuant to authority conveyed by President Ortega. To the contrary, in each incident, the Colombian naval vessel insisted that it was in Colombia's own waters, not Nicaragua's, because Colombia did not consider applicable, or abide by, the Court's ruling[13].

14. As that unchallenged evidence shows, the Colombian Navy did not act on anything President Ortega said. It was acting pursuant to what Colombia's own President said: that the boundary with Nicaragua was the 82nd meridian, and that all the waters east of it were Colombian.

II. The régime of the EEZ extinguished any traditional fishing rights

15. Not only are President Ortega's statements insufficient to vest the Raizales with the traditional fishing rights Colombia claims, those would-be rights are also inconsistent with the régime of the EEZ.

16. On Wednesday, Mr. Valencia-Ospina seemed irritated about once again hearing what he called "the 'legal monopoly' plea"[14]. I apologize for trying his patience, but the truth is that this is much more than just a "plea" from Nicaragua. It is a juridical fact established by a chamber of this Court — under customary international law, no less — in the *Gulf of Maine* case. As I pointed out

---

[11] CR 2021/18, p. 37, para. 40 (Bundy).

[12] CR 2021/15, p. 18, para. 48 (Bundy).

[13] CR 2021/17, pp. 25-26, paras. 11-12, 14 (Reichler).

[14] CR 2021/18, p. 56, para. 18 (Valencia-Ospina).

last time, the Chamber held that, with the advent of the EEZ, "[t]hird States *and their nationals found themselves deprived of any right of access to the sea areas within those zones*"[15]. I know Colombia finds this fact uncomfortable, but a fact it remains.

17. On Wednesday, for the very first time in the very long history of this case, we heard Colombia at least make an attempt to distinguish *Gulf of Maine*. Mr. Valencia-Ospina said first that that case "was not about traditional fishing rights"[16]. That may technically be true, but it is also irrelevant. The Court's language could not be any more clear. The coastal State has a "legal monopoly" that deprives "[t]hird States *and their nationals*" of any right of access. There is no room to read any ambiguity into that language.

18. Mr. Valencia-Ospina also said that the *Gulf of Maine* decision "says nothing . . . on the impact of delimitation on vested rights"[17]. But that assertion too cannot stand in the face of the Court's emphatic language. The effect of delimitation is precisely to determine the extent of the relevant States' EEZs and, with them, the extent of their "legal monopol[ies]" and the areas from which other States and their nationals are excluded.

19. At the end of the day, Colombia's case rests on two arguments, unpersuasive though they may be. *First*, it says, because traditional rights can exist on land and in the territorial sea, they can also exist in the EEZ. Mr. Valencia-Ospina came back to this argument at some length on Wednesday[18]. But I have already responded to it and I will not burden the Court by repeating those points now, all the more since Mr. Valencia-Ospina did not add anything new to the conversation on Wednesday.

20. Colombia's second argument is what might be termed the "but *Eritrea/Yemen*" argument. In Colombia's telling, the *Eritrea/Yemen* Tribunal was "the only tribunal ever *formally* tasked with addressing traditional rights in the EEZ" and decided that "traditional fishing . . . is not qualified by the maritime zones specified under . . . [UNCLOS]"[19]. The first part of this assertion is just wrong

---

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

[16] CR 2021/18, p. 58, para. 22 (Valencia-Ospina).

[17] CR 2021/18, p. 58, para. 22 (Valencia-Ospina).

[18] CR 2021/18, pp. 49-50, para. 3; p. 56, para. 18 (Valencia-Ospina).

[19] CR 2021/18, p. 57, para. 19 (Valencia-Ospina).

as a matter of fact. Indeed, a case Mr. Valencia-Ospina himself cites[20], the *South China Sea* arbitration, specifically addressed the question of whether traditional rights could exist in the EEZ and decisively concluded that they could not[21].

21. Moreover, the language from *Eritrea/Yemen* that Colombia is so fond of does not sweep as broadly as Colombia suggests. Here, greater precision is in order. The relevant passage from the tribunal's decision is on the screen now. The sentence to which Colombia devotes such attention reads: "By its very nature *it* is not qualified by the maritime zones specified under [UNCLOS]"[22]. But what is the "it" that is the subject of this sentence? The rest of the passage makes clear that this "it" is "the traditional fishing regime", which "has existed for the benefit of the fishermen of both countries throughout the region". In other words, the "it" is referring to the *specific* régime applicable between Eritrea and Yemen.

22. This is critical because, as I explained last Friday and Colombia dares not dispute, the traditional fishing régime between Eritrea and Yemen is characterized by an express agreement to allow traditional fishing in the EEZ[23]. This agreement was integral to the existing "traditional fishing regime" that was not qualified by the maritime zones under UNCLOS. This is a far cry from saying generally that, absent agreement, traditional fishing is compatible with the régime of the EEZ. Indeed, for all the reasons we have previously explained in our written and oral pleadings, traditional fishing is *not* compatible with the EEZ régime.

III. Colombia's evidence does not prove the existence of the rights it claims or their violation

23. I can be much briefer on the facts relating both to the alleged existence of the rights Colombia claims and Nicaragua's ostensible violation of them. The Court will recall that on Friday, I devoted roughly half my speech to a discussion of Colombia's evidence on these points and

---

[20] CR 2021/18, p. 60, para. 26, fn. 217 (Valencia-Ospina).

[21] *The South China Sea Arbitration between the Republic of the Philippines and the People's Republic of China, Award of 12 July 2016, RIAA*, Vol. XXXIII, p. 287, para. 261.

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

[23] CR 2021/16, p. 23, para. 25 (Martin), citing the "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 (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).

examined Colombia's 11 affidavits in some detail. On Wednesday, Mr. Valencia-Ospina was conspicuously more reserved.

24. On the first point — that is, the evidence ostensibly proving the existence of the alleged rights — Mr. Valencia-Ospina asserted only that "Colombia's evidence indeed shows that . . . artisanal fishermen and their ancestors have long navigated and fished in the shallow banks of Cape Bank and Luna Verde, as well as the deep-sea banks located east of La Esquina and in between the Northern Islands"[24]. This assertion, however, is entirely unsupported by any citation to the evidence. Not a single source is listed in footnote or elsewhere. And for good reason. As I explained last Friday, while some of Colombia's affidavits do *mention* Cape Bank and other features, none of them claim they were traditional fishing grounds fished by any of the affiants or their ancestors[25].

25. The only other point Colombia made on Wednesday was to return to the statement against interest made by an office of Colombia's Ministry of Labour. As it did in its written pleadings, Colombia dismissed this statement claiming that the relevant office "did not provide any evidence to maintain that the traditional banks had not been impacted by the 2012 Judgment"[26]. Of course, the same may be said about Colombia's claims before this Court. For the reasons we have explained, there is no evidence to maintain that the traditional fishing banks *were* impacted by the 2012 Judgment. Moreover, and in any event, the statement stands as Colombia's officially espoused view, stated on more than one occasion before an organ of the International Labour Organization.

26. Colombia was even more brief on the issue of Nicaragua's putative violations of the Raizales' alleged rights. In response to our observation that all of the allegations were hearsay, Mr. Valencia Ospina said: "There are good reasons, not requiring much elaboration, that explain why Colombia cannot rely on first-hand accounts *only*."[27] With respect, we actually think it would have been helpful to have those reasons elaborated. It is not at all clear to us why Colombia cannot rely on first-hand accounts. Moreover, it is not true that Colombia did not rely "only" on first-hand accounts; it did not rely on *any* first-hand accounts. Given that Colombia was able to collect

---

[24] CR 2021/18, p. 53, para. 12 (Valencia-Ospina).

[25] CR 2021/16, p. 31, para. 57 (Martin).

[26] CR 2021/18, p. 54, para. 14 (Valencia-Ospina).

[27] CR 2021/18, p. 60, para. 27 (Valencia-Ospina).

first-hand testimonies from a number of local fishermen, there is no reason whatsoever it could not have — and should not be expected to have — produced testimonies from directly affected fishermen, including those cited by name in Colombia's affidavits.

27. Colombia also tried to excuse the paucity of its evidence by asserting that "the associations and co-operatives, with whom the artisanal fishermen interact, neither have records, nor protocols in case of incidents at sea"[28]. Again, with respect, the record proves precisely the opposite. I explained last Friday that the co-ops have a detailed procedure pursuant to which fishermen report to the port captaincy after every trip[29]. And, indeed, one of Colombia's own affiants specifically refers to multiple incidents involving illegal fishermen from other countries that have been reported to local authorities[30]. There is therefore no excuse for Colombia's total reliance on hearsay to prove its case.

28. Madam President, for all these reasons, Nicaragua respectfully submits that the Court should reject Colombia's counter-claim relating to the alleged traditional fishing rights of the Raizales. The rights do not exist and they have not been violated.

29. Thank you for your ever patient attention. May I ask that you invite Professor Alex Oude Elferink to the podium once more?

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

Mr. OUDE ELFERINK: Madam President, Members of the Court, good afternoon.

NICARAGUA'S BASELINES

A. Introduction

1. Madam President, Professor Thouvenin this Wednesday pleaded with pathos and innuendo. However, taking a step back and looking at the content of his presentation, there was very little in terms of engaging with Nicaragua's arguments both on the law and on the facts. I would like to take this opportunity to discuss what Professor Thouvenin said, and perhaps even more importantly, what he did not say. To assist the Court, I will comment on all aspects of the applicable law as it relates to

[28] CR 2021/18, p. 60, para. 27 (Valencia-Ospina).

[29] CR 2021/16, p. 32, paras. 61-62 (Martin).

[30] CR 2021/16, p. 33, para. 63 (Martin).

straight baselines and also will briefly revisit the issue of Nicaragua's normal baselines seaward of its straight baselines.

B. Colombia's straight baseline practice

2. Madam President, this Wednesday counsel for Colombia again argued that Colombia's fourth counter-claim is concerned with Nicaragua's straight baselines, not Colombia's straight baselines[31]. It should be more than obvious by now that Nicaragua is not contesting that.

3. However, as Professor Thouvenin also submitted, the question is whether Nicaragua's straight baselines are in conformity with international law[32]. Now, that is a question that requires looking at the practice of States other than Nicaragua. For example, Colombia's fourth counter-claim also is not concerned with the legality of the straight baselines of Norway or Australia, but the practice of both States has been discussed in Colombia's pleadings[33].

4. Colombia's straight baselines practice is even more relevant in this connection. Colombia's straight baselines show how Colombia considers the law has to be interpreted and applied. That practice reveals that Colombia has adopted a different and self-serving standard specifically for the purposes of its fourth counter-claim[34]. It might be regrettable that the Court does not have the benefit of Colombia's explanation of how it has interpreted and applied the law in establishing its straight baselines. However, its tenacious silence really says it all.

C. Nicaragua's straight baselines

(a) The length of Nicaragua's straight baselines

5. I now turn to a discussion of the various aspects of customary international law as they relate to Nicaragua's straight baselines. My first point concerns the length of Nicaragua's straight baselines. This Wednesday, counsel for Colombia submitted that I relied on the length of Nicaragua's baselines to justify that certain of Nicaragua's islands constituted part of the fringe of islands in the immediate

---

[31] CR2021/18, p. 62, para. 3 (Thouvenin).

[32] *Ibid*.

[33] See e.g. RC, para. 6.45; CR 2021/15, pp. 58-59, paras. 39-40 (Thouvenin); CR 2021/18, p. 61, para. 1 (Thouvenin).

[34] CR 2021/16, p. 40, para. 12 (Oude Elferink).

vicinity of Nicaragua's coast[35]. I did nothing of the kind. I observed that Nicaragua's straight baselines were unexceptional as regards their length in the light of State practice, including that of Colombia[36]. Professor Thouvenin had nothing to say on that point this Wednesday.

(b) **The presence of a fringe of islands**

6. Madam President, one of the main planks of Colombia's argument on its fourth counter-claim has been that Nicaragua has not proven the existence of a fringe of islands along its coast[37]. This Wednesday Professor Thouvenin again played this same record.

7. He started by revisiting my argument on the Archipelago of the Recherche off the coast of Western Australia. He submitted that I had argued that Nicaragua's geography was comparable to that of the Archipelago of the Recherche[38]. That is not the point I was making. So, what was it? Let me illustrate that graphically. Last Friday, I argued that to the west of the town of Esperance, there is only a limited number of small islands, which are all included in the Australian system of straight baselines.

8. In its written pleadings, Colombia had argued that Nicaragua's islands had a very limited masking effect of the mainland, and as such were not fringing islands[39]. If you apply Colombia's methodology to determine this effect to the islands to the west of Esperance, there also is hardly any masking effect. Colombia's methodology, which was criticized in Nicaragua's Reply[40], consists of looking at the part of the mainland coast that is covered by the frontal projection of the islands in front of it. Not a very substantial part in this case. This figure is at tab AOE-1 of today's judges' folder. My point last Friday was that this example belies the high threshold Colombia is now seeking to impose on Nicaragua in relation to the criterion of fringing islands[41], not that the geography of Western Australia and Nicaragua is comparable.

---

[35] CR 2021/18, p. 61, para. 1 (Thouvenin).

[36] CR 2021/16, p. 40, para. 13 (Oude Elferink).

[37] APN, paras. 3.31 and following; CR 2021/15, para. 28 and following (Reisman).

[38] CR 2021/18, p. 61, para. 1 (Thouvenin).

[39] See RC, paras. 6.36 and following.

[40] RN, paras. 7.34-7.35.

[41] CR 2021/16, p. 43, para. 23 (Oude Elferink).

9. As a matter of fact, last Friday I discussed the coast of Trondheim to explain that straight baselines may also be used to connect separate groups of islands that are a distance apart[42]. Professor Thouvenin had nothing to say in reply this Wednesday. Now that this figure is on screen, allow me to also make another point. Colombia has sought to make much of the extent of the sea areas that are enclosed by Nicaragua's straight baselines. In 1952, when Norway established the straight baselines in the Trondheim area[43], it had a 4-nautical mile territorial sea. All of the area that is now coloured in red, avowedly Professor Thouvenin's favourite colour[44], were part of the high seas and the régime of freedom of navigation before Norway established its straight baselines. This figure is at tab AOE-2 of today's judges' folder.

10. I now turn to Professor Thouvenin's discussion of Nicaragua's islands. First, he sought to downplay the significance of the figures Colombia had previously used and which illustrated the presence and close proximity of Nicaragua's fringing islands to its mainland coast[45]. Now, what did he actually say? Nicaragua had allegedly overlooked Colombia's Counter-Memorial in this previous case. But as counsel for Colombia pointed out, the only thing the Counter-Memorial observes is that the charts Colombia had used were "on different scales, and . . . outdated in some respects"[46]. In some respects. No further information is provided. If the presence of islands had been in issue, it would have stood to reason that Colombia would have done one of two things. First, it could have acquired further data. Second, it could have given this matter the necessary attention in its pleadings, not the bland reference counsel for Colombia quoted this Wednesday. Colombia used base points on Nicaragua's islands to determine its boundary claim in relation to Nicaragua. A not unimportant matter. In this light, Nicaragua maintains that Colombia's earlier position squarely confirms the presence of the islands and that they fringe Nicaragua's mainland coast and are in close proximity of

---

[42] CR 2021/16, p. 42, para. 20 (Oude Elferink).

[43] Royal Decree of 18 July 1952 relating to the Baselines for the Norwegian Fishery Zone as regards that part of Norway which is situated to the south of 66° 28' 8 N Latitude, available at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/NOR_1952_Decree.pdf (accessed 30 Sept. 2021). It should be noted that base points 49 and 50 in the Royal Decree are numbered as respectively base points 54 and 55.

[44] CR 2021/18, p. 62, para. 6 (Thouvenin).

[45] CR 2021/18, p. 66, para. 25 (Thouvenin).

[46] CR 2021/18, pp. 66-67, paras. 26-27 (Thouvenin).

that coast, as I also observed last Friday with reference to the baselines study of the United Nations Office for Ocean Affairs and the Law of the Sea[47].

11. Professor Thouvenin also revisited the map he showed of the Miskito biosphere reserve. It is welcome to see that he now admits that at least in this area there are many more islands than Miskito Cay. I will return to this point shortly. On the map he concluded: "La carte bio disait vrai. Il n'y a pas de connexion. Et on ne voit certainement ni un tapis ni un chapelet d'îles le long et à proximité de la côte."[48] That is not exactly true. The islands closest to the mainland are only some 9 nautical miles distant from it. As may be recalled, the baselines study of the United Nations Office for Ocean Affairs and the Law of the Sea observes that a distance of 24 nautical miles would satisfy the condition of "in the immediate vicinity"[49] for the islands that are closest to the coast. And Nicaragua has no doubt that this is a fringe of islands. Let me only add that, by omitting the areas of drying reefs in the Miskito Cays, which we have now added again to the figure, Professor Thouvenin's adjusted figure still did not do justice to the closely knit unit the Miskito Cays constitute. This figure is at tab AOE-3 of today's judges' folder.

12. But let me return to the larger picture. If Nicaragua's islands are such ephemeral features as Colombia claims them to be, one would have expected that Colombia should have been able to come up with some contemporary sources discussing this phenomenon. Nothing of the sort was done. To be truthful, counsel for Colombia did refer to one article that allegedly proved that Edinburgh Cay does not exist. An article from 1967[50]. That is all.

13. But more certainly has been published. Nicaragua in its Additional Pleading on Colombia's Counter-Claims already referred to a number of publications and the figures they include that describe and depict the islands fringing Nicaragua's Caribbean coast[51]. As these texts and figures also indicate, Nicaragua's mainland coast is also strewn with lagoons that cut deep into the mainland coast.

---

[47] CR 2021/16, pp. 40-41, para. 16 (Oude Elferink).

[48] CR 2021/18, p. 66, para. 23 (Thouvenin).

[49] See 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.

[50] CR 2021/18, p. 69, para. 40 (Thouvenin).

[51] APN, para. 3.38 and figs. 6 and 7.

14. It is not really difficult to find additional contemporary sources. A 2008 article on the coral reefs of the Miskito Cays, which is at tab AOE-4 of the judges' folder, describes them as consisting of "eighty mangrove and two sand and gravel cays, surrounded by seagrass beds, octocoral gardens, patch reefs, reef crests, extended algae platforms, short reef walls, and two marginal reefs around the sand cays"[52]. Again, evidence of the interconnectedness of the islands and the surrounding waters.

15. The figure that is now on screen is included in a 2011 article[53], which is at tab AOE-5 of today's judges' folder. It identifies 17 cays in the Pearl Cays by name. The 2014 Annual Report of the Hawksbill Conservation Project in the Pearl Cays observes that "[t]he Pearl Cays are located from 3-22 km east of the mainland, off the central Caribbean coast of Nicaragua . . . and encompass an area of approximately 700 km^2. The study area is comprised of 11 of the 22 Pearl Cays"[54]. The United States Navy Sailing Directions of 2017 describe Man O War Cays as "a cluster of islets, with the largest being 15 m high, [lying] 11 miles offshore"[55]. A 2003 article on coral reefs in Nicaragua indicates that Man O War, Tara and King's Cays are located in an area of coral reef measuring approximately 100 sq km[56]. These three publications I just quoted are reproduced in relevant part at tab AOE-5 of the judges' folder.

(c) A deeply indented and cut-into coast

16. Counsel for Colombia was very brief on the requirement of a deeply indented and cut-into coast. In that connection he had a figure on screen, which is at tab 14 of Colombia's judges' folder of this Wednesday. He submitted that this figure clearly illustrated that the southern coast of Nicaragua was not deeply indented and cut into[57]. That figure again is an example of Colombia's

---

[52] A. C. Fonseca, "Coral Reefs of Miskitus Cays, Nicaragua", *Gulf and Caribbean Research*, 2008, Vol. 20, p. 1, available at https://aquila.usm.edu/cgi/viewcontent.cgi?article=1431&context=gcr (accessed 30 Sept. 2021).

[53] C. Gonzalez and S. Jentoft, "MPA in Labor: Securing the Pearl Cays of Nicaragua", *Environmental Management*, 2011, Vol. 47, p. 620, available at https://link.springer.com/article/10.1007/s00267-010-9587-y (accessed 30 Sept. 2021).

[54] L. Irvine and P. J. Fletcher, WCS Hawksbill Conservation Project 2014 Annual Report — Pearl Cays, Nicaragua, Technical Report, May 2015 DOI: 10.13140/RG.2.1.4549.8322, available at https://www.researchgate.net/publication/283502960_WCS_Hawksbill_Conservation_Project_2014_Annual_Report_-_Pearl_Cays_Nicaragua (accessed 30 Sept. 2021).

[55] Sailings Directions (Enroute), Caribbean Sea Vol. II, 2017, 17th ed., available at https://msi.nga.mil>api>publications>download (accessed 30 Sept. 2021).

[56] J. Ryan and Y. Zapata, "Nicaragua's Coral Reefs, Status, Health and Management Strategies" in J. Cortés (ed.) *Latin American Coral Reefs* (2003), Elsevier, p. 212, available at https://www.elsevier.com/books/latin-american-coral-reefs/cortes/978-0-444-51388-5 (accessed 30 Sept. 2021).

[57] CR 2021/18, p. 61, para. 1 (Thouvenin).

cavalier use of graphics. It is at a scale at which Nicaragua's mainland coast is just over 2 cm. In reality it is over 530 km in length, measured along its general direction[58]. It would be an understatement to say that this is hardly a scale to assess a system of straight baselines. Neither does it allow for determining the location of any of the islands fringing Nicaragua's coast, nor the lagoons cutting into that coast. Counsel for Colombia also complained that Nicaragua, in any case, was not allowed to draw a straight baseline between an island and a point on the coast[59]. A somewhat bizarre proposition that was not supported by any legal authority. And since Colombia is not a party to the Convention, it would have to prove that this prohibition, which is not included in Article 7 of the Convention, meets the thresholds for the formation of a rule of customary international law.

(d) The general direction of the coast

17. Counsel for Colombia also submitted that it was useless to hammer home ("inutile . . . de marteler") the point that Nicaragua's straight baselines do not follow the general direction of the coast. "[C]ela saute aux yeux", he said[60]. No attempt at all to reply to my detailed assessment of this point last Friday, which proves that Nicaragua's straight baselines comply with this condition[61].

(e) Close linkage of the enclosed waters with the land domain

18. As regards the criterion of close linkage of the waters within straight baselines with the land domain, Professor Thouvenin again sang the worn-out refrain that Nicaragua has never proven the existence of the islands along its coast[62]. I beg to disagree. And not a word by counsel of Colombia on the fact that most of the waters inside Nicaragua's straight baselines overlap with traditional tenure areas of the indigenous population living on the coast, which also proves the close linkage[63].

---

[58] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 678, para. 145.

[59] CR 2021/18, p. 61, para. 1 (Thouvenin).

[60] *Ibid.*

[61] See CR 2021/16, pp. 44-46, paras. 26-32 (Oude Elferink).

[62] CR 2021/18, p. 61, para. 1 (Thouvenin). For Colombia's written pleadings on this point, see e.g. RC, paras. 6.28-6.29, 6.32, 6.34, 6.39, 6.43, 6.47.

[63] See CR 2021/16, pp. 46-47, para. 34 (Oude Elferink).

D. Edinburgh Cay

19. Professor Thouvenin did find it necessary to hammer home the point that Edinburgh Cay does not exist — *quod non*. Colombia's judges' folder contains no less than eight versions of the Sailing Directions of the United States Navy, published between 1920 and 2017[64]. Well, they all, every single one of them, attest to the existence of Edinburgh Cay. Professor Thouvenin even showed you this himself this Wednesday. We have added a highlight to the text on Edinburgh Cay. This figure is at tab AOE-6 of today's judges' folder.

20. And as a point of law, it is up to Nicaragua to determine its baselines and which nautical charts to use in that connection[65]. A point Professor Thouvenin conveniently overlooked. His misguided reference to the United States Navy Sailing Directions, and his ignoring that Edinburgh Cay was used as a base point in *Territorial and Maritime Dispute between Nicaragua and Honduras*[66] — a case in which the parties were in disagreement about the existence of several cays, but not Edinburgh Cay[67] — all indicate that Colombia has not even started making a case that Nicaragua has misapplied the law in using Edinburgh Cay as a base point[68].

21. As an aside, it may be noted, even if Colombia were right that Edinburgh Cay does not exist, *quod non*, it is a non-issue. A similar straight baseline segment as that connecting Cape Gracias a Dios to Edinburgh Cay may be drawn to several cays in the Miskito Cays.

E. Nicaragua's 2013 Decree on straight baselines and the low-water line seaward of it

22. Madam President, I now turn to the relationship between Nicaragua's straight baselines and its base points on the low-water line seaward of them. Professor Thouvenin seems to have abandoned the idea that different baselines may not be used at the same time. At least, he did not

---

[64] Colombia's judges' folder, second round, session of 29 September 2021, tab 24.

[65] See *Award in the arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname, Award of 17 September 2007, RIAA*, Vol. XXX, paras. 395-396; *Award of the Arbitral Tribunal in the Second Stage of the Proceedings between Eritrea and Yemen (Maritime Delimitation)*, para. 135; *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the Delimitation of the Exclusive Economic Zone and the Continental Shelf between Them*, *RIAA*, Vol. XXVII, para. 224

[66] See CR 2021/16, p. 41, para. 17 (Oude Elferink).

[67] See *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 760.

[68] See also *Guyana/Suriname, Award of 17 September 2007, RIAA,* Vol. XXX, paras. 395-396.

respond to my invitation to point out the rule of customary law prohibiting such use[69]. He now made two different points. First, for some reason, he has difficulty with the features concerned, referring to Nee Reef and London Reef as "soudainement apparues" and "deux mystérieux points"[70]. Let me just remind the Court that Nicaragua in its written pleadings introduced a report on a survey confirming that Nee Reef and London Reef are low-tide elevations as defined in Article 13 of the Convention and customary law and may be used as part of the baseline for measuring the breadth of the territorial sea and also the exclusive economic zone[71]. Colombia has not said a word about the veracity of that survey and information.

23. Professor Thouvenin's second point was that Nicaragua's Decree No. 33-2013 is the only legislation that is relevant to determining Nicaragua's baselines and outer limits in the Caribbean Sea[72]. That is plainly an incorrect reading of the Decree.

24. After ratifying the United Nations Convention on the Law of the Sea on 3 May 2000, Nicaragua updated its legislation on maritime zones through Law No. 420 on Maritime Spaces of 15 March 2002. The law provides that the baselines from which the breadth of the territorial sea is measured are either straight baselines or the low-water line along the coast[73]. Law No. 420 thus provides for the option of combining the two methods. Nicaragua has done so along its Caribbean coast.

25. The Decree does not provide that this is the only legislation defining Nicaragua's baselines in the Caribbean Sea, as Professor Thouvenin claims. Instead, Article 1 only provides that the Decree establishes the straight baselines that are relevant in that connection. The Decree is not concerned with defining the normal baseline, which was already done through Law No. 420 itself.

26. Professor Thouvenin also rehashed his argument about the scope of Colombia's fourth counter-claim to argue that the Court should not consider base points on Nicaragua's low-water line.

---

[69] See CR 2021/16, p. 38, para. 9 (Oude Elferink).

[70] CR 2021/18, p. 62, paras. 4 and 6 (Thouvenin).

[71] See APN, paras. 3.25-3.26, and Ann. 5, Technical Report, Fieldwork Results in the Nee Reef and London Reef, Feb. 2019.

[72] CR 2021/18, pp. 62-63, paras. 4-8 (Thouvenin).

[73] See Law No. 420 on Maritime Spaces, Art. 3 (reproduced in APN, Ann. 1), Art. 7.

I already addressed that point last Friday[74], and I do not want to further test the patience of the Court by again engaging with the same argument.

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

27. Last Friday, I explained why Colombia's rights are not infringed by Nicaragua's baselines. I stand by that argument and I see no need to repeat it. There is, however, one comment I feel I have to make on Professor Thouvenin's argument on this point. This concerns his completely baseless argument that Nicaragua, by establishing its system of straight baselines, is seeking to free itself from environmental obligations it has under international law[75]. But, perhaps, we should simply see this as a measure of Colombia's misguided and desperate attempts to draw the Court's attention away from the mainline case.

28. Madam President, Members of the Court, that brings to an end my submissions on behalf of Nicaragua in this case. I ask that you now invite Nicaragua's Agent to the podium, to present Nicaragua's final submissions on Colombia's counter-claims. I thank you for your attention.

The PRESIDENT: I thank Professor Oude Elferink. I shall now give the floor to the Agent of Nicaragua, H.E. Mr. Carlos José Argüello Gómez. You have the floor, Your Excellency.

Mr. ARGÜELLO GÓMEZ:

1. Madam President, Members of the Court, good afternoon. Before reading Nicaragua's submissions on the counter-claims of Colombia, please allow me a few comments on the question of the Raizales and the use of straight baselines.

The straight baselines

2. The counter-claim on the question of the straight baselines used by Nicaragua has been amply analysed and set to rights by Professor Oude Elferink.

3. One important issue is that since Colombia is not a party to UNCLOS and there are no other treaties binding the Parties on matters of baselines or base points, the law applicable is customary

[74] CR 2021/16, p. 37, para. 8.

[75] CR 2021/18, p. 65, paras. 16-17.

international law. In the present case, what I would emphasize is that Colombia has established its own straight baseline system, but its counsel insists that they not be taken into consideration[76].

4. Colombia, for example, questions the length of Nicaragua's straight baselines and yet has even lengthier straight baselines of its own. Can Colombia claim that Nicaragua is violating a rule that it does not itself respect?

5. The Court cannot allow the application of a double standard. As this Court has stated, and the International Law Commission has reiterated, the rules of customary international law, "by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour"[77].

6. On the question of baselines, the only rules that can be applied are those that have "equal force" for Nicaragua and for Colombia. Colombia does not have "any right of unilateral exclusion" of its own practice. Quite the contrary, this practice is conclusive.

The question of the alleged traditional fishing rights

7. Madam President, on the question of the Raizales, Colombia's submissions on 29 September request the Court to declare that "[t]he inhabitants of the San Andrés Archipelago, in particular the Raizales, enjoy artisanal fishing rights"[78]; and further ask that the Court declare that "Nicaragua has violated the traditional fishing rights of the inhabitants of the San Andrés Archipelago[79].

8. First, it should be emphasized that what Colombia is claiming is artisanal fishing rights and not, for example, industrial fishing rights, which they have nevertheless granted to Colombia and foreign-flagged vessels so that they could fish in Nicaragua's EEZ without Nicaragua's authorization.

9. With respect to artisanal fishing by the Raizales, Nicaragua has made it clear that it is willing, and even happy, to help the Raizal population, which has close relations with the Caribbean

---

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

[77] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, pp. 38-39, para. 63; see also *Report of the International Law Commission, Seventieth session*, 2018, UN doc. A/73/10, para. 66, Conclusion 15, Commentary 1.

[78] CR 2021/18, p. 75, para. II.3 (Arrieta).

[79] CR 2021/18, p. 75, para. II.4 (Arrieta).

population of Nicaragua. Obviously, as in other similar situations, fishing is not a free-for-all and artisanal fishermen need to identify themselves and fulfil certain requirements, including registering with Nicaragua. This is also a requirement for Nicaraguan artisanal fishermen. As indicated in my previous presentation: in 2018, all 8,907 Nicaraguan artisanal fishermen were registered[80]. All these procedures for the Colombian Raizales have to be worked out in an agreement between our two States.

10. Second, these potential rights in no way apply to the non-Raizal population of San Andrés. As I indicated before, these newcomers from the mainland arrived in the 1950s when San Andrés was converted into a freeport and a tourist destination[81]. In 1925, as I indicated before, the population of the Raizales in San Andrés was approximately 5,000 people and the non-Raizal population was only 30 — 30 people[82]. At present, as I explained in my earlier presentation, the majority of the population is non-Raizal and this population has not been part of any traditional artisanal fishing[83]. The newcomers simply took over from the Raizal the most lucrative businesses of the islands, which did not include artisanal fishing[84].

11. For this reason, it is necessary to emphasize that the offer made by Nicaragua to reach an agreement to facilitate the artisanal fishing of the Raizales refers to that population only. This, of course, does not close the door on the possibility of other fishing agreements, but that is not the point under discussion.

12. Third, Nicaragua has not violated any fishing rights of the inhabitants of San Andrés as claimed in the Colombian submissions. This claim is based on the affidavits of 11 persons and has been totally disproved by Mr. Martin in his first presentation[85], and again this afternoon.

13. In this regard, it should be emphasized that the Raizales could not and did not traditionally fish in Luna Verde, La Esquina and Cape Bank as Mr. Valencia stated[86.] This has already been

---

[80] CR 2021/16, p. 14, para. 23 (Argüello).

[81] CR 2021/16, p. 12, para. 12 (Argüello).

[82] CR 2021/16, p. 13, para. 17 (Argüello).

[83] CR 2021/16, pp. 12-13, paras. 15-17 (Argüello).

[84] CR 2021/16, p. 12, para. 12 (Argüello).

[85] CR 2021/16, pp. 28-31, paras. 46-58 (Martin).

[86] CR 2021/18, p. 53, para. 12 (Valencia-Ospina).

pointed out by Mr. Martin, who emphasized that this assertion is without any reference to proof. Permit me to add another consideration. It was simply impractical for the Raizales to have fished traditionally in artisan boats in areas located approximately 100 nautical miles from their home bases. This might occasionally have happened in the so-called northern keys of Serrana and Roncador, because in these places there was land and the fishermen could rest and preserve their catch from rotting. In Luna Verde, La Esquina and Cape Bank, there are no land areas so artisanal fishing is not practical from San Andrés or Providencia.

14. All this, does not mean that the Raizales could not travel longer distances. Of course they could, and they did. In fact, the original population of these islands arrived from the Miskito or Caribbean coast of Nicaragua[87]. But there is no evidence to support Colombia's claim that the Raizales who came to inhabit San Andrés and its sister islands fished with a degree of regularity, or over a prolonged period, sufficient to establish traditional rights at Luna Verde, La Esquina, Cape Bank or any other location in Nicaragua's EEZ, as delimited by the Court.

15. It should also be noted, in this regard, that all the incidents of illegal fishing in its waters that Nicaragua has brought to the Court's attention in these oral hearings — where the intervention of the Colombian Navy has been recorded, in some cases, played for the Court — involved industrial fishing, not artisanal fishing. And it should also be noted that most of these industrial fishing boats, were not even Colombian-flagged but Honduran[88] and even Tanzanian[89]. Not a single one was an artisanal Raizal fishing boat.

The statements of President Ortega

16. Madam President, Mr. Valencia and other speakers have expounded on the statements made by President Ortega with respect to the Raizales. Mr. Martin has amply covered this subject both in his first statement and his statement this afternoon. I will only add that President Ortega's statements in no way reflect an intention to make a unilateral cession of Nicaragua's sovereign rights over its EEZ, which took Nicaragua more than a dozen hard-fought years to secure in the Judgment

---

[87] A. Olmos-Pinzón, "Artisanal Fisheries in the San Andres Island: between cooperation and cooperativism", *Jangwa Pana:* Vol. 18 (2), p. 309, available at http://oaji.net/articles/2020/2336-1580499670.pdf (accessed 30 Sept. 2021).

[88] See for example CR 2021/13, p. 52, para. 32; p. 54, para. 39; p. 55, paras. 40-41 (Reichler).

[89] CR 2021/13, p. 53, para. 37 (Reichler).

of the Court of 19 November 2012. Precisely in order to enjoy those sovereign rights, in the face of Colombia's refusal to accept the Court's Judgment, President Ortega hoped that by offering to reach an agreement granting fishing rights to Colombia's Raizal population, Colombia could be coaxed into accepting and respecting Nicaragua's sovereign rights in its EEZ. The offer has never been withdrawn. But sadly, Colombia has shown no interest in reaching an agreement with Nicaragua, even if it would benefit its Raizal population.

17. Instead, Colombia hides behind its Constitution, claiming that it cannot accept the Court's Judgment or Nicaragua's rights without a treaty, while at the same time, refusing to enter into any discussions with Nicaragua that might lead to such a treaty.

18. Meanwhile, Colombia has not changed its attitude toward the Court's Judgment. It continues to reject and disregard it. This leaves us with a fundamental question: does the Court's Judgment matter? Nicaragua believes that it does. And that is why we are here before you.

19. Madam President, in compliance with Article 60 of the Rules of Court, I will now proceed to read into the record Nicaragua's final submissions on Colombia's counter-claims. A signed copy of the written text of these submissions is being duly communicated to the Court and transmitted to the other Party.

FINAL SUBMISSIONS

20. In the case concerning *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)*, for the reasons explained in the Written and Oral phase, Nicaragua respectfully requests the Court to adjudge and declare that the counter-claims of the Republic of Colombia are rejected with all legal consequences.

21. Madam President, Members of the Court, this ends Nicaragua's oral pleadings on Colombia's counter-claims. On my behalf, and that of the Nicaraguan team, we wish to extend our thanks to the Members of the Court, the Registrar and his staff, the translators and interpreters, secretaries and assistants, as well as to the technicians who have made this hybrid oral hearing possible. Our thanks also to the Colombian delegation for their attention.

The PRESIDENT: I thank the Agent of Nicaragua. The Court takes note of the final submissions which you have just read on behalf of Nicaragua on the counter-claims of Colombia.

This brings us to the end of the hearings in the case concerning *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)*. I thank the representatives of the Parties for the assistance they have given the Court by their presentations in the course of these hearings. In accordance with practice, I shall request the Agents of the Parties to remain at the Court's disposal to provide any additional information the Court may require.

The Court will now retire for deliberation. The Agents of the Parties will be advised in due course as to the date on which the Court will deliver its Judgment. Since the Court has no other business before it today, the sitting is now closed.

The Court rose at 3.55 p.m.

_____