INTERNATIONAL COURT OF JUSTICE

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

(NICARAGUA *v.* COLOMBIA)

COUNTER-MEMORIAL OF THE REPUBLIC OF COLOMBIA

VOLUME I

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Chapter 1

INTRODUCTION AND OVERVIEW

1.1. Colombia is filing the present Counter-Memorial in conformity with the Court's Order dated 17 March 2016 fixing 17 November 2016 as the time-limit for that purpose. In this pleading, Colombia will respond to the claims advanced by Nicaragua in its Application and Memorial over which the Court has jurisdiction, and will show that those claims are factually and legally devoid of merit.

1.2. Nicaragua's pleadings dwell on what Nicaragua asserts are the violations of its maritime rights and spaces by Colombia. Not only do these allegations misrepresent the facts and legal consequences of the events on which Nicaragua's claims are based, they ignore the fact that Nicaragua also has obligations under customary international law with respect to the relevant maritime area. These include the obligation to protect and preserve the marine environment, including exercising due diligence over the activities of its own nationals and flag as well as licensed vessels, and the obligation to respect the habitat and traditional fishing rights of the local population of the Archipelago of San Andrés, Providencia and Santa Catalina.[1]

[1] The Archipelago of San Andrés, Providencia and Santa Catalina is also referred to as "the San Andrés Archipelago" or "the Archipelago" in this pleading. It includes the three named islands as well as the islands of Alburquerque Cays, East-Southeast Cays, Roncador, Serrana, Quitasueño, Serranilla and Bajo Nuevo, together with their surrounding islets, rocks and reefs.

1.3. In other words, Nicaragua's pleadings only purport to tell half of the story. The scope of the dispute concerns not simply the lawfulness of Colombia's conduct in the Southwestern Caribbean, where Colombia too has rights, but also that of Nicaragua. As Colombia will show, Nicaragua has flagrantly disregarded its obligations under international law, which has resulted in significant harm to Colombia and prejudice to its nationals, including in particular the Raizal inhabitants of the Archipelago, and to the environment. Consequently, in accordance with Article 80 of the Rules of Court, Colombia is presenting counter-claims against Nicaragua for these breaches. As will be more fully explained in Part III of this Counter-Memorial, Colombia's counter-claims come within the jurisdiction of the Court and are directly connected with the subject-matter of Nicaragua's claims.

A. Colombia's Case and the Scope of the Dispute

1.4. In its Application dated 26 November 2013, Nicaragua advanced two claims against Colombia. The first was based on the allegation that Colombia had breached its obligation not to violate Nicaragua's sovereign rights and maritime zones as declared by the Court's Judgment of 19 November 2012. The second was based on the contention that Colombia's Navy had breached Colombia's obligation under the Charter of the United

Nations and customary international law not to threaten or use force.[2]

1.5. Nicaragua's claims must be assessed in the light of the rights and obligations of *both* Parties in the Southwestern Caribbean Sea, the special characteristics of that part of the sea including the political unity of the Archipelago of San Andrés, Providencia and Santa Catalina, the freedom of navigation and overflight that Colombia and all other States are entitled to exercise, and the duty that each Party has to protect and preserve the marine environment and respect the habitat of the local population.

1.6. As will be described in Chapter 2, the Southwestern Caribbean is a semi-enclosed sea, bordered by a number of countries. Of particular significance is the fact that large parts of this sea are ecologically sensitive due to their relatively shallow waters, fragile coral reef eco-systems, water currents and the presence of species that are subject to a risk of depletion and extinction if left open to abusive fishing practices. This is what has led to the establishment of specially protected environmental areas in the sea and the adoption of one major treaty, the Convention for the Protection and Development of the Marine

[2] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)*, Application of the Republic of Nicaragua instituting proceedings against the Republic of Colombia, 26 Nov. 2013 (Application), para. 2.

Environment in the Wider Caribbean Region (Cartagena Convention), which deals with these issues.[3]

1.7. The inhabitants of the Archipelago, including the Raizal community, are heavily dependent on the long-standing, traditional fishing rights they have enjoyed over maritime areas in and around the Archipelago that constitute an integral and vital part of their culture and habitat. These rights are being violated by Nicaragua's predatory fishing practices, and its inability and/or unwillingness to protect and preserve the marine environment, which is essential to the livelihood of the local population, and its intimidation of the local fishermen.

1.8. At the same time, this part of the Caribbean is vulnerable to the commission of transnational crimes, for example, when used by criminal groups as a major drug and arms trafficking route. Historically, Colombia has played a central role in combatting this scourge as a result of both its geographic location and the fact that it is the only country in the region which has invested in the naval and aerial resources capable of monitoring, tracking and intercepting suspicious activity. Moreover, Colombia has international obligations to counter such transnational crimes.

1.9. These factors help to explain Colombia's presence in the area and why Colombia's right to exercise freedom of

[3] Annex 17: Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (Cartagena Convention), adopted at Cartagena de Indias, Colombia on 24 March 1983.

navigation and overflight is so crucial for it and the international community. Nicaragua acknowledges that Colombia has the right of overflight over Nicaragua's exclusive economic zone (EEZ) and that this in itself does not imply a repudiation of Nicaragua's rights in those waters.[4] But Nicaragua fails to recognize that Colombia has exercised these rights in a positive manner having due regard for the rights and duties of other States, Nicaragua included. Contrary to Nicaragua's assertions, that conduct has in no way prevented Nicaragua from exercising its sovereign rights within its maritime spaces adjudicated by the Court.

1.10. The same cannot be said of Nicaragua. As will be demonstrated, Nicaragua has systematically failed to exercise due diligence in regulating and controlling the predatory fishing practices of its own nationals and flag as well as licensed vessels. It has also not lived up to its obligation to preserve and protect the marine environment and conserve the living resources of the area, or to respect the traditional fishing rights of the inhabitants of the Archipelago, thus compelling Colombia to lodge a number of counter-claims.

1.11. In these circumstances, the notion that Nicaragua is the aggrieved Party in this case, and that the scope of the dispute is limited to Colombia's conduct, is unsustainable. Not only is

[4] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)*, Memorial of the Republic of Nicaragua, 3 Oct. 2014 (Memorial of Nicaragua), para. 3.34. The same obviously applies to Colombia's freedom of navigation.

there no factual or legal basis for its claims, it is Nicaragua that has violated its obligations owed to Colombia within the Southwestern Caribbean Sea.

1.12. If anything, the contrast in the conduct of the Parties in the relevant area could not be more striking.

- Colombia has not prevented Nicaragua from exercising sovereign rights over its exclusive economic zone. Nor have Nicaraguan nationals been prevented from fishing in these areas. Yet, despite the promises of Nicaragua's leaders to respect the historic rights of the Raizales, Nicaragua's Naval Force has actively interfered and intimidated the inhabitants of the Archipelago from having access to their traditional fishing grounds.

- Colombian licensed vessels have respected Nicaragua's maritime spaces and its fishermen have even modified their fishing practices to avoid conflict and confrontation with Nicaragua's Naval Force. On the other hand, Nicaraguan licensed vessels have entered Colombia's territorial sea, fished there with predatory practices, polluted the waters, left behind large amounts of waste, and caused damage to the marine environment in Colombia's jurisdictional waters.

- Colombia has taken numerous concrete steps to protect and preserve the marine environment of the Southwestern Caribbean and to exercise due diligence over abusive fishing practices. Nicaragua, in contrast, has flouted its international obligations in this respect, and has shown no willingness or ability to control the destructive activities of its own fishermen or licensed fishing vessels in highly sensitive ecological areas. If anything, Nicaragua has encouraged such abusive practices by taking the position that it has unfettered sovereign rights over the EEZ with no concurrent obligations.

- Colombia has even gone so far as to provide humanitarian and technical assistance to Nicaraguan fishermen who have run into trouble in the waters of the Southwestern Caribbean. Nicaragua has done exactly the opposite. Its naval personnel have harassed Colombian fishermen from the Archipelago, confiscated their equipment and catch and thereby jeopardized their well-being.

- Colombia has also been diligent in monitoring transnational crime in the area, which is an essential security interest not only of Colombia, but also of other States. Nicaragua has shown no

interest in doing the same. Its only response is to complain of Colombia's presence in the area –a presence which is perfectly lawful.

B. Nicaragua's Claims in the Light of the Judgment on the Preliminary Objections

1.13. In its Judgment on the Preliminary Objections, the Court dismissed Nicaragua's claim concerning the alleged threat or use of force by Colombia for lack of jurisdiction. As the Court observed, prior to Nicaragua's Application, "nothing in the evidence suggests that Nicaragua had indicated that Colombia had violated its obligations under Article 2, paragraph 4, of the Charter of the United Nations or under customary international law regarding the threat or use of force".[5] To the contrary, Nicaragua's own President was on record as confirming that "there has not been any kind of confrontation between the Colombian and Nicaraguan Navy", and Nicaragua's senior military officers had similarly noted that there had not been any conflicts in the relevant waters.[6]

1.14. Consequently, in the operative part of its 17 March 2016 Judgment, the Court unanimously upheld Colombia's second preliminary objection "in so far as it concerns the existence of a dispute regarding alleged violations by Colombia of its

[5] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment*, 17 March 2016 (Judgment on the Preliminary Objections), para. 76.
[6] *Ibid*.

obligation not to use force or threaten to use force".[7] The facts – or so-called "incidents" –[8] that Nicaragua relies on in its Application and Memorial to support its claim of the threat or use of force thus fall away due to the lack of jurisdiction over that claim.

1.15. As for the remaining "incidents" that form the factual predicate for Nicaragua's claim, it should be recalled that they are based on a description that Nicaragua's Naval Force only sent to the Nicaraguan Ministry of Foreign Affairs on 26 August 2014, nine months *after* Nicaragua's Application and, conveniently, a few weeks prior to the filing of its Memorial.[9] Crucially, the majority of the alleged facts adduced by Nicaragua to support its claim that Colombia has violated its sovereign rights and maritime spaces occurred, even on Nicaragua's version of them, after 27 November 2013, when Colombia ceased to be bound by the American Treaty on Pacific Settlement (the "Pact of Bogotá"). Consequently, the Court lacks jurisdiction *ratione temporis* to consider any claims that are based on events that are alleged to have transpired after Colombia ceased to be bound by the provisions of the Pact. This dispenses with the need to consider many of the "incidents" Nicaragua relies on for its claim.

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[7] Judgment on the Preliminary Objections, para. 111(1)(c) *dispositif*.

[8] Nicaragua refers in its pleadings to a number of events that it characterizes as "incidents". As will be seen, however, none of these events amounted to an "incident" in the true sense of the word, and Nicaragua itself did not treat them as such at the time.

[9] Memorial of Nicaragua, Annex 23-A.

1.16. Only 13 of Nicaragua's so-called "incidents" are said to have occurred *before* the critical date when the Pact of Bogotá ceased to be in force for Colombia.[10] Yet, many of them are based on erroneous information, and they simply do not bear out Nicaragua's far-reaching claim that Colombia violated Nicaragua's sovereign rights and maritime spaces.

1.17. Equally striking is the fact that there is no evidence that Nicaragua's military considered Colombia's presence in the area or any of the alleged "incidents" to be serious enough to be worthy of mention at the time of their occurrence, either to Nicaragua's own political leaders or to Colombia. The first time Nicaragua protested to Colombia over any alleged "incidents" was by a diplomatic note sent on 13 September 2014, well after Nicaragua had opportunistically instituted these proceedings before the Court, on the last day it could do so before the Pact of Bogotá ceased to be in force for Colombia.

1.18. In its 17 March 2016 Judgment, the Court did not consider that this delay meant that, as of the date of the Application, there was no dispute between the Parties for jurisdictional purposes.[11] However, the lack of any reaction by Nicaragua's military officials, who had in the meantime

[10] In its Judgment on the Preliminary Objections, the Court found that the "critical date" for the determination whether there existed a dispute between the parties was the date of Nicaragua's Application (26 November 2013). For all practical purposes, this is the same critical date for considering the Court's jurisdiction *ratione temporis* over the "incidents" adduced by Nicaragua, which is the following day, when the Pact ceased to be in force for Colombia.

[11] Judgment on the Preliminary Objections, para. 73.

confirmed that the situation at sea was calm, or by its senior political leaders, who had said that the Colombian Navy had been respectful and that there had been no confrontations, shows that the so-called "incidents" on which Nicaragua now places so much weight could not, even on Nicaragua's version of them, have been considered important at the time they occurred, or as giving rise to a genuine claim that Colombia had violated Nicaragua's sovereign rights and maritime spaces.

1.19. Colombia will address each of these 13 "incidents" in Chapter 4. For present purposes, Colombia notes that none of them supports Nicaragua's theory that Colombia violated Nicaragua's sovereign rights and maritime spaces. Contrary to the impression Nicaragua seeks to convey, they were the result of Colombia's lawful exercise of its rights and duties under international law, and did not result in any inability of Nicaragua to exercise sovereign rights in its maritime spaces.

1.20. Nicaragua's claim that Colombia has violated its sovereign rights and maritime spaces also rests on Colombia's enactment of Presidential Decree No. 1946 of 9 September 2013, establishing an Integral Contiguous Zone (ICZ) around Colombia's islands. In advancing this contention, Nicaragua accuses Colombia of repudiating the Court's 2012 Judgment.[12]

[12] Memorial of Nicaragua, para. 3.27.

1.21. It is worth recalling that the Court's Judgment of 19 November 2012[13] established a single maritime boundary delimiting the exclusive economic zone and the continental shelf without addressing any matters relating to the contiguous zone. As will be shown in Chapter 5, the mere pronouncement by Colombia of an Integral Contiguous Zone around its islands, which the Decree expressly stated would be done in conformity with international law and with due regard to the rights of third States,[14] is not an internationally wrongful act and has in no way compromised Nicaragua's sovereign rights and maritime spaces.

1.22. The integral nature of the zone results from geography due to the fact that the islands in the Archipelago are less than 24 nautical miles from each other. Moreover, the scope of jurisdiction provided for in the contiguous zone is fundamentally different from the sovereign rights a coastal State is entitled to exercise in its exclusive economic zone; the two are not mutually incompatible but rather are coexistent.

1.23. As Colombia will demonstrate, neither the extent of the zone, nor the type of contingent powers that its legislation provides for within the zone, is inconsistent with customary international law. Nicaragua cannot point to a single act that Colombia has undertaken in its Integral Contiguous Zone that has had the slightest adverse effect on Nicaragua's ability to

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

[14] Annex 7: Presidential Decree No. 1946 of 9 September 2013, as modified and amended by Presidential Decree No. 1119 of 17 June 2014 (composite version), Article 7.

exercise the enumerated sovereign rights in the exclusive economic zone or continental shelf. In contrast, if Nicaragua has its way, it is Colombia that will be precluded from fully enjoying its rights under international law.

C. Nicaragua's Failure To Respect Its Own Obligations and the Rights of the Inhabitants of the San Andrés Archipelago, Including in Particular, the Raizal Community

1.24. While Nicaragua's Memorial harps on the rights it claims Colombia has violated, it is silent regarding the fact that, under customary international law, Nicaragua also has obligations with respect to the exercise of its sovereign rights in its maritime spaces with which it has failed to comply *vis-à-vis* Colombia. Nicaragua also has obligations to respect the fishing rights and natural habitat of the inhabitants of the Archipelago.

1.25. Under customary international law, Nicaragua has the obligation to protect and preserve the marine environment. This, it has failed to do in the areas where it asserts its rights have been affected, including in areas covered by the Seaflower Biosphere Reserve and the Seaflower Marine Protected Area. Colombia has documented several episodes in which Nicaraguan authorities have failed to prevent and remedy predatory fishing practices by Nicaraguan flagged vessels, which employ destructive methods within the ecologically most sensitive parts of the Caribbean Sea to Colombia's prejudice without any control or due diligence on Nicaragua's part. These

not only cause serious harm to the environment, they violate the traditional fishing grounds and habitat of the inhabitants of the Archipelago.[15]

1.26. Nicaragua also has significant obligations of a customary and regional nature that are reflected in other instruments to which it and Colombia are parties. These include, for example, the Cartagena Convention. Colombia will revert to the sources of the legal obligations that Nicaragua has failed to respect in connection with its counter-claims.

D. Colombia's Counter-claims

1.27. It is precisely because Nicaragua is acting in violation of its obligations towards Colombia and its people that Colombia is submitting a number of counter-claims with this Counter-Memorial. These will be addressed in Part III, where Colombia will show that:

- Nicaragua has violated, and is violating, its obligations to preserve and protect the marine environment, including its obligation to exercise due diligence, in the Southwestern Caribbean Sea under customary international law, which has a fundamentally adverse impact on the marine environment in the area and on the rights of the inhabitants of the Archipelago.

[15] See Chapters 8 and 9 *infra*.

- By tolerating predatory fishing practices, including by its flagged and licensed vessels in Colombia's territorial sea, Nicaragua has similarly violated the rights of Colombia and the Raizal community as an indigenous group, including their right to the territories and natural resources of the areas that form part of their natural habitat, and their human rights.

- Nicaragua has also failed to respect the traditional fishing rights of the Raizal community and Colombia in the same maritime areas; and

- Nicaragua's straight baselines enacted after the 2012 Judgment, by which Nicaragua purports to measure its maritime spaces that it asserts have been violated by Colombia, are contrary to international law and are not opposable to Colombia. If these are not corrected, Colombia's sovereign rights and maritime spaces will continue to be injured.

E. Outline of the Counter-Memorial

1.28. This Counter-Memorial is divided into three Parts.

Part I deals with the factual, human, and legal background of the case.

- Chapter 2 discusses the special circumstances that characterize the Southwestern Caribbean Sea as part of the overall context within which the conduct of the Parties falls to be assessed. This context provides an important backdrop for considering Nicaragua's claims as well as Colombia's counter-claims, the latter of which arise out of the same factual matrix.

- Chapter 3 then turns to the rights and obligations of the Parties in the Southwestern Caribbean with respect to freedom of navigation and overflight, the protection and preservation of the marine environment, the customary rights of the inhabitants of the Archipelago to their traditional fishing grounds including the relationship of those rights to the environment, and the need to suppress transnational crime through, for example, the monitoring of drug trafficking and the transport of other illegal materials in the region. As Colombia will show, its presence in and around the Archipelago has been in accordance with its rights, and in compliance with its duties and obligations under international law, having due regard for the rights of third States, including Nicaragua.

Part II shows that, contrary to Nicaragua's allegations, Colombia has acted lawfully in the Caribbean Sea.

- Chapter 4 addresses the factual and legal deficiencies of Nicaragua's claim that Colombia has violated Nicaragua's maritime rights and spaces by allegedly harassing its vessels and preventing Nicaragua from exercising its sovereign rights within its maritime spaces. Not only do the facts adduced by Nicaragua in the present case fail to substantiate its claims; Nicaragua's own conduct is incompatible with them.

- Chapter 5 responds to Nicaragua's claim that, in enacting a decree establishing the ICZ, Colombia has also violated Nicaragua's sovereign rights and maritime spaces. Colombia will show why the establishment of such a zone, which is critical for Colombia and the region, is lawful and that neither the contours of the ICZ nor the functions reserved for Colombia within it are contrary to customary international law or to the rights of other States.

- Chapter 6 deals with the remedies Nicaragua seeks as particularized in Chapter IV of the Nicaraguan Memorial. As will be explained, there are no

grounds for these remedies given that Colombia has not breached obligations owed to Nicaragua.

Part III takes up Colombia's counter-claims.

- In Chapter 7, Colombia will provide a brief overview of its counter-claims, and show that the counter-claims fall within the jurisdiction of the Court. Colombia will also set out the requirements for the admissibility of its counter-claims, and will demonstrate that these requirements have all been met in connection with each counter-claim. Colombia will (i) demonstrate that the counter-claims are admissible in that they are directly connected with the subject-matter of Nicaragua's claims, (ii) set out the facts relevant to the counter-claims, and (iii) show how Nicaragua has breached its legal obligations.

- Chapter 8 presents Colombia's first two counter-claims, which are inter-related but distinct. The first is based on Nicaragua's violation of its duty to preserve and protect the marine environment of the Southwestern Caribbean Sea to the detriment of Colombia and the international community at large; the second is based on Nicaragua's concurrent violation of the rights of the inhabitants of the Archipelago, including the Raizal people.

These rights are dependent on the protection and preservation of the marine environment forming part of the habitat, and are thus closely connected with the first counter-claim.

- Chapter 9 then sets out Colombia's third counter-claim, which is based on Nicaragua's failure to respect the traditional fishing rights of the inhabitants of the Archipelago and of Colombia. Legally and factually, these are separate rights from those that the inhabitants enjoy with respect to the environmental integrity of their habitat.

- Chapter 10 addresses the factual and legal basis of Colombia's fourth counter-claim, which concerns the illegal nature of the straight baselines that Nicaragua enacted subsequent to the Court's 2012 Judgment. While Nicaragua asserts that Colombia has violated its maritime spaces, the extent of those spaces cannot be derived from straight baselines that have been drawn in a manner that is in breach of customary international law.

The Counter-Memorial ends with a brief summary of Colombia's case (Chapter 11), followed by Colombia's Submissions and a list of appendixes, annexes and figures.

1.29. Volume II contains appendixes, figures, and evidentiary materials in the form of documentary and other annexes.

PART I

FACTUAL, HUMAN AND LEGAL BACKGROUND OF THE CASE

Chapter 2

THE SPECIAL CIRCUMSTANCES OF THE CARIBBEAN SEA AND COLOMBIA'S REGULATORY RESPONSES

A. Introduction

2.1. In this chapter, Colombia will set out the special circumstances that characterize the Southwestern Caribbean Sea within which Nicaragua's claims and Colombia's counter-claims fall to be assessed. It is important for the Court to have an understanding of these circumstances in order to appreciate the importance that the area has for Colombia. These factors explain the reasons for Colombia's presence in the relevant waters and the actions it has taken to meet its legal duties, as well as Nicaragua's failure to fulfil its obligations under international law.

2.2. This section first addresses the consequences of the fact that the Southwestern Caribbean is a semi-enclosed sea under international law. It then explains the inter-related nature of the area. The next three sections discuss various aspects of the special circumstances of the area. Section B focuses on the distinctive characteristics and inter-related nature of the marine environment; Section C describes the inhabitants of the Archipelago and their traditional fishing practices; and Section D addresses the significance of the physical and human geography of the Archipelago, including concerns relating to drug trafficking, transnational crime, and other security matters.

(1) THE SOUTHWESTERN CARIBBEAN AS A SEMI-ENCLOSED SEA

2.3. **Figure 2.1** depicts the coastal geography of the Southwestern Caribbean. Starting in the north and moving in a clockwise direction, the sea is bordered by Jamaica, Haiti, the Dominican Republic, Colombia, Panama, Costa Rica and Nicaragua.

Figure 2.1

2.4. There are no areas within the southwest part of the Caribbean which Colombia and Nicaragua front that are more than 200 nautical miles from the nearest land territory. Consequently, the Southwestern Caribbean falls within the classical definition of a semi-enclosed sea. Per force, then, the whole of the waters of the Southwestern Caribbean belong to the exclusive economic zone of the riparian States and there are no areas of the high seas within the confines of this semi-enclosed sea.

2.5. The islands within this sea which make up the San Andrés Archipelago are: San Andrés, Providencia, Santa Catalina, the Alburquerque Cays, the East-Southeast Cays, Quitasueño, Roncador, Serrana, Serranilla and Bajo Nuevo. Sovereignty over these islands rests with Colombia, and the inhabitants who live on them, including the Raizales, are Colombian nationals. The entire sea is a fragile ecological unit, with the most sensitive areas comprising the Seaflower Biosphere Reserve and the Seaflower Marine Protected Area lying within the area bounded by the Colombian islands.

2.6. The fact that the Southwestern Caribbean is a semi-enclosed sea has legal, as well as environmental, social and security implications.[16] The area is especially vulnerable to

[16] For example, Article 123 of UNCLOS, which is binding on Nicaragua as a party to the Convention, provides *inter alia* for States bordering an enclosed or semi-enclosed sea to coordinate the management, conservation, exploration and exploitation of the living resources and the implementation of their rights and duties with respect to the protection and preservation of the marine environment.

predatory and destructive fishing practices, which harm the underlying coral reefs, and are incompatible with the fundamental obligation under customary international law to protect and preserve the marine environment.

2.7. Colombia has taken the lead in regulating, monitoring and sanctioning such practices in fulfilment of its legal duties under customary international law. As discussed later in this chapter, legal instruments, including the Cartagena Convention, and other arrangements to protect and preserve the marine environment and its ecosystems, such as the establishment of the Seaflower Biosphere Reserve and Seaflower Marine Protected Area, are critical parts of the normative structure that is designed to conserve the living resources of the area.

2.8. Nicaragua has shown no interest in doing the same. To the contrary, as will be shown in Chapter 8, Nicaragua has flagrantly breached its obligations to preserve and protect the marine environment and to exercise due diligence over its nationals and licensed vessels operating in these waters.

(2) THE INTER-RELATED NATURE OF THE AREA

2.9. The San Andrés Archipelago, including its islands, cays and banks, is a natural, political and social unity. With regard to its environment, its inhabitants and more generally its "functioning", the Archipelago is not just an addition of independent features. Rather, it is an area in which each element

is connected to the others in such a manner as to form an interdependent unit encompassing an ecosystem that can be soundly administered only when taken as a whole.

2.10. One aspect of this interconnectivity is that the local inhabitants of the Archipelago, including the Raizal people, are heavily dependent on traditional fishing and sea-based tourism for their livelihood. Yet the living resources of the area are situated in an extremely sensitive ecosystem that is interconnected by a series of coral reefs and other submarine features. These resources in turn face a real risk of depletion and even extinction by over-fishing, destructive fishing practices, and pollution from vessels and human activity. Those practices have an adverse knock-on effect on other parts of the ecosystem, and endanger the traditional fishing rights of the local population and their very existence, as well as the environment of an internationally recognized biosphere.

2.11. At the same time, the area in and around the Archipelago is used as a major maritime route for the commission of transnational crimes. Colombia is the only State with the ability to monitor and control this illegal activity from its bases on the Island of San Andrés and its outposts on other of the islands. It is also the only State to have a genuine interest in protecting the natural habitat of the population of the islands.

2.12. The combination of these factors explains the importance to Colombia of its right to exercise freedom of navigation and

overflight in the area. It is only by maintaining this presence that Colombia can monitor activities which threaten an area that is critical to its own people, Caribbean coastal States, and the wider international community. It also explains the need for measures taken by the Colombian Government in the aftermath of the Court's 2012 Judgment, such as Presidential Decree 1946 of 9 September 2013, reinstating the essential unity of the San Andrés Archipelago and establishing an Integral Contiguous Zone composed of the sum of the overlapping contiguous zones of its island components.

B. The Marine Environment and Colombia's Protective Measures

(1) Distinctive Characteristics of the Marine Environment

2.13. The waters of the San Andrés Archipelago are recognized to be of "a regional and global [ecological] significance", which is "one of the world's top ten regions exceptionally rich in marine species and facing extreme threat".[17]

2.14. The Archipelago's complex reef system is the most extensive in the Soutwestern Caribbean Sea and a major site of coral and fish diversity. It has been identified as a biodiversity hotspot and "is part of the Caribbean Terrestrial Biodiversity

[17] UNESCO Man and the Biosphere Program - MAB/ CORALINA, *Evaluation Report Seaflower Biosphere Reserve Implementation: The First Five Years 2000-2005*, by M. Howard, June 2006, p. 8. Available at: http://www.unesco.org/csi/smis/siv/Caribbean/San_actEnvEd_Seaflower2000-2005%20.pdf. (Last visited: 10 Nov. 2016).

Hotspot and also the Western Caribbean Coral Reef Hotspot".[18] Its ecosystems include barrier and fringing reefs, lagoons, seagrass beds, and coastal mangroves of San Andrés, Providencia, and Santa Catalina; the reefs and shallow sandbanks surrounding the group of cays comprising the East-Southeast Cays; the reef terrace of Alburquerque; the large coral structure at Quitasueño, which is almost 60 km long and 20 km wide, with a 40 km reef wall and 496 km^2 of live coral coverage; the complex reef system 37 km by 30 km, with 75 km^2 of live coral coverage of Serrana; and the 30 km^2 of live coral coverage of Roncador.

2.15. This complex forms the base of the Archipelago's ecosystems. There is a continuous flow of biomass between coral reefs and the different coastal and marine habitats, including beaches, seagrass beds and mangroves.[19]

2.16. Seagrass beds perform a number of important roles. In particular, they serve as habitats for a wide range of organisms. They provide food for species such as parrot fish, surgeonfish,

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[18] UNESCO Man and the Biosphere Program - MAB/ CORALINA, *Evaluation Report Seaflower Biosphere Reserve Implementation: The First Five Years 2000-2005*, by M. Howard, June 2006, p. 8. Available at: http://www.unesco.org/csi/smis/siv/Caribbean/San_actEnvEd_Seaflower2000-2005%20.pdf. (Last visited: 10 Nov 2016).

[19] J.B.R. Agard, A. Cropper, *Caribbean Sea Ecosystem Assessment (CARSEA), A contribution to the Millennium Ecosystem Assessment*, prepared by the Caribbean Sea Ecosystem Assessment Team, Caribbean Marine Studies, Special Edition, 2007, pp. 12-21. Available at: http://www.icmyl.unam.mx/pdf/GRAMED/Assessments_Delivery-Item-1/GRAMED_revised/pdf_support%20information/GRAMED_before%202012_pdf/Caribbean%20Sea%20Ecosystem%20Assessment_COMPL1.pdf. (Last visited: 10 Nov. 2016).

Queen Conch,[20] sea urchin and green turtles. They are important in the marine food chain, as they act as a nursery for many commercial species of fish, crustaceans and molluscs, while reef-based carnivores venture off into nearby seagrass beds in search of food.[21]

2.17. Mangroves fulfil important socioeconomic and environmental functions, including the provision of a variety of wood and non-wood forest products, coastal protection against the effects of wind, waves, and water currents, conservation of biological diversity (reptiles, amphibians and birds), protection of coral reefs and seagrass beds. They also provide habitat, spawning grounds and nutrients for a variety of fish and shellfish, including many commercial species. Mangroves can also provide income as eco-tourist attractions.[22]

2.18. Healthy reefs provide an abundant variety of foods, including fish, crustaceans, molluscs, sea cucumbers, and sea-weeds. Fisheries are one of the most direct forms of human dependence on reefs, providing vital food, income, and employment. Reef fisheries are largely small-scale and artisanal, resulting in a low barrier to entry, making them particularly attractive as a source of livelihood for the inhabitants of the Archipelago, including the Raizal people.

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[20] Queen Conch's scientific name is *Lobatus gigas* or *Strombus gigas.* In Spanish it is known as "Caracol Pala".

[21] J.B.R. Agard, A. Cropper, *op. cit*., p. 13.

[22] *Ibid*., p. 15.

2.19. Coral reefs also play a valuable role in buffering coastal communities from the physical impacts of wave action and storms, thereby reducing coastal erosion and lessening wave-induced flooding. Coral reefs typically mitigate 75 to 95 percent of wave energy.

2.20. In addition, coral reefs are important for tourism, an activity which is particularly significant for the economy of the Archipelago. Reef tourism attracts divers. Beyond the transport and guiding of tourists on diving sites, expenses of divers and snorkelers also support a range of businesses such as dive shops, hotels, restaurants, and transportation. Reef tourists also include beach visitors, in areas where sand is supplied by nearby reefs. Additionally, the overall natural environment associated with coral reefs, including birds that are found in the mangroves, attracts eco-tourism, an increasingly popular and economically important activity. It should be mentioned, however, that while tourism is an important activity for the region, Colombian regulations dictate that certain islands of the Archipelago are not accessible to tourists in order to protect the environment.

2.21. These features of the Archipelago are connected by a complex ecosystem. While much remains unstudied to date, experts note that:

> "The deep water between sites… is important for flows, connectivity, spawning aggregations, larval dispersal, maintaining marine food webs, etc."[23]

(2) THE FRAGILITY OF THE ARCHIPELAGO'S ECOSYSTEM

2.22. The fragility of the Caribbean ecosystem is well documented. Threats include marine-based pollution and damage due to pressures from shipping and boating (such as the dumping of garbage, oil spills, discharge of ballast, and physical damage caused by groundings and anchors), overfishing or other predatory practices, the introduction of alien fish species[24], beach erosion, and rising sea temperatures due to climate change.

2.23. Overfishing threatens over 60 percent of Caribbean coral reefs. Fishing above sustainable levels affects coral reefs by altering the ecological balance of the reef. The removal of herbivorous fish, which consume algae, facilitates algal overgrowth of corals. Currently, declines in coral cover and increases in algal cover have been observed across the region; about one-third of Caribbean reefs are at high threat from overfishing and about 30 percent at medium threat. Moreover, it is estimated that 15 percent of Caribbean reefs are threatened by

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[23] Listing of Protected Areas under the Protocol Concerning Specially Protected Areas and Wildlife to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, Specially Protected Areas and Wildlife, Seaflower Marine Protected Area, site description. Available at: http://www.spaw-palisting.org/area_public/show/id/31/template/C3_2. (Last visited: 10 Nov. 2016).

[24] Lionfish (*Pterois*) is recognized as an alien species and may cause serious deleterious consequences on local species. It can reduce by 79% the recruitment of native fish.

the discharge of wastewater from cruise ships, tankers and yachts, leaks or spills from oil infrastructure, and damage from ship groundings and anchors.[25]

2.24. While the coastal States of the Caribbean Sea are aware of this situation (which led to conclusion of the Cartagena Convention, amongst other responses), it is of particular concern to Colombia and the inhabitants of the Archipelago. This is because the Archipelago not only contains one of the most extensive reef areas in the Western Atlantic, but is also a particularly complex one susceptible to the threats mentioned above. For instance, out of all the species of fish identified in the Seaflower Marine Protected Area, 53 are on the Red List of Threatened Species maintained by the International Union for Conservation of Nature (IUCN).[26]

(3) COLOMBIA'S PROTECTIVE MEASURES IN THE AREA

(a) Colombia's Responses to the Environmental Concerns

2.25. In response to these threats to the equilibrium of the Archipelago, Colombia has adopted a number of protective measures. In particular, Colombia has been taking steps to protect and preserve the area around and between the islands comprising the Archipelago most vulnerable to these risks.[27]

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[25] L. Burke, J. Maidens, *Reefs at Risk in the Caribbean*, World Resources Institute, 2004, p. 12. Available at: http://pdf.wri.org/reefs_caribbean_full.pdf. (Last visited: 10 Nov. 2016).

[26] *Ibid.*, p. 13.

[27] See, for instance, Colombian Institute for Agrarian Reform, Resolution No. 206 of 1968; National Institute of Renewable Natural

The practices which Colombia has been trying to discourage and control include over-fishing, the use of explosives and scuba gear which damage the coral reef environment and results in serious waste, and the indiscriminate use of nets that capture the living resources without regard to the particular species or their risk of depletion. Colombia has also had to deal with abandoned fishing vessels and pollution from ships, and even undertake search and rescue missions, including for Nicaraguan flagged vessels that have engaged in prejudicial activities.[28] Colombia's efforts to control this situation date back more than six decades.[29]

2.26. As early as 1972, when Colombia and the United States signed a treaty resolving their differences over the islands of Quitasueño, Roncador and Serrana – the waters of which formed part of this ecosystem – U.S. fishing in these waters was agreed to be subject to reasonable conservation measures applied by the

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Resources and Environment, Agreement No. 028 of 1970; National Institute of Renewable Natural Resources and Environment, Executive Resolution No. 23 of 1971; Law No. 47 of 1993; Law No. 99 of 1993; Ministry of Environment, Resolution No. 1021 of 1995; Ministry of Environment, Resolution No. 013 of 1996; Ministry of Environment, Resolution No. 1426 of 1996; Corporation for the Sustainable Development of the San Andrés, Providencia and Santa Catalina Archipelago – CORALINA, Resolution No. 163 of 1999; Departmental Decree No. 325 of 2003; Law No. Ley 915 de 2004; Ministry of Environment, Resolution No. 876 of 2004; Ministry of Environment, Resolution No. 107 of 2005 (Annex 4); CORALINA, Agreement No. 021 of 2005 (Annex 5); CORALINA, Agreement No. 025 of 2005 (Annex 6); Ministry of Environment, Resolution No. 0149 of 2006; Ministry of Environment, Resolution No. 019 of 2007. See also para. 3.43 *infra*.

[28] Details of these kinds of activities are discussed in Chapters 4 and 8.

[29] See, for example, Colombian Institute for Agrarian Reform, Resolution No. 206 of 16 December 1968 (Annex 2).

Government of Colombia.[30] This was critical since U.S. flagged fishing vessels were the most numerous foreign fishing vessels in the region at the time. In 1983, Colombia and the United States engaged in a further Exchange of Notes providing for Colombia's right to monitor the arrival and departure of U.S. vessels in the waters of the islands and to receive a statement on the quantity and species of any catch.[31]

2.27. Further agreements were reached between Colombia and the United States in 1987 and 1989. The 1987 arrangements included a temporary ban on conch fishing in the waters of Quitasueño to prevent the depletion of stocks. The 1989 agreement continued this ban, and adopted a three-month closed season for Queen Conch fishing around Roncador and Serrana, and a prohibition on the capture of Caribbean Spiny Lobster[32] of less than a specified size.[33]

2.28. Colombia adopted further fishing regulations to preserve the marine environment in 1990. These extended the ban on conch fishing off Quitasueño, placed size limitations on the capture of Spiny Lobsters and imposed restrictions on certain kinds of dive equipment and nets, and on fishing carried out by

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30 *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Counter-Memorial of Colombia (Vol. II)*, Annex 3, pp. 18-20

31 *Ibid*., Annex 8.

32 Caribbean Spiny Lobster's scientific name is *Panulirus argus.* In Spanish it is known as "Langosta Espinosa del Caribe".

33 *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Counter-Memorial of Colombia (Vol. II)*, Annexes 11 and 13.

factory ships.[34] None of these regulations were protested; all of them were put into place for the purpose of protecting and preserving the marine environment.

2.29. In 1994, and again in 1996, Colombia and the United States entered into further arrangements which gave Colombia the right to board U.S. flagged vessels to verify compliance with Colombia's regulations and to enact further conservation measures. The two countries also agreed to cooperate in developing an action plan for evaluating the fishing resources of the area and the threats they faced.[35]

2.30. Further north, Colombia entered into a series of agreements with Jamaica regulating artisanal fishing by Jamaican nationals and vessels in the waters around the cays of Bajo Nuevo and Serranilla. The first such agreement was signed on 30 July 1981.[36] It was supplemented by a further agreement concluded on 30 August 1984,[37] and an agreement of 12 November 1993 establishing, *inter alia*, a Joint Regime Area around these islands.[38]

2.31. In the 1981 and 1984 agreements, Colombia conditioned Jamaican fishing on a series of environmental regulations. These included limits on the number and size of vessels that were

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[34] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Counter-Memorial of Colombia (Vol. II)*, Annex 151.
[35] *Ibid*., Annexes 16, 68 and 150.
[36] *Ibid*., Annex 7.
[37] *Ibid*., Annex 9.
[38] *Ibid*., Annex 14.

allowed to operate in the waters of the Cays, limits on the type of species that could be caught and the maximum annual catch, regulations as to the type of fishing gear that could be employed and reporting obligations. Vessels flying the Jamaican flag were also subject to all relevant laws and regulations of Colombia pertaining to conservation of the living resources, the preservation of the environment, pollution, sanitation, navigation and other such areas.

2.32. All of these actions attested to Colombia's concern to preserve and protect the marine environment and conserve the living resources of the area, and its determination to take concrete actions to this end. In the meantime, Colombia was one of the main States that pushed for the negotiation and conclusion of the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, otherwise known as the "Cartagena Convention", of which it acts as depository. The next section turns to this convention and the establishment of the Seaflower Biosphere Reserve under the auspices of UNESCO and the Seaflower Marine Protected Area.

(b) Regional Arrangements and Colombia's Implementation

(i) The Cartagena Convention

2.33. The Cartagena Convention was signed in Cartagena, Colombia on 25 March 1983. It entered into force on 11 October 1986. At the time it was concluded, the Convention was the only legally binding environmental treaty in the Caribbean. Colombia

signed the Convention at the time it was adopted and ratified it in 1988. Nicaragua, in contrast, took over 22 years to ratify the Convention, only doing so in August 2005.

2.34. The text of the Cartagena Convention may be found in Annex 17. As its Preamble records, the Convention was entered into in the light of the Contracting Parties' recognition of the economic and social value of the marine environment, their responsibility to protect this environment and its ecosystems, and the special hydrographic and ecological characteristics of the region and its vulnerability to pollution and environmental deterioration.

2.35. The obligations encapsulated in the Convention are based on, amongst others, the customary international law principle to preserve and protect the environment. Under Article 4 of the Convention, the Contracting Parties shall, individually or jointly, take

> "…all appropriate measures in conformity with international law and in accordance with this Convention and those of its protocols in force to which they are parties to prevent, reduce and control pollution of the Convention area and to ensure sound environmental management, using for this purpose the best practicable means at their disposal and in accordance with their capabilities".[39]

[39] Article 3, paragraph 3 of the Convention stipulates that: "Nothing in this Convention shall prejudice the present or future claims or the legal views of any Contracting Party concerning the nature and extent of maritime jurisdiction".

Paragraph 3 of Article 4 provides that the Contracting Parties "shall co-operate in the formulation and adoption of protocols or other agreements to facilitate the effective implementation of this Convention".

2.36. Article 10, which is entitled "Specially Protected Areas", provides that the "Contracting Parties shall, individually or jointly, take all appropriate measures to protect and preserve rare and fragile ecosystems, as well as the habitat of depleted, threatened or endangered species". To this end, the article provides that "the Contracting Parties shall endeavour to establish protected areas", which shall not affect the rights of other Contracting Parties and third States. In view of the fragile nature of the ecosystem around Colombia's islands, Colombia has established a Marine Protected Area in part of the sea that is most susceptible to ecological degradation (discussed below).

2.37. Under Article 17 of the Cartagena Convention, the Contracting Parties may adopt additional protocols to the Convention pursuant to paragraph 3 of Article 4. Three protocols to the Convention have been concluded: the 1983 Oil Spill Protocol, the 1990 Specially Protected Areas and the 1999 Wildlife Protocol, and the Land-based Sources of Marine Pollution Protocol.

2.38. For the purposes of this case, it is the second of these Protocols – the Protocol Concerning Specially Protected Areas and Wildlife to the Convention for the Protection and

Development of the Marine Environment of the Wider Caribbean Region, known as the SPAW Protocol – that is important.[40] The Protocol was adopted in 1990 and came into force in 2000. Colombia acceded to SPAW in January 1998. Nicaragua has not signed or ratified the SPAW Protocol, although many other countries both within and outside of the region have done so.[41]

2.39. The Preamble to the SPAW Protocol acknowledges the special hydrographic, biotic and ecological characteristics of the Wider Caribbean Region. It also refers to the grave threat posed by ill-conceived development options to the integrity of the marine and coastal environment, and the overwhelming ecological, economic, aesthetic, scientific, cultural, nutritional and recreational value of rare or fragile ecosystems. It also notes that protection and maintenance of the environment of the Wider Caribbean Region are essential to sustainable development within the region.

2.40. Article 4 of the SPAW Protocol obligates parties, "when necessary, [to] establish protected areas … with a view to sustaining the natural resources of the Wider Caribbean Region, and encouraging ecologically sound and appropriate use,

[40] Annex 18: Protocol Concerning Specially Protected Areas and Wildlife to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (SPAW Protocol), adopted in Kingston, Jamaica, on 18 January 1990.

[41] The following States have signed and ratified the SPAW Protocol: Bahamas, Barbados, Belize, Colombia, Cuba, Dominican Republic, France, Grenada, Guyana, Netherlands, Panama, Saint Lucia, St. Vincent and the Grenadines, Trinidad and Tobago, United States of America and Venezuela.

understanding and enjoyment of these areas, in accordance with the objectives and characteristics of each of them".

2.41. Under Article 5 of the Protocol, parties have the obligation, in conformity with their national laws and regulations and with international law, progressively to take such measures as are necessary and practicable to achieve the objectives for which a protected area has been established. A host of measures that should be adopted as appropriate are then listed.

2.42. Article 7, paragraph 3, sets out the procedures for the establishment of the list of protected areas. States may nominate such areas. If they do so, they must provide the necessary supporting documentation to the Scientific and Technical Advisory Committee, which evaluates the nomination and advises the United Nations Environment Programme (UNEP), which is the "Organization" designated in Article 15 of the Cartagena Convention to carry out this function, as to whether the nomination fulfils the guidelines and criteria established pursuant to Article 21 of the Protocol. If these guidelines and criteria are met, the Organization will advise the Meeting of Contracting Parties who will include the nomination in the List of Protected Areas.

2.43. As will be seen, for Colombia, the designation and regulation of a Marine Protected Area was critical not only to protect and preserve the ecosystem that exists within the waters

of the Archipelago, but also to take into account the traditional rights and interests of the indigenous Raizal people that lives on the islands and depends on the sustainability of the living resources within the waters that have always formed part of their natural and traditional habitat.

(ii) The Seaflower Biosphere Reserve

2.44. In the 1970s, UNESCO launched its Man and the Biosphere (MAB) Programme designed to enable States to nominate biosphere reserves with the objective of achieving a sustainable balance between goals of conserving biodiversity, promoting economic development, and maintaining associated cultural values. Biosphere Reserves are areas of terrestrial and coastal/marine ecosystems which are internationally recognized within the framework of UNESCO's MAB Programme.[42] As the Seville Strategy devoted to the project stated in its review of the Programme in 1995:

> "Each biosphere reserve is intended to fulfil three complementary functions: a conservation function, to preserve genetic resources, species, ecosystems and landscapes; a development function, to foster sustainable economic and human development, and a logistic support function, to support demonstration projects, environmental education and training, and research and monitoring related

[42] Biosphere Reserves: The Seville Strategy & Framework of the World Network, endorsed at the 13th session of the International Co-ordinating Council of the Man and the Biosphere (MAB) Programme, Seville, 12-16 June 1995. Available at: http://unesdoc.unesco.org/images/0010/001038/103849Eb.pdf. (Last visited: 10 Nov. 2016).

> to local, national and global issues of conservation and sustainable development".[43]

A further goal is to promote biosphere reserves "as means of implementing the goals of the Convention on Biological Diversity".[44]

2.45. The procedure for designating a biosphere reserve under the MAB Programme is set out in Article 5 of the Statutory Framework of the World Network of Biosphere Reserves.[45] States forward nominations with supporting documentation to the secretariat, taking into account the criteria for a reserve as defined in Article 4 of the Statutory Framework. After the secretariat verifies the content of the submission, the nomination is considered by the Advisory Committee for Biosphere Reserves for recommendation to the International Co-ordinating Council (ICC) of the MAB Programme.

2.46. The Advisory Committee is the primary scientific and technical committee advising the ICC and the Director-General of UNESCO on matters pertaining to the World Network of Biosphere Reserves. The ICC is the MAB's main governing body. It consists of 34 Member States elected by UNESCO's

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[43] Biosphere Reserves: The Seville Strategy & Framework of the World Network, *op. cit.*, p. 4.

[44] *Ibid.*, Goal I, Objective I.1, recommended at the international level, No. 1.

[45] Statutory Framework of the World Network of Biosphere Reserves, Art. 5. Available at: http://unesdoc.unesco.org/images/0010/001038/103849Eb.pdf. (Last visited: 10 Nov. 2016).

biennial General Conference. Under Article 5(1)(d) of the Statutory Framework, the ICC takes a decision on nominations for designation.

2.47. Recognizing the need to protect and preserve the ecosystem of the sea bed and waters of the Archipelago, and to foster understanding of the principles of sustainable development amongst the local population, Colombia nominated the Seaflower Biosphere Reserve under UNESCO's MAB Programme on 25 September 2000. The reserve covered areas of Colombia's EEZ, over which it had control at the time, in line with its international obligations to protect the marine environment. Colombia's nomination was duly considered by the ICC, which approved the submission and officially designated the Seaflower Biosphere Reserve for inclusion in the World Network of Biosphere Reserves in 2000.[46]

2.48. The Seaflower Biosphere Reserve was established in line with customary international law which calls for all States to preserve and protect the environment. The manner in which the Seaflower Biosphere Reserve's objectives have been drawn reflects the integrity of the area that it covers. They are to achieve a sustainable balance between biodiversity conservation, economic development, and cultural survival. In order to achieve these goals, the biosphere reserve is designed to fulfil

[46] UNESCO, Biosphere Reserve Information: Colombia, Seaflower. Available at: http://www.unesco.org/mabdb/br/brdir/directory/biores.asp?mode=all&code=COL+05. (Last visited: 10 Nov. 2016).

three complementary functions: conservation (preserve genetic resources, species, ecosystems, and landscapes); development (foster sustainable economic and human development); and, logistic support (support demonstration projects, environmental education and training, research and monitoring related to local, national, and global issues of conservation and sustainable development).[47]

2.49. The area covered by the Seaflower Biosphere Reserve is depicted on **Figure 2.2**. As the MAB Programme's "General Description" of the reserve indicates, it comprises areas of coastal mangrove swamps and "highly intact and productive associated coral reef ecosystems, [which are] a major site of coral and fish diversity".[48] The administrative authority for the Seaflower Reserve in Colombia is the Corporation for the Sustainable Development of the Archipelago of San Andrés, Providencia and Santa Catalina (CORALINA).

[47] M. W. Howard, *Evaluation Report Seaflower Biosphere Reserve Implementation: The First Five Years 2000–2005, Archipelago Of San Andrés, Old Providence & Santa Catalina*, June 2006, p. 7. Available at: http://www.unesco.org/csi/smis/siv/Caribbean/San_actEnvEd_Seaflower2000-2005%20.pdf. (Last visited: 10 Nov. 2016).

[48] UNESCO, Biosphere Reserve Information: Colombia, Seaflower. Available at: http://www.unesco.org/mabdb/br/brdir/directory/biores.asp?mode=all&code=COL+05. (Last visited: 10 Nov. 2016).

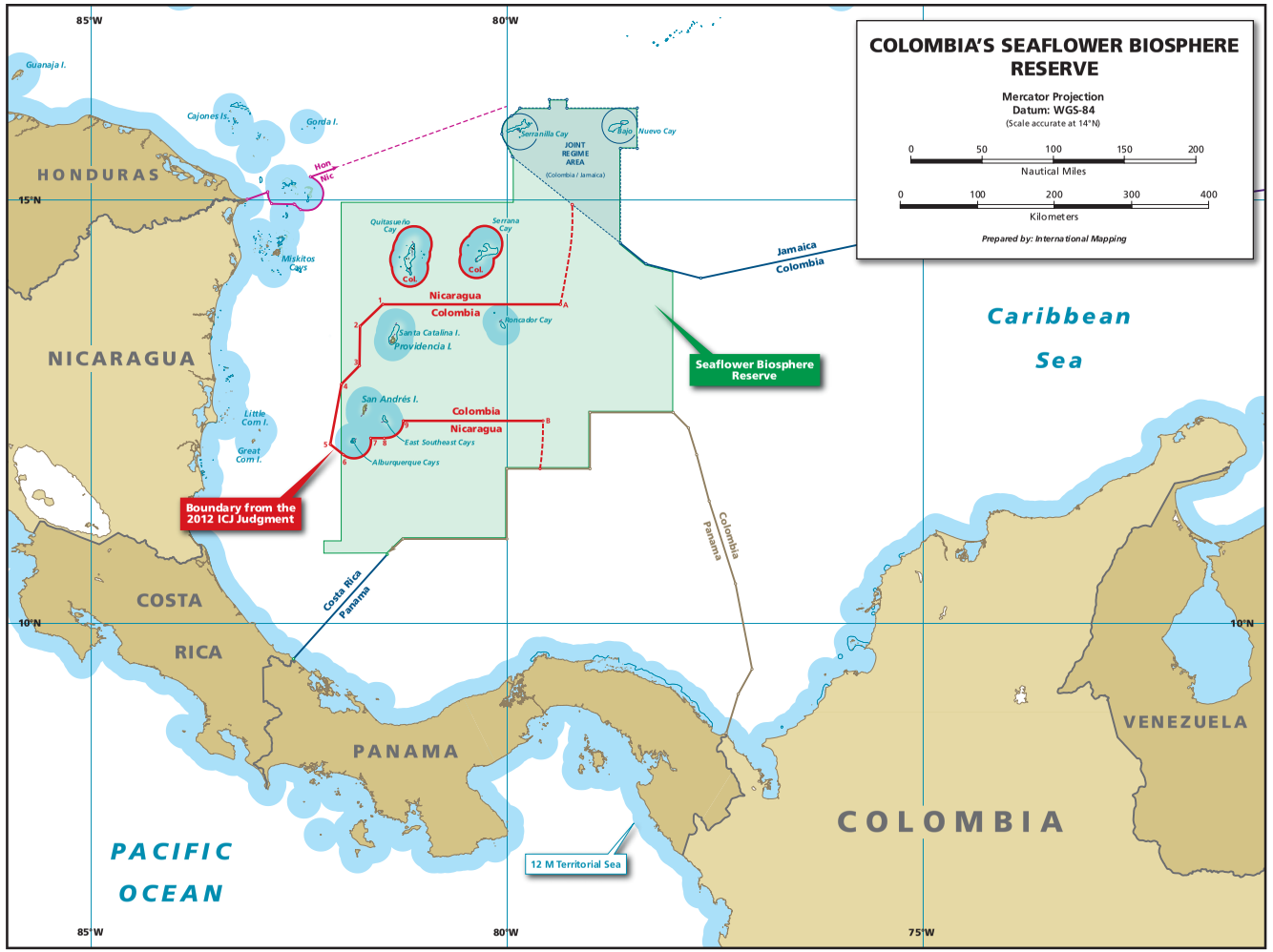
COLOMBIA'S SEAFLOWER BIOSPHERE RESERVE
Mercator Projection
Datum: WGS-84
(Scale accurate at 14°N)
0 50 100 150 200
Nautical Miles
0 100 200 300 400
Kilometers
Prepared by: International Mapping
85°W
80°W
75°W
15°N
10°N
HONDURAS
NICARAGUA
COSTA RICA
PANAMA
COLOMBIA
VENEZUELA
Caribbean Sea
PACIFIC OCEAN
Guanaja I.
Cajones Is.
Gorda I.
Hon
Nic
Miskitos Cays
Quitasueño Cay
Serrana Cay
Col.
Serranilla Cay
Bajo Nuevo Cay
JOINT REGIME AREA
(Colombia / Jamaica)
Jamaica
Colombia
Nicaragua
Colombia
Roncador Cay
Santa Catalina I.
Providencia I.
San Andrés I.
Colombia
Nicaragua
East Southeast Cays
Alburquerque Cays
Little Corn I.
Great Corn I.
Seaflower Biosphere Reserve
Boundary from the 2012 ICJ Judgment
Costa Rica
Panama
Colombia
Panama
12 M Territorial Sea

Figure 2.2

2.50. CORALINA has played a key role in the management of the Seaflower Biosphere Reserve, a role made possible by domestic Colombian legislation and administration.[49] In respect of the main concerns of the Archipelago, its natural environment and the related human interaction, especially fishing,[50] the principal governing actors at the local level are CORALINA,[51] the Agriculture and Fishing Secretary,[52] the Public Services and Environment Secretary,[53] the Departmental Government of the Archipelago of San Andrés and the Municipality of Providencia and Santa Catalina,[54] and the Departmental Board of Fishing

[49] The Colombian legislation grants to the Archipelago a large degree of autonomy for its governance (Colombian Constitution, Arts. 310 and 42 transitory; Presidential Decree 2762 of 1991, Art. 1; Law 47 of 1993, Art. 1; and Law 915 of 2004, Art.1) and for the management of its natural resources (Colombian Constitution, Arts. 79, 80, 150-7 and 310; Law 47, Arts. 5, 23-30; Law 99 of 1993, Art. 37; Law 915, Art. 24-47).

[50] On the human interaction with the Archipelago's features, see Chapter 2, Sec. C *infra*.

[51] The Board of Directors of CORALINA is composed of: a. The Minister of Environment or his representative; b. The Governor of the Archipelago Department of San Andrés, Providencia and Santa Catalina who shall preside it; c. A representative of the President of the Republic; d. The Director of Institute of Marine and Coastal Investigation (INVEMAR); e. A representative of the economic groups existing in the Archipelago; f. A representative of the artisanal, agriculture and livestock and fishing production groups duly incorporated in the Archipelago; g. The Director of the General Maritime Directorate of the Ministry of Defense; h. The members of the Board for the Protection of Natural and Environmental Resources of the Archipelago Department of San Andrés, Providencia and Santa Catalina.

[52] As its name indicates, the Agriculture and Fishing Secretary has the function of controlling and monitoring all activities related to the fishing and agriculture activities in the Archipelago.

[53] The Public Services and Environment Secretary has the function of developing the activities of the Environmental System of the Archipelago Department and programs for the due preservation, administration and sustainable use of the natural resources therein.

[54] The Departmental Government of the Archipelago of San Andrés and the Municipality of Providencia and Santa Catalina, are in charge of

and Aquaculture.[55] CORALINA's authority includes land and sea, allowing the agency to advance a cross-sectoral approach to marine resource management emphasized by the White Water to Blue Water Initiative, the World Summit on Sustainable Development (WSSD), and the International Coral Reef Initiative (ICRI).[56]

2.51. Amongst its tasks, CORALINA carries out studies on climate, oceanography, hydrology, the flora and fauna of the reserve, socio-economic aspects and long-term monitoring of the marine ecosystems. In order to increase awareness, CORALINA has organized a special programme of education, public awareness and community involvement amongst the local population of the islands in order for them to develop and understand the philosophy and approaches of the MAB

executing the fishing policy of the national government; regulating and enforcing the fishing activity and periodically establishing the maximum number of boats, their kind and size, in order to not exceed the maximum allowed yield.

[55] The Departmental Board of Fishing an Aquaculture is formed by nine members: the Governor of the Archipelago; the Agriculture and Fishing Secretary; a member from the General Maritime Directorate of the Ministry of Defense (DIMAR); and persons representing respectively CORALINA, SENA (National Service for Learning), the National Presidency, artisanal fishers from Providencia, artisanal fishers from San Andrés, and industrial fishers. They have to find agreements on the regulatory system for fishing and land use, and the control of illegal activities at the sea such as drug trafficking.

[56] United Nations Environment Programme (UNEP), Annotated format for presentation reports for the areas proposed for inclusion in the SPAW List (Revised draft). Fourth Meeting of the Scientific and Technical Advisory Committee (STAC) to the Protocol Concerning Specially Protected Areas and Wildlife (SPAW) in the Wider Caribbean Region. Gosier, Guadeloupe, France, 2-5 July 2008. Par.8, P. 2. Available in: http://www.car-spaw-rac.org/IMG/pdf/Colombia_-_Presentation_report_for_the_Seaflower_MarineProtected_Area-3.pdf. (Last visited: 10 Nov. 2016).

Programme in cultural, environmental and economic terms. As the MAB Programme Information notes:

> "To contribute to sustainable economic and human development, the biosphere reserve will support eco and ethno-tourism, and strengthen traditional native pursuits of subsistence agriculture, small animal rising, and artisan fishing that promotes self-sufficiency."[57]

2.52. The area covered by the Seaflower Biosphere Reserve is rich in biological resources that are in serious need of protection and preservation. These include some 400 species of fish, 170 species of macroalgae, 99 species of hard and soft coral, 66 species of invertebrates, which include lobsters and other similar creatures, and four of the seven species of sea turtles in the world.[58] Colombia's action in creating the Reserve has contributed to the sustainability of its living resources and has raised awareness of the importance of the protection of the marine environment in the region.

(iii) The Seaflower Marine Protected Area

2.53. Largely in response to the concerns expressed by the local Raizal population, who were worried about the protection of the environment surrounding the Archipelago and about over-

[57] UNESCO, Biosphere Reserve Information: Colombia, Seaflower. Available at: http://www.unesco.org/mabdb/br/brdir/directory/biores.asp?mode=all&code=COL+05. (Last visited: 10 Nov. 2016).

[58] Overview of the Seaflower Biosphere Reserve. Available at: http://www.caribbeancolombia.com/content/reserva-de-biosfera-seaflower-san-andres. (Last visited: 10 Nov. 2016).

fishing and the conservation of their traditional fishing areas and resources, Colombia initiated a project, executed by CORALINA, entitled "Caribbean Archipelago Biosphere Reserve: Regional Marine Protected Area System" in June, 2000. This project built on an initiative to work on environmental problems in the Archipelago in 1998 that was partnered by Scotland's Heriot-Watt University and funded by the European Union.

2.54. On 27 January 2005, Colombia established the Seaflower Marine Protected Area (the "Seaflower MPA") as the next step in the process. The Seaflower MPA is depicted on **Figure 2.3**. It is comprised within the larger Seaflower Biosphere Reserve and covers maritime areas in the vicinity of the islands of San Andrés, Providencia, Santa Catalina, Quitasueño, Serrana, Roncador, the Alburquerque Cays and the East-Southeast Cays where the ecosystems are deemed to be subject to particularly high risks. As the Proposal for the listing for the Marine Protected Area under the SPAW Protocol noted:

> "The MPA was created in response to a demand from the islander community - that has depended on marine resources for their livelihood for centuries - for improved conservation of marine biodiversity and management to promote sustainable use."[59]

[59] Annex 89: Proposed areas for inclusion in the SPAW List, Annotated Format for Presentation Report for Seaflower Marine Protected Area, Colombia, 5 Oct. 2010, p. 5.

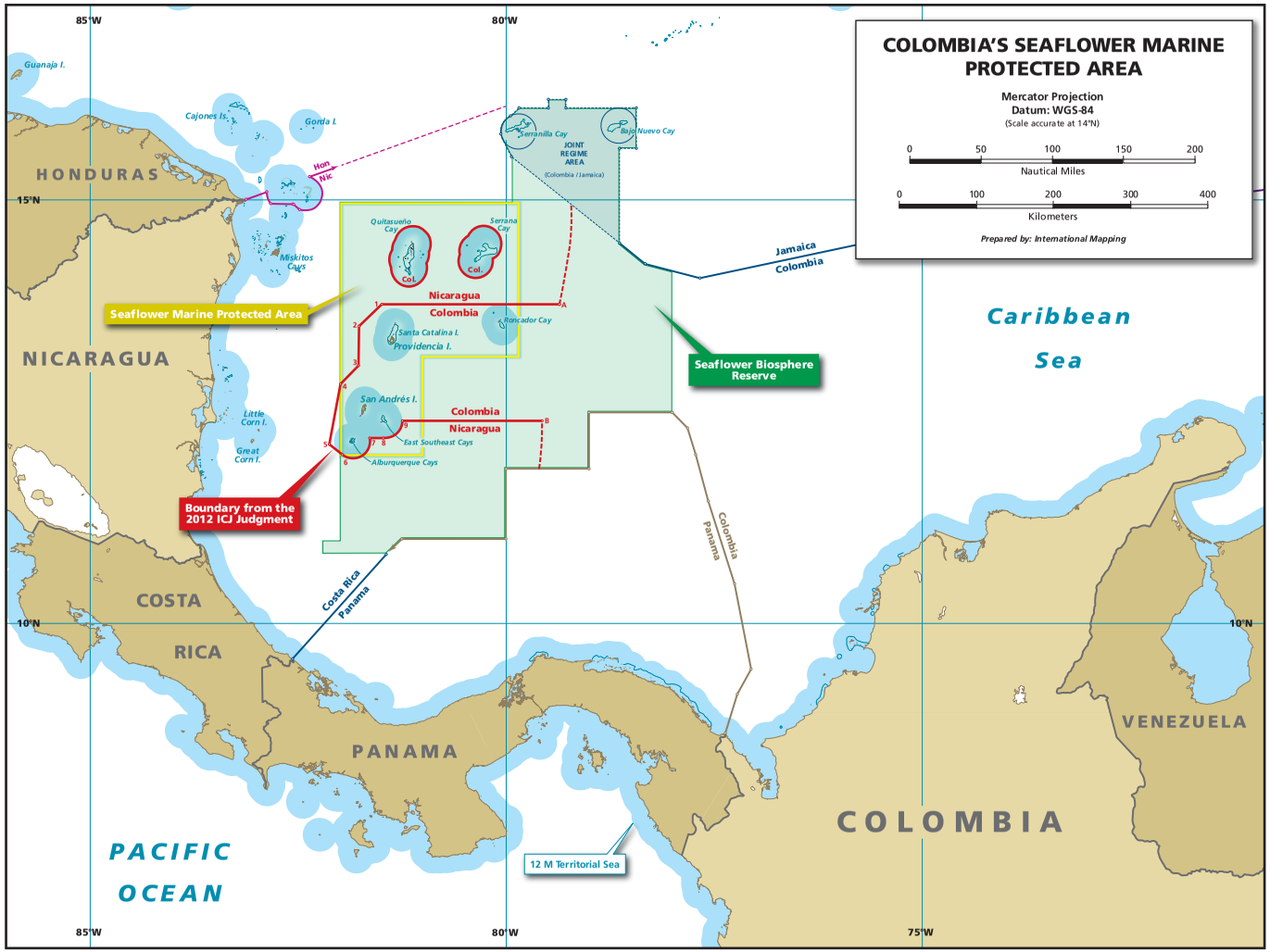
COLOMBIA'S SEAFLOWER MARINE PROTECTED AREA
Mercator Projection
Datum: WGS-84
(Scale accurate at 14°N)
0 50 100 150 200
Nautical Miles
0 100 200 300 400
Kilometers
Prepared by: International Mapping
85°W
80°W
75°W
15°N
10°N
Guanaja I.
Cajones Is.
Gorda I.
HONDURAS
Hon
Nic
Miskitos Cays
NICARAGUA
Seaflower Marine Protected Area
Quitasueño Cay
Serrana Cay
Col.
Col.
Nicaragua
Colombia
Santa Catalina I.
Providencia I.
Roncador Cay
San Andrés I.
Colombia
Nicaragua
East Southeast Cays
Alburquerque Cays
Little Corn I.
Great Corn I.
Boundary from the 2012 ICJ Judgment
Serranilla Cay
Bajo Nuevo Cay
JOINT REGIME AREA
(Colombia / Jamaica)
Jamaica
Colombia
Seaflower Biosphere Reserve
Caribbean Sea
Colombia
Panama
Costa Rica
Panama
COSTA RICA
PANAMA
VENEZUELA
COLOMBIA
PACIFIC OCEAN
12 M Territorial Sea

Figure 2.3

2.55. The Seaflower Marine Protected Area was designed to implement biosphere objectives in an area characterized by the presence of significant marine and coral ecosystems, in line with the customary international law principles concerning the preservation and protection of the environment. Its objectives are preservation, recovery, and long-term maintenance of species, biodiversity, ecosystems, and other natural values including special habitats, promotion of sound management practices to ensure long-term sustainable use of coastal and marine resources, equitable distribution of economic and social benefits to enhance local development, protection of rights pertaining to historical use, and education to promote stewardship and community involvement in management.[60] As such, the MPA follows an integrated approach that depends as much on social considerations as on biological and ecological ones.

2.56. The Seaflower Marine Protected Area covers some 2,000 square kilometres of coral reefs, which the UNEP/CAR-SPAW Regional Action Centre Factsheet describes as "some of the most productive and diverse coral ecosystems in the region", along with atolls, mangroves and seagrass beds.[61] A detailed description of the site may be found in the Proposal for Listing under the SPAW Protocol, made by Colombia on 5 October 2010, and attached as Annex 89.[62]

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[60] Annex 89: p. 26.

[61] Annex 94: Seaflower Marine Protected Area – a SPAW Listed Site: Factsheet (undated).

[62] Annex 89.

2.57. The Seaflower MPA submission was accompanied by an Integrated Management Plan, both of which were developed in collaboration with the local stakeholders, especially those who live off the marine resources of the area, who had final decision-making power.[63] The initiative was thus a highly participatory process, particularly involving the Raizales who rely heavily on the coastal and marine resources for their traditional cultural value. The focus of the Management Plan for the area included:

- species and habitat protection and conservation;
- recovery of species;
- establishment of size and catch limits;
- creation of no entry or no-take zones where necessary;
- minimization of socio-economic impacts; and
- sound management practices to ensure sustainable use and historical fishing, including education programmes for the local populace.

2.58. As noted above, Colombia made a proposal for listing the Marine Protected Area under the SPAW Protocol in October 2010. UNEP, in its role as secretariat under the Protocol, carried out a standard evaluation which included external review. The proposal was subsequently submitted to the SPAW Scientific and Technical Advisory Committee for decision. The proposal clearly met the criteria for inclusion as a listed site, and the

[63] Annex 89.

Seaflower Marine Protected Area was accordingly listed under SPAW on 23 October 2012.

2.59. Like the Seaflower Biosphere Reserve, the Seaflower Marine Protected Area is managed and administered by CORALINA. Its actions in this regard have received praise from the World Bank's Global Environment Facility (GEF). As GEF observed in 2010, when the MPA was submitted for listing under the SPAW Protocol:

> "The process that CORALINA spearheaded to arrive at the MPA's declaration was exceptional. According to Cheri Recchia, Chair of Seaflower's International Advisory Board, 'CORALINA has, with this project, exemplified international best practice for establishing MPAs. They led a truly participatory process, and gathered and used the best available biological and socioeconomic information, combined with stakeholder input, to design all aspects of the Seaflower MPA: objectives, external boundaries, zone types and placement, and regulations. The design of the MPA itself is cutting-edge, encompassing the islands and using a zoned approach to allow a range of human activities balanced with critically needed ecological protections, including a well-thought-out series of «no-take» areas critical for restoring reef system health and productivity. With these solid foundations, the Seaflower MPA is poised to generate significant benefits not only for Colombia, but for the Caribbean region.'"[64]

[64] Global Environment Facility: "Persistence and a Clear Vision Mark the Way Forward for the Caribbean's Largest Marine Protected Area", 7 July 2010. Available at: https://www.thegef.org/news/2010-iyb-persistence-and-clear-vision-mark-way-forward-caribbean%E2%80%99s-largest-marine-protected. (Last visited: 10 Nov. 2016).

2.60. In sum, Colombia takes its environmental responsibilities under customary international law seriously. Colombia has played a leading role in developing and implementing a complex and multi-layered geographical, legal and environmental regime in the Southwestern Caribbean, which include programmes for the protection and preservation of the marine environment in the waters around the San Andrés Archipelago. Importantly, in view of the interconnected ecosystem of the Archipelago, Colombia has adopted an integrated approach to its development so as to ensure sustainability. These have been met with wide-spread approval from the international community.

C. The Dependence of the Inhabitants of the Archipelago and the Raizal People on the Marine Environment and Artisanal Fishing

(1) The Dependence on the Southwestern Caribbean Sea

2.61. The inhabitants of the Archipelago have always relied for their sustenance on what the islands of this geo-political unit and the Southwestern Caribbean Sea could provide. This is unsurprising considering the location of the Archipelago in the middle of a semi-enclosed sea, that is to say at a rather significant distance from the continental coasts. Historically, the inhabitants of the Archipelago who have resided in these islands were first and foremost men and women of the sea. Life in the Archipelago has always depended on the Southwestern Caribbean Sea and the trade of its resources with the

communities based in the Mosquito Coast, Costa Rica, Panama, Jamaica, the Cayman Islands and continental Colombia.

2.62. It was estimated that by 2015, the Archipelago, which is the only Colombian "departamento" without continental land, would have approximately 76.442 inhabitants.[65] Such figures make it one of the most densely populated oceanic islands in the world. Consequently, each island of the Archipelago, as well as the waters that surround it and connect it to the other islands, are crucial for the socio-economic functioning of the Archipelago.

2.63. Presently, agriculture is limited due to the reduced availability of surface soil. Artisanal fishing, on the other hand, remains a fundamental activity providing food security in the Archipelago as well as the survival of the traditions of its inhabitants.

2.64. Included amongst the inhabitants of the Archipelago is the indigenous Raizal people. The Raizales are the descendants of the enslaved Africans and the original Dutch, British and Spanish settlers. They are the result of the amalgamation of all these different groups, but have acquired through the centuries their own specific culture. The name of this ancestral community, quite appropriately, comes from the word "raiz" which means "roots" in Creole. Since time immemorial, they

[65] Annex 86: National Administrative Statistics Department of Colombia (Departamento Administrativo Nacional de Estadística – DANE), Postcensal Studies No. 7, National and Departmental Population Projections 2005-2020, Mar. 2010, p. 50.

have navigated all of the Southwestern Caribbean in search of resources, such as fish and turtles. The Raizales represent more than a third of the inhabitants of the Archipelago and constitute approximately 90 percent of the population of Providencia and Santa Catalina.[66] Their culture is clearly recognizable. They speak Creole, English and Spanish and are predominantly of the Protestant faith as a direct consequence of the British Puritans' historical presence.

2.65. The Raizales and other inhabitants of the Archipelago recognize that the viability of their habitat and of their long-standing fishing activities depends on the preservation of the marine environment and their ability to access the traditional banks where their ancestors have always fished and turtled unimpeded. Artisanal fishermen understand that they must find the right equilibrium between exploitation and preservation in order to achieve sustainable development. Sound management of marine resources is an arduous challenge that can only be met by addressing the integrity of the Archipelago as a whole. The right balance between what the Archipelago may provide and what the fishermen need to catch for their economic well-being therefore has been an important task of the Colombian

66 Annex 87: National Administrative Statistics Department of Colombia (Departamento Administrativo Nacional de Estadística – DANE), General Census 2005 Bulletin - Profile Archipelago Department of San Andrés, 13 Sep. 2010, p. 2; Annex 88: National Administrative Statistics Department of Colombia (Departamento Administrativo Nacional de Estadística – DANE), General Census 2005 Bulletin - Profile Providencia and Santa Catalina, 14 Sep. 2010, p. 2.

authorities and, in particular, of CORALINA.[67] The adoption of quotas and temporary bans on fishing of certain species, as well as the creation, in some instances, of "no-catch" or "no-entry" zones within the Seaflower Marine Protected Area are measures that, while restricting the lives of the fishermen in the short term, are designed to help them in the long run.

2.66. The creation of the Seaflower Biosphere Reserve and the Seaflower Marine Protected Area demonstrates that Colombia is committed to the protection of the habitat of the inhabitants of the Archipelago. Colombia is also committed to fulfilling its legal obligations under customary international law *vis-à-vis* the inhabitants of the Archipelago to ensure the protection of their marine environment. This is true in particular with regard to the Raizales who are indigenous peoples of the Archipelago. Indeed, as interpreted by the Inter-American Court of Human Rights, the American Convention on Human Rights (to which Colombia and Nicaragua are parties) obliges State Parties to "take positive, concrete measures geared toward fulfilment of the right to a decent life, especially in the case of persons who are vulnerable and at risk, whose care becomes a high priority",[68] such as groups that international law qualifies as indigenous peoples, and to ensure that indigenous and tribal communities "may continue living their traditional way of life, and that their distinct cultural identity, social structure,

[67] For more on CORALINA's role and objectives, see para. 2.49 et seq. *supra*.

[68] I/A Court H.R., Case of *Yakye Axa Indigenous Community v. Paraguay*, Merits, Reparations, and Costs, Judgment of 17 June 2005, Series C., No. 125, para. 162.

economic system, customs, beliefs and traditions are respected, guaranteed and protected."[69] This issue is also addressed in Chapter 3.[70]

(2) THE LONG-STANDING ARTISANAL FISHING AND TURTLING PRACTICES

2.67. The history of artisanal fishing in the Archipelago has evolved since the beginning of the seventeenth century. What has not changed, however, is that the inhabitants of the islands of the Archipelago were always seafarers with remarkable skills in the artisanal arts of navigation, fishing and turtling.

2.68. This section will demonstrate those long-standing practices in the Archipelago. First, it identifies what constitutes artisanal fishing (sub-section (a)). Next, the history of artisanal fishing and turtling in the Archipelago will be discussed, demonstrating how these activities were carried out throughout the traditional fishing grounds of the Southwestern Caribbean, and how the boats and fishing practices of the fishermen evolved over the years (sub-section (b)). Importantly, these long-standing practices show that, as a practical matter, the drawing of maritime boundaries did not affect the extent of the fishing activities of the indigenous fishermen (sub-section (c)).

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[69] I/A Court H.R., Case of *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of 28 November 2007, Series C. No. 172, para. 121.

[70] See Chapter 3, Sec. C (3) *infra*.

(a) Artisanal Fishing Distinguished from Subsistence Fishing and Industrial Fishing

2.69. Artisanal fishing generally comprises traditional, small-scale fishing practices undertaken by local inhabitants for subsistence or the local community. Subsistence fishing, which is practiced by many of the inhabitants of the Archipelago, is essentially fishing for personal consumption. While artisanal fishing has an important subsistence component, beyond the surrounding waters of the islands of San Andrés, Providencia and Santa Catalina, artisanal fishing has historically also occurred at greater distances from the shores in both shallow and deep-sea waters according to the species involved.

2.70. Besides being of particular significance to the fishermen who depend on it for their own families' economic well-being, artisanal fishing contributes to food security within the overall community of the Archipelago.[71] This is because artisanal fishermen are often members of fishing associations that impose specific obligations that serve their interests as well as those of the Archipelago's community at large. This is well illustrated by the following excerpt from the affidavit by Mr Landel Hernando Robinson Archbold, fisherman and President of the cooperative "Fish and Farm" of Providencia.

[71] Annex 71: Affidavit by Jorge De la Cruz De Alba Barker: "Artisanal fishing fulfils a social role in the Archipelago; it contributes to local food security as opposed to industrial fishing in which the interest is purely economic"; Annex 62: Affidavit by Landel Hernando Robinson Archbold; Annex 65: Affidavit by Ligorio Luis Archbold Howard.

> "Subsistence fishing is just when you go along the beach, with a line, catch a snapper and go home. Artisanal fishing is about selling products to your community. You want to make your economic situation viable. Subsistence fishing does not have this commercial component. It is only about survival. We have a policy in the co-operative, to the effect that fishing products must first be sold to the community. Only the surplus can be sold outside of the community. Fishermen are not forced to be part of the co-operatives but there is an interest in doing so because the co-operatives can help you on your project if you pay the fees. If a fisherman does not own a boat, he can use the boat of the co-operative. But if he is not a member, the co-operative's policy is to give the priority to the members when establishing the crew for a specific expedition. If there is no space, you have to wait."[72]

2.71. Artisanal fishing must also be distinguished from industrial fishing. Both have commercial connotations, but the activities' production scales are vastly different. For instance, an artisanal fisherman may fish with lines with five to ten hooks, but this is very different from an industrial vessel that may trawl with a thousand hooks that do not discriminate between the species caught. This is portrayed in the affidavit by Mr Ligorio Luis Archbold Howard, another member of the cooperative "Fish and Farm".

> "For me, artisanal fishing relates to the arts of fishing; it is the ancestral way of fishing. Instead of using the modern industrial means that rely on long lines with thousands of hooks that do not

[72] Annex 62. Cf. also Annex 68: Affidavit by Orlando Eduardo Francis Powell.

> discriminate, you fish with lines with four, five or ten hooks. It is the traditional way. Subsistence fishing is just for household, personal and family use. Artisanal fishing is for commercial purposes but it is also necessary for our subsistence. I believe that 90% of the population of Providencia depends on artisanal fishing. This is because there are not many jobs. People have to fish to better their living conditions. Many of us fishermen receive support from the co-operative in the form of resources to help us in our fishing projects. While some fishermen have their own boats, others rely on the three boats of the co-operative. Right now the biggest fishing boat in Providencia is a 35 ft. boat owned by the co-operative, but currently it is their only one functioning. I have my own boat but I am currently repairing it. This is why, right now, I depend on other fishermen or the co-operative to go fishing."[73]

(b) The History of Artisanal Fishing in the Area and its Evolution

2.72. The history of artisanal fishing in the Archipelago attests to the fact that this activity has been carried out throughout the Southwestern Caribbean Sea between the Mosquito Coast and the Archipelago, in the area known as "Cape Bank", as well as in the banks surrounding the islands of Quitasueño, Serrana, Bajo Nuevo, Serranilla and Roncador. **Figure 2.4** depicts the traditional shallow banks of the artisanal fishermen of the Archipelago on both sides of the boundary established by the Court's Judgment in 2012.

[73] Annex 65. Cf. also Annex 64: Affidavit by Ornuldo Rodolfo Walters Dawkins; Annex 71.

Figure 2.4

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2.73. The map shows that the area that Nicaragua calls "Luna Verde" in its Memorial is part of Cape Bank located East of the 82° West Meridian and South of the 15th North parallel.[74] While for Nicaragua, Luna Verde is just a small addition to its huge area of shallow waters, for Colombia, this specific part of Cape Bank constitutes one of the biggest and most important traditional banks for the inhabitants of the Archipelago.[75] **Figure 2.5** depicts on a larger scale the traditional shallow banks as well as the deep-sea banks (that are the most important for the artisanal fishermen of the Archipelago).

[74] Memorial of Nicaragua, para. 2.23, Figures 2.3-2.5.

[75] Annex 68; Annex 71; Annex 72: Affidavit by Antonio Alejandro Sjogreen Pablo.

Figure 2.5

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2.74. **Figures 2.4** and **2.5** indicate that those traditional shallow and deep-sea banks are located between: Providencia and Quitasueño; Quitasueño and Serrana; and, Serrana and Roncador.[76] It also demonstrates the existence of important shallow and deep-sea traditional banks that go beyond the triangle depicted in the Memorial of Nicaragua. These banks are ecologically interconnected, as has been explained above.

2.75. In the past, traditional fishing activities often occurred close to San Andrés and Providencia. However, historical documents and affidavits demonstrate that the inhabitants of the Archipelago also historically navigated, fished and turtled in the waters surrounding the Northern and Western banks of Quitasueño, Serrana, Serranilla, Roncador and Bajo Nuevo, as well as in the whole of Cape Bank.[77]

2.76. In the second-half of the twentieth century, due to the decrease in production around Providencia and San Andrés, artisanal fishermen started sailing to Cape Bank and the Northern banks much more frequently.[78] While long fishing expeditions have always taken place, over the past few decades many artisanal fishermen have gone to these more remote fishing banks more frequently (at least prior to the 2012

[76] Annex 62; Annex 63: Affidavit by Wallingford González Steele Borden; Annex 64; Annex 65; Annex 66: Affidavit by Jonathan Archbold Robinson.

[77] Annex 63; Annex 64; Annex 66; Annex 67: Affidavit by Alfredo Rafael Howard Newball; Annex 69: Affidavit by Domingo Sánchez McNabb; Annex 71.

[78] Annex 65; Annex 69.

Judgment) – since these are the most productive areas that guarantee food security for the inhabitants of the Archipelago.[79]

2.77. The fishing practices of artisanal fishermen also evolved with technology and the boats they had. Catboats are probably the most representative of the traditional boats used, and sometimes are still used, by the inhabitants of the Archipelago.[80] They are direct evidence of the positive cross-cultural interactions between the sea-faring communities of the Southwestern Caribbean since they were introduced at the beginning of the twentieth century by the inhabitants of the Cayman Islands that were engaged, like those of the Archipelago, in turtling expeditions.[81] On these relatively small boats of approximately 30 ft., the artisanal fishermen would sail in small groups to the fishing grounds located far beyond the waters immediately adjacent to San Andrés, Providencia and Santa Catalina.[82] These boats were specifically designed for turtling in the sea but were also used for fishing and trade.[83]

2.78. The affidavit by Mr Wallingford González Steele Borden discusses the evolution of artisanal fishing in the Archipelago.

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79 Annex 71; Annex 72.

80 Annex 69.

81 Annex 91: A. I. Márquez-Pérez, "Catboats, lanchs and canoes: Notes towards a history of the relations between the islands of Providencia, Santa Catalina and the Central American and Insular Caribbean by means of the construction and use of wooden vessels", *Revista Internacional de História Política e Cultura Jurídica*, Vol. 6, No. 3, September-December 2014, p. 491; Annex 67.

82 Annex 65.

83 Annex 63; Annex 65.

> "We artisanal fishermen always fished in Roncador, Quitasueño, Serrana and in the area of the 82° west of Providencia. We would even go further and reach Bobel Cays close to Cape Gracias a Dios. But at that time the expeditions occurred less frequently because in the sixties we had a lot of fish also around Providencia. We would go in these expeditions to the Northern and Western banks a few times a year and stay there one or two months. With less fish around Providencia we started going more often to these banks. Of course it was easier once engines arrived and we started using *lanchas*. To go on a catboat to the North Cays is a demanding physical exercise. *Lanchas* allow us to reach the grounds with less effort. I personally used to go one or two times a month to Quitasueño and Serrana. When I went on longer expeditions, I would even sleep a month in Serrana where I built a hut with coconut palm. Our stay in Serrana depends on the boat we use. When we go on small boats like my *lancha*, I stay two or three days. When we went on bigger boats that carried our catboats, we would stay up to fifteen days, sometimes, even a month in Serrana Cays."[84]

As mentioned in the last part of this excerpt, artisanal fishermen also relied on schooners and sloops to carry catboats to these traditional banks. These boats would sometimes serve as floating stations.[85] Other times they would leave the fishermen on an island such as Serrana or Roncador for weeks or months to later come back to pick the salted and corned products as well as the fishermen.[86] From these islands and so-called mother

[84] Annex 63. Cf. also Annex 69.

[85] Annex 65.

[86] Annex 65. Similar practices were also carried out by fishermen from other Caribbean communities, see for example Annex 83, where R.C. Smith, recalls that "[Cayman] Brac fishermen also collected seabird eggs and

boats the fishermen would sail between the different cays and to the west toward Cape Bank and the Mosquito Coast.

2.79. This is, in particular, explained in the affidavit by Mr Ligorio Luis Archbold Howard:

> "We used to build larger wooden boats of 50 ft. long that could carry 20 sailors to the Northern fishing grounds. In those days the boat could be considered big, but today what used to be seen as a big boat is in fact a small boat when you compare it to non-artisanal boats. These boats could carry 5 to 15 small catboats on their decks. These were then used to fish in those cays for weeks or months. The large boat would often be used as a station for the [sic] fishermen to go after their activities. But very often the fishermen would build shelters on the cays where they would be able to rest after their fishing activities and to process (salt) the products they fished. Once filled with fish, the large boat would return to the main island to sell the catch to the community, while most of the fishermen remained with their catboats at the provisional station in order to prepare a new stock in the Northern fishing grounds. Sometimes the large boat would sail to Jamaica to sell the

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phosphate-rich guano, particularly on the larger of the Serrana Cays… who often camped in small huts… for weeks until sufficient amounts of these products were collected for market in Jamaica." (p. 79). Historical literature also mentions the fact that islands such as Roncador were traditionally used by fishermen as a hub for their fishing activities. A well-known writing from the mid-nineteenth century describes it as follows: "… 'El Roncador' is famous for the number of its turtles, and is frequented, at the turtle season, by turtle-fishers from Old Providence, and sometimes from the main land. Among the palm trees, to which I have referred, these fishermen had erected a rude hut of poles, boards, and palm branches, which was literally withed and anchored to the trees, to keep it from being blown away by the high winds." S.A. Bard, *Waikna, Adventures on the Mosquito Shore*, University of Florida Press (Reproduction of the 1855 edition), 1965, pp. 39-40, Available at:
https://archive.org/details/waiknaoradventur00bard. (Last visited: 10 Nov. 2016). See

> products and then go back to the cays to pick up the fishermen that remained and their new stock, in order to finally return to Providencia and San Andrés. Today it is easier to go to the Northern Cays thanks to the *lanchas* that are equipped with outboard engines. We can go farther in less time."[87]

2.80. While fishing and turtling originally occurred on catboats and other sailing boats such as schooners and sloops, in the second half of the twentieth century, the inhabitants of the Archipelago adapted the design of catboats so as to leave space for outboard motors and then started relying on *lanchas*, i.e. boats designed to be equipped with an engine, for their fishing activities.[88] These boats sometimes play the same role that schooners and sloops did previously. They are regularly used to transport smaller boats in the fishing banks located in the northern part of the Archipelago.[89] However, other times they perform navigation and fishing functions.

2.81. In sum, history demonstrates that artisanal fishing by the inhabitants of the Archipelago was carried out throughout the Southwestern Caribbean Sea, even though practices varied with technological advances and time.

2.82. Although banned by Colombia today, turtling also played an essential role in the history of the Archipelago. As put by Professors Sharika Crawford and Ana Isabel Márquez-Pérez, the

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87 Annex 65; Cf. also Annex 66.
88 Annex 69.
89 Annex 68; Annex 71.

search for turtles and its trade "facilitated the creation and recreation of a dynamic contact zone of ongoing transnational and cross-cultural encounters among indigenous, European and Afro-Caribbean inhabitants"[90] across the Southwestern Caribbean. The inhabitants of the Archipelago went turtling around the Northern banks of Quitasueño, Serrana, Roncador, Serranilla and Bajo Nuevo, but also in the Corn Islands, and the waters surrounding the continental communities in Bluefields, Tortuguero and Bocas del Toro, a town founded by fishermen from the Archipelago.[91] Thus, turtling was an activity that, from the seventeenth to the twentieth centuries, led the artisanal fishermen of San Andrés, Providencia and Santa Catalina to exploit the marine resources all around the Southwestern Caribbean.

2.83. Performed since times immemorial, turtling was already practiced by the English Puritans from Bermuda who settled in Providencia in 1630.[92] In fact, by the mid-eighteenth century, the harvesting of turtles was one of the main economic activities of the fishing populations established in the Archipelago and, in particular, in Providencia.[93] The lives of the inhabitants of the Archipelago depended on the harvesting, consumption and commerce of turtles' meat and scales. This commerce greatly

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[90] Annex 93: S.D. Crawford, A.I. Márquez-Pérez, "A Contact Zone: The Turtle Commons of the Western Caribbean", *The International Journal of Maritime History*, 2016, 64.

[91] Annex 91, p. 495.

[92] Annex 93, p. 73; Annex 85: M.J. Jarvis, *In the Eye of All Trade: Bermuda, Bermudians, and the Maritime Atlantic World, 1680-1783*, Chapel Hill, 2010, pp. 190, 219.

[93] Annex 93, p. 74.

stimulated the economic and cultural exchanges between the fishing communities of the Southwestern Caribbean, which followed the circular migration patterns of these marine reptiles across the sea.[94]

2.84. By the mid-nineteenth century, recently freed Afro-Caribbean Caymanians dedicated to turtling, also established themselves in the Archipelago, which they had come to know during their fishing expeditions in the banks of Quitasueño, Serrana and Roncador.[95] And in 1835, British Captain Beaufort, who was conducting a survey of the eastern coast of Central America, stressed that the younger part of the 342 inhabitants of Providencia was engaged in turtling activities six months of the year on "three vessels of from ten to fifteen tons burthen" which, "from their size, [were] managed very easily among the banks they frequent[ed] – such as the Serrana, Serranilla, Roncador, &c."[96] In the famous book "*Waikna, Adventures on the Mosquito Shore*" published in 1855, Ephraim Squier, a diplomat of the United States of America, described the arrival to Roncador of a turtle schooner with fishermen from the islands of Providencia or Santa Catalina.[97] This attests to the generally recognized navigational skills of the inhabitants of the

[94] Annex 93, p. 70.

[95] Annex 83: R.C. Smith, *The Maritime Heritage of the Cayman Islands*, Gainesville, 2000, p. 77; Annex 91, p. 7.

[96] C.F. Collet, "On the Island of Old Providence", 7 *Journal of the Royal Geographical Society* (1837), pp. 207-208. Available at: https://ia601704.us.archive.org/1/items/jstor-1797524/1797524.pdf. (Last visited: 10 Nov. 2016).

[97] S.A. Bard, *Waikna; or Adventures on the Mosquito Shore* (New York, Harper & Brothers, 1855), pp. 36-55. Available at: https://archive.org/details/waiknaoradventur00bard. (Last visited: 10 Nov. 2016).

Archipelago since Roncador is located approximately 75 nautical miles from Providencia.

2.85. In the second half of the nineteenth century and the first half of the twentieth century, unauthorized incursions of British and American turtling expeditions in the Northern banks of Quitasueño, Serrana, Roncador, Serranilla and Bajo Nuevo jeopardised the interests of the fishing communities which depended on these marine reptiles for their sustenance. In a letter of 26 September 1871, the Prefect of the National Territory of San Andrés and San Luis de Providencia brought to the attention of the US Secretary of Finance and Development that, in the waters of Quitasueño and Roncador, citizens of the United States of America fished "turtle and tortoises" and extracted "guano" without the required authorizations and that these activities "[were] highly damaging to the interests of the territory".[98] By a diplomatic note of 25 March 1914, the Colombian Minister in London stressed that "[t]he Colombian Government ha[d] constantly received complaints from the San Andrés' authorities regarding the illegal practice performed by some subjects of His British Majesty of fishing turtles in those islands"; a habit which "seem[ed] to increase".[99]

2.86. Thus, even though turtling as an activity has diminished in importance today, the history of the practice similarly demonstrates that the artisanal fishermen of the Archipelago

[98] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Counter-Memorial of Colombia (Vol. II),* Annex 279.
[99] *Ibid*., Annex 37.

exploited the marine resources all around the Southwestern Caribbean.

(c) Boundaries Did Not Affect Fishing Activities

2.87. As seen from the above, artisanal fishing and turtling were carried out by the Archipelago's inhabitants throughout the Southwestern Caribbean Sea. In practice, boundaries did not affect the extent of fishermen's activities.

2.88. The 1930 Protocol to the 1928 Esguerra-Bárcenas Treaty between Colombia and Nicaragua established that:

> "…the Archipelago of San Andrés and Providencia, which is mentioned in the first clause of the referred to Treaty, does not extend west of the 82 Greenwich meridian."[100]

However, many artisanal fishermen have stressed that, regardless of the adoption of the 1928 Treaty and its Protocol of 1930, they continued to fish, often with their parents, grand-parents or uncles, in banks located west of the 82° West Meridian, that is to say on the other side of what Colombia then considered to be its maritime boundary with Nicaragua. These traditional fishing grounds are located in Cape Bank and, in particular, close to the Corn islands,[101] Cape Gracias a Dios,[102]

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[100] Treaty concerning Territorial Questions at issue between the two States, signed at Managua, March 24, 1928, and Protocol of Exchange of Ratifications, signed at Managua, May 5, 1930, 105 LNTS 337. See text in *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections*, (*Vol. II*), Annex 1A.

[101] Annex 64: Affidavit by Ornuldo Walters.

[102] Annex 69; Annex 71.

Bobel Cay,[103] or along "La Esquina", that is to say the geographic limit of Cape Bank located on both sides of the 82° West Meridian.[104]

2.89. Thus, the position of the artisanal fishermen of the Archipelago was that the existence of boundaries, or alleged boundaries, did not in practice affect the extent of their activities. This is well explained in the affidavit by Mr Alfredo Rafael Howard Newball.

> "In those days, there were no limits, we fished in all the cays and banks. The fishermen from the Nicaraguan coast would also come to fish to the cays and banks. They came and went, and we came and went. It was the same territory, you did not have to ask anyone for permission, there was no authority at that time."[105]

2.90. As a result of the 2012 Judgment, many traditional fishing banks of the inhabitants of the Archipelago are now located in the maritime zones under the jurisdiction of Nicaragua, while others are situated in those of Colombia (such as the banks located in and around Quitasueño, Serrana, Bajo Nuevo and Serranilla), but can only be accessed by navigating through waters belonging to Nicaragua's exclusive economic zone.

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103 Annex 65.

104 Annex 64; Annex 65; Annex 70; Annex 71.

105 Annex 67. Cf. also Annex 69: "The dispute between Colombia and Nicaragua is a problem between Bogotá and Managua, not a problem between the peoples of the islands of San Andrés, Providencia, Corn Islands, Bluefields, Pearl Lagoon, Puerto Limon or Jamaica. We are all one culture and have always had cultural and trade exchanges. It was a single Caribbean Sea. There were no limits for the communities and we did not care, which allowed the exchange of knowledge, information, culture and business with all of the Caribbean."

2.91. The traditional fishing banks found in the maritime zones that now appertain to Nicaragua are, in particular, those located in Cape Bank on both sides of the 82° West Meridian, as well as between the two enclaves created by the Court – Quitasueño and Serrana – and the delimitation line along the northern parallel established by the Court in 2012. Some of these traditional banks straddle the boundary.

2.92. The inhabitants of San Andrés, Providencia and Santa Catalina are concerned by the fact that some of their most important traditional banks can only be reached now by navigating through the maritime zones adjudicated to Nicaragua. Although this is their right, the discontinuity of the Archipelago's maritime spaces has had a chilling effect on the artisanal fishermen's resolve to reach the areas where they, and their ancestors, have always fished. Considering the conduct of Nicaragua's Naval Force, this is no mere theoretical fear as will be demonstrated in Colombia's counter-claims.[106]

[106] See Chapter 9 of this Counter-Memorial.

D. The Threat of Drug Trafficking, Transnational Crime and Other Security Concerns

2.93. The size of the Archipelago as well as its location between South and North America is a factor that attracts all kinds of illegal activity. Colombia is committed to protecting the Archipelago and its diverse interdependent components, both for the sake of the Colombian population and for preservation of the integrity and security of the Caribbean Sea as a common good. This aspect will be further developed in sub-section (1).

2.94. As an illustration of the fact that many other States rely on Colombia to maintain security in the area, some of the agreements concluded by Colombia with other States on responsibilities for drug interdiction will be discussed in sub-section (2).

(1) Colombia's Navy and Air Force Presence for Security, Environmental Monitoring and Drug Interdiction

2.95. Nicaragua has argued that the presence of Colombian forces in the Archipelago and its vicinity reflects a hostile posture.[107] This could not be further from the truth. Colombia's presence in the area is aimed at protection of the Archipelago, and in particular its environment, the preservation of which is indispensable for its inhabitants, and also for the interdiction of

[107] Memorial of Nicaragua, p. 33, paras. 2.22, 2.26, 2.27, 2.28, among others, and Annex 50.

illegal activities, without infringing on Nicaragua's sovereign rights.

2.96. Unfortunately, in spite of growing awareness that the environment must be protected, environmental norms are not spontaneously respected. They need to be monitored and, where circumstances justify it, enforced. Such enforcement action is beyond the capability and jurisdiction of CORALINA and the Farm and Fishing Secretary. For purposes of implementation of the Seaflower Biosphere Reserve and Marine Protected Area, therefore, the cooperation and assistance of the Colombian Navy is required.

2.97. It is a fact that the San Andrés Archipelago has been used for decades by transnational drug traffickers, who consider it a major gateway for delivering South American illegal drugs to North American markets (see **Figure 2.6**). Also, as noted in a 2016 Official Report by the United States, "[t]he Caribbean coast regions of Nicaragua,… remain the primary routes for international drug trafficking".[108] This has also been recognized by the United Nations Office on Drugs and Crime.[109] The

[108] United States of America, Bureau of International Narcotics and Law Enforcement Affairs, 2016 International Narcotics Control Strategy Report (INCSR), Country Report: Nicaragua, Conclusion. Available at: http://www.state.gov/j/inl/rls/nrcrpt/2016/vol1/253295.htm. (Last visited: 10 Nov. 2016).

[109] As explained by the United Nations Office on Drugs and Crime, "The Caribbean is situated in the midst of some of the world's major drug trafficking routes, between the world's main drug producing countries to the South and the major consumer markets of the North." Available at:

Archipelago's proximity to Nicaragua's coasts makes it particularly vulnerable, as its various features offer numerous places for drug traffickers to hide. In this regard, the Colombian Navy has been tasked to monitor and fight crime, in particular transnational crime, in and around the Archipelago.

https://www.unodc.org/ropan/en/unodc-regional-programme-2014-2016-in-support-of-the-caricom-crime-and-security-strategy.html. (Last visited: 10 Nov. 2016).

Figure 2.6

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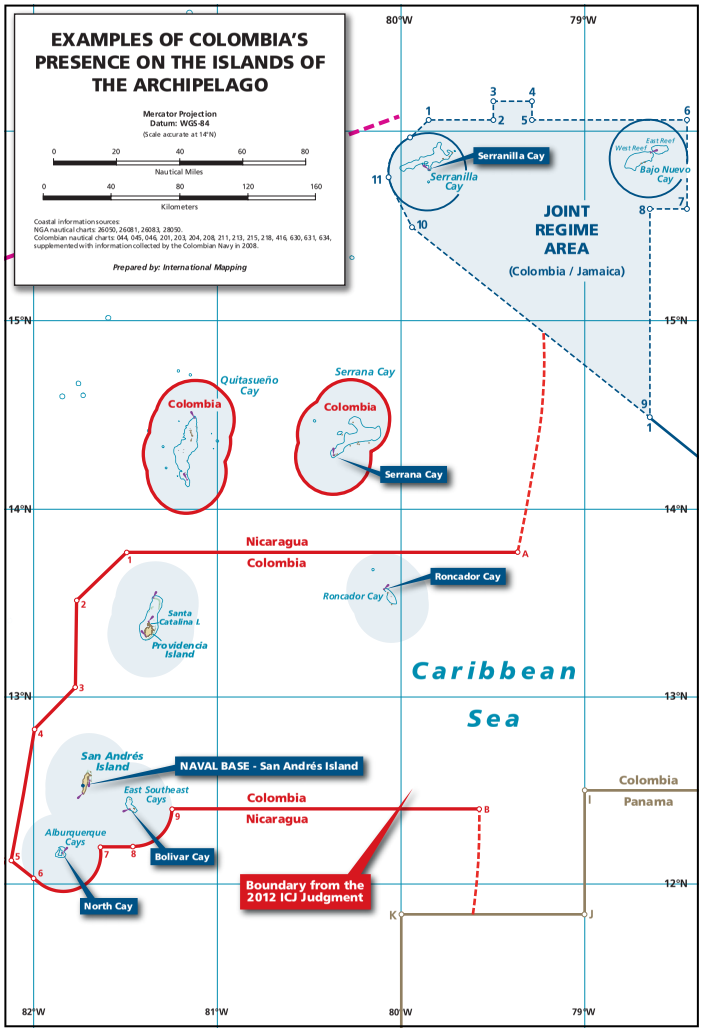
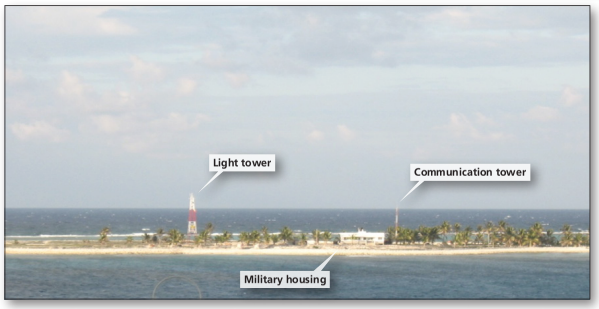
2.98. In order to combat drug trafficking, protect the environment, and maintain security, infrastructure works have been built and maintained by Colombia on various features of the Archipelago as depicted in **Figure 2.7.** There are Marine Infantry detachments entrusted with tasks concerning drug trafficking, environmental monitoring and security not only on San Andrés, where the main Naval Garrison of the Archipelago is located, but also on Serrana, Serranilla, Roncador, and Cayo Bolívar (one of the East-South-East Cays). On these islands, Colombia has built lighthouses, quarters and facilities for Navy detachments, solar panels, water collection wells, facilities for the use of the Navy infantry corps and fishermen who visit the islands and cays, and radio stations or antennae.



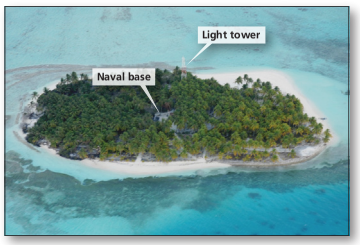
Serranilla Cay

Serrana Cay

Roncador Cay



North Cay - Alburquerque Cays



Bolivar Cay - East Southeast Cays

Figure 2.7

2.99. As important as these detachments are, they are alone insufficient to ensure effective control. International criminals may circumvent them to avoid arrest, and polluters and fishermen that engage in predatory fishing practices can hide in remote places. A significant naval presence is therefore needed in order to monitor and discourage any illegal activities, including those harmful to the environment.

2.100. The Colombian Navy operates in three naval forces and four commands, one of which is the Specific Command of San Andrés and Providencia. The Colombian Navy built a large base in San Andrés, which performs a vital role in control of the Archipelago and the war against illicit drug trafficking.[110] It consists of the General Headquarters of the Specific Command, Naval Base No. 4, and a unit attached to the Caribbean Naval Force. From this base, the Navy regularly carries out missions, including aerial missions, with the purpose of surveillance, protection of the marine environment, fishing control, defense against armed actions such as piracy, the fight against and interdiction of smuggling operations, arms and other related

[110] Presidential Decree Nº 487 establishing the Naval Garrison on San Andrés, 8 March 1940. Naval Base A.R.C. San Andrés, Coordinates: 12°31'31''N 81°43'48''E. The headquarters of the Specific Command for San Andrés and Providencia (Comando Específico de San Andrés y Providencia – CESYP) are located on the San Andrés island. The CESYP has the military responsibility for the area of the archipelago, and the operational command of the Navy vessels detached in the area. This command responds to the Naval Force of the Caribbean (Fuerza Naval del Caribe) based in Cartagena, where the main base of the Colombian Navy is located.

criminal activities as part of Colombia's response to transnational crime.[111]

2.101. Colombia is also present in the area in order to perform its duties as part of international coalitions against drug traffickers. One such coalition is the ongoing Operation Martillo (Spanish for hammer), launched in association with 14 countries, including the United States and six Central American and Caribbean coastal countries (Panama, Costa Rica, Nicaragua, Honduras, Guatemala and Belize),[112] which seeks to disrupt drug-trafficking routes in the Atlantic, the Caribbean and the Pacific. Since it was launched on 15 January 2012, Operation Martillo has netted more than 1 million pounds of cocaine and more than 100.000 pounds of marijuana. It has also led to the arrest of at least 1.348 people in various operations under the program. The interdictions have resulted in a loss of about $8 billion in revenue for drug trafficking organizations, according to official U.S. estimates.[113]

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111 Some outcomes of the operations carried out by the Navy in the Caribbean (in the area of the San Andrés Archipelago) between 2009 and 2016 are: 59.299 kg (average of 6.662,3 kg per year) of cocaine hydrochloride seized; 163 people arrested for drug trafficking (about 33 per year); 248 people rescued in search and rescue operations (approximately 31 per year); 24.420 gallons of contraband fuel seized (average of 4070 gal. per year) and 28.713 kg of fish (about 4.785 kg per year) from illegal fishing by vessels using prohibited methods of fishing or violating restrictions or seasons of fishing.

112 Fourteen countries are participating: Belize, Canada, Colombia, Costa Rica, El Salvador, France, Guatemala, Honduras, the Netherlands, Nicaragua, Panama, Spain, United Kingdom and the United States.

113 Miami Herald, "Drug interdictions result in a loss of about $8 billion in revenue for drug traffickers", 4 July 2015. Available at: http://www.miamiherald.com/news/local/crime/article26499271.html. (Last visited: 10 Nov. 2016).

2.102. Colombia plays a leading role in Operation Martillo. As explained in a Joint Press Release on the United States – Colombia Action Plan on Regional Security Cooperation dated 15 April 2012:

> "One example of direct combined U.S. and Colombian operational efforts is OPERATION MARTILLO, where the U.S. Joint Interagency Task Force – South (JIATF-S) and Colombian Navy and Air Forces are coordinating air and maritime detection, monitoring, and interdiction efforts to detect and disrupt transnational organized criminal elements who exploit the extensive coasts and sparsely populated interior throughout Central America."[114]

2.103. The U.S.-Colombia Action Plan on Regional Security Cooperation launched in 2012 is also worth mentioning. This plan:

> "draws on Colombia's established and expanding expertise to develop security assistance programs and operational efforts that support six nations in the hemisphere afflicted by the effects of transnational organized crime, including the Northern Triangle countries.
>
> With assistance from the State Department's Bureau of International Narcotics and Law Enforcement Affairs (INL) and SOUTHCOM, the action plan has completed hundreds of capacity-building engagements since its inception in 2013, many of them led by Colombian military training

[114] US Department of State, Office of the Spokesperson, Washington DC, April 15, 2012. Available at: http://www.state.gov/r/pa/prs/ps/2012/04/187928.htm. (Last visited: 10 Nov. 2016).

> teams and subject matter experts or hosted at Colombian law-enforcement and military schools."[115]

2.104. Colombia is now recognized as playing a leading role in the fight against drug trafficking, which requires the presence of Naval Forces and a high level of vigilance in and around the Archipelago. The USA acknowledged in 2016 that:

> "Colombia continues to take steps to combat the drug trade. These efforts likely have kept hundreds of metric tons of drugs each year from reaching the United States and other markets, and have helped stabilize Colombia. Colombia is now a partner in exporting security expertise and training to international partners."[116]

2.105. As an acknowledgment of Colombia's effectiveness and activities in this regard, a number of other Caribbean States or States interested in securing the region have concluded international agreements with Colombia on responsibilities for drug interdiction.

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[115] J. Ruiz, Southern Command Public affairs, "US Joins Northern Triangle Security Dialogue Hosted by Colombia". Available at: http://www.southcom.mil/newsroom/Pages/U-S--joins-Northern-Triangle-security-dialogue-hosted-by-Colombia.aspx. (Last visited: 10 Nov. 2016).

[116] Bureau of International Narcotics and Law Enforcement Affairs, 2016 International Narcotics Control Strategy Report (INCSR), Country Report: Colombia, Conclusion. Available at: http://www.state.gov/j/inl/rls/nrcrpt/2016/vol1/253252.htm. (Last visited: 10 Nov. 2016).

(2) COLOMBIA'S AGREEMENTS WITH OTHER CARIBBEAN STATES ON RESPONSIBILITIES FOR DRUG INTERDICTION

2.106. Colombia, other Caribbean countries (Mexico, Jamaica, Costa Rica, Honduras, Panama, Guatemala, the Dominican Republic) and the United States have promoted the conclusion of international conventions establishing cooperation in the fight against illicit drug trafficking by sea, in particular in the Caribbean Sea. In line with this policy, Colombia has concluded a number of bilateral "shiprider" agreements with neighboring States in the region, reinforcing the fight by facilitating visits and inspections of private or commercial vessels of the flag of either party by the respective authorities. According to the United States Bureau of International Narcotics and Law Enforcement Affairs in a 2016 Report, the agreement to suppress illicit traffic by sea between the Government of the Republic of Colombia and the Government of the United States of America, concluded on 1 April 1997, "continues to be one of the most effective in the region, enabling the United States to seize over 29 MT of cocaine in fiscal year 2015."[117]

2.107. Internationally, Colombia is considered an essential actor for the effective enforcement of the fight against trasnational crime in the region. Colombia's Navy has improved its capacity and developed its skills over many years, notably under an

[117] Bureau of International Narcotics and Law Enforcement Affairs, 2016 International Narcotics Control Strategy Report (INCSR), Country Report: Colombia, Conclusion. Available at: http://www.state.gov/j/inl/rls/nrcrpt/2016/vol1/253252.htm. (Last visited: 10 Nov. 2016).

international cooperation framework, ranging from its participation in the Inter-American Naval Conference,[118] to exchanges of naval personnel with the US Navy.[119] Colombia also exports its expertise in maritime security to other countries. As one commentator observed: "Colombia is… a 'net security exporter', providing [counter-narcotics] training to numerous countries in Latin America, the Caribbean, and West Africa. Colombian forces are also contributing air and naval assets in a multinational effort to interdict smuggling along the Pacific and Atlantic coasts of Central America."[120] This meets one of the objectives of the US-Colombia Action Plan on Regional Security Cooperation, under which Colombia's security forces provide expertise for countering transnational organized crime and drug trafficking to nations in Central America and the Caribbean with US assistance. This Action Plan included 39 capacity-building activities in four countries in 2013, and has

[118] The Naval Conference, initiated in 1959 by the United States Navy, promotes the exchange of ideas, knowledge and mutual understanding of maritime problems that affect the hemisphere, the main purpose of which is to encourage permanent professional contacts between the hemisphere's navies (Argentina, Bolivia, Brazil, Canada, Chile, Colombia, Ecuador, Guatemala, Honduras, Mexico, Panama, Paraguay, United States of America and Uruguay), with the purpose of promoting solidarity in the hemisphere. It includes, for example, a specialized conference on naval control of shipping. The 2012 Conference on this matter was held in Cartagena, Colombia.

[119] Memorandum of Agreement on Exchange of Naval Personnel of 30 April 1985, allowing for the Exchange of personnel between both institutions with the purpose of developing knowledge Exchange in terms of doctrine and services among both institutions.

[120] J. Thomas, C. Dougherty, *Beyond the Ramparts. The Future of U.S. Special Operations Forces*, Center for Strategic and Budgetary Assessments (CSBA), May 2013. Available at: http://www.csbaonline.org/publications/2013/05/beyond-the-ramparts-the-future-of-u-s-special-operations-forces/. (Last visited: 10 Nov. 2016).

grown to include more than 200 activities in six countries.[121] Separately, Colombia has also concluded a series of cooperation agreements with neighboring countries, Jamaica,[122] Costa Rica,[123] Mexico,[124] Honduras,[125] the Dominican Republic,[126] Guatemala,[127] Panama,[128] and the Netherlands.[129]

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[121] Bureau of International Narcotics and Law Enforcement Affairs, 2016 International Narcotics Control Strategy Report (INCSR), Country Report: Colombia. Available at: http://www.state.gov/j/inl/rls/nrcrpt/2016/vol1/253252.htm. (Last visited: 10 Nov. 2016).

[122] Operational Agreement between the Ministry of National Defense of Colombia and the Ministry of National Security of Jamaica, 2 May 2002, which allows for mutual cooperation to counteract and reduce unlawful activities in jurisdictional waters, through coordinated naval operations, information exchanges and operations for strengthening integral maritime safety and security.

[123] Supplementary Agreement between the Government of the Republic of Colombia and the Government of the Republic of Costa Rica on maritime cooperation in the jurisdictional waters appertaining to each State for the fight against illicit drug traffic, illegal exploitation in the Exclusive Economic Zone and rescue of lost ships, 23 February 2004, which allows for mutual cooperation for conducting coordinated actions in the fight against illicit drug traffic by sea, through information exchanges and joint training; mutual advice; search and rescue of vessels lost at sea; protection of the living and non-living resources existing in the Exclusive Economic Zones of the Parties; the protection, preservation and conservation of the marine environment.

[124] Inter-institutional Agreement for maritime cooperation between the Ministry of National Defense – National Navy on behalf of the Republic of Colombia and the Secretariat of the Navy of the United Mexican States, 31 January 2005, which allows for developing mutual cooperation, in order to counteract and reduce unlawful activities in jurisdictional waters, through the coordination of maritime interdiction operations; information exchanges; increasing integral maritime safety and security; protecting the marine environment; developing plans and programs for joint education and training; mutual advice; developing scientific research and technical development programs.

[125] Maritime cooperation agreement between the Ministry of National Defense of Colombia and the Secretariat of Defense of the Republic of Honduras, 8 August 2005, which allows for mutual cooperation with the purpose of developing coordinated actions in the fight against illicit traffic in the maritime sphere, through information exchanges and joint training; mutual advice and developing programs of scientific and technological research; integral maritime safety and security; search and rescue of vessels lost at sea; protection of the living and non-living marine resources; the protection, preservation and conservation of the marine environment.

2.108. It is in the context described in this section, a context completely ignored by Nicaragua in its Memorial, that Colombia deploys an important and costly security force in and around the San Andrés Archipelago. Although it is a financial burden for

[126] Inter-institutional Agreement for maritime cooperation between the Ministry of National Defense – National Navy on behalf of the Republic of Colombia and the Secretariat of State of the Armed Forces of the Dominican Republic - Navy of the Dominican Republic, 5 December 2005, which allows for mutual cooperation with the purpose of conducting coordinated actions in the fight against illicit traffic in the maritime sphere, through information exchanges, plans and programs for joint education and training; mutual advice and developing scientific and technological research programs; integral maritime safety and security; search and rescue of vessels lost at sea; protection of the living and non-living marine resources; the protection, preservation and conservation of the marine environment.

[127] Agreement on maritime cooperation between the Ministry of National Defense of the Republic of Colombia and the Ministry of National Defense of the Republic of Guatemala, 2 October 2013, which allows for mutual cooperation to counteract and reduce unlawful activities in jurisdictional waters, through developing coordinated operations; information exchanges; providing training and promoting the mutual development of common measures aimed at preserving the marine environment and prevent the unlawful exploitation of its resources.

[128] Inter-institutional agreement for maritime cooperation between the Ministry of National Defense – National Navy on behalf of the Republic of Colombia and the Ministry of Public Security of the Republic of Panama – National Aero-naval Service, 26 July 2014, which allows for developing coordinated actions against illicit traffic of narcotic drugs, psychotropic substances and chemical precursors; as well as arms, munitions and explosives trafficking and related crimes; education and training plans and programs; information exchanges; integral maritime safety and security; search and rescue of vessels lost at sea; protection of marine resources and the marine environment in general; advice on maritime matters.

[129] Memorandum of Understanding between the Ministry of National Defense – National Navy on behalf of the Republic of Colombia and the Ministry of Defense of the Netherlands, 2 August 2015, which increases the cooperation and complementarity activities in operational matters, intelligence gathering and information exchanges with the purpose of counteracting transnational organized crime at sea, promoting cooperation in the field of training and education, and advice on maritime matters and maritime safety and security.

Colombia,[130] it is necessary for ensuring environmental protection, security at sea, protection of the inhabitants of the Archipelago, and transnational crime interdiction, among other public missions that Colombia carries out for the benefit of the region, including Nicaragua.

2.109. In this respect, it is worth emphasizing that Nicaragua omits to mention events that clearly show that the Colombian Navy has been very helpful in providing security to its own fishing vessels, especially in the Luna Verde bank area. There, Nicaragua fails to exercise any security or regulatory control over vessels operating under Nicaraguan licenses, although many of them are overcrowded, devoid of basic marine security gear, and acting in complete disrespect of environmental norms and navigational rules, thereby endangering the environment as well as the life of their crew and passengers, and even of other ships. The Court will find in **Appendix A** and depicted in **Figure 2.8** examples of events in which the Colombian Navy provided humanitarian assistance,[131] technical aid,[132] and carried

[130] Per year, the average number of naval units permanently located in the area is seven major units Fragata/OPV, one maritime patrol aircraft, one reconnaissance helicopter and four patrol boats RRU. The average number of men detached in the area on board of the naval units involved is 598 per year. The number of operations carried out in the area is 19 on average per year. For these operations, from 2012 to 2016, $69.362.982.542 COP (sixty-nine billion, three hundred sixty-two million, nine hundred eighty-two thousand, five hundred forty-two COP) have been invested, approximately $15.413.996.120.00 COP (fifteen billion, four hundred thirteen million, nine hundred ninety-six thousand, one hundred twenty COP) per year.

[131] One example can be highlighted: on 17 August 2013, the Captain of the Nicaraguan flag vessel named "Trapper" located in the area of Luna Verde required health assistance for 15 persons on his board. The captain of the Colombian ship A.R.C. "Antioquia", on routine patrol, ordered his staff to carry out humanitarian assistance. Assistance was given to 12 persons.

out search and rescue operations,[133] most of the time upon express request of fishing vessels, including Nicaraguan flagged vessels. Likewise, Nicaragua fails to mention the importance and efficiency of the Colombian Navy in carrying out its part of the task in the global fight against drug trafficking.[134]

During the operation, it was observed that the vessel had scuba tanks and canoe type boats (*cayucos*). It was also noted that the quality of life on board was deficient considering that the fishing vessel was not equipped to host 70 persons.

[132] For example: on 8 November 2013, the Colombian ship A.R.C. "San Andrés" was called via radio VHF channel 16 by the Nicaraguan fishing vessel "Pacific Star", located in the Luna Verde bank, requesting support because of a water in the engine compartment. The Colombian A.R.C. successfully helped the fishing vessel to resolve the problem with pumps and shoring equipment.

[133] As an example, on 17 November 2013, the Colombian Frigate A.R.C. "Almirante Padilla" found two Nicaraguan fishermen drifting in the Luna Verde bank in a canoe type boat (*cayuco*) without any element of maritime safety. The frigate rescued them and the fishermen said they part of the crew of the "Miss Sofia". The Colombian Navy then tried to contact the "Miss Sofia" several times, with no success. The Colombian Navy had therefore, with the assistance of the Nicaraguan Naval Forces, no other option than to look for another vessel to which to deliver the two fishermen. They were therefore rendered to another Nicaraguan fishing vessel, the "Caribean Star".

[134] See Chapter 2, Sec. D, paras. 2.93-2.110 *supra*.

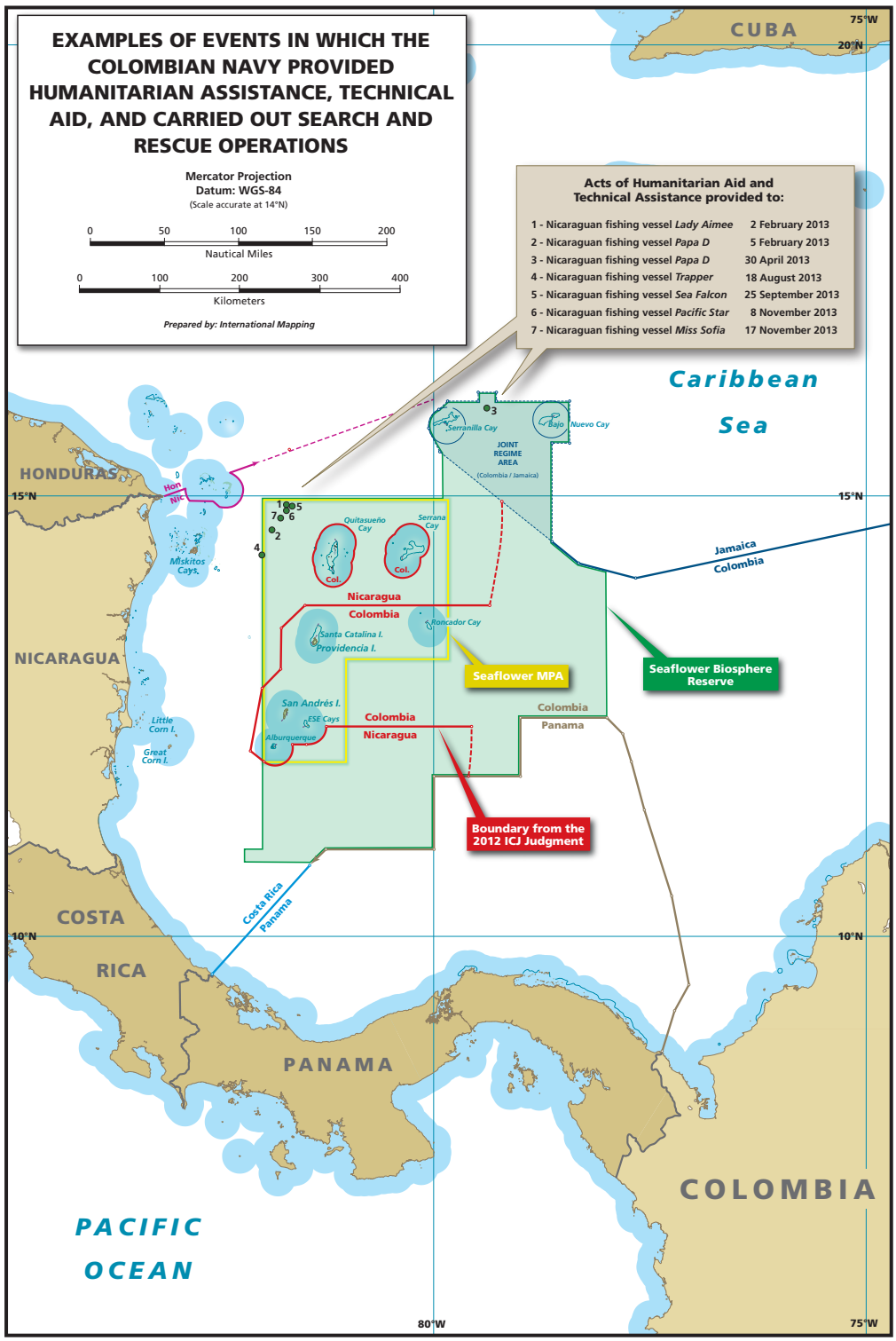
EXAMPLES OF EVENTS IN WHICH THE COLOMBIAN NAVY PROVIDED HUMANITARIAN ASSISTANCE, TECHNICAL AID, AND CARRIED OUT SEARCH AND RESCUE OPERATIONS
Mercator Projection
Datum: WGS-84
(Scale accurate at 14°N)
0 50 100 150 200
Nautical Miles
0 100 200 300 400
Kilometers
Prepared by: International Mapping
Acts of Humanitarian Aid and Technical Assistance provided to:
1 - Nicaraguan fishing vessel Lady Aimee 2 February 2013
2 - Nicaraguan fishing vessel Papa D 5 February 2013
3 - Nicaraguan fishing vessel Papa D 30 April 2013
4 - Nicaraguan fishing vessel Trapper 18 August 2013
5 - Nicaraguan fishing vessel Sea Falcon 25 September 2013
6 - Nicaraguan fishing vessel Pacific Star 8 November 2013
7 - Nicaraguan fishing vessel Miss Sofia 17 November 2013
CUBA
75°W
20°N
Caribbean Sea
HONDURAS
15°N
NICARAGUA
Miskitos Cays
Serranilla Cay
Bajo Nuevo Cay
JOINT REGIME AREA
(Colombia / Jamaica)
Quitasueño Cay
Serrana Cay
Col.
Nicaragua
Colombia
Santa Catalina I.
Providencia I.
Roncador Cay
Seaflower MPA
Seaflower Biosphere Reserve
Jamaica
Colombia
San Andrés I.
ESE Cays
Albuquerque
Colombia
Nicaragua
Colombia
Panama
Little Corn I.
Great Corn I.
Boundary from the 2012 ICJ Judgment
Costa Rica
Panama
COSTA RICA
10°N
PANAMA
COLOMBIA
PACIFIC OCEAN
80°W
75°W

Figure 2.8

E. Conclusion

2.110. In light of the special circumstances in this region of the Caribbean, Colombia's presence in the relevant waters and the actions it has taken are based on, and justified by, its rights of freedom of navigation and overflight, and the fulfilment of its legal obligations and international duties. Nicaragua's claims must be assessed both in this context, and in the light of Nicaragua's serious failure to respect its own obligations under international law.

Chapter 3

THE RIGHTS AND DUTIES OF THE PARTIES IN THE SOUTHWESTERN CARIBBEAN SEA

A. Introduction: Nicaragua's Misconception of the Applicable Legal Principles

3.1. In view of the fact that Colombia is not a party to the United Nations Convention on the Law of the Sea (UNCLOS), the applicable law in the present case is based on customary international law, as informed by other Conventions and legal instruments to which Colombia and Nicaragua are parties. This applies both to the claims by Nicaragua and the counter-claims made by Colombia and included in Part III of the present Counter-Memorial.[135]

3.2. Nicaragua takes a myopic view of the applicable legal principles. Its case is premised on what it claims are Colombia's violations of its rights and maritime spaces – sovereign rights which exist primarily for the purpose of exploring and exploiting the natural resources of the exclusive economic zone and continental shelf. But in adopting this one-sided posture, Nicaragua ignores the fact that (i) Colombia also possesses rights and duties under international law that are relevant to and require its presence and conduct in the Southwestern Caribbean, and (ii) Nicaragua, as a corollary to its rights, also has important

[135] Moreover, as stated by the Court in *Territorial and Maritime Dispute*, the fact that Colombia is not a party to UNCLOS does not relieve Nicaragua of its own obligations thereunder. See 2012 Judgment, p. 669, para. 126.

legal obligations in the relevant area – obligations that Colombia will show Nicaragua has fundamentally breached.

3.3. In other words, the existence of sovereign rights and jurisdiction over maritime spaces does not exempt a State such as Nicaragua from complying with its international obligations towards other States, including Colombia. Nor does it deprive Colombia of its own rights or relieve Colombia of its duties. This is particularly the case in a situation such as the present where a number of special circumstances exist requiring a high degree of diligence on the part of the coastal States of the Southwestern Caribbean Sea to preserve and protect the fragile marine environment of this semi-enclosed sea, and to ensure that the historical fishing rights and natural habitat of the population of the Archipelago, including the Raizales, are not harmed.

3.4. As the Arbitral Tribunal recently noted in the *Chagos Marine Protected Area Arbitration*, within various maritime zones (such as the territorial sea, international straits, and exclusive economic zone), customary international law requires that "States will exercise their rights (…) subject to, or with regard to, the rights and duties of other States".[136]

3.5. In this chapter, Colombia will discuss the rights and duties of both Parties with respect to the relevant maritime area, and by which the legality of its conduct, as well as that of

[136] *Chagos Marine Protected Area Arbitration (Mauritius* v. *United Kingdom), Final Award, ICGJ 486 (PCA 2015), 18th March 2015, Permanent Court of Arbitration [PCA]*, para. 503.

Nicaragua, can be assessed. Those rights and duties stem from principles and rules of international law that go well beyond the artificially narrow category of "sovereign rights" relied on by Nicaragua, and include:

- The basic freedoms of navigation and overflight that Colombia enjoys, including the right to monitor and report suspicious maritime traffic as part of its obligation to counter drug trafficking, and to dissuade destructive fishing and other practices (Section B);

- The obligation to preserve and protect the marine environment, coupled with the duty to exercise due diligence within the maritime spaces of the Southwestern Caribbean, and the duty to respect and protect the rights of the inhabitants of the Archipelago to a healthy habitat and environment under customary international law as informed by the Cartagena Convention, to which both Colombia and Nicaragua are Parties (Section C); and

- The existence of historic fishing rights vested in Colombia and the inhabitants of the Archipelago, who depend on a right to access their traditional fishing banks for their livelihood and as part of their traditional culture (Section D).

3.6. These rights and duties underlie three central propositions that are at the heart of Colombia's case.

First, Nicaragua's rights and jurisdiction within its EEZ are enumerated exclusive rights that are carved out from waters that otherwise form part of the high seas. They do not preclude other States, Colombia included, from exercising their own rights and duties in such areas.

Second, Colombia has the right to be present in Nicaragua's EEZ for monitoring and tracking activities that prejudice the marine environment, constitute suspicious trafficking of drugs and other forms of transnational crime, or threaten the habitat and livelihood of the inhabitants of the Archipelago who have traditional fishing rights in the area.

Third, in addition to a coastal State's environmental obligations with respect to its maritime zones (special environmental obligations), all State users of the residual high seas freedoms have general environmental obligations. If Nicaragua fails to fulfil its own special and general obligations, it is not in a position to object to others fulfilling their general environmental obligations so long as this does not infringe on Nicaragua's sovereign rights (which Colombia's activities have not done).

3.7. As will be seen in the following two chapters where the facts relating to Colombia's conduct are addressed, in reality, Colombia's actions within the Southwestern Caribbean Sea are

evidence of the good faith exercise of its rights, undertaken in compliance with its duties, under international law. In contrast, as Colombia will demonstrate when it presents its counter-claims, Nicaragua has breached its obligations.

B. Freedom of Navigation and Overflight

3.8. In introducing this Section, Colombia must first clarify its position in relation to what the Court considered in its 17 March 2016 Judgment, at paragraph 71. This paragraph reads as follows:

> "Regarding the incidents at sea alleged to have taken place before the critical date, [Colombia] does not rebut Nicaragua's allegation that it continued exercising jurisdiction in the maritime spaces that Nicaragua claimed as its own on the basis of the 2012 Judgment."[137]

3.9. Colombia wants to make crystal clear that it is not its position that, with respect to any so-called "incidents" raised by Nicaragua, it exercised "jurisdiction" in Nicaragua's EEZ. This is simply not the case; nor does it form the basis of Colombia's counter-claims. Rather, Colombia's position is that Nicaragua's allegation, according to which Colombia is said to have infringed Nicaragua's maritime spaces when its vessels and aircraft navigated in or above its EEZ, is unsupported and clearly wrong. This allegation is based on a basic misconception of the freedoms of navigation and overflight that Colombia enjoys throughout the Caribbean beyond the territorial sea of

137 Judgment on the Preliminary Objections, para. 71.

other States (1), and ignores the fact that Colombia exercised such freedoms peacefully and in a manner that duly respected Nicaragua's sovereign rights (2).

(1) NICARAGUA'S MISCONCEPTION OF THE FREEDOMS OF NAVIGATION AND OVERFLIGHT

3.10. Nicaragua acknowledges that Colombia's air and naval forces have a right to be present in the Southwestern Caribbean Sea, including in Nicaragua's EEZ, by virtue of rights it enjoys in this area under customary international law. Nicaragua refers in particular to the "right" of Colombian aircraft "to overfly Nicaragua's exclusive economic zone",[138] and further admits that "overflight by Colombian aircraft of fishing vessels in waters that are part of the Nicaraguan exclusive economic zone does not in itself imply a repudiation of Nicaragua's rights in those waters."[139] Surprisingly, Nicaragua omits mentioning another key principle, namely freedom of navigation, despite the fact that it is also an important part of the legal context in the present case. In other words, while Nicaragua emphasizes the sovereign rights and jurisdiction it possesses in its EEZ, it is forced to concede that Colombia is also entitled to enjoy certain "rights" in this area.

3.11. Notwithstanding this isolated and rather incomplete acknowledgment, Nicaragua's arguments are inconsistent. Nicaragua's claim still relies on the assumption that Colombia's

138 Memorial of Nicaragua, para. 3.34.

139 *Ibid*.

mere presence in its EEZ, in and of itself, constitutes an infringement of its rights and jurisdiction, and a repudiation of the 2012 Judgment. As Nicaragua's Memorial asserts:

> "(i) The Republic of Colombia maintains naval units on a permanent basis in areas under the sovereignty and jurisdiction of Nicaragua, disregarding Nicaraguan rights, as recognized by the Court's Judgment of 19 November 2012."[140]

3.12. This contention echoes one of President Ortega's statements, which appears to express the basic legal assumption underlying Nicaragua's case – namely, that Colombia has no right to be present in Nicaragua's EEZ. In President Ortega's words:

> "Until recently, not too long ago, surveillance was exercised by the Colombian Navy, by the Colombian Air force up to November 19th; they exercised surveillance in the area…
>
> …when we speak of implementing the Agreements of the Ruling, the decision by the International Court of Justice in The Hague… this is similar to when there is a change in government. Namely, with their strength, they had control of the area in the past, but now the strength does not stem from force but rather from a ruling; and it mandates that we exercise sovereignty in the area, that we patrol the area as Nicaraguans. …Namely, that… Nicaragua starts exercising sovereignty in the area, as we are now doing with the Navy and with the Air force, (…)".[141]

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140 Memorial of Nicaragua, para. 3.38.

141 *Ibid*., Annex 27, p. 361.

3.13. Nicaragua therefore seems to consider that, as a consequence of the 19 November 2012 Judgment, it is entitled to exercise "sovereignty in the area". Its basic legal position is that Colombia is obliged to withdraw its vessels and aircraft from what is now Nicaragua's EEZ, as if it were Nicaragua's territory.

3.14. This is not correct. The EEZ has never been envisaged as a zone of sovereignty; to the contrary, it is a zone of shared rights *and* responsibilities. Coastal States have the sovereign right to explore and exploit the natural resources within the EEZ, but foreign States retain, among other rights, the freedoms of navigation and overflight. This is true under both customary international law and UNCLOS, since the applicable rules expressly preserve the rights of overflight and navigation in the EEZ for all aircraft and vessels, including those of a military nature. Colombia is thus entitled to freedom of navigation and overflight in and over Nicaragua's EEZ for all aircraft and vessels registered in its books or flying its flag, including those acting under its military authorities.

3.15. Colombia recognises that, just as a coastal State's sovereign rights and jurisdiction within its EEZ must be exercised with "due regard" to the rights and duties of other States, so also must the rights deriving from the freedoms of navigation and overflight be exercised with "due regard" to the rights and duties of the coastal State. However, the right of another State to freedom of navigation and overflight includes

the right to carry out surveillance activities, provided they are peaceful and undertaken with due regard for the coastal State's sovereign rights and jurisdiction.[142]

3.16. It is first necessary to emphasize that the freedoms of navigation and overflight are essential to permit a State to carry out its duties.[143] Under customary international law, amongst others, a State has the right, as well as the duty, to protect and preserve the marine environment. A State also has the right to monitor activities essential to its security and territorial integrity, such as drugs and arms trafficking at sea, including in the EEZ of another State, to the extent that it respects the "due regard" requirement. The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances adopted at Vienna on 20 December 1988, to which both Colombia and Nicaragua are Parties, reflects the customary "due regard" requirement with respect to the coastal State's rights and jurisdiction. Article 17, paragraph 11, of the Convention states that actions taken in respect of suppression of illicit traffic at sea "shall take due account of the need not to interfere with or affect the rights and obligations and the exercise of jurisdiction of coastal States in accordance with the international law of the sea."

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142 J. S. Kraska, "Resources Rights and Environmental Protection in the Exclusive Economic Zone: The Functional Approach to Naval Operations", *in Military Activities in the EEZ*, P. Dutton (ed.), p. 82. Available at: https://www.usnwc.edu/Research---Gaming/China-Maritime-Studies-Institute/Publications/documents/China-Maritime-Study-7_Military-Activities-in-the-.pdf. (Last visited: 10 Nov. 2016).

143 See Chapter 3, Sec. B, paras. 3.17, 3.29-3.30; Chapter 3, Sec. C (2) paras. 3.52-3.84 *infra*.

(2) COLOMBIA EXERCISED ITS FREEDOMS OF NAVIGATION AND OVERFLIGHT WITH DUE REGARD FOR NICARAGUA'S RIGHTS

3.17. Colombia exercised its freedoms of navigation and overflight while carrying out its duties with respect to the protection of the environment and the rights of the local population, ensuring security at sea, and fulfilling its commitments to combat drug trafficking, peacefully and in full respect of the "due regard" requirement.

3.18. Nicaragua attempts to argue that Colombia's activities were not carried out peacefully, and were based on the use of force and threat to use force. For instance, in its Memorial, Nicaragua asserts that:

> "Following the Court's judgment of 19 November 2012, and in spite of it, Colombia has continued to deploy its naval forces in areas determined by the Court to form part of Nicaragua's Exclusive Economic Zone and continental shelf, and has used these forces to prevent Nicaragua from exercising its sovereign rights and jurisdiction in those areas."[144]

3.19. This argument lacks any seriousness, and the Court in its Judgment of 17 March 2016 has ruled that it has no jurisdiction over any Nicaraguan claim concerning the threat or the use of force.

[144] Memorial of Nicaragua, para. 3.37.

3.20. Therefore, the only question still at issue between the Parties is whether Colombia's activities in Nicaragua's EEZ have been carried out with "due regard" to Nicaragua's sovereign rights and jurisdiction. Nicaragua claims that Colombian aircraft and vessels have "harassed" fishing vessels flying Nicaragua's flag or licenced by Nicaragua. According to the Applicant, Colombia has carried out its right of overflight "in a harassing manner, with the apparent aim of frightening off or 'dissuading' vessels authorized by Nicaragua from fishing in those waters."[145] Colombian naval frigates and military aircraft are also accused of having "harass[ed] and intimidate[d] Nicaraguan licensed fishing vessels and prevent[ed] them from fishing in areas subject to exclusive Nicaraguan jurisdiction; thereby depriving Nicaragua of its right to benefit from the full enjoyment of its rich fishing areas."[146]

3.21. Colombia will demonstrate in Chapter 4 that Nicaragua's account of Colombia's behaviour does not reflect reality: insofar as the facts are concerned, Nicaragua has simply not substantiated its "harassment" claims. For purposes of this section, however, a simple test demonstrates the implausibility of Nicaragua's allegation that its fishermen have been deprived of access to their fishing grounds due to Colombia's activities. If that were true, the fishing production of Nicaragua's fishermen in the Caribbean Sea would have remained as it was before November 2012. But this is clearly not the case. As reported in

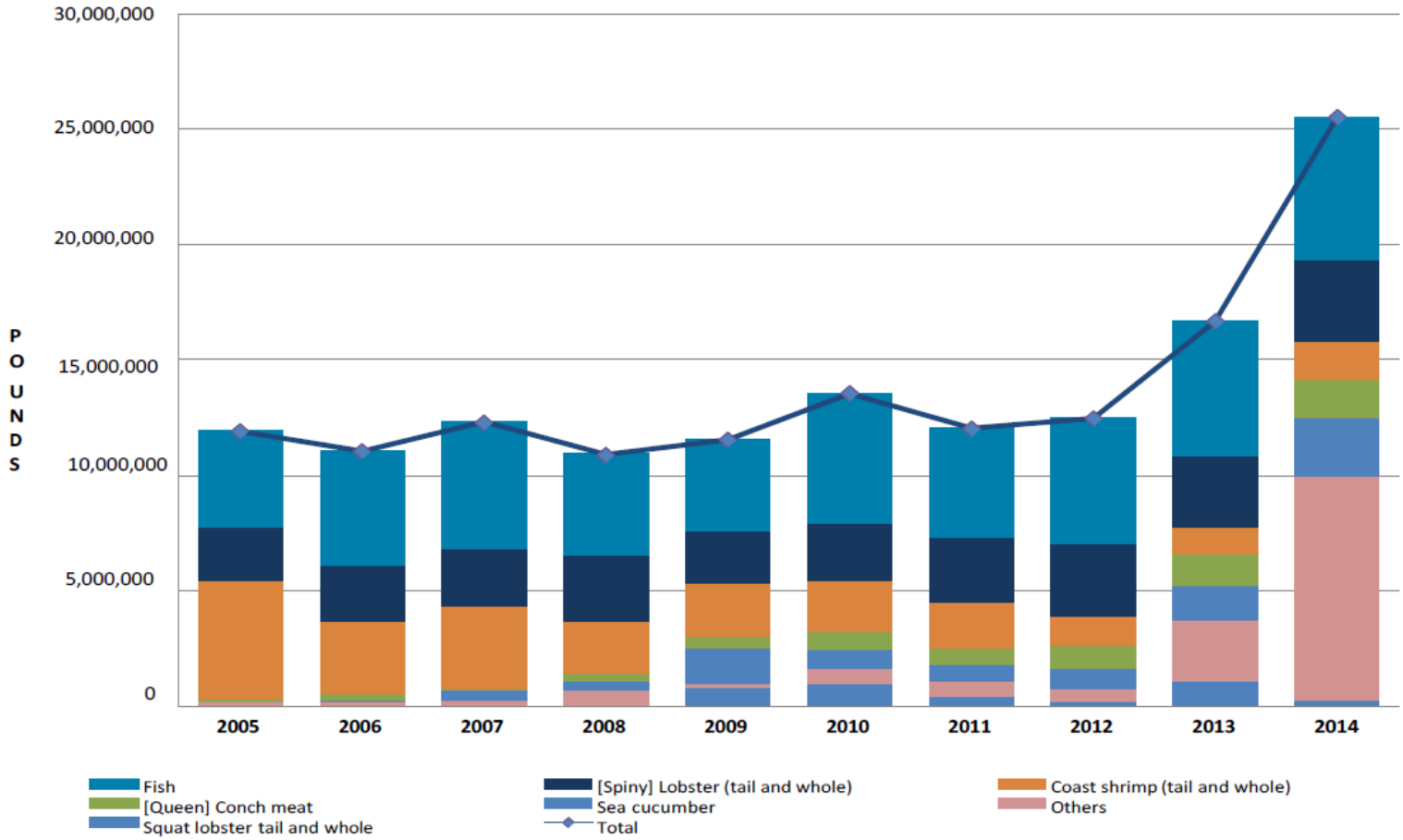
[145] Memorial of Nicaragua, para. 3.34. See also paras. 1.9,
[146] *Ibid*., para. 2.22. See also, among others, paras. 2.28; 2.36.

an official assessment published in 2014 by the Nicaraguan institution for fisheries and agriculture, INPESCA[147], from 2012 to 2014, the total catch of Nicaraguan fishermen in the Caribbean Sea increased by more than 100%, rising from 12.589.596 pounds in 2012, to 16.735.109 pounds in 2013 and 25.551.466 pounds in 2014. The following graph speaks for itself[148]:

[147] Annex 92: Nicaraguan Institute for Fishing and Aquaculture – INPESCA, Fishing and Aquaculture Yearbook for 2014, June 2015, p. 7.

[148] Figure taken from Annex 92.

Graphic No. 2
Reported landings of fishery resources. Caribbean Sea
2005-2014



3.22. It is abundantly clear from Nicaragua's own records that Nicaraguan fishermen have not suffered from any Colombian "harassment", whatever this term means, or from other actions that have prevented them from carrying out their fishing activities. Colombia exercised its freedoms of navigation and overflight, and carried out its duty of due diligence in order to monitor drug trafficking and protect the environment. But it did not prevent Nicaraguan fishermen from engaging in their fishing activities within Nicaragua's EEZ, even when such activities were being carried out in a predatory and destructive manner. No doubt, some Nicaraguan fishermen would have preferred to be able to carry out their illegal practices unobserved. But the facts relating to Colombia's conduct cannot be construed as reflecting a violation of Nicaragua's sovereign rights and jurisdiction.

C. The Rights and Duties of the Parties to Preserve and Protect the Marine Environment and to Exercise Due Diligence

3.23. This section will set out the legal framework relating to the rights and obligations of the Parties to protect and preserve the marine environment, including the environment of the local inhabitants of the Archipelago.

3.24. As will be shown, Colombia has been acting in accordance with three types of rights and duties recognized by international law to apply to *both* Nicaragua and Colombia. First, Colombia

was acting in conformity with the right and duty to protect and preserve the environment of the Southwestern Caribbean Sea (Section (1)). Second, Colombia was complying with the duty to exercise due diligence within the relevant maritime area (Section (2)). Third, Colombia was fulfilling the right and duty to protect the environment and habitat of the Raizales and the other local communities inhabiting the Archipelago (Section (3)). None of this involved an infringement of Nicaragua's sovereign rights or maritime spaces. In contrast, Chapters 8, 9 and 10, dealing with Colombia's counter-claims, will show that Nicaragua has violated its obligations on all three counts.

(1) The Parties' Rights and Duties to Preserve the Environment of the Southwestern Caribbean Sea

3.25. On several occasions, the Court has recalled that respect for the environment is an obligation of States aimed not simply at benefitting other States, but also mankind as a whole. As the Court stressed in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*:

> "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment".[149]

[149] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996,* pp. 241-242, para. 29.

3.26. Following the footsteps of the Court, other international courts and tribunals have also acknowledged that the "duty to prevent, or at least to mitigate"[150] significant harm to the environment, has become a principle of general international law.

3.27. There is no doubt that the obligation to respect the environment is incumbent upon all States. This means that all States have a "common interest"[151] – indeed an "essential interest" –[152] in preventing damage to the environment and in preserving ecological balance. This is particularly important in the context of a rare and fragile ecosystem such as the Southwestern Caribbean. As the Court recognised in the *Pulp Mills* case in the context of the fragile ecosystem of the River Uruguay, "vigilance and prevention is all the more important in the preservation of the ecological balance, since the negative impact of human activities… may affect other components of the ecosystem… such as its flora, fauna, and soil".[153] Due to this fragility and inter-connectivity, the reality for Colombia is that its land, waters and people are especially vulnerable.

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150 *Iron Rhine Arbitration (Belgium* v. *Netherlands), Award, ICGJ 373 (PCA 2005), 24th May 2005, Permanent Court of Arbitration [PCA]*, para. 59.

151 *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012*, p. 449, para. 68.

152 *Gabcikovo-Nagymaros Project (Hungary* v. *Slovakia), Judgment, 1.C.J. Reports 1997*, p. 41, para. 53.

153 *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010*, p. 67, para. 188.

3.28. Colombia attaches the utmost importance to the need to preserve the environment of the Caribbean Sea and has conducted itself to this end. Colombia made reference to environmental concerns during the proceedings in the *Territorial and Maritime Dispute* case,[154] and its actions since the Judgment in that case have been consistent with its international rights and duties. In several diplomatic notes, Colombia has stressed that it was "in the process of duly and judiciously reviewing the 2012 Judgment in order to fully ascertain all its implications" with a view to "make use of all legal recourses available to defend… the sustainability of the Seaflower Marine Reserve, as well as the sovereign rights of Colombia, within international law".[155]

3.29. Environmental concerns within the Southwestern Caribbean Sea need to be fully taken into account regardless of considerations of sovereignty or sovereign rights. The

[154] See in particular, *Territorial and Maritime Dispute (Nicaragua* v. *Colombia*), *Counter-Memorial of Colombia (Vol. I)*, paras. 2.16, 2.8 (concerning the cays of the Archipelago in general) and paras. 3.89-3.91, 3.99 (concerning the domestic laws and regulations for the protection of the Archipelago environment).

[155] Following the 2012 Judgment, Colombia voiced its concerns for the Southwestern Caribbean Sea environment in various multilateral contexts. This is attested by a series of letters addressed to the Secretariats of the United Nations, the Organization of American States, and UNESCO. As reiterated in all these letters, Colombia is keen in ensuring the "sustainability of the Seaflower Marine Reserve" after the 2012 Judgment. See, Annex 19: Diplomatic Note DM No. 94331 from the Minister of Foreign Affairs of Colombia to the Secretary-General of the United Nations, 23 November 2012; Annex 20: Diplomatic Note DM No. 94365 from the Minister of Foreign Affairs of Colombia to the Secretary-General of the Organization of American States, 23 November 2012; and Annex 21: Diplomatic Note DM No. 78634 from the Minister of Foreign Affairs of Colombia to the Director-General of the United Nations Education, Scientific and Cultural Organization – UNESCO, 23 November 2012.

"sovereignty (or sovereign rights) umbrella",[156] that Nicaragua relies on for purposes of claiming that Colombia violated its maritime rights and spaces cannot exist to the detriment of the environment of the Southwestern Caribbean Sea or derogate from both Parties' obligation to preserve and protect the marine environment, as well as the right of local communities to enjoy and benefit from a healthy0 environment.

3.30. In short, Nicaragua and Colombia each have the duty to adopt, take and implement appropriate measures and actions that would ensure respect for the environment of the maritime zones within the Southwestern Caribbean Sea, having regard for the rights and duties of the other State. As the Court stated in the *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua)* case, in a context where Nicaragua was also advancing an expansive approach to the scope of its sovereignty, "sovereignty is affirmed only to the extent that it does not prejudice the substance of [another State's] right…"[157]

3.31. At the least, Colombia has the right to monitor any practices that contravene the obligation to preserve and protect the marine environment, and to urge that such activities cease. This is particularly so when they are undertaken in ecologically sensitive areas such as the Seaflower Biosphere Reserve and the

[156] Expression borrowed from the Chagos Arbitration, *Chagos Marine Protected Area Arbitration (Mauritius* v. *United Kingdom), Final Award, ICGJ 486 (PCA 2015), 18th March 2015, Permanent Court of Arbitration [PCA]*, para. 122.

[157] *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 237, para. 48.

Seaflower Marine Protected Area, which surround the San Andrés Archipelago. Nicaragua also has the obligation to preserve and protect the marine environment, and to exercise due diligence over its vessels and nationals in this regard.

(a) The Duty To Protect and Preserve Requires Preventive and Proactive Action

3.32. The applicable international law at stake in the present dispute is clear, in particular concerning the protection and preservation of the marine environment of the Southwestern Caribbean Sea. Customary international law imposes an obligation for Nicaragua and Colombia to act in both a preventative and proactive way in order to prevent damage to the environment of the Southwestern Caribbean.

3.33. The emphasis on the obligation both to "protect" and "preserve" the marine environment, entails two elements: to *protect* the marine environment from future damage, and to *preserve* the marine environment in the sense of maintaining or improving its present condition.[158] Customary international law thus prohibits Nicaragua and Colombia from actions whose effect is to degrade the marine environment. This is especially important with respect to the environmentally sensitive Seaflower Reserve and the Seaflower Marine Protected Area. Under customary international law, *all* States have an obligation

[158] This is also reflected in Article 192 of UNCLOS, to which Nicaragua is a party and which thus establishes a legal obligation on it.

to protect and preserve a "shared resource",[159] such as the Seaflower Reserve.

3.34. Colombia has historically taken several concrete steps to protect the marine environment of the Southwestern Caribbean Sea, including the Seaflower Biosphere Reserve and the Seaflower Marine Protected Area.[160] More recently, it established an Integral Contiguous Zone, which Nicaragua vigorously contests in its Memorial, but one of the purposes of which is to ensure the protection and preservation of the marine environment within its confines.[161] Nicaragua has failed to take any similar steps or even to acknowledge that it has any legal obligation to protect and preserve the marine environment.

3.35. The Cartagena Convention, to which Colombia and Nicaragua are parties, but which Nicaragua passes over in

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159 *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010*, p. 82, para. 204.

160 Colombian authorities have issued the following legislation in order to protect the Caribbean environment: Ministry of Environment, Housing and Territorial Development, Resolution No. 107 of 2005 (in Annex 4); Ministry of Environment and Territorial Development, Resolution No. 679 of 2005 (Rosario Archipelago and San Bernardo Archipelago MPAs); CORALINA, Agreement No. 021 of 2005 (in Annex 5); CORALINA, Agreement No. 025 of 2005 (in Annex 6); Ministry of Environment, Housing and Territorial Development, Resolution No. 2372 of 2010; Ministry of Environment and Sustainable Development, Resolution No. 977 of 2014 (in Annex 9); CORALINA, Agreement No. 027 of 2001 (Johnny Cay Regional Park Declaration); CORALINA, Agreement No. 041 of 2001 (Delimitation and reservation of Johnny Cay Regional Park). Colombia currently has 54 protected areas, out of which 12 are marine protected areas. A list of the Protected Areas in the Caribbean is available at: http://www.invemar.org.co/redcostera1/invemar/docs/cartillasampcolombia.pdf. (Last visited: 10 Nov. 2016).

161 See in particular the Preamble of Presidential Decree No. 1946 of 9 September 2013, as modified and amended by Presidential Decree No. 1119 of 17 June 2014 (composite version), in Annex 7.

silence, is also relevant in this connection. It specifically addresses the protection and development of the marine environment of the Wider Caribbean Region.[162]

3.36. The Convention is based on the customary international law principle obliging States to protect and preserve the marine environment. Its provisions apply that general obligation to the specific characteristics of the wider Caribbean Sea. As Article 3, paragraph 2, provides: "This Convention and its protocols shall be construed in accordance with international law relating to their subject-matter".[163]

3.37. The Convention reflects the same pro-active spirit as customary international law and requires both Nicaragua and Colombia to "*individually* or jointly, take all appropriate

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[162] The Cartagena Convention (in Annex 17) establishes its scope of application as follows:

> "**Article 1.** Convention Area
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> 1. This Convention shall apply to the wider Caribbean region, hereafter referred to as 'the Convention area' as defined in paragraph 1 of article 2.
>
> 2. Except as may be otherwise provided in any protocol to the Convention, the Convention shall not include internal waters of the Contracting Parties." Article
>
> **Article 2.** Definitions
>
> For the purposes of this Convention:
>
> 1. The 'Convention area' means the marine environment of the Gulf of Mexico, the Caribbean Sea and the areas of the Atlantic Ocean adjacent thereto, south of 30 deg north latitude and within 200 nautical miles of the Atlantic coasts of the States referred to in article 25 of the Convention."

See also: Chapter 2, Sec. B (2), paras. 2.33-2.43 *supra*.

[163] Cartagena Convention, Article 3, para. 2 (in Annex 17).

measures in conformity with international law… to prevent, reduce and control pollution of the Convention area and to ensure sound environmental management, using for this purpose the best practicable means at [its] disposal and in accordance with [its] capabilities".[164] (Emphasis added).

3.38. Measures and actions undertaken by Colombia – including the establishment of its ICZ – show that Colombia has used in good faith the best practical means at its disposal to ensure the protection and preservation of the marine environment of the San Andrés Archipelago and of the Southwestern Caribbean Sea. Measures and actions were also adopted by Colombia in order to "take all appropriate measures to prevent, reduce and control pollution of the Convention area caused by discharges from ships", as required by the Cartagena Convention.[165] This is not the case when it comes to Nicaragua, as will be seen in Chapter 8 dealing with Colombia's counter-claims.

3.39. In the light of the foregoing, and in contrast to what Nicaragua alleges in its Memorial, both Parties have obligations that relate to its actions (or, in Nicaragua's case, lack of action) in the relevant maritime area. Colombia's measures and actions have been taken not only as a consequence of its freedoms discussed in Section B, but also in order to comply with its duties under international law: in particular, its duty to protect and preserve the marine environment of the Southwestern

[164] Cartagena Convention, Article 4, para. 1 (in Annex 17).
[165] Cartagena Convention, Article 5, (in Annex 17).

Caribbean Sea. The paradox is that Colombia is the Respondent in these proceedings. The Applicant – *i.e.*, Nicaragua – is complaining of alleged violations of its sovereign rights and maritime spaces when it not only ignores Colombia's rights and duties, but also has not shown any effort or due diligence to comply with its duty to protect and preserve the marine environment.[166]

(b) The Parties' Duty and Right To Protect and Preserve the Biodiversity of the Southwestern Caribbean Sea

3.40. One of the main purposes of the customary obligation to protect and preserve the marine environment is to ensure the sustainability of marine biodiversity.

3.41. The Court is familiar with the need to protect and preserve biodiversity and has acknowledged its importance in the context of the law of the sea. Indeed, the Court stated that "[t]he very fact of convening the third Conference on the Law of the Sea evidences a manifest desire on the part of all States to proceed to the codification of that law on a universal basis, including the question of fisheries and *conservation of the living resources of the sea*".[167] (Emphasis added).

3.42. In the *Pulp Mills* case, the Court stressed the "duty to protect the fauna and flora" in relation to the obligation to

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[166] See Chapter 8 *infra*.

[167] *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974,* p. 23, para. 53.

preserve the aquatic environment.[168] Furthermore, the Court noted that rules and measures adopted by States that aim at preserving the aquatic environment "should also reflect their international undertakings in respect of *biodiversity* and habitat protection".[169] Thus, customary international law emphasizes the need to protect and preserve marine biodiversity, and in particular, "rare or fragile ecosystems"[170]. In line with this, the Cartagena Convention provides that: "The Contracting Parties shall, *individually* or jointly, take all appropriate measures to protect and preserve rare or fragile ecosystems, as well as the habitat of depleted, threatened or endangered species, in the Convention area. To this end, the Contracting Parties shall endeavour to establish protected areas"[171]. The Seaflower Marine Protected Area pursues such objectives.

3.43. As shown in Chapter 2, the Southwestern Caribbean Sea is an important reservoir of biodiversity. As such, and in accordance with its duties under customary international law, Colombia has been,[172] and is, very concerned with the protection and preservation of the biodiversity of the Caribbean Sea. One of the objectives of the Seaflower Biosphere Reserve

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168 *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010*, p. 100, para. 262.

169 *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010*, p. 100, para. 262. (Emphasis added).

170 UNCLOS, article 194, para. 5.

171 Article 10. (Emphasis added).

172 In this respect, see in *particular, Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Counter-Memorial of Colombia (Vol. I)*, paras. 2.8, 2.16, 2.26, 3.28, 3.89 – 3.91, 3.99. Ibid., *Rejoinder of Colombia (Vol. I), paras. 2.89, 3.35. Ibid., Public Sitting, 26 April 2012, CR2012/11*, p. 52, p. 55 (Bundy); *Ibid., Public Sitting, 27 April 2012, CR2012/13*, p. 25 (Bundy).

and the Seaflower Marine Protected Area, as well as the ICZ, is to ensure conservation of the biodiversity of the Southwestern Caribbean Sea in order to protect the ecosystems at risk. This can be seen from the Preamble to the Cartagena Convention, which reads: "Considering the *protection of the ecosystems of the marine environment* of the wider Caribbean region to be one of th[e] principal objectives".[173] (Emphasis added).

3.44. Colombia's concerns for the preservation of biodiversity within the Southwestern Caribbean Sea date back many years. Already by Resolution No. 206 of 1968, the Board of Directors of the Colombian Institute for Agrarian Reform (INCORA) provided that the territory of the San Andrés Archipelago would no longer be included in what was termed the "territorial reserve of the State", and certain sectors thereof were declared to be special reserves. The operative part stated:

> "Article Three: To declare as special reserve zones, with the purpose of preserving the flora, fauna, lake levels, the creeks and natural scenic beauties, the following sectors of the Archipelago of San Andrés and Providencia.
>
> (…)
>
> Cays and Banks
>
> Preservation Zones
>
> (…)
>
> b) The Cay of Serrana and the banks of Roncador, Quitasueño, Serrana, Serranilla, Bajo Nuevo and Alicia

[173] Cartagena Convention, fifth preambular paragraph (Annex 17). Emphasis added.

> Article Four: To declare as special reserve zones for tourism purposes the following sectors of the Archipelago of San Andrés and Providencia: Cays and banks.
>
> All of the cays and banks that form part of the Archipelago of San Andrés and Providencia, excluding Cangrejo and Serrana Cays as well as the banks of Roncador, Quitasueño, Serranilla, Bajo Nuevo and Alicia, comprised within the intangible preservation zones dealt with in the previous article...".[174]

3.45. As discussed in Chapter 2, CORALINA was created with a jurisdiction comprising the "territory of the Archipelago Department of San Andrés, Providencia and Santa Catalina, the territorial sea and the EEZ generated by the land sections of the Archipelago". It was mandated to promote the preservation, protection and sustainable use of the renewable natural resources and the environment of the Archipelago, and integration of the native communities inhabiting the islands and their ancestral methods of using nature's resources in this process.

3.46. Beyond biodiversity concerns, there are also concerns to maintain the "essential processes"[175] of the nature, or to maintain what are nowadays generically referred to as "ecosystems". Internationally accepted definitions of the term

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[174] Annex 2: Colombian Institute for Agrarian Reform, Resolution No. 206 of 16 December 1968.

[175] UN Doc. A/RES/37/7. World Charter for Nature, General Principle 1. Available at: http://www.un.org/documents/ga/res/37/a37r007.htm. (Last visited: 10 Nov. 2016).

"ecosystem" include that in Article 2 of the Convention on Biological Diversity, which defines ecosystem to mean "a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit"[176].

3.47. Nicaragua seems to think that mere promises to protect the marine environment of the Southwestern Caribbean Sea and its biodiversity are sufficient. However, compliance with international law is dependent on actions not words or promises. In particular, where a fragile ecosystem is at stake, international law requires both Parties to take proactive action and not adopt a "wait-and-see" attitude.

3.48. It is astonishing that, in addressing Colombia's allegedly illegal presence in its EEZ, Nicaragua's Memorial does not address these important legal objectives embodied in international conventions to which it is a party. Nor does Nicaragua recognize that Colombia has a legitimate interest, indeed a duty, in seeing that the marine environment of the Southwestern Caribbean is protected and preserved, let alone that it (Nicaragua) also has serious obligations in this regard.

3.49. To achieve sustainable development, biodiversity needs to be preserved, in particular in the context of semi-enclosed seas

[176] Convention on Biological Diversity, Art. 2. Available at: https://www.cbd.int/convention/text/ (Last visited: 10 Nov. 2016).

where ecosystems are not only fragile, but very much interdependent and interconnected.

3.50. As emphasized in the Preamble of the Convention on Biological Diversity, which informs rights and obligations under customary international law, "the conservation of biological diversity is a common concern of humankind".[177] The Convention on Biological Diversity also states that "the fundamental requirement for the conservation of biological diversity is the in-situ conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings".[178]

3.51. The Seaflower Biosphere Reserve, the Seaflower Marine Protected Area and the ICZ all facilitate the development of *in-situ* conservation of the ecosystems. They constitute a fulfilment by Colombia of the duty to protect and preserve the biodiversity of the Caribbean Sea and the fragile ecosystems encompassing the San Andrés Archipelago. In doing so, Colombia is complying with another fundamental duty under international law, namely, the duty to exercise due diligence.

3.52. These initiatives cannot be seen, therefore, as an impediment to the exercise by Nicaragua of its sovereign rights

[177] Convention on Biological Diversity, Preamble. Available at: https://treaties.un.org/doc/Treaties/1992/06/19920605%2008-44%20PM/Ch_XXVII_08p.pdf (Last visited: 10 Nov. 2016).

[178] Convention on Biological Diversity, Preamble. Available at: https://treaties.un.org/doc/Treaties/1992/06/19920605%2008-44%20PM/Ch_XXVII_08p.pdf (Last visited: 10 Nov. 2016).

– rights which, in any event, are not unfettered, and must be exercised while fulfilling the obligation to protect and preserve the marine environment.

(2) The Parties' Duty to Exercise Due Diligence within the Maritime Spaces of the Southwestern Caribbean Sea

3.53. Customary international law requires that States, and in particular, States whose maritime spaces are situated within a semi-enclosed sea such as the Caribbean, exercise *due diligence* in order to prevent infringements within maritime zones, such as infringements of environmental protection and fisheries.

3.54. The present sub-section aims at showing that Nicaragua and Colombia are bound by a duty under international law to exercise due diligence within the maritime spaces of the Southwestern Caribbean Sea. This duty of due diligence is of a "reinforced"[179] character given the particular environmental characteristics of the Southwestern Caribbean Sea. More specifically, in the context of the present case, the reinforced duty of due diligence applies to the protection of the environment (Sub-section (a)) and concerns predatory fishing practices within the Southwestern Caribbean Sea (Sub-section (b)).

[179] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010*, p. 80, para. 197.

3.55. Nicaragua's pleadings totally ignore its duty of due diligence, as will be shown in the section on counter-claims. But that scarcely means that Colombia may also ignore its due diligence duty, or be accused of "harassing" Nicaraguan fishermen when it fulfils this vital duty.

(a) The Parties' Reinforced Duty to Exercise Due Diligence with respect to the Environment of the Southwestern Caribbean Sea

3.56. Colombia has already stressed the importance of the duties that Nicaragua and Colombia have under customary international law to protect and preserve the marine environment, as well as the marine biodiversity of the Caribbean Sea. Those duties are components of a broader duty: namely, the duty to exercise due diligence with respect to the environment in general.

3.57. Customary international law incorporates such a duty of due diligence. As the Court has highlighted, under customary international law, "[a] State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State".[180] The Court went further and emphasized that the obligation to act with due diligence in respect of activities which take place under the jurisdiction and control of a State is an obligation that entails not

[180] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010*, p. 56, para. 101.

only the adoption of appropriate rules and measures, but also "*a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators, to safeguard the rights of the other* [*State*]".[181] (Emphasis added).

3.58. It follows that the due diligence obligation requires a State to adopt appropriate rules and measures, and to exercise vigilance in their enforcement and administrative control. In other words, the Flag State has "an obligation 'to deploy adequate means, to exercise best possible efforts, to do the utmost'".[182]

3.59. Moreover, the Court has recognized in the *Pulp Mills* case that the obligation of due diligence can be "further reinforced"[183] in certain circumstances. The specific context of the Southwestern Caribbean Sea, combined with the fragility of its ecosystems, and the growing threats to the environment – such as predatory fishing practices, pollution, large infrastructure projects, *etc.* – requires that the duty of due diligence be reinforced. This means that a State must be allowed to exercise related rights in order to fulfil its duty of due

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[181] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010*, p. 89, para. 197.

[182] *Responsibilities and Obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 41, para. 112; *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015*, para. 129.

[183] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010*, p. 80, para. 197.

diligence (although, for the avoidance of doubt, those related rights are not contingent on performance of the duty of due diligence). Accordingly, Colombia must be able to exercise in conformity with international law its rights of freedom of navigation, overflight, monitoring, humanitarian assistance and other related rights, which include the proper "monitoring of activities undertaken"[184] by public or private operators without being accused of impeding Nicaragua's sovereign rights.

3.60. It is precisely this level of vigilance in terms of environmental protection that is at issue in the present case. In implementing this duty, Colombia has in no way prevented Nicaragua from exercising its own sovereign rights.

3.61. The other side of the coin is that Nicaragua also has a duty of due diligence over fishing vessels carrying its flag or operating under its licenses, as well as over its nationals. Given the nature of the marine area, that should entail a "zero tolerance" attitude towards public or private operators from Nicaragua that engage in destructive practices and show no regard for the environment. Nicaragua has utterly breached this obligation.

(b) The Parties' Reinforced Duty of Due Diligence with respect to Predatory Fishing Practices within the Southwestern Caribbean Sea

[184] *Ibid.*, p. 79, para. 197.

3.62. Additionally, customary international law imposes upon both Nicaragua and Colombia a heightened duty of due diligence with respect to the protection and preservation of living resources of the Caribbean Sea. As recalled by the International Tribunal of the Law of the Sea (ITLOS), "[T]he conservation of the living resources of the sea is an element in the protection and preservation of the marine environment".[185]

3.63. The United Nations General Assembly has expressed concerns regarding fisheries within the Caribbean Sea, and encouraged concerned States to implement sustainable fishing practices. For instance, in 2004, the General Assembly adopted Resolution 59/230 on "Promoting an integrated management approach to the Caribbean Sea area in the context of sustainable development", in which it "call[ed] upon States, taking into consideration the Convention on Biological Diversity, to develop national, regional and international programmes for halting the loss of marine biodiversity in the Caribbean Sea, in particular fragile ecosystems, such as coral reefs".[186] The same concerns were reiterated in Resolution 63/214 adopted in 2008 ("Towards the sustainable development of the Caribbean Sea for present and future generations"),[187] and the UN General Assembly went as far as encouraging Caribbean States "to meet the principles of the Code of Conduct for Responsible Fisheries

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185 *Southern Bluefin Tuna (New Zealand* v. *Japan; Australia* v. *Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999*, p. 295, para. 70.

186 UN Doc. A/RES/59/230, para. 14.

187 UN Doc. A/RES/63/214.

of the Food and Agriculture Organization of the United Nations".[188]

3.64. The Code of Conduct for Responsible Fisheries was adopted on 31 October 1995 by more than 170 members of the Food and Agriculture Organization, including Colombia and Nicaragua. It is considered as reflecting minimum international standards.[189] It provides that "[t]he right to fish carries with it the obligation to do so in a responsible manner so as to ensure effective conservation and management of the living aquatic resources",[190] and establishes, among other things, that States should prevent overfishing and excess fishing capacity,[191] and take account of the interests of fishers.[192] The UN General Assembly insisted on the same concerns in 2012.[193]

3.65. Both Nicaragua and Colombia are thus under a reinforced duty of due diligence to prevent harmful fishing practices, predatory fishing and harvesting of endangered species that would damage the living resources of the Caribbean Sea and threaten their sustainability. This is particularly significant given the inter-connectivity and fragility of the ecosystem of the Archipelago and its surrounding waters. Predatory fishing

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188 United Nations, *International Fisheries Instruments with Index*, Sect. III. Available at Peace Palace Library.

189 R. Wolfrum, "Preservation of the Marine Environment", in J. Basedow, U. Magnus, R. Wolfrum, *The Hamburg Lectures on Maritime Affairs, 2011-2013* (Springer, 2015), p. 6. Available at Peace Palace Library.

190 Article 6.1.

191 Article 6, para. 3.

192 Article 7.2.2 (c).

193 UN Doc. A/RES/67/205.

activities in the maritime area relevant to this case take the form of destructive fishing methods, including fishing with divers and scuba tanks. Both Parties have the obligation to adopt appropriate measures and take action to prevent such activities within the Southwestern Caribbean Sea.

3.66. These obligations are not only based on customary international law, but also derive from the Cartagena Convention, and the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)[194].

3.67. The most fished species in the border area between Colombia and Nicaragua, which mainly comprises the Luna Verde bank, Quitasueño and Serrana, are the Caribbean Spiny Lobster and the Queen Conch.[195]

3.68. The Caribbean Spiny Lobster is recognised as a species that could rapidly become endangered. It is listed in Annex III of SPAW, which means that countries party to the SPAW Protocol, such as Colombia, must take special measures to ensure the protection and recovery of the Spiny Lobster whilst regulating the use of the species.

3.69. The Queen Conch is listed under Appendix II of the CITES. In accordance with the CITES, Colombia has reduced

[194] Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). Available at: https://treaties.un.org/doc/publication/unts/volume%20993/volume-993-i-14537-english.pdf. (Last visited: 10 Nov. 2016).

[195] See Chapter 6, para. 6.8 *infra.*

drastically the activity of its fishing sector with regard to Queen Conch. The number of Colombia's fishermen fishing Queen Conch is limited to only 90, spread in 15 small boats.[196] No industrial boats are allowed to fish this species, and only free diving is permitted. Colombia does not export Queen Conch.[197] Queen Conch fishing in the Archipelago is subject to specific regulations, which foresees a strict system of allocation of fishing quota limited to artisanal fishermen and reserved for local consumption.[198]

3.70. By inviting Nicaraguan flagged and authorized vessels to cease predatory activities that would have a detrimental effect on those species, Colombia is complying with its duty of due diligence. With respect to Queen Conch in particular, the CITES Conference of Parties (COP) 16 has encouraged States "to participate in the development of national, subregional and

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196 See M. C. Prada, R. S. Appeldoorn, *Draft Regional Queen Conch Fisheries management and Conservation Plan*, pp. 16, 23. Available at: http://www.fao.org/fi/static-media/MeetingDocuments/WECAFC16/Ref20e.pdf. (Last visited: 10 Nov. 2016.)

197 According to Resolution No. 350 of 10 October 2013 issued by the Ministry of Agriculture and Rural Development, 16 Tons of Queen Conch catch quota are exclusively assigned to artisanal fishermen and is only for local consumption (i.e. not for export) (Annex 8). This was duly ratified by Resolution No. 1680 of 27 December 2013, Resolution No. 1845 of 13 December 2014 and Resolution 1975 of 10 November 2015, issued by the National Authority on Aquiculture and Fishing.

198 In accordance with Resolution 3312 of 24 November 2010, Queen Conch fishing was banned for the Department of San Andrés, Providencia and Santa Catalina; consequently, during of 2011 and 2012 there was no allocation of catch quota for Queen Conch. From the year 2013, the responsible authority allocates an overall fishing quota of 16 Tn. of Queen Conch in the area of the San Andrés Archipelago. This quota has been of exclusive assignment to artisanal fishermen and it is solely for local consumption.

regional plans for the management and conservation of [*Strombus gigas*] and to share information and collaborate on: … enforcement issues, including illegal, unregulated and unreported fishing (IUU)."[199]

3.71. More generally, the need to exercise reinforced due diligence against IUU fishing has also been endorsed in the context of the Western Central Atlantic Fishery Commission (WECAFC), of which both Nicaragua and Colombia are members. In Resolution WECAFC/15/2014/6 on region-wide support to the implementation of the Caribbean Regional Fisheries Mechanism (CRFM) 2010 Castries Declaration on Illegal, Unreported and Unregulated Fishing, the WECAFC stressed the need to fight against IUU fishing practices, and to that end, to "facilitate the development and implementation of policies and measures to *prevent, deter and eliminate IUU fishing within the region.*"[200] (Emphasis added).

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[199] Convention on International Trade in Engendered Species and Wild Fauna and Flora, Sixteenth meeting of the Conference of the Parties, Bangkok, Thailand, 03-14 March 2013, Decision 16.141 to 16.148, Regional cooperation on the management of and trade in the Queen Conch (*Strombus gigas*), at 16.143. Available at: https://www.cites.org/eng/dec/valid16/230. (Last visited: 10 Nov. 2016).

[200] Western Central Atlantic Fishery Commission, Fifteenth Session, Port of Spain, Trinidad and Tobago, 26-28 March 2014, Document WECAFC/XV/2014/16, "Draft Resolutions and Recommendations", Draft Resolution WECAFC/15/2014/6 on region-wide support to the implementation of the CRFM "Castries, St Lucia, (2010) Declaration on Illegal, Unreported and Unregulated Fishing", p. 20. Available at: ftp://ftp.fao.org/FI/DOCUMENT/wecafc/15thsess/16e.pdf. (Last visited: 10 Nov. 2016.)

3.72. In the Outcome Document of the 2012 United Nations Conference on Sustainable Development (Rio+20), the international community acknowledged that:

> "[I]llegal, unreported and unregulated fishing deprive many countries of a crucial natural resource and remain a persistent threat to their sustainable development"[201]

and recommitted

> "to eliminate illegal, unreported and unregulated fishing… and to prevent and combat these practices, including through the following: developing and implementing national and regional action plans in accordance with the FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing; implementing, in accordance with international law, effective and coordinated measures by coastal States, flag States, port States, chartering nations and the States of nationality of the beneficial owners and others who support or engage in illegal, unreported and unregulated fishing *by identifying vessels engaged in such fishing and by depriving offenders of the benefits accruing from it*".[202] (Emphasis added).

The Sustainable Development Goals (SDGs) go in the same direction. Indeed, SDG14 ("Conserve and Sustainably use the oceans, seas and marine resources") require from all Members States of the United Nations to "effectively regulate harvesting and *end overfishing, illegal, unreported and unregulated fishing and destructive fishing practices*…".[203] (Emphasis added).

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201 UN Doc. A/66/L.56, Rio+20 Outcome Document, para. 170.
202 UN Doc. A/66/L.56, *Ibid.*
203 UN Doc. A/70/L.1. (Emphasis added).

3.73. Additionally, reinforced due diligence is required for the conservation of the habitats of endangered fish species, particularly in fragile ecosystems. In addition to preventing the direct harvesting of species recognized internationally as being threatened with extinction, customary international law extends to the prevention of harms that would affect depleted, threatened, or endangered species indirectly through the degradation of their habitat. While the measures taken by Colombia in respect of the Seaflower Biosphere Reserve and the Seaflower Marine Protected Area contribute to protecting and preserving those species, Nicaragua has taken no such action.

3.74. In addition to these considerations, the Court has acknowledged that a State (such as Nicaragua in the present case) "ha[s] an obligation to take full account of [another State's] rights and of any fishery conservation measures the necessity of which is shown to exist in"[204] maritime spaces. For the Court, "[i]t is one of the advances in maritime international law, resulting from the intensification of fishing, that the former *laissez-faire* treatment of the living resources of the sea… has been replaced by a *recognition of a duty to have due regard to the rights of other States and the needs of conservation for the benefit of all.*"[205] (Emphasis added).

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[204] *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 31, para. 72.

[205] *Ibid.* (Emphasis added).

3.75. All of these rights and duties regarding the preservation of the environment and the sustainable conservation of fisheries do not operate in isolation from other rights, in particular the rights of Raizal community and other inhabitants of the Archipelago. Customary international law requires the Parties to preserve the environment not only for ecological reasons, but also for human purposes. As Principle 1 of the 1992 Rio Declaration on the Environment and Development states: "Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature".[206]

3.76. The entitlement to a healthy, sound and sustainable environment is even more crucial when vulnerable communities living in the Archipelago such as the Raizales are at stake. The subsistence of those communities is inextricably linked to, and dependent on, a healthy and sustainable environment. This has been explicitly recognized by the international community at the Rio+20 Conference, where it was emphasized "that indigenous peoples and local communities are often the most directly dependent on biodiversity and ecosystems and thus are often the most immediately affected by their loss and degradation".[207] The next section turns to this issue.

[206] UN Doc. A/CONF.151/26 (Vol. I), Principle 1 of the Rio Declaration on the Environment and Development.
[207] UN Doc. A/66/L.56, Rio+20 Outcome Document, para. 197.

(3) THE PARTIES' RIGHT AND DUTY TO PROTECT THE RIGHT OF THE RAIZALES AND OTHER INHABITANTS OF THE ARCHIPELAGO TO A HEALTHY, SOUND AND SUSTAINABLE ENVIRONMENT

3.77. On several occasions, the Court has acknowledged the link between environmental protection and the well-being of human communities. As the Court has observed, "the environment is not an abstraction but represents the *living space, the quality of life and the very health of human beings*".[208] (Emphasis added). Such an acknowledgement shows that a foundational aim of the obligation of States to protect the environment is to preserve a healthy and sound environment for human beings. When the environment of vulnerable communities such as the Raizales and other inhabitants of the Archipelago is at stake, States need to be even more diligent with respect to the need to protect the environment of these communities.

3.78. This duty applies regardless of considerations of sovereignty. What is at stake are not sovereign rights over maritime spaces, but the right of the Raizales and other inhabitants of the Archipelago to a healthy and sustainable environment.

3.79. The right of indigenous peoples and local communities to benefit from the protection of their environment and habitats is recognized in State practice. Noteworthy, in the context of the

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[208] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, pp. 241-242, para. 29; *Gabcikovo-Nagymaros Project (Hungary* v. *Slovakia), Judgment, 1.C.J. Reports 1997*, p. 41, para. 53.

present dispute, is the American Declaration on the Rights of Indigenous Peoples, adopted on 15 June 2016. Article XIX (Right to protection of a healthy environment) states at paragraph 2 that: "Indigenous peoples have the right to conserve, restore, and protect the environment and to manage their lands, territories and resources in a sustainable way."[209]

3.80. The Inter-American Court of Human Rights ("I/A Court H.R.") has, on various occasions, addressed the link between the protection of the environment and the rights of indigenous peoples and local communities. This jurisprudence is particularly significant as it recognizes that the protection of the territories of indigenous peoples and local communities stems from the need to ensure the continuity of their use of natural resources, which in turn allows them to maintain their way of living.

3.81. In the *Sarayaku* case, for example, the I/A Court H.R. found that "the right to use and enjoy the territory would be meaningless for indigenous and tribal communities if that right were not connected to the protection of natural resources in the territory."[210] And in the *Bayano* case, that court further extended

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209 American Declaration on the Rights of Indigenous Peoples, Available at: http://www.narf.org/wordpress/wp-content/uploads/2015/09/2016oas-declaration-indigenous-people.pdf. (Las visited: 10 Nov. 2016)

210 I/A Court H.R., Case of the *Kichwa Inigenous Peolple of Sarayaku v. Ecuador*, Judgment (Merits and Reparations) 27 June 2012, paras. 146-147. See also, *Xákmok Kásek Indigenous Community*, Merits, Reparations and Costs, Judgment of August 24, 2010, para. 85; *Sawhoyamaxa Indigenous Community*, Merits, Reparations and Costs, Judgment of March 29, 2006,

the nexus between the protection of the environment and the enjoyment of rights for indigenous peoples and local communities by holding that:

> "In addition, although neither the American Declaration of the Rights and Duties of Man nor the American Convention on Human Rights includes any express reference to the protection of the environment, it is clear that several fundamental rights enshrined therein require, as a precondition for their proper exercise, a minimal environmental quality, and suffer a profound detrimental impact from the degradation of the natural resource base".[211]

3.82. Based on the link between the environment and the enjoyment of indigenous rights, the I/A Court H.R. went on to conclude that States have a duty to prevent harm to and protect the habitat of indigenous peoples "taking into account the special characteristics of indigenous peoples, and the special and unique relationship that they have with their ancestral territories and natural resources found therein".[212] As the I/A Court H.R. also recalled: "States are under an obligation to control and prevent illegal extractive activities such as logging, *fishing*, and illegal mining on indigenous or tribal ancestral territories, and to investigate and punish those responsible".[213]

Series C No. 146, para. 118; *Yakye Axa Indigenous Community*, Merits, Reparation and Costs, Judgment of June 17, 2005, Series C No 125, para. 137; *Saramaka People*, Preliminary Objections, Merits, Reparations and Costs, Judgment of November 28, 2007, Series C No. 172, para. 88.

211 I/A Court H.R., Report No. 125/12, Case 12.534, *Kuna Indigenous People of Mudungandi and Embera Indigenous People of Bayano and their Members* v. *Panama*, Merits, 13 November 2012, para. 233.

212 *Ibid*., para. 234.

213 *Ibid*.

3.83. As explained in Chapter 2, the protection of the environment and access to and conservation of fisheries in areas where they have traditionally fished is of vital importance for the subsistence of the Raizales. The Court itself has recognized the importance of fishing for the well-being and quality of life of the inhabitants of coastal or riparian areas. For instance, while referring specifically to subsistence fishing, in its Judgment on the *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua)*, the Court upheld the customary right of fishing of the inhabitants of Costa Rica in the Nicaraguan San Juan River.[214]

3.84. Both Nicaragua and Colombia have a duty to prevent the potential threat to the Raizales' traditional fishing rights through the protection of their environment and habitat. Colombia has complied with that duty by ensuring the involvement of the Raizales and other communities of the Archipelago in the regulation and management of initiatives such as the Seaflower Marine Protected Area. This was established in accordance with Colombian legislation in 2005 by CORALINA's Agreements No. 021 and 025.[215] However, Nicaragua's Memorial ignores all of these elements. Apparently, Nicaragua considers that the mere possession of sovereign rights over its EEZ exempts it

[214] The Court held that "fishing by the inhabitants of the Costa Rican bank of the San Juan River for subsistence purposes from that bank is to be respected by Nicaragua as a customary right", *Dispute relating to Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, Merits, I.C.J. Reports 2009*, p. 266, paras. 143-144.

[215] Annexes 5 and 6.

from complying with the obligations that accompany those rights and that are duly recognized under customary international law. Similarly, Nicaragua seeks to deny to Colombia the rights and duties that it has in the relevant area, except for what it contends is Colombia's obligation not to carry out activities in Nicaragua's EEZ.

3.85. Yet, the existence of sovereign rights does not supersede, much less eliminate, the duty that both Nicaragua and Colombia have to protect the rights of the Raizales as well as the other inhabitants of the Archipelago to a healthy, sound and sustainable environment.

D. The Customary Artisanal Fishing Rights To Access and Exploit the Traditional Banks

3.86. The existence of traditional fishing rights in favour of the inhabitants of the Archipelago is not a matter of controversy. As evidenced by the practice put forward by Colombia in the form of historical documents and affidavits discussed in Chapter 2, ever since colonial times, the Raizales, who are the ancestral inhabitants of the Archipelago, and the other communities living there have been navigating, fishing and turtling in maritime areas of the Southwestern Caribbean that go beyond those that were found to appertain to Colombia in the 2012 Judgment. That much is uncontested. Nicaragua has not only acknowledged the existence of this long-standing practice, but has also recognized that the artisanal fishermen of the Archipelago have the right to

fish in Nicaragua's own maritime zones without having to request an authorization.[216]

(1) The Formation and Recognition of a Local Customary Right to Artisanal Fishing

3.87. It is not uncommon for States to agree, either tacitly or explicitly, that inhabitants living in border regions should be allowed to traverse boundaries in order to have access to resources that are important for the livelihood of their communities. This happens in the context of territorial frontiers[217], as well as with regard to functional maritime boundaries.[218]

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[216] Annex 73: El 19 Digital, *President Daniel meets Juan Manuel Santos in Mexico*, 2 Dec. 2012; Annex 74: Radio La Primerísima, *Daniel ratifies to Colombia his vocation for peace*, 2 Dec. 2012; Annex 76: Radio La Primerísima, *Powerful interests want a confrontation with Colombia*, 21 Feb. 2013; Annex 75: Radio La Primerísima, *Nicaragua exercises peaceful sovereignity over its waters*, 5 Dec. 2012; Annex 77: El 19 Digital, *Daniel meets delegation from Iceland*, 18 Nov. 2014.

[217] *Kasikili/Sedudu Island (Botswana/Namibia), I.C.J. Reports 1999*, p. 1094, para. 74: "It is, moreover, not uncommon for the inhabitants of border regions in Africa to traverse such borders for purposes of agriculture and grazing, without raising concern on the part of the authorities on either side of the border."; *Eritrea-Ethiopia Boundary Commission, Decision Regarding Delimitation of the Border between the State of Eritrea and the Federal Democratic Republic of Ethiopia, 13 April 2002, 41 ILM 1057*, p. 1116, para. 7.3: "Regard should be paid to the customary rights of the local people to have access to the river."; *Frontier Dispute (Burkina Faso/Niger), Judgment, I.C.J. Reports 2013*, pp. 90-91, para. 112; Article 9 of the Agreement regarding Water rights on the Boundary between Tanganyika and Ruanda-Urundi, London, 22 November 1934, 190 LNTS 106.

[218] *Award of the Arbitral Tribunal in the second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation), Decision of 17 December 1999, R.I.A.A., Vol. XXII*, paras 103-112; Article 5(1) of the Agreement between the Government of the Republic of Indonesia and the Government of Papua New Guinea concerning maritime boundaries between the Republic of Indonesia and Papua New Guinea and co-operation on related matters; Agreement between the Government of Papua New Guinea and the Government of Solomon Islands concerning the administration of the special

3.88. Often, these practices have been observed for a long period of time without giving rise to any protest from the authorities of the neighbouring State. Sometimes, the "positive" practice of private individuals necessarily implies the existence of a "negative" practice on the part of State authorities which, although aware of the on-going activities within their jurisdiction, fail to take action in circumstances where there is a duty to react within a reasonable period of time.

3.89. This was acknowledged by the Court as early as 1960 in its Judgment in the *Case concerning Right of Passage over Indian Territory*.[219] In that Judgment, the Court found that the "negative" practice of the British and, later, of the Indian authorities of allowing free passage between coastal Daman and the enclaves had given rise to a local custom between Portugal and India.[220] The finding that Portugal held a customary right of passage in favour of private persons, civil officials and goods did not require an in-depth analysis of *opinio juris sive necessitatis*. The circumstances were such that India's toleration of the activities occurring under its jurisdiction satisfied the Court that "that practice was accepted as law by the Parties and ha[d] given rise to a right and a correlative obligation".[221] On

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areas; Memorandum of Understanding between the Government of Australia and the Government of the Republic of Indonesia regarding the operations of Indonesian traditional fishermen in areas of the Australian exclusive fishing zone and continental shelf.

[219] *Case concerning Right of Passage over Indian Territory, (Portugal* v. *India), Merits, Judgment, I.C.J. Reports 1960*, p. 6.

[220] *Ibid.*, p. 40.

[221] *Ibid.*, p. 40.

the other hand, India's timely complaints *vis-à-vis* the unannounced passage of Portuguese troops in its territory attested to the non-existence of a parallel customary right in favour of armed forces, armed police and arms and ammunition.[222]

3.90. Similarly, in a recent case which also concerned Nicaragua, the Court found that, "the failure… to deny the existence of a right arising from the practice which had continued undisturbed and unquestioned over a very long period, [was] particularly significant", before ruling in favour of the existence of a Costa Rican customary right to fish in the territory of Nicaragua.[223] In such circumstances, where both parties have recognized a long-standing practice[224], the State that has tolerated the conduct taking place under its jurisdiction cannot hide behind the argument that it is for the State relying on the customary norm to demonstrate the *opinio juris sive necessitatis*. In fact, the Court has been prepared to recognize the existence of a customary right on the basis of little evidence since it rightly stressed that the practice in question, "especially given the remoteness of the area and the small, thinly spread population, [was] not likely to be documented in any official record".[225]

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222 *Case concerning Right of Passage over Indian Territory, (Portugal* v. *India), Merits, Judgment, I.C.J. Reports 1960*, pp. 41-43.

223 *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, pp. 265-266, para. 141.

224 *Ibid.*, p. 265, para. 141.

225 *Ibid*.

3.91. The Court's findings in these two precedents spanning half a century also demonstrate that there can be no doubts as to the existence in international law of local customary norms in addition to general ones. As stated by the Court in its 1960 Judgment in the *Case concerning Right of Passage over Indian Territory*, "[i]t is difficult to see why the number of States between which a local custom may be established on the basis of long practice must necessarily be larger than two".[226]

3.92. State authorities can also recognize the existence of such customary rights explicitly, instead of merely recognizing the existence of a practice. Indeed, there are no uncertainties when the omissions are followed by explicit and reiterated recognition that such practices amount to the exercise of a right.

3.93. Significantly, in the present case, there are a number of explicit recognitions when it comes to the traditional fishing rights of the Raizales to artisanal fishing in waters that now fall within Nicaragua's EEZ. The first of these took place on 26 November 2012 when President Ortega stressed that Nicaragua fully respected the rights of the inhabitants of the Archipelago "to fish and navigate those waters, which they ha[d] historically navigated".[227]

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[226] *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960: I.C.J. Reports 1960*, p. 39.

[227] El 19 Digital, *Message from the President Daniel to the People of Nicaragua*, 26 November 2012 (Memorial of Nicaragua, Annex 27).

3.94. In that statement, however, the President of Nicaragua also suggested that artisanal fishermen would require an authorization from the relevant Nicaraguan authorities. Such a requirement would have deprived the recognition of the Raizales' historic rights of any meaning. Yet, subsequent statements by President Ortega omitted any reference to the need for an authorization. Thus, at the meeting in Mexico City of 1 December 2012, President Ortega stressed that "Nicaragua will respect the ancestral rights of the Raizales" and that distinct "mechanisms" will have to be established in order to "ensure the right of the Raizal people to fish".[228] Then, on 21 February 2013, President Ortega explicitly distinguished the situation of artisanal fishermen from the situation of industrial ones.[229] While industrial fishermen would have to request an authorization from the relevant Nicaraguan authority, the Nicaraguan Naval Force would not demand permits from artisanal fishermen.[230] President Ortega also specified the scope of the "mechanisms" by explaining that the technical issue was one of identifying the artisanal fishermen of the Archipelago and their boats in order to allow them to "fish freely".[231] On 18 November 2014, President Ortega further stated 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.[232] Finally, on 5 November 2015, President Ortega underlined once

228 Annex 73; Annex 74.
229 Annex 76.
230 *Ibid*.
231 *Ibid*.
232 Annex 77.

more that the right to fish of the "Raizales brothers" will be recorded in said agreement.[233]

3.95. The recognition of this right by the highest representative of Nicaragua is critical for the present proceedings. Given the importance that Colombia attaches to protecting the historical fishing rights of the inhabitants of the Archipelago, it is worth recalling that the very day following the delivery of the 2012 Judgment, the Minister for Foreign Affairs of Colombia declared her willingness to establish a dialogue with the authorities of Nicaragua in order to make sure that the fishermen of Colombia, especially those who practiced artisanal fishing, were not harmed by the decision.[234]

3.96. The statement made by the President of Colombia on 13 February 2013 also insisted on the importance of respecting those artisanal fishing rights. According to President Santos, the inhabitants of the Archipelago should not have to request permission from Nicaragua in order to exercise their historical fishing rights in the banks where they had traditionally been fishing.[235]

3.97. The importance of protecting the artisanal fishing rights is also attested to by the adoption of Decree No. 1946 of 9

[233] Annex 78: El 19 Digital, *President Daniel receives letters of credence from the ambassadors of Colombia, El Salvador, Germany and Italy*, 6 Nov. 2015.

[234] Press Conference of the Minister of Foreign Affairs of Colombia, 18 Feb. 2013, Preliminary Objections of Colombia, Annex 10.

[235] Declaration of the President of the Republic of Colombia, 18 Feb. 2013, Preliminary Objections of Colombia, Annex 10.

September 2013, which also reflected Colombia's mandate to protect the historical fishing rights of the inhabitants of the Archipelago,[236] and also by the Government's decision to pay subsidies to the artisanal fishermen who were impacted by the loss of traditional fishing grounds after the 2012 delimitation.[237]

(2) THE TRADITIONAL FISHING RIGHTS SURVIVE THE 2012 MARITIME DELIMITATION

3.98. While Nicaragua has thus recognized in principle the existence of traditional fishing rights vested on the inhabitants of the Archipelago, it is important to recall that the general rule under international law is that traditional rights remain unaffected by the delimitation of new international boundaries. As stated by an Arbitral Tribunal in a recent award:

> "The jurisprudence of international courts and tribunals as well as international treaty practice lend additional support to the principle that, in the absence of an explicit prohibition to the contrary, the transfer of sovereignty in the context of boundary delimitation should not be construed to extinguish traditional rights to the use of land (or maritime resources)."[238]

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[236] Memorial of Nicaragua, p. 46, para. 2.41 (Annex 23-B, Audio Transcript of 8 May 2014, p. 339); El Nuevo Diario, *The Navies are Communicating*, 5 Dec. 2012, Preliminary Objections of Colombia, Annex 36.

[237] See, for example: Agreement between the National Fund for Disaster Risk Management and the Department for Social Prosperity No. 9677-20-251-2013.

[238] *Award in the Arbitration regarding the delimitation of the Abyei Area between the Government of Sudan and the Sudan People's Liberation Movement/Army, Award of 22 July 2009, R.I.A.A., Vol. XXX*, p. 408, para. 753.

3.99. It follows that the customary regimes in question survive the delimitation of maritime boundaries, and it is only in the event that the concerned parties agree otherwise that those rights are relinquished.[239] As stated by another Arbitral Tribunal, traditional fishing regimes do not depend, "either for [their] existence or for [their] protection, upon the drawing of an international boundary".[240] Moreover, "no further joint agreement is legally necessary for the perpetuation of a regime based on mutual freedoms".[241]

3.100. This customary regime, which could also be called a *servitude internationale*[242], a kind of international usufruct or, in other words, a right *in rem*, might be perceived as derogating from the exclusive character of sovereignty and sovereign rights. The Court has already found, regarding arguments in respect of treaty provisions that are entirely transposable to customary norms, tacit agreements and unilateral undertakings that, once a limitation to sovereignty is established, there is no reason for

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239 *Ibid.*, pp. 408-410, paras 753-760.

240 *Award of the Arbitral Tribunal in the second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation), Decision of 17 December 1999, R.I.A.A., Vol. XXII*, p. 361, para. 110.

241 *Ibid.*, p. 361, para. 111.

242 *Award of the Arbitral Tribunal in the first stage of the proceedings between Eritrea and Yemen (Territorial Sovereignty and Scope of the Dispute), Decision of 9 October 1998, R.I.A.A., Vol. XXII*, p. 244, para. 126: "In the first place, the conditions that prevailed during many centuries with regard to the traditional openness of southern Red Sea marine resources for fishing, its role as means for unrestricted traffic from one side to the other, together with the common use of the islands by the populations of both coasts, are all important elements capable of creating certain "historic rights" which accrued in favour of both parties through a process of historical consolidation as a sort of "servitude internationale" falling short of territorial sovereignty."

interpreting its scope narrowly.[243] The material and personal scopes of the fishing rights in the present case should be clear. As stated by President Ortega on 22 February 2013, while the artisanal fishermen of the Archipelago would be allowed to fish in the maritime zones judged to appertain to Nicaragua without having to request a permit from the Nicaraguan authorities, industrial fishermen will have to request such an authorisation.[244]

3.101. It goes without saying that the customary rights in question, whose content will be developed below, are not tantamount to exclusive sovereign rights; nor do they derogate from the sovereign rights of Nicaragua. These traditional rights are not even to be considered the customary equivalent of a joint regime area such as the one established between Jamaica and Colombia where both States share equal rights and obligations. Rather, the nature of these rights is more limited. They are merely customary rights of access and exploitation that fall well short of a claim of sovereignty or of sovereign rights over the

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[243] *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 237, para. 48: "… the Court is not convinced by Nicaragua's argument that Costa Rica's right of free navigation should be interpreted narrowly because it represents a limitation of the sovereignty over the river conferred by the Treaty on Nicaragua... While it is certainly true that limitations to the sovereignty of a State over its territory are not to be presumed, this does not mean that treaty provisions establishing such limitations, such as those that are in issue in the present case, should for this reason be interpreted *a priori* in a restrictive way. A treaty provision which has the purpose of limiting the sovereignty powers of a State must be interpreted like any other provision of a treaty, i.e. in accordance with the intentions of its authors as reflected by the text of the treaty and the other relevant factors in terms of interpretation."

[244] La Opinion, *Nicaragua asks Bogotá to form the Hague Commissions*, 22 Feb. 2013, Memorial of Nicaragua, Annex 35.

continental shelf and exclusive economic zone. Their exercise does not negate the exclusive sovereign rights of the coastal State, that is to say, Nicaragua.

3.102. This conforms to the history of the region. The artisanal fishermen of the Archipelago have been fishing in their traditional fishing grounds since time immemorial, regardless of past and present disputes. Until the second half of the twentieth century, it was customary for the population of the Archipelago to follow the migration patterns of turtles through the Southwestern Caribbean. The question, therefore, is not one of excluding these communities from their traditional fishing grounds, but rather of allowing their artisanal practices to continue unimpeded, to the extent that they are respectful of the environment.

3.103. This limited right of access and exploitation is also grounded on necessity since its purpose is to support the concrete needs of the population that would otherwise be deeply affected. As Colombia demonstrated in Chapter 2, the inhabitants of the Archipelago, and in particular, the Raizal community, have fished for more than three centuries in traditional banks that are located on both sides of the 82° West Meridian. These artisanal fishing practices, which involved relatively long distance navigation on sailing boats and later *lanchas*, are part of the cultural identity of the inhabitants of the Archipelago and serve to satisfy the vital and economic needs of the islands' population.

3.104. During the hearings on the preliminary objections, Nicaragua felt compelled to argue that "Colombia never advanced any argument regarding the purported ancestral fishing rights of the autochthonous population of San Andrés"[245] in the first case between the two Parties. However, boundaries do not necessarily take into account the necessities and traditional rights of local communities. As the Arbitral tribunal in the *Barbados-Trinidad and Tobago* case observed:

> "Taking fishing activity into account in order to determine the course of the boundary is, however, not at all the same thing as considering fishing activity in order to rule upon the rights and duties of the Parties in relation to fisheries within waters that fall, as a result of the drawing of that boundary, into the EEZ of one or other Party." [246]

3.105. For reasons pertaining to jurisdiction, the Arbitral Tribunal in that case was not able to rule on the existence of Barbados' claim to a customary right of access to the flying fish fishery.[247] It did, however, find that "Trinidad and Tobago

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[245] *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Public Sitting 9 October 2015, CR 2015/29*, p. 50, para. 30 (Agent).

[246] *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them, R.I.A.A., Vol. XXVII*, p. 147, at pp. 224, para. 276.

[247] *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them, R.I.A.A., Vol. XXVII*, p. 147, at p. 226, para. 283.

ha[d] assumed an obligation" to grant "Barbados access to fisheries within [its] EEZ".[248]

3.106. The Court, arbitral tribunals and States have stressed on many occasions that traditional rights ought to be respected regardless of the course of the boundary. Accordingly, while they do not play an important role in assessing the path followed by a boundary, the line adopted by the Parties, the judges or the arbitrators, does not affect their existence. Although a Chamber of the Court gave little weight to El Salvador's arguments based on "crucial human necessity" when assessing the course of the boundary in the 1992 Judgment in the *Land, Island and Maritime Frontier Dispute* case, it nonetheless indicated that it had confidence that the parties would find a way so that the "acquired rights" of the inhabitants that found themselves living on the wrong side of the line be fully respected.[249] And in the *Eritrea-Yemen* arbitration, the Arbitral Tribunal emphasized that the traditional fishing regime that applied for the benefit of artisanal fishermen, "does not depend, either for its existence or for its protection, upon the drawing of an international boundary by this Tribunal".[250]

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[248] *Ibid.*, p. 227, para. 292.

[249] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 400, para. 66. See also: *German Settlers in Poland, Advisory Opinion, 1923 P.C.I.J. Series B, No. 6*, p. 36.

[250] *Award of the Arbitral Tribunal in the second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation), Decision of 17 December 1999, R.I.A.A., Vol. XXII*, para. 110.

3.107. In the light of the foregoing, there is no dispute as to the existence of traditional fishing rights in the maritime zones recognized to appertain to Nicaragua. Accordingly, it comes as no surprise that, in the immediate aftermath of the 2012 Judgment, Colombia and Nicaragua have recognized, both tacitly and explicitly, that such a regime based on a long-established practice had taken the shape of a local customary norm that survived the maritime delimitation.

3.108. However, the Parties' understanding that they will conclude fishing agreements is not a prerequisite for establishing the existence of a local customary right to fish. In the present case, that customary right has already been shown to exist. The statements of the highest representatives of both Parties demonstrate this understanding. Those statements are also justified on the basis of the recognition of the existence of an already consolidated regime protecting the traditional fishing rights of the inhabitants of the Archipelago. In other words, while the Parties might in the future resolve some technical issues by way of fishing agreements, the interested States have already accepted that the artisanal fishermen of the Archipelago have a right to fish in the maritime zones adjudicated to Nicaragua.

3.109. The recognition by both Parties of the historical fishing rights of the inhabitants of the Archipelago attests to the formation of a local customary right. It matters little whether the formal source is a local customary norm, a tacit agreement, an

act of acquiescence, a unilateral undertaking or even a rule of international law on the treatment of vested rights of foreign nationals. The result is the same. The inhabitants of the Archipelago and, in particular, the Raizales have the right to fish in the banks located in the maritime zones found to appertain to Nicaragua where they have always been fishing, without having to request an authorization.

3.110. As already highlighted in Chapter 2, these traditional banks are in particular situated in:

- The shallow grounds of Cape Bank and, in particular, along la Esquina, that is to say on both sides of the 82° West Meridian, and the area known as Luna Verde; and

- The deep-sea banks situated North of Quitasueño, East of the 82° West Meridian and West and North-West of Providencia, and between, respectively, Providencia and Quitasueño, Quitasueño and Serrana and Serrana and Roncador.

3.111. But the recognition by Nicaragua that the inhabitants of the Archipelago have these established traditional fishing rights does not mean that, in practice, Nicaragua has respected those rights. As Colombia will show in Chapter 9, Nicaragua's conduct has impeded the ability of the inhabitants of the Archipelago to access freely their traditional fishing banks,

notwithstanding the statements that have been made by its highest officials to the contrary.

E. Conclusion

3.112. The Parties' conduct as coastal States in the Southwestern Caribbean Sea must be assessed in the light of the rights and duties of both Parties with respect to the relevant maritime area. In this context, it will become apparent that Colombia has exercised its rights in good faith and in order to fulfil its duties under international law. In contrast, Nicaragua has consistently breached its obligations and infringed Colombia's rights.

PART II

COLOMBIA HAS ACTED LAWFULLY IN THE CARIBBEAN SEA

Chapter 4

THE ILL-FOUNDED NATURE OF NICARAGUA'S CLAIMS REGARDING ALLEGED VIOLATIONS OF ITS MARITIME RIGHTS

A. Introduction

4.1. In this Chapter, Colombia will respond to the allegation that it has violated Nicaragua's sovereign rights and maritime spaces, and will show that these claims are unfounded in fact and in law.

4.2. Section B places the issue in context by demonstrating the lack of seriousness of Nicaragua's claims when viewed against the Applicant's own conduct and the public statements it made before the Application was lodged. While Nicaragua now tries to paint a picture of systematic harassment of its vessels by Colombia and violations of its maritime spaces, at the relevant time Nicaragua made no complaint. To the contrary, Nicaraguan officials, including its Head of State, repeatedly confirmed that there were no incidents and that the situation at sea was calm.

4.3. Nicaragua's claims cannot therefore be reconciled with its contemporaneous conduct. Rather, the only plausible reason Nicaragua instituted the proceedings when it did is because 26 November 2013 (the date of the Application) was the last possible day on which a jurisdictional basis existed for bringing any case against Colombia under the Pact of Bogotá and not

because the claims had any inherent merit. The timing of that filing was entirely opportunistic.

4.4. In Section C, Colombia will address the "incidents" adduced by Nicaragua in support of its claims on a case-by-case basis. As will be seen, based on the evidence that Nicaragua itself has produced, there was no violation of Nicaragua's maritime rights and no impediment for Nicaragua to exercise sovereign rights or jurisdiction in areas that it considered fell within its exclusive economic zone or continental shelf. Nicaragua's assertions to the contrary are not only misleading, in many cases they are based on demonstrably inaccurate "facts".

B. The Lack of Seriousness of Nicaragua's Claims

4.5. In its Judgment on the Preliminary Objections, the Court ruled that, as of the critical date (the date of the Application), there was a dispute between the Parties regarding alleged violations by Colombia of Nicaragua's rights in the maritime zones which, according to Nicaragua, the Court declared in its 2012 Judgment appertained to Nicaragua.[251] However, the existence of a dispute and the question whether in fact and in law there were any such violations are two different matters.

4.6. In its Application, Nicaragua did not refer to a single "incident" that had occurred at sea that gave rise to a violation

[251] Judgment on the Preliminary Objections, para. 74.

of its maritime rights. Most of the Application took issue with statements made by senior Colombian officials about the 2012 Judgment and the enactment by Colombia of Decree No. 1946 establishing an Integral Contiguous Zone (discussed in the next chapter). Nicaragua did allege that "Colombia had consistently resorted to the threat of the use of force",[252] but the Court upheld Colombia's preliminary objection on that claim. The Application also asserted that Colombia's Naval Forces had given "hostile treatment" to Nicaraguan vessels, which was said to have seriously affected the ability of Nicaragua to exploit the resources of its exclusive economic zone and continental shelf.[253] However, no specific instances of such treatment were cited.

4.7. As Colombia showed during the jurisdictional phase, in the period between the date of the Court's 2012 Judgment and the filing of Nicaragua's Application, including the following day when the Pact of Bogotá ceased to be in force for Colombia, Nicaragua's own officials were on record as repeatedly saying that there were no problems involving the Colombian Navy, no confrontations and no incidents. These statements in themselves contradict Nicaragua's claim that Colombia's conduct amounted to a violation of Nicaragua's sovereign rights. Manifestly, Nicaragua did not think so at the time. Nicaragua never complained to Colombia until almost ten months after having instituted the present proceedings.

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252 Application, para. 9.

253 *Ibid.*, para. 15.

4.8. In order to place Nicaragua's contentions about the so-called incidents that gave rise to its claim in their proper perspective, it is useful to recall the relevant chronology.

- On 5 December 2012, shortly after the Court's Judgment in the *Territorial and Maritime Dispute* case, the Chief of Nicaragua's Army, General Avilés, stated that communication with the Colombian authorities was on-going, and that the Naval Forces of Colombia had not approached Nicaraguan fishing vessels.[254]

- On 14 August 2013, some nine and one-half months after the Judgment was handed down, Nicaragua's President Ortega said the following:

> "As I said, we must recognize that in the middle of all this media turbulence, the Naval Force of Colombia, which is very powerful, that certainly has a very large military power, has been careful, has been respectful and there has not been any kind of confrontation between the Colombian and Nicaraguan Navy, thank God, and God help us to continue working that way."[255]

- On 18 November 2013, shortly before Nicaragua filed its Application, Admiral Corrales Rodriquez,

[254] Preliminary Objections of Colombia, Annex 36.
[255] *Ibid*., Annex 11.

Chief of the Nicaraguan Naval Forces, said the following: "in one year of being there [that is, in the one year since the Court's 2012 Judgment], we have not had any problems with the Colombian Navy". He added that the naval forces of both countries "maintain[ed] a continuous communication", and that "we have not had any conflicts in those waters".[256]

- On 18 March 2014 – that is, three and one-half months *after* the Application was filed and Colombia had ceased to be bound by the Pact of Bogotá – General Aviles of the Nicaraguan Army again reiterated that there "are no incidents", and that the navies of both countries were navigating in their respective waters and remaining in "permanent communication".[257]

4.9. It is impossible to reconcile these statements with the notion that, throughout this period, Colombia was engaging in conduct that rose to the level of a violation of Nicaragua's sovereign rights and maritime spaces. It is inconceivable that, if incidents breaching Nicaragua's rights had genuinely taken place, Nicaragua's military commanders and President Ortega would not have mentioned them. But nothing at all was said. To the contrary, the statements emanating from Nicaragua's highest

256 Preliminary Objections of Colombia, Annex 43.
257 *Ibid*., Annex 46.

officials showed precisely the opposite.

4.10. As for the position of President Santos of Colombia, following his meeting with President Ortega in Mexico City a few days after the 2012 Judgment was delivered, he said the following:

> "We expressed that we should handle this situation with cold head, in an amicable and diplomatic fashion, as this type of matters must be dealt with to avoid incidents. He [President Ortega] also understood.
>
> We agreed to establish channels of communication to address all these points. I believe this is the most important. I believe this meeting was positive."[258]

4.11. As the statements of Nicaragua's officials made after this meeting attest, channels of communication were opened, particularly between the naval forces of both countries, and there were no incidents or confrontations.

4.12. It was not until 13 August 2014, some eight and one-half months after Nicaragua filed its Application, and Colombia ceased to be bound by the Pact, that Nicaragua's Deputy Minister for Foreign Affairs and Director of Juridical Affairs, Sovereignty and Territory, Mr. César Vega Masís, wrote to Rear Admiral Corrales, the Head of Nicaragua's Naval Forces,

> "in order to request that you kindly inform us of any incidents that may have taken place between the Colombian Navy and the Nicaraguan Navy, as

[258] Preliminary Objections of Colombia, Annex 9.

> well as with Nicaraguan fishermen in the zone that was returned by the International Court of Justice (ICJ) in its judgment of November 19, 2012."[259]

4.13. Admiral Corrales responded on 26 August 2014 with a letter to which was attached a report on what he termed "incidents" involving Colombia's Navy and aircraft.[260] This was the same individual who, just one week before Nicaragua lodged its Application, had stated that, in the one year following the Court's Judgment, there had not been any problems with the Colombian Naval Forces, nor any conflicts in those waters. Yet, Nicaragua now refashions and elevates the same events which had not even warranted mention when they occurred to the status of "incidents" and, in its Memorial, relies on them as evidence of Colombia's alleged violations of Nicaragua's rights. The argument is not credible.

4.14. On 13 September 2014, almost ten months after the Application had been filed and a mere three weeks before the filing of the Memorial, Nicaragua sent a diplomatic note to Colombia which, for the first time, alleged that Colombia had infringed Nicaragua's sovereign rights and threatened to use force.[261] Colombia responded by a diplomatic note dated 1 October 2014 pointing out its surprise at Nicaragua's note, and stating that, without prejudice to the facts of any of the so-called "incidents" referred to in the Nicaraguan note, none of them

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259 Memorial of Nicaragua, Annex 23-A, p. 281.
260 *Ibid*., pp. 282, ff.
261 Preliminary Objections of Colombia, Annex 17.

could have been understood by Nicaragua as a genuine incident at the time of their alleged occurrence given Nicaragua's failure to report them despite the fact that there were good channels of communication between the officials of both countries.[262]

4.15. What is clear from the above is that, even after the Application was submitted, Nicaragua's Foreign Ministry had no information about any such "incidents". That fact, considered together with the statements made by Nicaragua's highest political and military leaders, further confirms that, prior to the filing of the Application and the effective date of Colombia's denunciation of the Pact, there were no actions by Colombia at sea that Nicaragua considered amounted to a violation of its maritime spaces. As for the "incidents" that Nicaragua subsequently seems to have discovered, the next section will show that none of them amounted to a violation of Nicaragua's rights.

C. The Misleading Version of the Events Presented by Nicaragua

4.16. In its Memorial, Nicaragua refers to 36 "incidents" which purportedly support its claim that Colombia breached its obligation not to violate Nicaragua's sovereign rights and maritime zones declared by the Court's 2012 Judgment. However, almost two-thirds of those incidents (23 out of 36) occurred after Colombia ceased to be bound by the provisions of

[262] Preliminary Objections of Colombia, Annex 18.

the Pact of Bogotá (i.e., after 26 November 2013) and after Nicaragua had filed its Application. As will be discussed in Sub-Section (1), the evidence relating to these events is not admissible because the Court has no jurisdiction over alleged violations that occurred after the critical date.

4.17. Furthermore, when Nicaragua's assertions with respect to the remaining incidents are examined in the light of the contemporaneous evidence, it becomes apparent that its descriptions are inaccurate, representing a distorted account of the events (if, indeed, there was one). Sub-Section (2) will demonstrate the lack of basis for Nicaragua's allegations on an incident-by-incident basis, and show that none amounted to a violation of Nicaragua's maritime rights.

4.18. While Nicaragua also complains that Colombia violated its sovereign rights and maritime spaces by licensing fishing vessels to fish in Nicaraguan waters, this too distorts the factual record. As will be shown in Sub-Section (3), the reality is that Colombia is acting in compliance with its international obligations in the Caribbean Sea, and there has been no impediment to the exercise by Nicaragua of its sovereign rights.

(1) THE COURT LACKS JURISDICTION OVER ALLEGED VIOLATIONS THAT OCCURRED AFTER 26 NOVEMBER 2013

4.19. In the operative part of its Judgment on the Preliminary Objections, the Court found that it has jurisdiction, on the basis of Article XXXI of the Pact of Bogotá, to adjudicate upon the

dispute between the Parties concerning the alleged violations by Colombia of Nicaragua's maritime zones.[263] As the Court had earlier indicated in the same Judgment: "The Court recalls that the date at which its jurisdiction has to be established is the date on which the application is filed with the Court".[264]

4.20. It follows that the Court does have jurisdiction over Nicaragua's claims to the extent those claims existed as of the critical date – the date of the Application. By the same token, the Court has jurisdiction to consider whether the facts that relate to pre-critical date events support Nicaragua's claims. To recall what the Court said in its 17 March 2016 Judgment: "The subsequent termination of the Pact as between Nicaragua and Colombia does not affect the jurisdiction which existed on the date that the proceedings were instituted".[265]

4.21. However, the situation is different when it comes to post-critical date events. Pursuant to Colombia's denunciation of the Pact of Bogotá on 27 November 2012, the Pact, including its dispute resolution provisions, ceased to be in force for Colombia as of 27 November 2013, the day after Nicaragua's Application was filed. Given that Colombia's consent to the Court's jurisdiction lapsed as of that date, the Court has no jurisdiction *ratione temporis* to consider any alleged violations that occurred afterwards. Stated another way, any facts on which Nicaragua relies in support of its claims that post-date 26 November 2013

263 Judgment on the Preliminary Objections, para. 111(2).
264 *Ibid*., para. 33.
265 *Ibid.*, para. 48.

are not apposite or subject to judicial review. Had those facts been adduced in connection with a separate claim or a new case introduced by Nicaragua against Colombia after 26 November 2013, there clearly would have been no jurisdiction. Nor do such facts amount to a continuing pattern of allegedly illegal conduct on the part of Colombia.

4.22. Given that only 13 of the incidents occurred before Colombia ceased to be bound by the Pact and are therefore admissible as evidence, this section will focus on those events. As will be seen, far from being a violation of Nicaragua's rights, these events involved the exercise of freedom of navigation or overflight, efforts to aid local inhabitants of the islands who were exercising their traditional fishing rights, efforts to protect the ecosystem in the UNESCO-registered Seaflower Biosphere Reserve and the Seaflower Marine Protected Area under the SPAW Protocol, Colombia's protection of its own maritime rights, and situations where the Colombian Navy was extending assistance to vessels in distress, including Nicaraguan flagged vessels. To the extent that Colombia was in the area, it was also fulfilling international obligations *vis-à-vis* third States. For instance, Colombia has entered into international agreements with Jamaica, Costa Rica, Mexico, the United States, Honduras, Dominican Republic, Guatemala and Panama to coordinate actions against the illicit traffic of narcotic drugs and psychotropic substances, carry out the search and rescue of vessels lost at sea, increase integral maritime safety and security,

and protect and preserve the marine environment.[266]

(2) THE "INCIDENTS" ALLEGED BY NICARAGUA

4.23. In examining the allegations of Nicaragua in this Section, it is apparent that many of its assertions are factually inaccurate and not borne out by the evidence. Taken in a chronological order, the first alleged incident occurred on 19 February 2013. According to Nicaragua, the A.R.C. "Almirante Padilla" prevented a Nicaraguan naval vessel from inspecting a Colombian fishing boat that was operating in the Luna Verde area. Under Nicaragua's thesis, this was an instance of Colombia impeding Nicaragua's efforts to enforce its own fisheries jurisdiction.[267] ("Incident 1") However, it is not possible that this "incident" actually occurred. The Navigation Log of A.R.C. "Almirante Padilla" indicates that on 19 February 2013, the frigate was docked at the pier of BN1 (Cartagena's Naval Base). The locations of the Nicaraguan naval vessel and the A.R.C. are shown in **Figure 4.1** below. The Navigation Log of the A.R.C. also shows that its next departure for San Andrés Island was scheduled for 20 February 2013.[268] It thus could not have impeded Nicaragua in any way. Given that the "facts" on which Nicaragua relies are clearly wrong, Nicaragua has totally failed to meet its burden of proof that Colombia violated its maritime rights and spaces.

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[266] See Chapter 2, Sec. D (2) *supra*.

[267] Memorial of Nicaragua, para. 2.39.

[268] Annex 31: Navigation Log, A.R.C. "Almirante Padilla", 19 Feb. 2013.

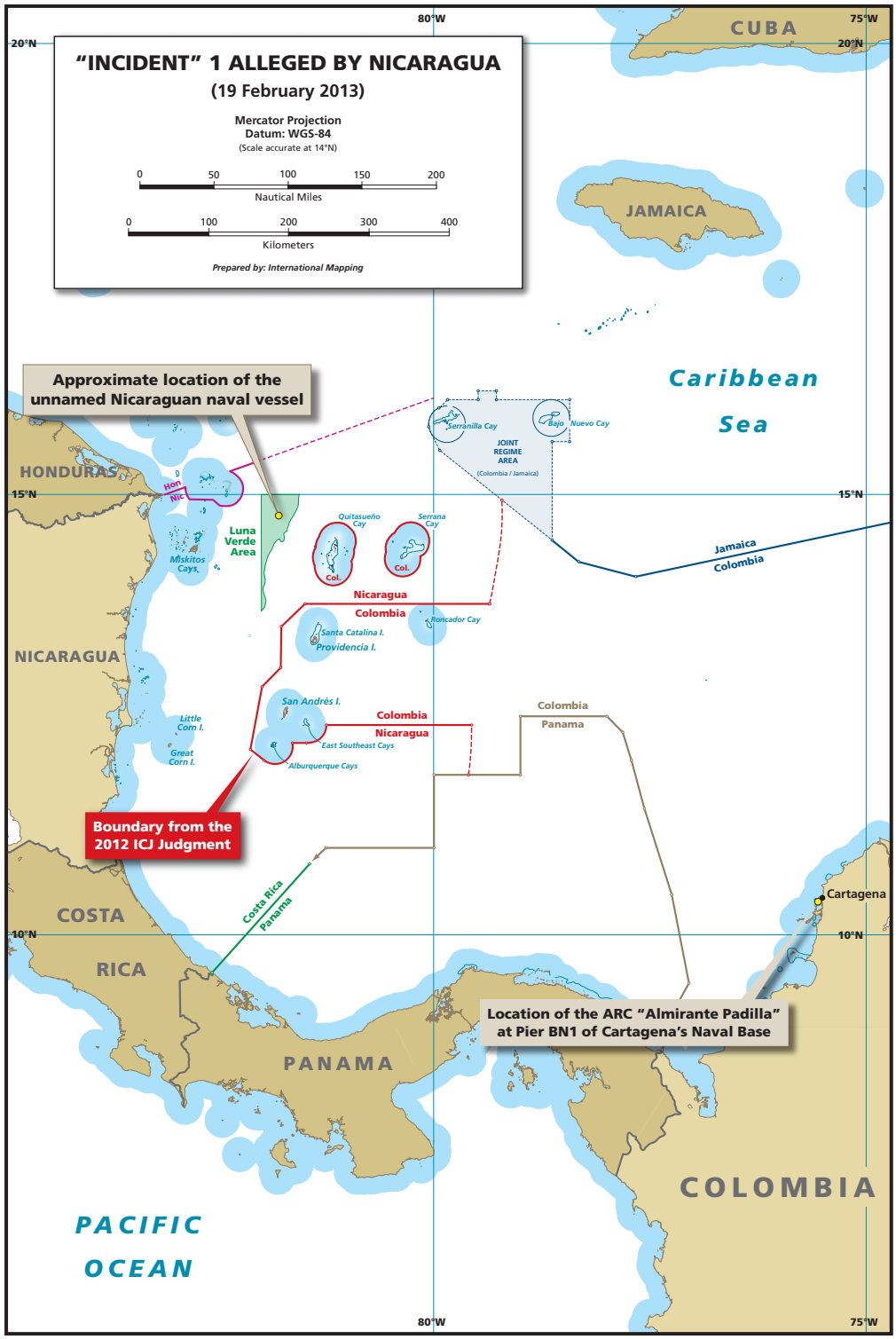
"INCIDENT" 1 ALLEGED BY NICARAGUA
(19 February 2013)
Mercator Projection
Datum: WGS-84
(Scale accurate at 14°N)
0 50 100 150 200
Nautical Miles
0 100 200 300 400
Kilometers
Prepared by: International Mapping
Approximate location of the unnamed Nicaraguan naval vessel
Boundary from the 2012 ICJ Judgment
Location of the ARC "Almirante Padilla" at Pier BN1 of Cartagena's Naval Base
CUBA
JAMAICA
Caribbean Sea
HONDURAS
NICARAGUA
COSTA RICA
PANAMA
COLOMBIA
PACIFIC OCEAN
Serranilla Cay
Bajo Nuevo Cay
JOINT REGIME AREA
(Colombia / Jamaica)
Luna Verde Area
Miskitos Cays
Quitasueño Cay
Serrana Cay
Col.
Nicaragua
Colombia
Roncador Cay
Santa Catalina I.
Providencia I.
San Andrés I.
Little Corn I.
Great Corn I.
East Southeast Cays
Albuquerque Cays
Jamaica
Colombia
Colombia
Panama
Costa Rica
Panama
Cartagena
80°W
75°W
20°N
15°N
10°N

Figure 4.1

4.24. The second event that Nicaragua points to in its Memorial is not an "incident", but rather, an assertion based on a few miscellaneous press articles. Nicaragua alleges that military and surveillance manoeuvers were conducted by a Colombian airplane over the Caribbean Sea, and the media reported that Colombia's purpose in so doing was to "exercis[e] sovereignty" over Colombia's maritime areas.[269] ("Incident 2") Nicaragua also tries to attach significance to the report that Governor of the San Andrés Archipelago, Ms. Aury Guerrero Bowie, stated that in her tour of the area, she did not visually see any vessels besides Colombian navy frigates.[270] However, regardless of how the media presented the story, the only fact that is being referred to in the press articles is the exercise by Colombian navy vessels and aircraft of their right of freedom of navigation and overflight. Under customary international law, in the EEZ all States enjoy the freedom of navigation and overflight.

4.25. The third event ("Incident 3") is similar to Incident 2; it involved the exercise by Colombian vessels of their right of freedom of navigation. Regardless of how it is described,[271] the exercise by a State of its right of freedom of navigation does not infringe the coastal State's EEZ rights, and Nicaragua points to no way in which it was prevented from exercising its sovereign rights. Moreover, what Nicaragua ignores is that the declaration by President Santos (on which Nicaragua bases its complaint)

269 Memorial of Nicaragua, para. 2.25 and Annex 36.
270 *Ibid.*, para. 2.26 and Annex 37.
271 *Ibid.*, para. 2.27.

emphasized Colombia's commitment to "continue to protect the Seaflower Reserve, which UNESCO deems as patrimony of humanity", and that "this area is of great importance for [Colombia's] artisanal fishermen".[272] The reality is that, many alleged "incidents" involved Colombia drawing attention to and urging Nicaragua and Nicaraguan vessels to respect the traditional fishing habitat of the artisanal fishermen, and to protect the fragile ecosystem of the Seaflower Biosphere Reserve. As was shown in Chapter 3, Colombia has rights and obligations under international law to preserve and protect the marine environment.

4.26. The fourth "incident" is said to have occurred on 13 October 2013 at 08:55 hours. According to the Nicaraguan Commander of the GC-205 "Río Escondido" (Navy Lieutenant Holvin Martínez), the "Río Escondido" was located at 14°50'00"N – 081°42'00"W when the Colombian frigate A.R.C. "20 de Julio" called him on the marine channel to say that the Nicaraguan vessel was heading toward Colombian waters. The Lieutenant then responded that he was navigating in the jurisdictional waters of Nicaragua[273] ("Incident 4"). However, according to Colombia's records, the A.R.C. "20 de Julio" was not in the area identified at the time the alleged events took place. At that time, it was conducting exercises with the helicopter A.R.C. 201 in another area.[274] The approximate

[272] Memorial of Nicaragua, Annex 5.

[273] *Ibid.*, para. 2.40 and Annexes 18, 23-A and 24.

[274] According to the A.R.C.'s Maritime Travel Report, it was at coordinates 12°01.1'N and 81°59.0'W at 06:28 hours, and at 12°05.7'N and

locations of the GC-205 and the A.R.C. are shown in **Figure 4.2** below. After that, the A.R.C. moved to 12°31.2'N and 81°43.9'W, in the territorial sea of San Andrés, and was anchored there the rest of the day, loading and unloading educational materials donated by the South American Foundation (in Spanish, "Fundación Suramericana").[275] Nicaragua also has not provided any recording or transcript of the communication between the A.R.C. and "Río Escondido". However, based on Nicaragua's own exhibit, after the Lieutenant responded, the Commander of the Colombian frigate did not call again.[276] In any event, simply drawing attention to the fact that a vessel is heading toward another State's waters causes no prejudice whatsoever and can scarcely be equated with a violation of Nicaragua's maritime rights. Thus, even if Incident 4 had taken place, it did not result in any inability of Nicaragua to exercise its sovereign rights.

81°58.0'W at 06:57 hours. See Annex 46: Maritime Travel Report, A.R.C. "20 de Julio", 21 Oct. 2013, p. 5.

275 *Ibid*.

276 Memorial of Nicaragua, Annex 23-A, p. 291.

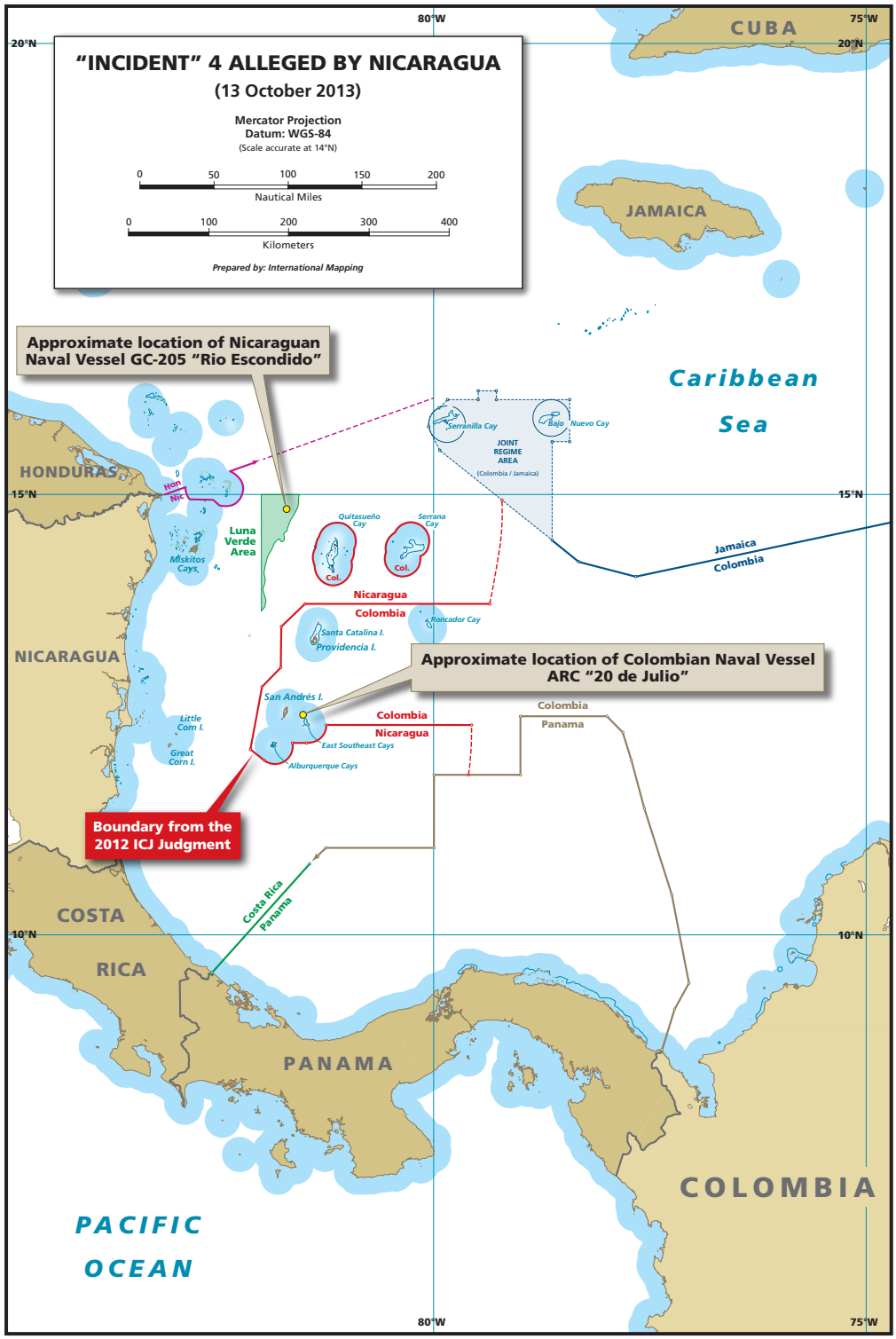
"INCIDENT" 4 ALLEGED BY NICARAGUA
(13 October 2013)
Mercator Projection
Datum: WGS-84
(Scale accurate at 14°N)
0 50 100 150 200
Nautical Miles
0 100 200 300 400
Kilometers
Prepared by: International Mapping
Approximate location of Nicaraguan Naval Vessel GC-205 "Rio Escondido"
Approximate location of Colombian Naval Vessel ARC "20 de Julio"
Boundary from the 2012 ICJ Judgment
CUBA
JAMAICA
Caribbean Sea
HONDURAS
NICARAGUA
COSTA RICA
PANAMA
COLOMBIA
PACIFIC OCEAN
Serranilla Cay
Bajo Nuevo Cay
JOINT REGIME AREA
(Colombia / Jamaica)
Quitasueño Cay
Serrana Cay
Luna Verde Area
Miskitos Cays
Nicaragua
Colombia
Roncador Cay
Santa Catalina I.
Providencia I.
San Andrés I.
Little Corn I.
Great Corn I.
East Southeast Cays
Albuquerque Cays
Jamaica
Colombia
Colombia
Panama
Costa Rica
Panama
80°W
75°W
20°N
15°N
10°N

Figure 4.2

4.27. In fact, Annex 23-A of Nicaragua's Memorial demonstrates that on 13 October 2013, Nicaragua's naval vessels were operating in waters east of the 82° meridian. That exhibit shows that, shortly after Incident 4 which allegedly occurred at 08:55 hours, the "Río Escondido" at 09:20 hours reported that it was at position 14°42'00"N – 081°39'00"W, and was ordered to proceed to coordinates 14°41'00"N – 081°35'00"W. At 12:00 hours, the vessel reported that it had arrived at 14°36'00"N – 081°48'00"W, and at 13:10 hours, the Commander of the "Río Escondido" "reports nothing new from position 14°36'00"N – 081°49'00"W (65 M NE of the Miskito Keys)". The vessel "Río Grande de Matagalpa" also reports at 09:45 hours that it is anchored at position 15°32'00"N – 081°59'00"W and resupplied "La Capitana", a fishing vessel with a Nicaraguan fishing permit[277] which was fishing in the area, with 50 gallons of water.[278] The Nicaraguan naval vessels were therefore navigating freely, reporting on activities in the area, and supporting fishing vessels carrying Nicaraguan permits with no interference from Colombia.

4.28. The next few "incidents" involve alleged overflights by Colombian aircraft. It is important to recall that, insofar as Nicaragua claims that such overflights represented a threat of use of force, the Court has observed that none of these incidents even relate to such a claim.[279] The Court also determined that it has no jurisdiction to consider any claims concerning the threat

[277] Memorial of Nicaragua, Annex 23-A, p. 284.
[278] *Ibid*., Annex 23-A, p. 291.
[279] Judgment on the Preliminary Objections, para. 77.

or use of force.[280] In addition, virtually all of these incidents (Nos. 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13) took place either in the month before, or a few days after, the Chief of Nicaragua's Naval Forces had categorically stated that there were no problems or conflicts with the Colombian Navy. As the Court has recognized, "members of Nicaragua's executive and military authorities confirmed that the situation at sea was calm and stable."[281]

4.29. Nicaragua claims that on 19 October 2013, two OV-10 Bronco airplanes of the FAC (Colombian Air Force) flew over the "Río Escondido" from north to south in a hostile manner for 10 minutes. They also are said to have flown over the fishing vessels "La Capitana", flying the Honduran flag with a Nicaraguan fishing permit, and "Camerón", which was flying the Nicaraguan flag.[282] ("Incident 5") However, the aircrafts, which were flying at an altitude of 4600 feet,[283] were exercising their freedom of overflight in the EEZ, and neither the Nicaraguan naval unit nor the fishing vessels were prevented from continuing their activities in the area.

4.30. Moreover, the alleged location of Incident 5 is in an area which covers one of the air and maritime routes most widely-

280 Judgment on the Preliminary Objections, para. 111(1)(c) dispositif.

281 *Ibid.*, para. 76.

282 Memorial of Nicaragua, para. 2.28 and Annexes 18, 20, 23-A and 24. It is noted, however, that based on Annex 20 thereof, apparently it is alleged that only one fishing vessel named "Capitana-Cameron" is involved, instead of two separate vessels named "La Capitana" and "Cameron".

283 Annex 49: Maritime Travel Report, A.R.C. "Independiente", 6 Nov.2013.

used for the transportation of narcotics from South America to Central and North America. States are obliged under international law to cooperate in the suppression of illicit traffic in narcotic drugs and psychotropic substances.[284] Up until the date of the 2012 Judgment, Colombia carried out maritime traffic safety and airspace monitoring missions in the area relating to the fight against organized crime and drug-trafficking. Colombia continues to be the only State in the region with the technical and operational capacity to do so, and it was continuing to cooperate in the suppression of illicit traffic in drugs by its overflight in the area, in compliance with its international obligations.

4.31. The alleged sixth incident, which Nicaragua says took place on 29 October 2013, is similar to Incident 5. Apparently, Nicaraguan Naval Force vessels GC-201 "Río Grande Matagalpa" and GC-205 "Río Escondido" were located at 14°36'00"N – 081°55'00"W and 14°37'00"N – 081°58'00"W when a Colombian Air Force plane was said to have flown over them in a "hostile manner".[285] ("Incident 6") As with Incident 5, there is no evidence of any hostile activity against Nicaragua's Naval Units. Incident 6 allegedly occurred in an area widely-used for the transportation of narcotics, and while Nicaragua has not identified the relevant aircraft, planes are routinely

[284] Both Nicaragua and Colombia are Parties to the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. Article 17(1) thereof provides that "[t]he Parties shall co-operate to the fullest extent possible to suppress illicit traffic by sea, in conformity with the international law of the sea."

[285] Memorial of Nicaragua, Annexes 18, 23-A and 24.

dispatched on drug and contraband reconnaissance missions and to verify suspected drug-trafficking incidents. In any case, the plane had freedom of overflight in the EEZ, and its flight did not interfere with Nicaragua's ability to exercise its maritime rights.

4.32. On 30 October 2013, the Nicaraguan vessel GC-201 "Río Grande Matagalpa" reported that it was located at 14°36'00"N – 081°55'00"W when a Colombian Navy helicopter flew over it. The helicopter also allegedly flew over the GC-205 "Río Escondido", at position 14°37'00"N – 081°58'00"W, in the same way.[286] Based on Nicaragua's exhibit, both of these overflights apparently occurred at 16:40 hours, and one occurred at an altitude of approximately 200 feet (i.e., 60.96 metres), while the other occurred at an altitude of 400 feet (i.e., 121.92 metres).[287] ("Incident 7")

4.33. On Colombia's records, while the helicopter A.R.C. 201 was in the area, there was no hostile conduct, and it did not fly over those Nicaraguan vessels at such low altitudes. According to internal naval orders, Colombia's helicopters are not allowed to fly above any military-type vessel at a height lower than 3500 feet. The order of operations issued by the Specific Command of San Andrés and Providencia states that "… [i]t is forbidden to fly above any military-type vessel at a lower height of 3500 feet, taking into account that these acts may be considered as hostile

[286] Memorial of Nicaragua, Annexes 18, 23-A and 24.
[287] *Ibid.*, Annex 23-A, p. 294.

by the respective vessel…".[288] According to Colombia's records, this order was duly implemented since the helicopter, which carries no air-to-surface weapons,[289] was flying at 6400 feet.[290] In any case, the helicopter was doing no more than exercising its freedom of overflight in the EEZ. Even though the helicopter also flew over a U.S. coastguard vessel, the United States never made any complaint in that regard. Moreover, Incident 7 allegedly occurred in an area widely-used for the transportation of narcotics, and Colombia was carrying out its duties to monitor and cooperate in the suppression of illicit traffic in drugs.

4.34. In the eighth "incident", the Commander of the GC-201 "Río Grande de Matagalpa" reported that it was at 14°36'00"N – 081°55'00"W when, at 09:00 hours on 31 October 2013, a helicopter flew over his vessel from north to south. At 10:00 hours, he noticed a Colombian frigate arrive about 5 miles southeast of his vessel, where the helicopter landed and they subsequently headed northeast, disappearing from the radar.[291] ("Incident 8") In fact, this was not an "incident" at all. On Colombia's records, the helicopter A.R.C. 201 took off at 09:42, but had to return to land on the A.R.C. "Independiente" at 10:23 due to loss of communication.[292] This could not possibly have

[288] Annex 61: Communication No. 241000R / MDN-CGFM-CARMA-SECAR-JONA-CAVNA-CGANCA-CEANCAR 29.60, 24 June 2016, p. 1.
[289] *Ibid*.
[290] Annex 49: Maritime Travel Report, A.R.C. "Independiente", 6 Nov. 2013, p. 7.
[291] Memorial of Nicaragua, Annexes 18, 23-A, p. 295, and 24.
[292] Annex 49: Maritime Travel Report, A.R.C. "Independiente", 6 Nov. 2013, p. 10.

prejudiced Nicaragua in any way. Nicaragua's Chief of Naval Forces evidently did not feel differently when he reported during the same period that there had been no problems with the Colombian Navy.

4.35. At this juncture, it is worth recalling that, in respect of each of incidents 5, 6, 7 and 8, the Court has observed that none of these overflights relate to a claim concerning a threat of use of force.[293] Similarly, there was no interference with Nicaragua's ability to exercise sovereign rights in its maritime spaces.

4.36. The next alleged "incident", which is said to have occurred on 7 November 2013, is based on an indirect report. According to Nicaragua, the Head of the Puerto Cabezas Naval Base reported that the Captain of the Nicaraguan-flagged fishing vessel "Lady Dee II" informed him that the fishing vessel was approached by the Colombian frigate A.R.C. "Antioquia".[294] Given the situation, the Commander of GC-401 of the Nicaraguan Naval Force established communication with the Colombian frigate to state that the "Lady Dee II" fishing vessel was fishing in waters within Nicaragua's jurisdiction.[295] ("Incident 9")

4.37. Nicaragua has not provided any evidence of the alleged

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293 Judgment on the Preliminary Objections, para. 77.

294 Memorial of Nicaragua, para. 2.29 and Annexes 18, 20, 23-A and 24.

295 *Ibid.*, Annexes 18, 20, 23-A and 24.

communications between the vessels, and its account of the facts could not be further from reality. Based on Colombia's records, the A.R.C. "Antioquia" was not even in the Caribbean Sea on the date the alleged facts took place. Additionally, there is no record of any interaction between the frigate and the "Lady Dee II" or between the frigate and the GC 401 – which is not surprising since the Colombian frigate was not in the area. According to the A.R.C. "Antioquia's" Navigation Log, on 7 November 2013, the frigate was docked at the pier of Malaga's Naval Base in the Pacific Ocean.[296] The locations of the "Lady Dee II" and the A.R.C. are shown in **Figure 4.3** below. Clearly, therefore, Nicaragua's version of the event is unreliable, and as such forms no grounds for a claim that Colombia violated Nicaragua's maritime spaces.

[296] Annex 50: Navigation Log, A.R.C. "Antioquia", 7 Nov. 2013.

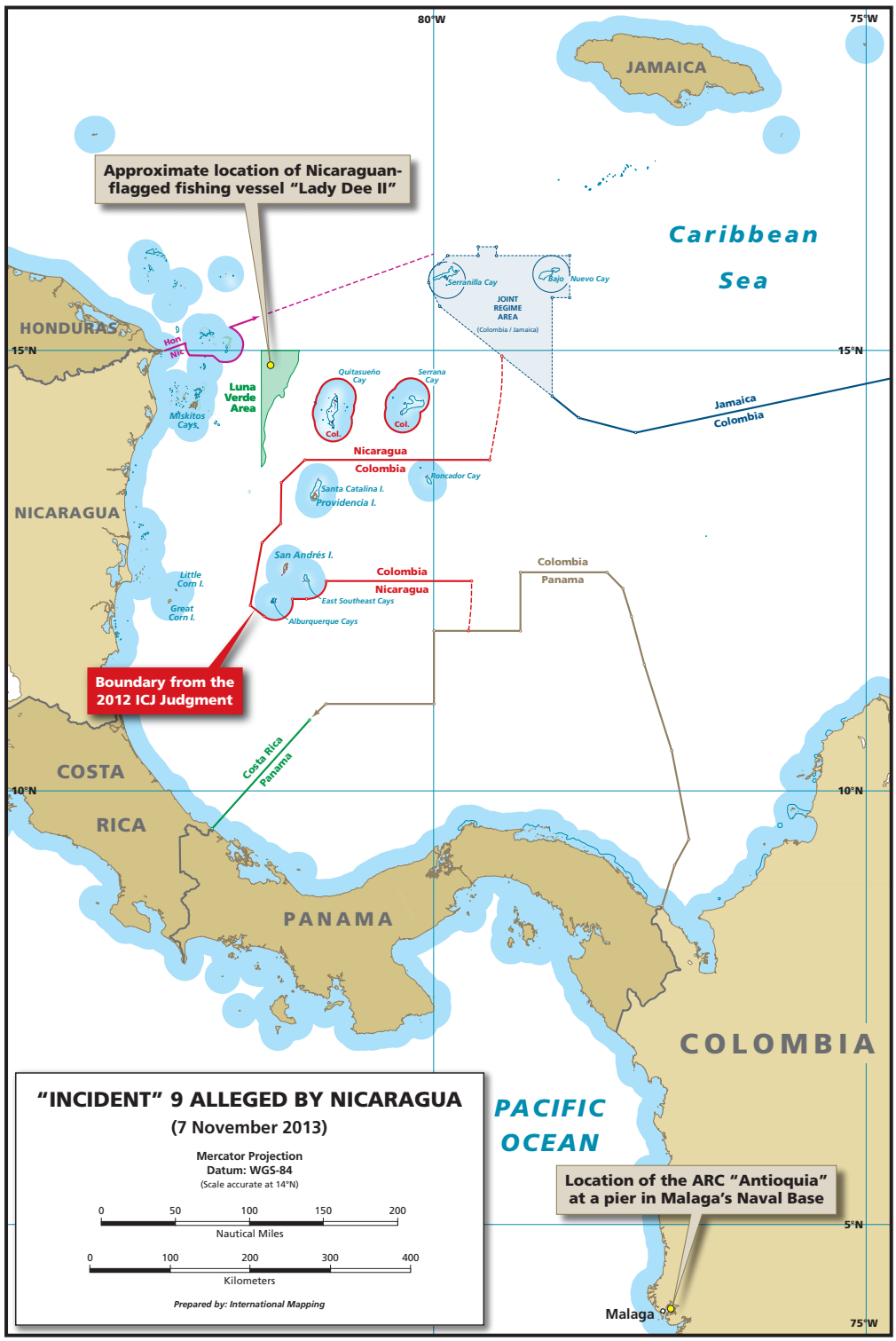
80°W
75°W
JAMAICA
Approximate location of Nicaraguan-flagged fishing vessel "Lady Dee II"
Caribbean Sea
Serranilla Cay
Bajo Nuevo Cay
JOINT REGIME AREA
(Colombia / Jamaica)
HONDURAS
15°N
Luna Verde Area
Quitasueño Cay
Serrana Cay
Col.
Col.
Jamaica
Colombia
Nicaragua
Colombia
Roncador Cay
Santa Catalina I.
Providencia I.
NICARAGUA
San Andrés I.
Little Corn I.
Great Corn I.
Colombia
Nicaragua
East Southeast Cays
Alburquerque Cays
Colombia
Panama
Boundary from the 2012 ICJ Judgment
Costa Rica
Panama
COSTA RICA
10°N
PANAMA
COLOMBIA
PACIFIC OCEAN
"INCIDENT" 9 ALLEGED BY NICARAGUA
(7 November 2013)
Mercator Projection
Datum: WGS-84
(Scale accurate at 14°N)
0 50 100 150 200
Nautical Miles
0 100 200 300 400
Kilometers
Prepared by: International Mapping
Location of the ARC "Antioquia" at a pier in Malaga's Naval Base
5°N
Malaga
75°W

Figure 4.3

4.38. The tenth "incident" is also based on an indirect report, which Colombia challenges. According to Nicaragua, Navy Lieutenant Mario Páramo, the Commander of GC-205 "Río Escondido", reported that the Captain of the Nicaraguan flagged lobster vessel "Miss Sofía" advised him that he was at position 14°50'00"N – 081°45'00"W on 17 November 2013 when the Commander of the Colombian frigate A.R.C. "Almirante Padilla" ordered him to withdraw from that position because he was in waters within Colombia's jurisdiction. When the Nicaraguan vessel refused to leave the area, the A.R.C. is said to have sent a speedboat to chase it away.[297] Subsequently, the Nicaraguan "Río Escondido" established communication with the Colombian frigate "Almirante Padilla" and informed the latter that it was in Nicaraguan waters pursuant to the 2012 Judgment, but the "Almirante Padilla" refused to withdraw from its location.[298] ("Incident 10")

4.39. However, the A.R.C. "Almirante Padilla" never ordered the "Miss Sofía" to withdraw from its position; nor did it send a speedboat to harass the fishing vessel. According to Colombia's Navy reports, the A.R.C. tried to contact the fishing vessel "Miss Sofía" on 17 November, but was unsuccessful. The approximate locations of the "Miss Sofia" and the A.R.C. are shown in **Figure 4.4** below.

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[297] Memorial of Nicaragua, para. 2.30 and Annexes 18, 20, 23-A and 24.

[298] *Ibid.*, para. 2.31 and Annexes 18, 20, 23-A, p. 297 and 24.

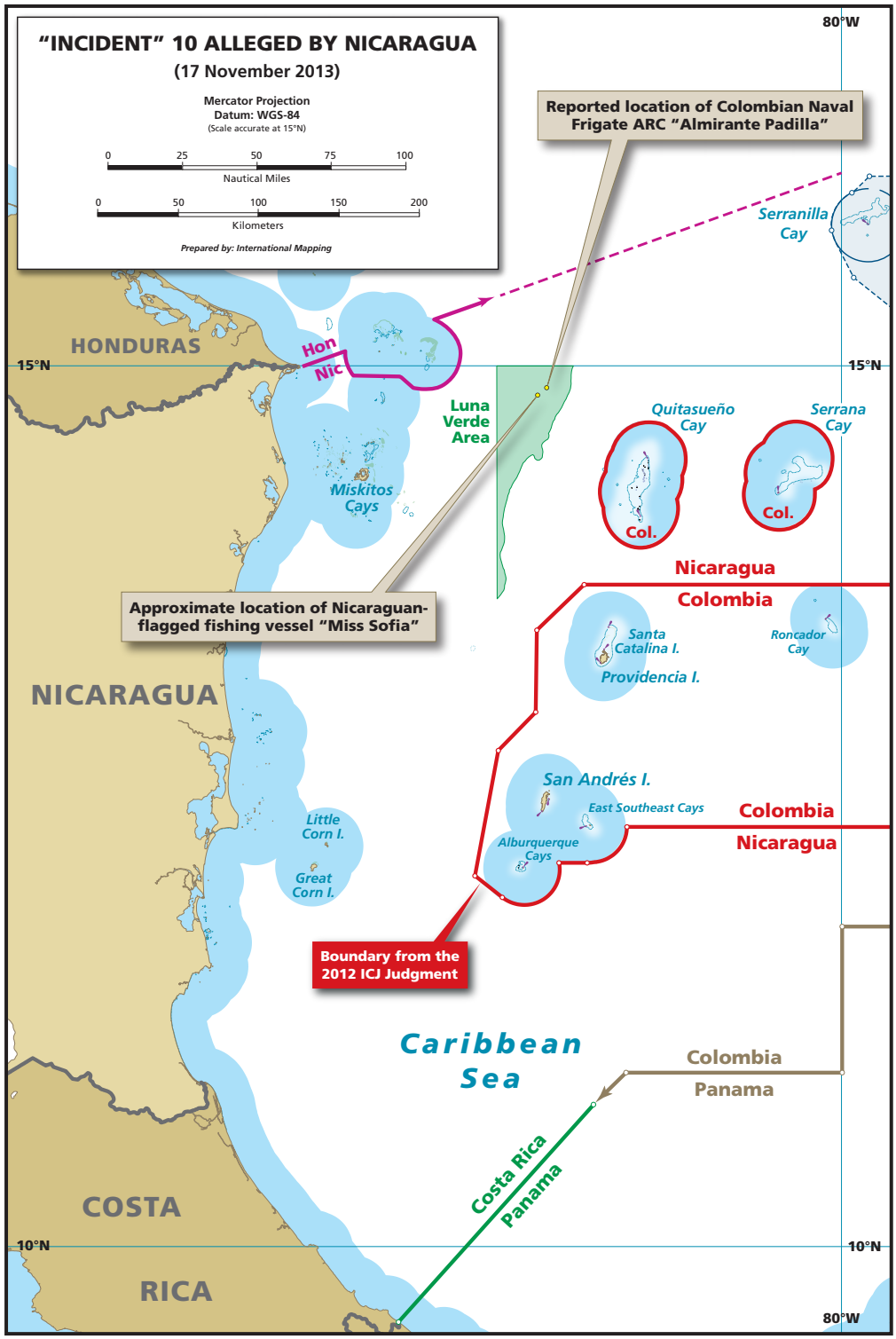
"INCIDENT" 10 ALLEGED BY NICARAGUA
(17 November 2013)
Mercator Projection
Datum: WGS-84
(Scale accurate at 15°N)
0 25 50 75 100
Nautical Miles
0 50 100 150 200
Kilometers
Prepared by: International Mapping
80°W
Reported location of Colombian Naval Frigate ARC "Almirante Padilla"
Serranilla Cay
HONDURAS
15°N
Hon
Nic
Luna Verde Area
Quitasueño Cay
Serrana Cay
Col.
Col.
Miskitos Cays
Nicaragua
Colombia
Approximate location of Nicaraguan-flagged fishing vessel "Miss Sofia"
Santa Catalina I.
Roncador Cay
Providencia I.
NICARAGUA
San Andrés I.
East Southeast Cays
Colombia
Nicaragua
Alburquerque Cays
Little Corn I.
Great Corn I.
Boundary from the 2012 ICJ Judgment
Caribbean Sea
Colombia
Panama
Costa Rica
Panama
COSTA
RICA
10°N
80°W

Figure 4.4

4.40. Furthermore, on 17 November 2013 the A.R.C. "Almirante Padilla" actually rescued two fishermen from "Miss Sofía", who appeared to have been abandoned by the crew of the vessel and were found to have no communication equipment. The A.R.C. therefore sought to contact the "Miss Sofía", but once again did not receive any response. The two fishermen were taken on board the frigate, where they received first aid and food.[299]

4.41. Under customary international law, in the EEZ there is a duty to render assistance to any person found at sea in danger of being lost, and a duty to proceed with all possible speed to the rescue of persons in distress, which is precisely what the Colombian vessel did. However, as the A.R.C. was unable to contact the fishing vessel on 17 November 2013, it proceeded to contact a Nicaraguan unit that was in the area, which advised that the A.R.C. should wait until the next day in order to coordinate the transfer of the two fishermen. On 18 November 2013, the fishing vessel "Miss Sofía" sailed at dawn to continue its fishing activities, notwithstanding that its crew was aware that two of its fishermen were lost and had been found by the A.R.C. In the course of that day, the A.R.C., in coordination with a Nicaraguan Naval Force unit, delivered the two fishermen to the fishing vessel "Caribean Star" instead, given that the "Miss Sofía" was not near the rescue area.[300]

[299] Annex 112: Video, Event "Miss Sofía", 17 Nov. 2013. See also Appendix A, Event No. 7.

[300] Annex 53: Communication No. 304 – MD-CGFFMM-CARMA-SECAR-JONA-CFNC-CFSUCA-CMW29.57, 20 Nov. 2013.

4.42. The remainder of the 13 "incidents" relate to overflights, which do not form any basis for a threat of use of force claim and, in any event, resulted in no interference with Nicaragua's ability to exercise its maritime rights.

4.43. For example, Nicaragua alleges that on 19 November 2013, the GC-201 "Río Grande de Matagalpa" reported that a Colombian Navy aircraft flew over it.[301] ("Incident 11") However, there was no hostile conduct; the aircraft was merely exercising its freedom of overflight. As mentioned above, the minimum altitude for helicopters is 3500 feet when flying over any military-type vessel. The alleged incident also occurred in an area widely-used for the transportation of narcotics, and Colombia would have been carrying out its duties to monitor and cooperate in the suppression of illicit traffic in drugs.

4.44. The GC-201 "Río Grande de Matagalpa" made similar reports on 21 and 24 November 2013, stating that a Colombian Navy helicopter flew over it.[302] ("Incident 12") This allegedly happened again on 25 November 2013.[303] ("Incident 13") According to the Maritime Travel Report of the Colombian Navy's A.R.C. "Almirante Padilla", the A.R.C. 201 (a helicopter) did fly over GC-201 on those dates. However, there was no hostile conduct, and the helicopter's mission was to

301 Memorial of Nicaragua, para. 2.46 and Annexes 18, 23-A and 24.
302 *Ibid*., para. 2.46 and Annexes 18, 23-A and 24.
303 *Ibid*., para. 2.46 and Annexes 18, 23-A and 24.

identify any suspicious drug trafficking activity.[304] In any event, the helicopter was exercising its freedom of overflight, and Nicaragua was neither impeded from exercising its sovereign rights, nor did it register a complaint with Colombia.

4.45. Aside from their factual inaccuracies, Nicaragua's reliance on these 13 alleged "incidents" tells an incomplete story. Aside from the fact that Colombia did not violate Nicaragua's sovereign rights and maritime spaces, the reality is that Colombia was providing technical and humanitarian assistance to vessels and persons in distress, including Nicaraguan flagged vessels, protecting the marine environment, in particular the Seaflower Biosphere Reserve and Seaflower Marine Protected Area, and combating illegal activities, such as illegal, unreported and unregulated (IUU) fishing activities by Nicaraguan fishing vessels. These events are considered in greater detail in Chapter 8.

(3) NICARAGUA'S ILL-FOUNDED ARGUMENTS ON COLOMBIA'S LICENSING OF FISHING VESSELS

4.46. Separately, while not categorized as an "incident" *per se*, Nicaragua alleges a violation of its rights on the basis that, on 22 October 2013, the Governor of San Andrés authorized a Honduran vessel, the "Captain KD", to use an "Integrated Commercial Industrial Fishing Permit" that had been accorded to Mr. Armando Basmagui Perez in September 2012. According

[304] Annex 55: Maritime Travel Report, A.R.C. "Almirante Padilla", 5 Dec. 2013, pp. 21-23.

to Nicaragua, that permit authorized the fishing fleet associated with Mr. Perez to fish in, besides other areas that are not challenged by Nicaragua, an area known as "Luna Verde", which Nicaragua asserts "is plainly under the jurisdiction of Nicaragua pursuant to the Court's 2012 Judgment."[305] However, when the permit is examined, it is apparent that the part on which Nicaragua bases its assertion is part of the "Whereas" clauses of the resolution. The permit only authorizes, at Article three (*i.e.*, under the "Resolves" part of the resolution), the area of operation of "the Archipelago Department of San Andrés, Providencia and Santa Catalina (Roncador, Serrana y Quitasueño, Serranilla Keys) and Shallows (Alicia and Nuevo), and their port of disembarkation will be the Island of San Andres".[306] There is no authorization to fish at the Luna Verde bank, and the operator of the vessel, if he in fact sailed there, went on his own accord.

D. Conclusions

4.47. In respect of the alleged "incidents" that occurred before Colombia ceased to be bound by the Pact, the vast majority concerned the exercise by Colombian vessels and aircraft of their freedom of navigation and overflight, rights that belong to all States in the EEZ. These events do not relate to a claim concerning a threat of use of force, and in any event, any such claim falls outside the jurisdiction of the Court. In respect of the

305 Memorial of Nicaragua, para. 2.51 and Annex 11.

306 *Ibid*., Annex 11, pp. 174-175.

rest of the "incidents", one concerned Colombia's rescue of two fishermen of the Nicaraguan flagged lobster vessel "Miss Sofía", and the rest are largely based on demonstrably erroneous information. A number of the allegations are simply not substantiated by contemporary evidence, and Nicaragua has not satisfied its burden of proof. Moreover, and more importantly, none of these "incidents" prevented Nicaragua or Nicaraguan nationals from exercising their maritime rights; and none were thought by Nicaragua's senior officials to have caused any problems, confrontations or conflicts at the time they allegedly occurred and were not protested to Colombia.

4.48. To the extent Colombia was present in the area, it was exercising its freedom of navigation and overflight, endeavouring to carry out its duty to monitor and cooperate in the suppression of transnational crimes, to protect human life at sea, to provide assistance required by boats present in the area, and to protect the ecosystem in the UNESCO-registered Seaflower Biosphere Reserve and the Seaflower Marine Protected Area. Those areas are not only essential to the livelihood of Colombian artisanal fishermen, they include the waters from which the Raizal community has historically drawn its sustenance, and form part of their identity, habitat and way of life. Colombia's actions in this regard were fully consistent with its rights and duties under international law, including its freedom of navigation and overflight.

Chapter 5

COLOMBIA'S CONTIGUOUS ZONE IS NOT A WRONGFUL ACT UNDER INTERNATIONAL LAW

A. Introduction

5.1. At issue is the lawfulness of Colombia's contiguous zone around the islands comprising the San Andrés Archipelago as set out in Article 5 of Colombia's Presidential Decree No. 1946 concerning the Territorial Sea, Contiguous Zone and Continental Shelf of the Colombian Islands Territories in the Southwestern Caribbean, issued on 9 September 2013[307]. The objective of Article 5 is:

> "[S]ecure the proper administration and orderly management of the entire Archipelago of San Andrés, Providencia and Santa Catalina, and of their islands, cays and other formations and their maritime areas and resources, and in order to avoid the existence of irregular figures or contours which would make practical application difficult, the lines indicated for the outer limits of the contiguous zones will be joined to each other through geodetic lines. In the same fashion, these will be linked to the contiguous zone of the island of Serranilla by geodetic lines which maintain the direction of parallel 14° 59´ 08"N, and to Meridian 79° 56´ 00" W, and thence to the North, thus forming an

[307] The text of Decree 1946 was already submitted to the Court (Preliminary Objections of Colombia, Annex 3). This Decree was modified and supplemented by means of Decree 1119 of 17 June 2014 (Preliminary Objections of Colombia, Annex 5). For ease of reference, a composite version of these two Decrees is presented as Annex 7 to the present Counter-Memorial.

> Integral Contiguous Zone of the Department Archipelago of San Andrés, Providencia and Santa Catalina."[308]

The powers to be exercised in the contiguous zone are:

> "a) Prevent and control the infractions of the laws and regulations related with the integral security of the State, including piracy and trafficking of drugs and psychotropic substances, as well as conduct contrary to the security in the sea and the national maritime interests, the customs, fiscal, migration and sanitary matters which take place in its insular territories or in their territorial sea. In the same manner, violations against the laws and regulations related with the preservation of the maritime environment and the cultural heritage will be prevented and controlled.
>
> b) Punish violations of laws and regulations related to the matters indicated in section a) above, committed in its island territories or in their territorial sea."[309]

These specific sections of Article 5 will be considered in this chapter. No official map of the Integral Contiguous Zone has been published.

5.2. In its Application of 26 November 2013, Nicaragua fails to adduce any compelling evidence of actual injury it may have suffered but refers to the existence of Colombia's Integral Contiguous Zone, as expressed in Article 5 of the Decree, as if it were a *per se* violation of Nicaraguan rights.[310] In its Memorial

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308 Annex 7.

309 *Ibid.*, at section 3(a) and (b).

310 Application, pp. 12-14, para. 10.

of 3 October 2014, Nicaragua summarily described Article 5 of Presidential Decree No. 1946 as Colombia's "rejection and defiance of the November 2012 judgment."[311] Nicaragua reads the Decree as purporting "to establish Colombia's rights and jurisdiction in parts of the Caribbean that indisputably belong to Nicaragua under the Court's Judgment."[312] At paragraph 2.14 of the Memorial, Nicaragua avers that "neither the size of the ICZ... nor the nature of the rights in jurisdiction that Colombia claims within it, are consistent with the definition of contiguous zone recognized by international law."[313] This reflects a misunderstanding of the nature of a contiguous zone as well as the historic adaptability of the law of the sea to idiosyncratic geographical situations. This and other Nicaraguan misconceptions will be analysed in this chapter. First, however, it will be useful to recall the actual international legal situation.

5.3. In its Judgment of 19 November 2012, the Court recognized that "Colombia, and not Nicaragua, has sovereignty over the islands at Albuquerque, Bajo Nuevo, East-Southeast Cays, Quitasueño, Roncador, Serrana and Serranilla"[314], Colombia's sovereignty over the islands of San Andrés, Providencia and Santa Catalina having been settled by the 1928 Treaty between the Parties.[315] The Court then continued, in paragraph (4) of the operative part of its Judgment, to set out the

311 Memorial of Nicaragua, p. 26, para. 2.14.
312 *Ibid*.
313 *Ibid*., pp. 28-29, para. 2.14.
314 2012 Judgment, p. 662, para. 103.
315 *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J Reports 2007*, p. 861, para. 88.

single maritime boundary delimiting the continental shelves and the exclusive economic zones of the Parties.[316]

5.4. While the Court recognized that Colombia's islands were capable of generating maritime entitlements under international law, it did not address the subject matter of the contiguous zone, even though, in oral argument, both Colombia and Nicaragua had accepted the idea of Colombia's entitlement to a contiguous zone around its islands. As recounted in Colombia's Preliminary Objections in 2003:

> "At one point in the proceedings relating to Costa Rica's request to intervene, Nicaragua contended that Colombia had never claimed a contiguous zone around its islands. However when Colombia recalled Article 101 of its Constitution, which expressly proclaimed such a zone, the allegation was not repeated. Instead, both Parties referred in some detail to the contiguous zones around the islands during the hearings on the merits."[317]

5.5. Notwithstanding this concurrence, Nicaragua, in its Application of 26 November 2013, prayed the Court to adjudge and declare that "Colombia is in breach of its obligation not to violate Nicaragua's maritime zones as delimited in paragraph

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316 2012 Judgment, pp. 719-720, para. 251 (4).

317 Preliminary Objections of Colombia, p. 35, para. 2.53. See also: *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Rejoinder of Colombia*, paras. 3.10 *in fine*, 5.34, 6.51,7.35, 8.63 and 8.68. See in particular paras.7.9 to 7.11, wherein Colombia described the overlapping contiguous zones of the archipelago, and depicted them in Figure R-7.1. This matter was also mentioned by Colombia in the public hearings on the merits (in *CR2012/12*, p. 15, para. 27 (Bundy)). Significantly at *CR2012/12*, pp. 18-19, paras. 42-46 (Bundy). Colombia described in detail how the contiguous zones of the islands overlapped. See also *CR2012/12*, p. 27, para. 3; p. 29, para. 9 (Crawford).

251 of the Court Judgment of 19 November 2012 as well as Nicaragua's sovereign rights and jurisdiction in these zones". Nicaragua particularly focuses on "rights under customary international law as reflected in parts V and VI of the United Nations Convention on the Law of the Sea".[318]

5.6. In its effort to substantiate these allegations, Nicaragua relies on a number of statements and declarations made by high-ranking Colombian officials, which it defines as "hostile".[319] The majority of these declarations were issued in the immediate aftermath of the 2012 Judgment.[320] On the other hand, Nicaragua chooses to ignore subsequent official statements which clarify Colombia's considered position.[321] Such atmospherics aside, the lawfulness of Colombia's integral contiguous zone depends on its configuration and assigned powers.

5.7. Nicaragua's submission is that the Integral Contiguous Zone (ICZ) established under Article 5 of the Decree "infringes on Nicaragua's sovereign rights and jurisdiction, by extending

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318 Application, p. 15.

319 Memorial of the Nicaragua, p. 3, para. 1.3.

320 *Ibid.*, pp. 22-26. These include declarations made by President Juan Manuel Santos, on 19 November 2012, 28 November 2012, 3 December 2012, 9 September 2013, 19 September 2013, and 17 June 2014; a statement made by the Foreign Affairs Minister of Colombia, María Ángela Holguín, on 27 November 2012; a Letter from Colombia to the Secretary General of the Organization of American States, dated 27 November 2012; a Statement made by the Commander of the Colombian Navy, Vice Admiral Hernando Wills, on 19 September 2013; and a Statement made by the Governor of San Andrés, on 19 September 2013.

321 See *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Public Sitting 28 September 2015, CR2015/22*, p. 17 (Agent).

beyond the maritime boundary determined by the Court in the north, west and south" (hereinafter "Nicaragua's first claim"). Furthermore, Nicaragua claims that "neither the size of the ICZ [which in many places extends substantially more than 24 M from Colombia's baselines], nor the nature of the rights and jurisdiction that Colombia claims within it, are consistent with the definition of a contiguous zone recognized by international law" (hereinafter "Nicaragua's second claim").[322] As will be shown, both of these claims are premised on misconceptions of the relevant international law and mischaracterizations of the relevant facts.

B. Colombia's Integral Contiguous Zone is Internationally Lawful

5.8. The spatial extent and legal content of the contiguous zone situated beyond Colombia's territorial sea lying off its continental and insular coasts are governed by customary international law, with which Colombia's legislation has consistently complied.

(1) Colombia's Integral Contiguous Zone was Proclaimed under its Constitution

5.9. As to the existence of the contiguous zone,[323] it is mentioned for the first time in Colombian domestic law in 1984, in a decree which reorganized the National Maritime Authority (DIMAR); that decree states that the authority "exercises its

322 Memorial of Nicaragua, pp. 28, para. 2.14.

323 Preliminary Objections of Colombia, paras. 2.47 - 2.64.

jurisdiction… in the following areas:… [the] contiguous zone…".[324] The existence of the contiguous zone was confirmed in Article 101 of the Constitution of 1991, which refers to "the subsoil, the territorial sea, *the contiguous zone*, the continental shelf, the exclusive economic zone" of Colombia.[325] The provision states explicitly that it is "in accordance with international law", confirming Colombia's intention to comply therewith.

5.10. The criteria for establishing baselines from which to measure Colombia's 12-mile territorial sea are set out in Articles 4, 5, 6 and 9 of Law No. 10 of 1978.[326] These baselines also serve, according to customary international law, as the basis for measuring Colombia's contiguous zone.

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[324] Annex 3: Presidential Decree No. 2324 of 18 September 1984.

[325] Constitution of Colombia, Article 101 (in Preliminary Objections of Colombia, Annex 1):

> "The borders of Colombia are those established in international treaties approved by Congress, duly ratified by the President of the Republic, and those defined by arbitration awards in which Colombia takes part. The borders identified in the form provided for by this Constitution may be modified only by treaties approved by Congress and duly ratified by the President of the Republic. Besides the continental territory, the archipelago of San Andrés, Providencia, Santa Catalina, and Malpelo are part of Colombia in addition to the islands, islets, keys, headlands, and sand banks that belong to it. Also part of Colombia is the subsoil, the territorial sea, the contiguous zone, the continental shelf, the exclusive economic zone, the airspace, the segment of the geostationary orbit, the electromagnetic spectrum and the space where it applies, in accordance with international law or the laws of Colombia in the absence of international regulations."

[326] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Counter-Memorial of Colombia (Vol. II)*, Annex 142.

5.11. The regulation of Colombia's insular territories in the Southwestern Caribbean was complemented by Presidential Decree No. 1946 which implements Colombia's Constitution and Law No. 10 of 1978 and is adapted to the territorial, cultural, administrative and political unity of the San Andrés Archipelago.[327] The factual unity of the Archipelago has been historically recognized by Colombia.[328] Examples include its designation as a "National Intendancy" in 1912, a "Special Intendancy" in 1972 and a "Department" in 1991 (Article 309 of the Political Constitution). Like Article 101 of the Constitution, these laws also state that their provisions have to be understood and applied in conformity with international law. In particular, Article 7 of Presidential Decree No. 1946 reads as follows: "Rights of Third States: Nothing of what is established herein will be understood as affecting or limiting the rights and obligations derived from the 'Maritime Delimitation Treaty between the Republic of Colombia and Jamaica' signed between those States on 12 November 1993, or affecting or limiting the rights of other States."

5.12. The integrality of Colombia's Integral Contiguous Zone is not only a manifestation of the cultural, administrative and political unity of the Archipelago; it is, essentially, an inescapable factual consequence. The overlap of most of the Colombian islands' contiguous zones occurs naturally – and inevitably. The integrality of such zones is thus one largely

[327] See in this regard the discussion in Chapter 2 and footnote 27 *supra*.

[328] See for example: *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Counter-Memorial of Colombia, (Vol. I)*, Chapter 2.

dictated by geography.[329] In this respect, the decree merely restates a geographical circumstance.

(2) COLOMBIA'S ISLANDS HAVE A RIGHT TO A CONTIGUOUS ZONE UNDER INTERNATIONAL LAW

5.13. As early as 1924, and in his capacity as the Chairman of the Committee on Neutrality constituted by the International Law Association, Judge Alvarez recognized that groups of islands should be "assimilated for the purpose of delimiting the territorial sea". This position, which he reiterated in 1927 alongside Sir Thomas Barclay in their capacity as Special Rapporteurs, recognized in essence the capacity of archipelagos to generate maritime zones.[330]

5.14. Consistent with this trend, Article 10 of the 1958 Convention on the Territorial Sea and Contiguous Zone recognized the right of islands to possess territorial seas.[331] The Convention further recognized in Article 24 that contiguous zones are contiguous to territorial seas; it drew no distinction, in this regard, between the mainland and its islands. Given the *raison d'être* of the contiguous zone, the assumption was plainly that if a territorial possession was entitled to a territorial sea, it was entitled to a contiguous zone.

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329 See Chapter 2, Sec. A (2) *supra*.

330 Annex 82: S. Ghosh, *Law of the Territorial Sea: Evolution and Development*, 1988, pp. 223-225

331 Colombia signed but never ratified this Convention. Available in: https://treaties.un.org/doc/publication/mtdsg/volume%20ii/chapter%20xxi/xxi-1.en.pdf. (Last visited 10 Nov. 2016).

5.15. The debate during the Third Law of the Sea Conference largely focused on the rights of islands to possess a continental shelf and an exclusive economic zone. But by necessary implication, the assumption that a territorial sea generated a contiguous zone was confirmed. Ultimately UNCLOS Article 121 specified that "Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf." *Exclusio unius est inclusio alterius:* Article 121(3)'s explicit exclusion of an EEZ or continental shelf coupled with the same provision's lack of mention of a territorial sea or a contiguous zone confirms that these latter zones can be generated by all islands.

(3) NOTHING IN THE 2012 JUDGMENT ADDRESSES THE CONTIGUOUS ZONE OR CAN BE READ TO QUESTION COLOMBIA'S CONTIGUOUS ZONE RIGHTS

5.16. In its 2012 Judgment, the Court recognized that San Andrés, Providencia and Santa Catalina and its islets and cays formed an archipelago which generated maritime and submarine zones, including territorial sea, continental shelf, and exclusive economic zone.

5.17. Because the Court in its 2012 Judgment did not address the contiguous zone or questions relating to Colombia's contiguous zone rights, there is no legal basis for denying the entitlement to a contiguous zone of the islands of the Archipelago.

5.18. Thus, Colombia's Contiguous Zone is long-standing, in compliance with international law and unaffected by the 2012 Judgment.

C. The Proper Exercise of Contiguous Zone Powers by a State in its Contiguous Zone is Not Incompatible with, and Does Not Violate Internationally Specified Sovereign EEZ Rights of a Neighbouring State

5.19. Nicaragua's first claim[332] is that by extending into its delimited EEZ, Colombia's ICZ has infringed Nicaragua's sovereign rights and jurisdiction. This claim is misconceived, as the exercise of contingent powers by a coastal State to specified categories of events within its contiguous zone neither negates nor otherwise infringes a neighbouring State's exercise of its specified sovereign rights within its overlapping EEZ.

5.20. In its 2012 Judgment, the Court noted that it "never restricted the right of a State to establish a territorial sea of 12 nautical miles around an island on the basis of an overlap with the continental shelf *and exclusive economic zone* entitlements of another State".[333] (Emphasis added).

5.21. Nicaragua's underlying premise is that the exercise in its contiguous zone by a contiguous zone holder of a lawful power in waters that are also in the exclusive economic zone of a coastally opposite State would *ipso facto* infringe the latter's sovereign rights and maritime spaces. Nicaragua actually goes

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332 See para. 5.7 *supra*.

333 2012 Judgment, p. 690, para. 178.

further, contending that the mere declaration of a contiguous zone infringes the EEZ of a neighbouring state. Both of these contentions misconceive the nature and extent of the rights of a State in its EEZ and the nature and extent of the contingent powers of a State in its contiguous zone.

5.22. The EEZ is a maritime space adjacent to the territorial sea of a coastal State, in which space that coastal state has been accorded, *jure gentium,* certain specified exclusive rights and coordinate obligations. Under customary international law, as reflected in UNCLOS Article 56(1), the coastal State is accorded enumerated rights and jurisdictions within its EEZ: "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources," as well as jurisdiction over "(i) the establishment and use of artificial islands, installations and structures; (ii) marine scientific research; and (iii) the protection and preservation of the marine environment."

5.23. The point of emphasis is that no coastal state "owns" an EEZ; rather, it is a high seas maritime space in which a limited number of enumerated economic rights are accorded to the coastal State. But because of the residual high seas character of the waters of the EEZ, international users continue to be entitled to exercise the rights which international law accords them – to the extent that the exercise of such rights has due regard for and does not infringe the enumerated sovereign economic rights of the coastal State in its EEZ. In this respect, the EEZ may be

contrasted with the territorial sea, which the coastal State may be said to "own", subject to a servitude *erga omnes*, that is, the right of innocent passage. Other than that servitude, an international user has no rights in the territorial sea of the coastal state. Nicaragua, seemingly oblivious to all this, apparently considers that in its EEZ it has a plenary and absolute sovereignty.

5.24. The types of powers that may be exercised by a coastal State in its contiguous zone under customary international law[334] do not interfere with the economic rights granted to an EEZ holder. Therefore, within the same stretch of waters, a certain overlap or co-presence may exist as between the EEZ of one State and the contiguous zone of another neighbouring State.

5.25. This would not be the case, were the situation one of a narrow strait in which the contiguous zone of one State purported to extend into the territorial waters of a coastally opposite State. In such a scenario, the exercise of the powers and authorities granted to the contiguous zone holder would ineluctably infringe the plenary jurisdiction and sovereignty of the opposite State in its territorial waters.[335] But that cannot be said about the *limited* rights and jurisdictions granted to an EEZ holder *vis-à-vis* an appropriate exercise of contiguous zone

[334] For a discussion of the kinds of powers that may be exercised by a coastal State in its contiguous zone, under customary law, see Chapter 5, Sec. E *infra*.

[335] That is not to say that a particular and properly implemented exercise by the contiguous zone State, based on the right of self-defense, would necessarily constitute a violation of international law.

rights by a neighbouring State.

5.26. Thus, the proper exercise of contiguous zone powers by a State within its contiguous zone is not incompatible with, and does not violate internationally enumerated sovereign EEZ rights of a neighbouring State.

D. The Spatial Construction of Colombia's Integral Contiguous Zone is Dictated by the Natural and Special Configuration of the Archipelago and Does Not Violate International Law

(1) Colombia's Integral Contiguous Zone is almost entirely a result of the Naturally Overlapping Contiguous Zones of the Component Islands of the San Andrés Archipelago

5.27. While Colombia's entitlement to a contiguous zone around its islands was discussed by the Parties in the case concluded by the Judgment of 19 November 2012,[336] the configuration of the contiguous zone was neither addressed nor decided there by the Court. Hence some background will be useful.

5.28. As will be recalled,[337] the Integral Contiguous Zone established under Article 5 of Presidential Decree No. 1946 and depicted for illustrative purposes in **Figure 5.1**, was configured on the basis of arcs of circles of 24 nautical miles (12 nautical miles for the width of the territorial sea and 12 nautical miles for

[336] See Chapter 5, Sec. A, para. 5.4 and footnote 317 *supra*.
[337] See para. 5.1 *supra*.

the width of the contiguous zone) surrounding the islands comprising the San Andrés Archipelago. Because of its geography, the resulting ICZ includes perforce the overlapping contiguous zones of the islands and cays of the Archipelago. The outermost points of these arcs of circles were then connected with geodetic lines and thus include further areas. The introduction of these geodetic lines allowed for the creation of a continuous and viable zone, with an unindented outer limit. The resulting clarity contributes to the zone's intended purpose and facilitates its administration by Colombian officials.

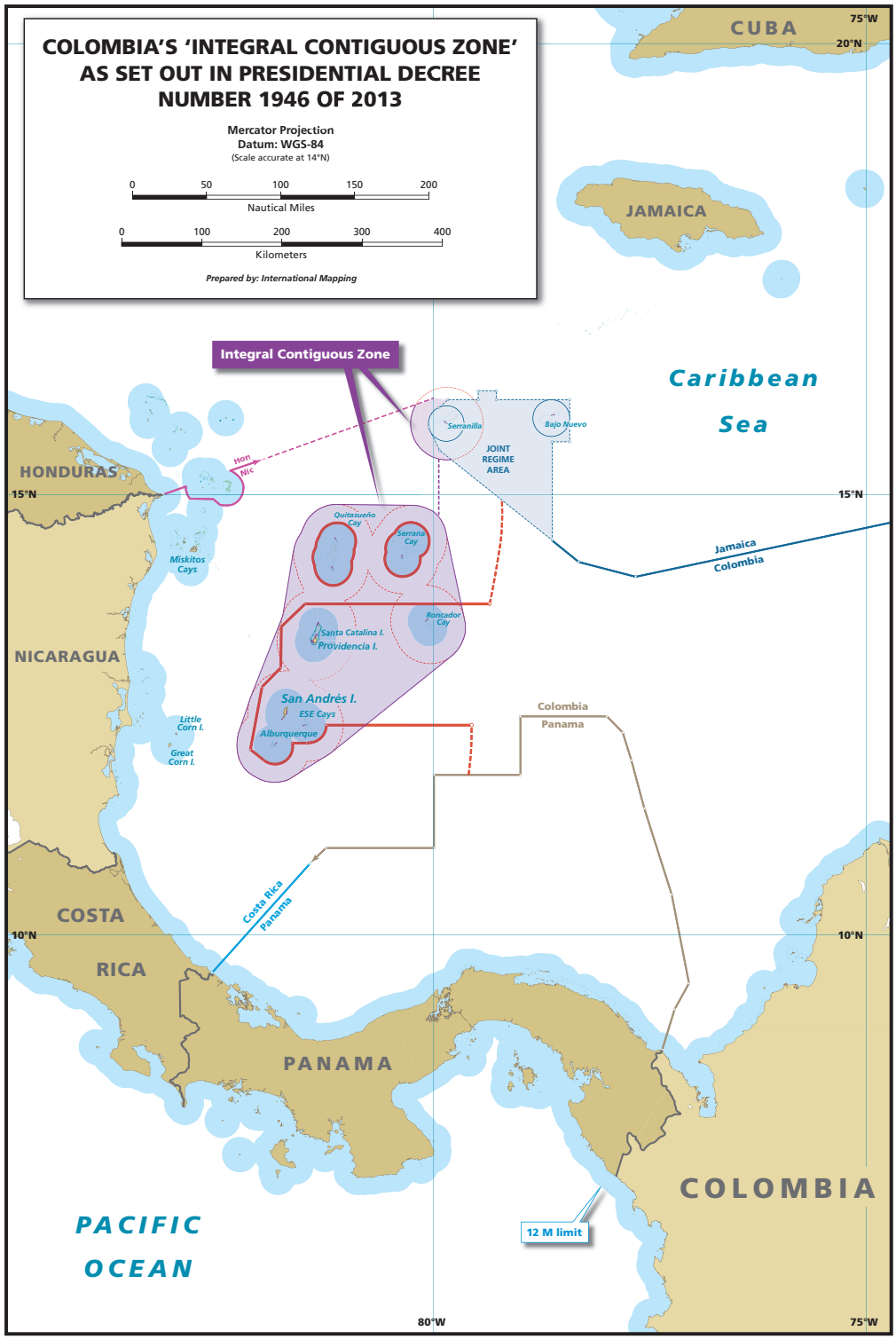
COLOMBIA'S 'INTEGRAL CONTIGUOUS ZONE' AS SET OUT IN PRESIDENTIAL DECREE NUMBER 1946 OF 2013
Mercator Projection
Datum: WGS-84
(Scale accurate at 14°N)
0 50 100 150 200
Nautical Miles
0 100 200 300 400
Kilometers
Prepared by: International Mapping
CUBA
75°W
20°N
JAMAICA
Integral Contiguous Zone
Caribbean Sea
Serranilla
Bajo Nuevo
JOINT REGIME AREA
HONDURAS
Hon
Nic
15°N
Quitasueño Cay
Serrana Cay
Roncador Cay
Miskitos Cays
Santa Catalina I.
Providencia I.
Jamaica
Colombia
NICARAGUA
San Andrés I.
ESE Cays
Alburquerque
Little Corn I.
Great Corn I.
Colombia
Panama
Costa Rica
Panama
COSTA RICA
10°N
PANAMA
COLOMBIA
PACIFIC OCEAN
12 M limit
80°W
75°W

Figure 5.1

5.29. This part of Article 5 has a firm jurisprudential basis. In the *Anglo-Norwegian Fisheries* Case, the Court affirmed the principle that, in certain exceptional geographical or socio-economic circumstances, methods used to establish maritime zones may depart from general rules. In the circumstances of that case, the Court found it appropriate to apply a flexible approach, taking into consideration, *inter alia*, the idiosyncratic geography which the case presented, *viz*., the fragmented nature of the coastline, or as the Court described it:

> "The coastal zone concerned in the dispute is of considerable length... it includes the coast of the mainland of Norway and all of the islands, islets, rocks and reefs, known by the name of *skjærgaard* (literally, rock rampart), together with all Norwegian internal and territorial waters. The coast of the mainland, which without taking into account of fjords, bays and minor indentations, is over 1,500 kilometers in length, is of a very distinctive configuration. Very broken along its whole length, it constantly opens out into indentations often penetrating for greater distances inland...".[338]

5.30. As Presidential Decree No. 1946 explains, the configuration of the zone was dictated not only as a result of the geographic proximity of the islands to each other, but also by "the need to avoid the existence of irregular figures or contours which would make practical application difficult".[339] The spatial configuration of Colombia's ICZ, and, in particular, Colombia's

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[338] *Fisheries (United Kingdom* v. *Norway), Judgment, I.C.J. Reports 1951*, p. 127.

[339] Annex 7, Article 5(2).

reliance on geodesic lines connecting the outermost points of the 24 nm arcs of circles to effect a unified zone are, like the Norwegian Decree, a direct consequence of the unique geographical features of the archipelago itself, and are in conformity with the practice of the Court.

5.31. For comparable reasons, the Court, itself, did this in its 2012 Judgment, in invoking the need for geodetic lines:

> "235. The method used in the construction of the weighted line (as described in the previous paragraph) results in a line which has a curved shape with a large number of turning points. Such a configuration of the line may create difficulties in its practical application. The Court therefore proceeds to a further adjustment by reducing the number of turning points and connecting them by geodetic lines. This produces a simplified weighted line which is depicted on sketch-map No. 10."[340]

(2) The addition of Geodetic Lines Connecting the Overlapping Contiguous Zones of the Islands allows for the Orderly Administration of Colombia's Rights and Obligations in its Integral Contiguous Zone

5.32. Article 5(2) of Presidential Decree No. 1946 clarifies that the configuration of the Integral Contiguous Zone responded to the need to ensure the "proper administration and orderly management of the entire Archipelago of San Andrés, Providencia and Santa Catalina". This was done in application of a general principle of good administration and orderly

[340] 2012 Judgment, p. 710, para 235 and Sketch-Map No. 10, p. 712.

management of maritime resources. This principle was implicitly applied by the Court in its 2012 Judgment when it rejected Nicaragua's proposal to draw enclaves around each of Colombia's islands. As the Court put it,

> "In addition, the Nicaraguan proposal would produce a disorderly pattern of several distinct Colombian enclaves within a maritime space which otherwise pertained to Nicaragua with unfortunate consequences for the orderly management of maritime resources, policing and the public order of the oceans in general, all of which would be better served by a simpler and more coherent division of the relevant area".

As noted above, this venerable and common-sense policy of the law of the sea underpinned the *Anglo-Norwegian Fisheries* Case and was reaffirmed most recently in the 2012 Judgment.[341]

5.33. Colombia established the ICZ to achieve the protection and orderly management of its territorial and maritime resources, taking account of the unique security concerns and challenges that confront the Caribbean region as a whole. Particularly as it relates to Colombia which has suffered over fifty years of internal armed conflict and continues to face the threat of human trafficking, drugs and arms smuggling and terrorism. Colombia also has obligations for ensuring the protection of the marine environment, as well as the cultural heritage, that are vital to the subsistence of the inhabitants of the

[341] 2012 Judgment, p. 708, at para. 230. See also, para 5.29, footnote 338 *supra*.

Archipelago.[342] As the preamble of Decree 1946 makes clear, one of the objectives of the ICZ is to ensure conservation of the biodiversity of the Southwestern Caribbean Sea, in order to protect the ecosystems in the area.[343] This applies, in particular, to the fragile ecosystems of the Seaflower Biosphere Reserve and Seaflower Marine Protected Area.[344] An unindented configuration of the zone enhances Colombia's ability to address these concerns in an effective manner and with no corresponding injury to neighbouring states.

5.34. Two points must be emphasized: First, the lines drawn by the Decree are not delimitation lines; their sole purpose is to define a *functional* area within which Colombia may execute, on a case-by-case basis, the powers granted in accordance with international law. Second, a configuration of the zone, which was not based on geodetic lines connecting the outermost points of the arcs of circles, would have resulted – borrowing the words of the Court – in a curved shape with a large number of turning points which would create difficulties in its practical application. That would have rendered the zone less effective, if not inoperative for its stated purposes.

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342 For a discussion of the kind of control that may be exercised by a coastal State in its contiguous zone, under customary international law, see paras.5.39-5.55 *infra.*

343 The preamble of Decree 1946 states, *inter alia*, that the extent of the contiguous zone needs to be determined, "in order to secure the protection of the environment and resources", and that "[t]he Colombian State is committed to the preservation of the ecosystems of the Archipelago, which are fundamental to the ecological balance of the zone, and to preserve historical, traditional, ancestral, environmental and cultural rights, and the rights of survival of the inhabitants."

344 See Chapter 3, Sec. C (1) *supra*.

(3) THE CONTINGENT POWERS WHICH COLOMBIA MAY EXERCISE IN THE INTEGRAL CONTIGUOUS ZONE, AS SPECIFIED IN PRESIDENTIAL DECREE NO. 1946, ARE CONSISTENT WITH INTERNATIONAL LAW

5.35. By definition, the powers which a coastal State is entitled to exercise in appropriate circumstances and appropriate ways in its contiguous zone relate to high seas freedoms inuring to third States and their nationals, the exercise of which, in specific instances, threaten or compromise vital – and internationally recognized – interests of the coastal State. Thus Presidential Decree No. 1946 includes matters customarily found in the police powers of a coastal State in its contiguous zone, such as customs, fiscal, immigration and sanitary regulation. Other rights to be exercised in the contiguous zone under the Decree are concerned with special and, alas, notorious problems infecting the Caribbean region: the "comprehensive security of the State," "includ[ing] piracy and trafficking of drugs and psychotropic substances, and forms of conduct as well as conduct contrary to the security of the sea and the national maritime interests...". The Decree also provides that "violations against the laws and regulations related to the preservation of the environment, cultural heritage, and the exercise of historical fishing rights" will be prevented and controlled.[345]

5.36. Given the objects and purposes of a contiguous zone as they relate to the responsibilities of the coastal State, it is

[345] Annex 7, Article 5(3)(a).

obvious that a State is entitled to exercise contiguous zone rights with respect to inhabited dependent archipelagos no less than to mainland coastal regions. Indeed, archipelagos are particularly vulnerable to actions initiated in and beyond their land components and their territorial seas that may impact their security and their often fragile social and ecological processes. No surprise, then, that the Decree includes express reference to Colombia's competence to punish violations of laws and regulations concerning the above-mentioned matters, provided that the infringements are "committed in its island territories" or "in their territorial sea."[346]

5.37. That this Decree was scrupulously designed to conform to the requirements of international law is confirmed in its text. Thus, Article 1(3) specifies that Colombia exercises jurisdiction and sovereign rights over the maritime spaces different from the territorial sea "in the terms prescribed by international law. . . in what corresponds to each of them." It also specifies that "in those spaces Colombia exercises historic rights in conformity with international law," deriving from practice in waters which were long believed to be Colombia's. This provision is critical, for the core issue of lawfulness is not the existence of a contiguous zone as such, but rather the circumstances of and the way specific exercises of contiguous zone powers are carried out within it, as well as the extent to which due regard has been paid, in those exercises, to the rights of third States.

346 Annex 7, Article 5(3)(b).

5.38. Thus, like every contiguous zone, Colombia's Integral Contiguous Zone (i) is necessary for the orderly management, policing and maintenance of public order in the maritime spaces pertaining to the San Andrés Archipelago; (ii) is to be applied in conformity with international law having due regard to the rights of other States; (iii) is in conformity with international law; and (iv) consequently, cannot be said to be contrary to the Court's Judgment of 19 November 2012.

E. The Extent and Contingent Powers of Colombia's Integral Contiguous Zone are Consistent with International Law

5.39. Nicaragua's second claim[347] is that both the spatial configuration of the ICZ and the nature of the contingent powers that Colombia claims within it are inconsistent with customary international law. Considering both the legislative history and subsequent state practice surrounding Article 24 of the U.N. Convention on the Territorial Sea and the Contiguous Zone and Article 33 of UNCLOS, Colombia considers that these Articles do not reflect the rules of customary international law and as a result, even though they might serve as guidance, are not applicable in the instant case.

5.40. Under the customary law of the sea, the spatial conception of the contiguous zone is based on context, function and policy considerations. (Even with respect to States parties to UNCLOS, unique circumstances may temper the numerical standard of

[347] See para. 5.7 *supra*.

geographical distance and the enumerated functions in UNCLOS Article 33, as will be explained below.)

5.41. The Draft Convention on Territorial Waters of 1929 was produced by a Research Committee of the Harvard Law School, in preparation for the 1930 Hague Conference for the Codification of International Law. The Draft was also the first joint international articulation and conceptualization of the contiguous zone. Its Article 20 provided:

> "The Navigation of the high sea is free for all states. On the high sea adjacent to the marginal sea, however, a state may take such measures as may be necessary for the enforcement within its territory or territorial waters of its customs, navigation, sanitary or police laws or regulations, or for its immediate protection".[348]

The proponents of Article 20 of the Draft refused to lay down stringent technical requirements on either the breadth or the nature of the measures to be exercised within the zone. Instead, they turned to a general test of necessity, which respected the zone's core flexible character, as they explained in their commentary:

> "It would seem to serve no useful purpose to attempt to state what is adjacent in terms of miles as the powers described in this article are not dependent upon sovereignty over the locus and are not limited to a geographical area which can be thus defined. The distance from the shore at which these powers may be exercised is determined not

[348] Harvard Research in International Law, Draft Convention on Territorial Waters, Art. 20, reprinted in *23 Am. J. Int'l. L. Supp.* (1929), pp. 243, 333-334. Available at Peace Palace Library.

> by mileage but by the necessity of the littoral state and by the connection between the interests of its territory and the acts performed on the high sea. The recognition that such measures are proper when they can be shown to be necessary for the enforcement of a state's customs, navigation, sanitary or police laws, or for its immediate protection does in some degree modify the general principle of freedom of navigation on the high sea, but the modification is here narrowly restricted and it is a modification which would seem to be entirely reasonable in view of the fact that it represents the long established practice of many states."[349]

5.42. The 1930 Hague Conference was witness to a continuation of the debates among States as to the purposes for which the zone should be recognized. As summarized by Professor Reeves: "Enforcement of customs legislation, supervision and even control over fisheries, and security to the littoral state were the main foundations for the theory of the contiguous zone, insistence upon one or another depending upon the policy or point of view of particular states."[350]

5.43. The debates surrounding the spatial flexibility of the regime of the contiguous zone continued during the 1958 Geneva Conference on the Law of the Sea. The ILC's had taken a strict approach, seeking, in the 1956 Draft on the Articles Concerning the Law of the Sea, to limit both the nature and

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[349] Harvard Research in International Law, Draft Convention on Territorial Waters, Art. 20, reprinted in *23 Am. J. Int'l. L. Supp.* (1929), pp. 243, 333-334. Available at Peace Palace Library.

[350] J. S. Reeves, "The Codification of the Law of Territorial Waters", *24 Am. J. Int'l L.* (1930), pp. 486, 494. Available at Peace Palace Library.

geographic scope of the contiguous zone.[351] A number of States (Yugoslavia, Chile, Ecuador, Poland, the Philippines, Ceylon and Korea) submitted proposals during the conference to expand on the nature of the zone.[352] Two such proposals were adopted in the First Committee: Ceylon's proposal to include immigration considerations and Poland's proposal to include security interests.[353]

5.44. At the Plenary Committee, the combined new draft was welcomed by a vote of 40 in favour and 27 against with 9 abstentions. That was, however, shy of the 2/3 majority necessary for adoption, a fact which allowed the U.S. to propose at the last minute alternative wording which included immigration but not security; it was eventually adopted. [354] In view of what actually transpired at the Conference, Judge Oda observed that the final wording of Article 24 of the 1958 Convention could not be deemed to reflect the consensus of the majority of States at the Conference:

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[351] Articles Concerning the Law of the Sea with Commentaries, Text Adopted by the International Law Commission at its eight session, reprinted in *2 Y.B. Int'l L. Comm'n, Commentary to Article 66 (1956)*. While the ILC rejected the notion that a coastal State may be allowed to exercise jurisdiction on matters relating to security, fishing, conservation of living resources, and immigration within the zone, it is submitted that in doing so it relied heavily on general justifications that did not conform to the practice of States at the time. Available in: http://legal.un.org/ilc/texts/instruments/english/commentaries/8_1_8_2_1956.pdf. (Last visited: 10 Nov. 2016).

[352] S. Oda, "The Concept of the Contiguous Zone", *11 Int'l & Comp.L.Q.* 131, 147-149 (1962). Available at Peace Palace Library.

[353] *Ibid.* (Ceylon's proposal was adopted by 39 votes to 15 with 20 abstentions; Poland's proposal was adopted by 33 to 27 with 5 abstentions. The final draft of the first committee which incorporated both proposals was sent to the Plenary Meeting by a vote of 50 to 18 with 8 abstentions).

[354] *Ibid*.

> "An examination of the drafting process at the Geneva Conference has indicated that the terms of Article 24 did not truly represent the opinion of the majority of the States at the Conference."[355]

5.45. At the 1972 session of the Sea-Bed Committee, a group of 55 States supported the inclusion, as item 3, of the question of the contiguous zone.[356] That item was divided into three sub-items: 3.1 – nature and characteristics; 3.2 – Limits; 3.3 – Rights of the coastal States with regard to national security, customs and fiscal control, sanitary, and immigration regulations. The introduction of, and continued discussions on this adopted agenda item further underlines the fact that the differences and debates on the scope and nature of the contiguous zone had not subsided following the adoption of the 1958 Convention.

5.46. In the Third United Nations Conference on the Law of the Sea, the focus of negotiations shifted to addressing issues surrounding the emerging EEZ regime. Those deliberations overshadowed the continued debates surrounding the nature and scope of the contiguous zone. Nonetheless, proposals were again put forward, calling for greater flexibility: these included India's proposal for a 30-mile contiguous zone; Egypt's and Honduras'

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355 S. Oda, *op. cit.*, p. 158.

356 Annex 80: UN Doc. A/AC.138/66 and Corr. 2, 14 Mar. 1972: Algeria, Argentina, Brazil, Cameroon, Chile, China, Colombia, Congo, Cyprus, Ecuador, Egypt, El Salvador, Ethiopia, Fiji, Gabon, Ghana, Guatemala, Guyana, Iceland, India, India, Indonesia, Iran, Iraq, Ivory Coast, Jamaica, Kenya, Kuwait, Liberia, Libyan Arab Republic, Madagascar, Malaysia, Mauritania, Mauritius, Morocco, Nicaragua, Nigeria, Pakistan, Panama, Peru, Philippines, Romania, Senegal, Sierra Leon, Somalia, Spain, Sri Lanka, Sudan, Trinidad and Tobago, Tunisia, United Republic of Tanzania, Uruguay, Venezuela, Yemen, Yugoslavia, and Zaire.

proposals for an 18-mile contiguous zone; and Israel's proposal for the insertion of "broadcasting" into the list of activities over which coastal States may enforce their jurisdiction. While none of these proposals was adopted, and while a final proposal by the Soviet Union and its backers to merely repeat the wording of the 1958 Convention was eventually accepted, the full record indicates that Article 33 of UNCLOS was far from reflecting unanimity.[357]

5.47. One may note that in 1975 a U.S. domestic court was called to determine the legality of the seizure of a Japanese vessel, the F/V Taiyo Maru, by the U.S. Coast Guard within the contiguous fisheries zone of the United States, for alleged violation of U.S. fisheries law. Deciding on the legality of the U.S. Coast Guard's hot pursuit, District Judge Edward Thaxter Gignoux had to address the issue of whether the 1958 Convention allowed for a contiguous zone to encompass fishing rights. Judge Gignoux held that Article 24 did not prohibit "the establishment of a contiguous zone for a purpose other than one of those specified in the Article." He reasoned instead that the list contained in that article was non-exhaustive:

> "The language of Article 24, relating to the purposes for which a contiguous zone may be established, is permissive, rather than restrictive. It provides that a coastal State "may" establish a contiguous zone for the purposes of enforcing its customs, fiscal, immigration or sanitary

[357] S. N. Nandan & S. Rosenne (Eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary (Vol II)*, 1993, pp. 268-275. (Virginia Commentary). Available at Peace Palace Library; see also Annex 82: S. Ghosh, *op. cit.*, pp. 271-277.

> regulations. Although Article 24 only affirmatively recognizes the right of a coastal State to create a contiguous zone for one of the four enumerated purposes, nothing in the Article precludes the establishment of such a zone for other purposes, including the enforcement of domestic fisheries law."[358]

5.48. Echoes of the crux of Judge Gignoux's holding recur in the rather widespread practice of States following both the 1958 Convention and UNCLOS. States have adopted and enforced legislation that expands the numerical and material limitations enumerated in Articles 24 and 33. States' domestic laws and powers within the contiguous zone have come to encompass varied concerns, ranging from security and defense, to environmental protection and maritime conservation, to fishing rights, and to cultural heritage protection. This is supported by extensive State practice. **Appendix B** to this Counter-Memorial shows examples from some 41 States which have enacted domestic legislation granting powers to address such concerns.[359]

5.49. Customary law is a continuous dynamic process, as exemplified by the sizeable body of State practice reviewed above. It also calls to mind the Court's allowance for an evolutionary interpretation of treaties in appropriate circumstances. In its 2009 Judgment in *Dispute Regarding*

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[358] Annex 81: *United States v. F/V Taiyo Maru,* Civ. No. 74-101 SD, Cr. No. 74-46 SD, 395 F.Supp. 413 (1975).

[359] Appendix B: Examples from States which have enacted domestic legislation concerning the Contiguous Zone.

Navigational and Related Rights, the Court stated that:

> "There are situations in which the parties' intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used – or some of them – a meaning or content capable of evolving, not one fixed once and for all, so as to make allowances for, among other things, developments in international law."[360]

5.50. The terms of Article 24 of the 1958 Convention, and Article 33 of UNCLOS, as they pertain to "custom, fiscal, immigration, or sanitary regulation", may thus be read in the light of contemporary developments in international law. Given that States have been adopting interpretations of what is respectively covered under the expressions "custom", "fiscal", "immigration", and "sanitary", in terms of contemporary administrative needs, the treaty terms, and the correlating customary norm reflected therein, may be read to be flexible and adaptive. Taking the aforesaid into account, the "laws for the protection of the environment", in Article 5 of the Presidential Decree No. 1946, are to be read to qualify as "sanitary laws and regulations" in the context of the contemporary understanding of the customary international legal regime of the contiguous zone.[361]

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[360] *Dispute Regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 242, para. 64.

[361] In this regard, the Court has stated that:

> "The Court has no difficulty in acknowledging that the concerns expressed by Hungary for its natural environment in the region affected by the Gabcikovo-Nagymaros Project related to an 'essential interest' of that State, within the meaning given to that expression in Article 33 of the Draft of the International Law Commission. The Commission, in its

5.51. This is, moreover, entirely in keeping with the historic function of the contiguous zone. In his venerable ruling in *Church* v. *Hubbart* (1804), United States Chief Justice John Marshall contributed to the customary international law foundations of a flexible contiguous zone. Chief Justice Marshall noted that as a matter of principles which are "universally acknowledged" the power of a State to "secure itself from injury may certainly be exercised beyond the limits of its territory":

> "These means do not appear to be limited within any certain marked boundaries, which remain the

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> Commentary, indicated that one should not, in that context, reduce an 'essential interest' to a matter only of the 'existence' of the State, and that the whole question was, ultimately, to be judged in the light of the particular case (see *Yearbook of the International Law Commission,* 1980, Vol. II, Part 2, p. 49, para. 32); at the same time, it included among the situations that could occasion a state of necessity, 'a grave danger to . . . the ecological preservation of al1 or some of [the] territory [of a State]' *(Ibid,* p. 35, para. 3); and specified, with reference to State practice, that "It is primarily in the last two decades that safeguarding the ecological balance has come to be considered an 'essential interest' of all States." *(Ibid.,* p. 39, para. 14.)

The Court recalls that it has recently had occasion to stress, in the following terms, the great significance that it attaches to respect for the environment, not only for States but also for the whole of mankind:

> "the environment is not an abstraction but represents the living space, the quality of life and the *very* health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment." *(Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996,* pp. 241-242, para. 29.)

Gabcikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997, p. 41, para. 53.

> same at all times and in all situations. If they are such as unnecessarily to vex and harass foreign lawful commerce, foreign nations will resist their exercise. If they are such as are reasonable and necessary to secure their laws from violation, they will be submitted to. In different seas and on different coasts, a wider or more contracted range, in which to exercise the vigilance of the government, will be assented to."[362]

5.52. Chief Justice Marshall thus held that rather than rigid limitations, broader standards of reasonableness and necessity are to be applied. In such a regime, the degree of intrusiveness, the extent, if any, of the displacement of the rights of other States, the legal justification of the State action in question, including its urgency and correlative proportionality, and the reaction of the international community, all play a role in a contextual assessment of the lawfulness of the extent to which contiguous zone powers are exercised as well as the lawfulness of the specific actions taken by the contiguous zone holder.

5.53. This approach was examined by Professors McDougal and Burke who concluded that the "brief and enigmatic Article 24 of the 1958 Convention" was as "far removed from the desirable community policies as from the probable future realities of claim and decision." In the face of "the considerable flexibility in the distances at which states have projected, and continue to project their contiguous zone," those authoritative scholars found a single zone of twelve miles to be "decidedly

[362] Annex 79: *Church v. Hubbart*, 6 U.S. 187, 234-235 (1804).

anachronistic".[363] With respect to the issue of the nature and functions of the zone, they endorsed an approach, sensitive to context and to international policies:

> "The proposed limitation of permissible purposes for contiguous zones in the reference to 'customs, fiscal, sanitation, and immigration' is certainly no accurate summary of the purposes of which states have in the past demanded, and been accorded, an occasional exclusive competence in contiguous waters. Their mutual demands, and reciprocal differences, have extended, as we have seen, to important common interests in relation to security and power, as well as to other forms of wealth protection. With developing technology and expanding enlightenment, new uses of the oceans, would appear certain to emerge. It can scarcely be regarded as an appropriate clarification of the common interests of states to protect a formulation of the purposes for which they may exercise reasonable exclusive competence which both omits important contemporary shared interest and forecloses the future protection of new, emerging interests, whatever their importance or urgency. Certainly any prediction that states will be able to live, and secure their common interests, within such limitations must be viewed as most precarious."[364]

In the light of subsequent State practice, the final sentence, published in 1962, has proved to have been prescient.[365]

5.54. The preceding review supports Colombia's position that,

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363 M. S. McDougal & W. T. Burke, *The Public Order of the Oceans: A Contemporary International Law of the Sea*, 1962, pp. 604-607. Available at Peace Palace Library.

364 *Ibid*.

365 *Ibid*.

in accordance with customary international law, both the spatial conception of the contiguous zone and the powers which the contiguous State may exercise therein are to be determined by reference to context, function and consideration.

5.55. Should, however, the Court find that the 24-mile limit of the contiguous zone reflects customary international law, Colombia's ICZ is, nonetheless, lawful, pursuant to the customary exemption to such a numerical rule. As discussed above in Section 3(A), under customary international law, in unique geographical circumstances, the techniques according to which the external limit of a maritime zone is determined, if reasonable in context, may depart from the general rules in order to create a viable contiguous zone that enables the achievement of its purposes. The geographical circumstances of the San Andrés Archipelago are such that the application of the general rule would create an impracticable contiguous zone. Thus, in accordance with customary international law, the configuration of Colombia's contiguous zone is lawful.

F. In Any Event, Nicaragua Can Point to No Actions in Colombia's Integral Contiguous Zone That Have Prejudiced Nicaragua's EEZ Rights

5.56. What the preceding review indicates is that each specific action allegedly taken by Colombia within its contiguous zone, and not only the spatial configuration of the zone itself, must be examined, on a case-by-case basis, against the backdrop of generally accepted international principles and State practice. In

this contextual analysis, the validity of the justification for the specific action must be examined, alongside the excessive or trivial nature of the allegedly injurious consequences of the measure. The burden of proof is, of course, on the party alleging the injurious event: *Ei incumbit probatio qui dicit, non qui negat.*

5.57. As it relates to alleged "injurious" events presented by Nicaragua in its Memorial and Annexes, Nicaragua will thus find it impossible to demonstrate any injury caused by Colombia because it has not proven that any incidents occurred within the ICZ. Moreover, in none of the alleged events subject to the jurisdiction of the Court, *i.e.*, those which occurred before Colombia's denunciation of the Pact of Bogotá, did Nicaragua raise the issue of Colombia infringing an alleged sovereign right or its maritime space as a result of the implementation of the ICZ. It is only with reference to a few events occurring *after* the denunciation (2 January 2014, 1 February 2014, 2 February 2014, and 5 February 2014) that Nicaragua specifically alleges that Colombia was implementing the ICZ to Nicaragua's detriment. As explained in Chapter 4, Section C, wholly apart from their lack of merit, these alleged events are outside the jurisdiction of the Court. But the critical point is that Nicaragua fails to demonstrate an actual injury suffered by it, as the result of specific actions or measures taken by Colombia in its ICZ.

G. Conclusion

5.58. As demonstrated in this chapter, Colombia's Presidential Decree No. 1946 of 9 September 2013, proclaiming an Integral Contiguous Zone is not a wrongful act under international law. In particular: (i) The spatial configuration of Colombia's Integral Contiguous Zone is internationally lawful; (ii) The powers which Decree No. 1946 specifies are internationally lawful; and (iii) Nicaragua has not proven that it has suffered any injury by reason of the existence of the Integral Contiguous Zone.

Chapter 6

THE REMEDIAL SITUATION

6.1. Nicaragua contends that it has suffered both material and moral injuries from Colombia's alleged wrongful acts.[366] In relation to material injuries, Nicaragua requests the immediate cessation of Colombia's internationally wrongful acts, as well as restitution, compensation and guarantees of non-repetition by Colombia.[367] As for the purported moral damage, Nicaragua, because it is "hardly financially assessable", requests a declaration of the wrongfulness of Colombia's actions by the Court.[368]

6.2. The short answer to Nicaragua's requests for relief is that (i) the Court has already ruled that it has no jurisdiction over the claim based on the allegation of the threat of use of force [369], and (ii) that Colombia has not committed any of the alleged international wrongful acts.

6.3. The list of purported "incidents" to have involved the Colombian Navy have been shown by Colombia to be based on erroneous or, at best, entirely misleading information. No Nicaraguan fishing vessels have been prevented from fishing in the waters found to appertain to Nicaragua as a result of Colombia's exercise of its freedoms of navigation and overflight

366 Memorial of Nicaragua, para. 4.6.
367 *Ibid*., para. 4.11.
368 *Ibid*., paras 4.12-4.13.
369 Judgment on the Preliminary Objections, paras 75-79.

and its right to monitor suspicious trafficking and practices that harm the marine environment. Indeed, even after allegedly having been chased away by the Colombian Navy, vessels such as the "Miss Sofia" continued fishing not only in the waters that were found to appertain to Nicaragua, but also in Serrana's territorial sea and in the waters of the Joint Regime Area established between Colombia and Jamaica.[370] It is also worth mentioning that these two vessels have a history of abandoning their crew members to their fate.[371]

6.4. As for Colombia's Decree No. 1946 enacting an Integral Contiguous Zone, Colombia has shown that the decree is neither contrary to international law, nor incompatible with Nicaragua's ability to exercise sovereign rights in its exclusive economic zone or continental shelf. Once again, no Nicaraguan vessels have been prevented from fishing in those parts of the Integral Contiguous Zone that overlap with Nicaragua's EEZ.

6.5. It follows that Nicaragua's claim that Colombia should re-establish the *status quo ante* by revoking laws, regulations and permits granted to fishing vessels is devoid of merit and calls for no further comment at this stage. By the same token, Nicaragua's claim based on an obligation to compensate is untenable. The facts of this case demonstrate that, even assuming *quod non* that the purported incidents have taken place and that they were in breach of international norms (which is not

370 Memorial of Nicaragua, paras 2.30 and 2.36.

371 See Chapter 8, Sec. C *infra* and Appendix A (in Vol. II).

the case), no injury was suffered, as the fishing vessels authorized by Nicaragua have not been prevented from fishing in Nicaragua's EEZ.

6.6. Accordingly, the Applicant's assertion that Colombia should compensate it for the "loss of profits resulting from the loss of investment caused by the threatening statements of Colombia's highest authorities" [372] is implausible. Not only does the very description of the "incidents" provided by Nicaragua show that no impediment has been created for fishing vessels authorized by Nicaragua, the Applicant has failed to provide even a shred of evidence in relation to this claim.

6.7. Quite simply, Nicaragua cannot demonstrate that it has suffered material injuries from the actions of Colombia. To the contrary, the situation in the relevant area demonstrates that Nicaragua is already fully enjoying its rights in the maritime spaces that were found to belong to it in 2012. In fact, according to the 2014 Report of the *Instituto Nicaragüense de Pesca y Acuicultura* (INPESCA), the production of fishery resources in the Nicaraguan Caribbean Sea has increased by more than 100% between 2012 and 2014. The production has grown steadily with respect to most of the marine resources including fish, spiny lobsters, conches and shrimp.[373]

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372 Memorial of Nicaragua, Submissions, para. 2 c.

373 Annex 92: Nicaraguan Fishing and Aquiculture Institute (INPESCA), Fishing and Aquiculture Yearbook 2014, July 2015, pp. 7-9.

6.8. Likewise, the FAO Report of the first meeting of the Working Group on Caribbean Spiny Lobster, which included Nicaragua but not Colombia as a participant, stresses the fact that Nicaragua suspended its quotas for total allowable catches of Caribbean Spiny Lobster "in 2012 after gaining territorial rights over a disputed area in the Atlantic allowing the country to expand its fishing zone".[374] But, more significantly, the Report includes as Nicaragua's presentation a *Informe* by INPESCA on the status of this resource in the Caribbean.[375] The *Informe* specifically draws attention to Luna Verde by attaching a map depicting the considerable amount of spiny lobsters that were harvested in the aftermath of the 2012 Judgment. While the exact tonnage is not given, the dots show that, between the rendering of the 2012 Judgment and the adoption of the Report in October 2014, Nicaragua has been fully enjoying its newly acquired rights in that area, although this has been accompanied with the widespread use of predatory fishing practices. As stressed in the *Informe*, Luna Verde is currently one of the "principal banks", if not the most important, for spiny lobsters' exploitation. This *Informe* conclusively shows that, contrary to Nicaragua's unsubstantiated claims, its fishermen are fishing, and substantially depleting, the spiny lobster resources located in Luna Verde, regardless of the purported "threatening" presence of the Colombian Navy.

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374 FAO, Western Central Atlantic Fishery Commission, Report of the First Meeting of the OSPESCA/WECAFC/CRFM/CFMC Working Group on Caribbean Spiny Lobster, Panama City, 21-23 October 2014, p. 22, para. 32. Available at: http://www.fao.org/3/a-i4860b.pdf. (Last visited: 10 Nov. 2016).

375 *Ibid*., pp. 80-83.

6.9. Accordingly, none of the purported "incidents" or Decree No. 1946 have caused Nicaragua any injury. Nicaraguan fishing vessels have also not been prevented from carrying out their fishing activities, nor have any of Nicaragua's sovereign rights or jurisdiction been otherwise infringed. To the contrary, Colombia has shown that it was entitled to be in the relevant area and that its actions were consistent, and in compliance, with its duties under international law. For these reasons, Nicaragua's requests for relief have no factual or legal basis and should be rejected.

PART III

COUNTER-CLAIMS

Chapter 7

COLOMBIA'S COUNTER-CLAIMS

A. Introduction

7.1. Colombia has demonstrated in the preceding chapters that the picture of Colombia's behaviour in the Southwestern Caribbean Sea portrayed by Nicaragua in its pleadings does not correspond to reality, and that no wrongful conduct can be attributed to Colombia. But the story told by Nicaragua is not simply inaccurate; it is the opposite of what actually occurred during the period beginning with the Judgment of the Court of 19 November 2012 up to the critical date, 27 November 2013 ("the relevant period") and is, therefore, incomplete.

7.2. As Colombia will show in the following chapters, it is Nicaragua's own conduct during this period in relation to both the areas in which it claims sovereign rights and jurisdiction, and in areas within Colombia's territorial sea – *i.e.*, areas under Colombia's sovereignty – that has given rise to a number of breaches of Nicaragua's obligations owing to Colombia.

7.3. The Court's Judgment of 19 November 2012 did not result in Nicaragua having unfettered sovereign rights or jurisdiction within its EEZ. Rather, with those newly recognized rights come responsibilities and duties, in particular *vis-à-vis* Colombia, but also with respect to third States. Nicaragua's pleadings disregard these obligations.

7.4. Amongst others, Nicaragua has the obligation to protect and preserve the marine environment. However, Nicaragua has not only completely failed to prevent and control predatory fishing practices and the destruction of the marine habitat perpetrated by vessels flying its flag or acting under its licenses within the relevant area, it has tolerated and even endorsed such practices. By doing so, Nicaragua not only breached its general environmental obligations, it violated the rights of the inhabitants of the Archipelago, including the Raizal community, to benefit from a healthy, sound and sustainable environment and habitat. This is the subject of Colombia's first two counter-claims, discussed in Chapter 8.

7.5. Moreover, while senior Nicaraguan representatives have made public pronouncements purporting to recognize the traditional fishing rights of the Raizal community and of Colombia, in practice Nicaragua has infringed the artisanal fishing rights of the inhabitants of the Archipelago to access and exploit their traditional banks. Its Naval Force has harassed the artisanal fishermen, by intimidating them, and seizing their products, fishing gear, food and personal property. This is the subject of Colombia's third counter-claim, addressed in Chapter 9.

7.6. Lastly, Nicaragua even went further in adopting a Decree establishing straight baselines for the determination of the breadth of its maritime zones, in clear contradiction with

international law, and thus purported to extend its maritime spaces beyond what international law permits. This decree directly infringes on Colombia's maritime rights and spaces, and forms the basis for Colombia's fourth counter-claim, discussed in Chapter 10.

B. Admissibility of the Counter-claims

7.7. Article 80, paragraph 1, of the Rules of Court provides that:

> "The Court may entertain a counter-claim only if it comes within the jurisdiction of the Court and is directly connected with the subject-matter of the claim of the other party."

Therefore, for counter-claims to be entertained by the Court, they must (i) come "within the jurisdiction of the Court", and (ii) be "directly connected with the subject-matter of the claim of the other party." In earlier pronouncements of the Court, these two requirements have been characterized as concerning the "admissibility" of the counter-claim.[376] In other words, "'admissibility' in this context must be understood broadly to encompass both the jurisdictional requirement and the direct-connection requirement...".[377]

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[376] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Counter-Claim, Order of 10 March 1998, I.C.J. Reports 1998*, p. 203, para. 33; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Counter-Claims, Order of 29 November 2001, I.C.J. Reports 2001*, p. 678, para. 35.

[377] *Jurisdictional Immunities of the State (Germany* v. *Italy), Counter-Claim, Order of 6 July 2010, I.C.J. Reports 2010*, pp. 315-316, para. 14.

7.8. Section (1) below will address the jurisdictional requirement with respect to Colombia's counter-claims. Section (2) will then set out the legal considerations that underpin the "direct connection" requirement. In the chapters that follow, Colombia will show that the admissibility test for each counter-claim is met, and that the counter-claims are well-founded in fact and law.

(1) THE COUNTER-CLAIMS COME WITHIN THE JURISDICTION OF THE COURT

7.9. The jurisdiction of the Court over a dispute between two States depends on their consent to have the dispute settled by the Court. In the current proceedings, the Court held in its Judgment on Preliminary Objections that consent to its jurisdiction to adjudicate upon the dispute between Nicaragua and Colombia derives from Article XXXI of the Pact of Bogotá.[378]

7.10. Article XXXI of the Pact reads as follows:

> "In conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice, the High Contracting Parties declare that they recognize, in relation to any other American State, the jurisdiction of the Court as compulsory ipso facto, without the necessity of any special agreement so long as the present Treaty is in force, in all disputes of a juridical nature that arise among them concerning:
>
> (a) [t]he interpretation of a treaty;

[378] Judgment on the Preliminary Objections, p. 41, para. 111 (2).

(b) [a]ny question of international law;

(c) [t]he existence of any fact which, if established, would constitute the breach of an international obligation;

(d) [t]he nature or extent of the reparation to be made for the breach of an international obligation."

7.11. In order to assess if the counter-claims come within the jurisdiction of the Court, it is convenient to distinguish between jurisdiction *ratione materiae*, *ratione temporis* and *ratione personae*.

7.12. With respect to jurisdiction *ratione materiae*, Colombia's counter-claims indisputably concern a "dispute of a juridical nature", as required by Article XXXI of the Pact. Indeed, they all concern "questions of international law" (Article XXXI (b)), the existence of facts which, if established, would constitute breaches of Nicaragua's obligations (Article XXXI (c)), and the nature and extent of the reparation to be made for those breaches (Article XXXI (d)).

7.13. As for jurisdiction *ratione temporis*, Article XXXI of the Pact provides that consent to the jurisdiction of the Court exists: (i) "so long as the present Treaty is in force"; (ii) in a dispute that arises among the Parties; (iii) concerning "the existence" of facts. As a consequence, a dispute that arises between the Parties with respect to the "existence" of facts that did not occur "so long as the Treaty was in force", but that occurred after the Treaty ceased to be in force, does not come within the

jurisdiction of the Court. But the facts alleged by Colombia in its counter-claims all occurred before 27 November 2013, that is to say, at a time when the Pact of Bogotá was still in force between Nicaragua and Colombia, as decided by the Court.

7.14. It is also undisputed that the Court decided that the Pact of Bogotá ceased to apply between the Parties as of 27 November 2013. Yet, it was still in force, and expressed the consent of the Parties to the jurisdiction of the Court, on 26 November 2013, the date when Nicaragua lodged its Application instituting the present proceedings.[379] Thus, jurisdiction is established both *ratione personae* and *ratione temporis*.

7.15. Article 80, paragraph 2, of the Rules of Court provides that a counter-claim shall be made in the Counter-Memorial of the party presenting it. Thus, Colombia's counter-claims are submitted not to institute new proceedings, but as "Incidental Proceedings",[380] "that is to say, within the context of a case which is already in progress."[381] Made in the Counter-Memorial, the counter-claims are presented in the jurisdictional context of the procedure already initiated by Nicaragua on 26 November 2013. In other words, the Court's jurisdiction over incidental proceedings must be assessed at the time of the filing of the

379 Judgment on the Preliminary Objections, p.24, para. 48.

380 This is the title of Section D of the Rules of Court in which Art. 80 is inserted.

381 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 257, para. 30.

main proceedings. Since the Court has found that it has jurisdiction over the main proceedings, jurisdiction is also established over the counter-claims.

(2) THE DIRECT-CONNECTION REQUIREMENT

7.16. The Court's jurisprudence establishes that the Court has discretion to assess whether the counter-claim is sufficiently connected to the main claim to be admissible. In doing so, the direct connection must be considered "both in fact and in law". As explained by the Court in the *Bosnian Genocide* case:

> "Whereas the Rules of Court do not define what is meant by 'directly connected'; whereas it is for the Court, in its sole discretion, to assess whether the counter-claim is sufficiently connected to the principal claim, taking account of the particular aspects of each case; and whereas, as a general rule, the degree of connection between the claims must be assessed both in fact and in law."[382]

7.17. In relation to the factual connection, the Court has to consider "whether the facts relied upon by each party relate to the same geographical area or the same time period",[383] and also

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[382] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 258, para. 33.

[383] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Counter-Claims, Order of 18 April 2013, I.C.J. Reports 2013*, p. 211-212, para. 33. See also: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Counter-Claims, Order of 17 December 1997*, I.C.J. Reports 1997, p. 258, para. 34;

examine whether these facts are of the "same nature, in that they allege similar types of conduct".[384] This was addressed by the Court in the *Certain Activities; Construction of a Road* cases in the following way:

> "In previous decisions relating to the admissibility of counter‑claims, the Court has taken into consideration a range of factors that could establish a direct connection both in fact and in law between a counter‑claim and the claims in the principal case for purposes of Article 80. The Court has thus considered whether the facts relied upon by each party relate to the same geographical area or the same time period (see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Counter‑Claims, Order of 17 December 1997, I.C.J. Reports 1997,* p. 258, para. 34 *; Oil Platforms (Islamic Republic of Iran* v. *United States of America), Counter‑Claim, Order of 10 March 1998, I.C.J. Reports 1998,* p. 205, para. 38). The Court has also considered whether the facts relied upon by each party are of the same nature, in that they allege similar types of conduct (see *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Counter‑Claims, Order of 29 November 2001, I.C.J. Reports 2001,* p. 679, para. 38)".[385]

Oil Platforms (Islamic Republic of Iran v. *United States of America), Counter-Claim, Order of 10 March 1998, I.C.J. Reports 1998,* p. 205, para. 38.

[384] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Counter-Claims, Order of 18 April 2013, I.C.J. Reports 2013,* p. 211-212, para. 32. See also: *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Counter-Claims, Order of 29 November 2001, I.C.J. Reports 2001,* p. 678-679, para. 38.

[385] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua); Construction of a Road in Costa Rica along the*

7.18. As for a direct connection in law, the key question is whether there is a direct connection based on the legal principles or instruments relied on, or whether the Parties can be considered to be pursuing the same legal aim. As the Court stated in the *Certain Activities; Construction of a Road* cases:

> "The Court has further examined whether there is a direct connection between the counter‑claim and the principal claims of the other party based on the legal principles or instruments relied upon, or where the Applicant and the Respondent were considered as pursuing the same legal aim by their respective claims (see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Counter‑Claims, Order of 17 December 1997, I.C.J. Reports 1997,* p. 258, para. 35; *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Counter‑Claim, Order of 10 March 1998, I.C.J. Reports 1998,* p. 205, para. 38; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Order of 30 June 1999, I.C.J. Reports 1999 (II),* pp. 985‑986; *Armed Activities on the Territory of the Congo (Democratic Republic of Congo* v. *Uganda), Counter‑Claims, Order of 29 November 2001, I.C.J. Reports 2001,* p. 679, paras. 38 and 40)."[386]

7.19. The following chapters will set out the connection between the relevant counter-claim and the subject-matter of Nicaragua's claims, and show that the counter-claims all meet

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San Juan River (Nicaragua v. *Costa Rica), Counter-Claims, Order of 18 April 2013, I.C.J. Reports 2013,* p. 211-212, para. 32.

[386] *Ibid*.

the admissibility test. In particular, each of the counter-claims relates to the same geographic area and time period, deals with the conduct and presence of both Parties in relation to the relevant maritime area, and pursues the same legal aims in terms of assessing the lawfulness of that conduct under customary international law.

Chapter 8

FIRST AND SECOND COUNTER-CLAIMS: NICARAGUA'S LACK OF DUE DILIGENCE WITH RESPECT TO THE MARINE ENVIRONMENT OF THE SOUTHWESTERN CARIBBEAN SEA AND THE HABITAT OF THE RAIZALES

A. Introduction

8.1. As discussed earlier, the Southwestern Caribbean Sea is a highly fragile environmental area. Interdependence is strong, and the acts of each of the Parties have repercussions upon the ecological balance of this area and its ecosystems. This chapter will show that Nicaragua has breached its obligation to preserve and protect the marine environment by engaging in conduct that harms not only the ecological balance of the area, but also the habitat of vulnerable communities, particularly the Raizales, whose livelihood depends on the sea.

8.2. Colombia is thus filing two counter-claims in relation to Nicaragua's actions (and inactions). The first counter-claim is based on Nicaragua's violation of its duty of due diligence to protect and preserve the marine environment of the Southwestern Caribbean Sea. The second counter-claim is a logical consequence of the first one, and deals with Nicaragua's violation of its duty of due diligence to protect the right of the inhabitants of the San Andrés Archipelago, in particular the Raizales, to benefit from a healthy, sound and sustainable

environment.

8.3. In presenting these counter-claims, Colombia will first show that they are directly connected with the subject-matter of Nicaragua's claims (Section B). Colombia will then set out the facts that underlie the counter-claims (Section C), before turning to the reasons why both counter-claims are fully justified in law (Sections D and E).

B. The Direct Connection with the Subject-Matter of Nicaragua's Claims

8.4. There are a number of elements which show that these two counter-claims by Colombia are directly connected with the subject-matter of Nicaragua's claims and pursue the same legal aims, and are thus admissible under the legal standards discussed in the previous chapter.

8.5. With respect to the factual component, Colombia's counter-claims arise out of the same "factual complex" as Nicaragua's claims. In the first place, the counter-claims concern Nicaragua's failure to preserve and protect the marine environment, and to exercise due diligence over its flagged vessels and fishermen, in the *same geographical area* to which Nicaragua's claims about the alleged violations of its sovereign rights and maritime spaces relate. This area comprises parts of the Seaflower Biosphere Reserve and the Seaflower Marine Protected Area, including the maritime area around the Luna Verde bank, which is where most of the "incidents" mentioned

by Nicaragua are said to have taken place, and within Colombia's Integral Contiguous Zone.

8.6. In essence, Colombia's counter-claims represent the other side of the coin of Nicaragua's claims, and are thus of the same nature. Nicaragua asserts that Colombia has violated its sovereign rights and maritime spaces. But these accusations fail to take into account that Nicaragua has legal *obligations* with respect to its own conduct in the same areas – namely, to preserve and protect the marine environment and exercise due diligence – and that Colombia too has a number of duties in this respect. At issue, therefore, is the conduct of *both* Parties within the relevant maritime area, not just that of Colombia. This attests to the direct connection between the subject-matter of the claims made by Nicaragua and Colombia's counter-claims.

8.7. Second, Colombia's counter-claims concern events that occurred within the *same period of time* as the "facts" adduced by Nicaragua. As noted in Chapter 7, the relevant period for assessing the claims and the counter-claims is from the date of the Court's Judgment on the merits in *Territorial and Maritime Dispute*, namely, 19 November 2012, to the date when the Pact of Bogotá ceased to be in force for Colombia, namely, 27 November 2013. All of the facts introduced by Colombia in support of its counter-claims took place within this same time period as the "facts" relevant to Nicaragua's claims. Again, there is a direct connection between the claims and the counter-claims.

8.8. Turning to the legal considerations, Colombia's counter-claims are based on the same corpus of law as Nicaragua's claims – that is, customary international law – and pursue the same legal aims. The heart of Nicaragua's claims rests on a challenge to Colombia's presence in Nicaragua's EEZ and the actions of Colombia's naval vessels and aircraft. However, Colombia has shown that it has a right to be present in those waters, and a right and obligation to monitor and report on destructive fishing and other practices (without forcibly interdicting such activities). The so-called "incidents" of which Nicaragua complains were not really incidents at all. To the extent that Colombia had a presence in the area, it was largely necessitated because of Nicaragua's failure to live up to its legal obligation to exercise due diligence over its fishing vessels to preserve and protect the marine environment, including the natural habitat of the Raizales and other inhabitants of the Archipelago.

8.9. In other words, Colombia's counter-claims are, for their part, relying on customary international law rules *limiting* and *conditioning* the exercise by Nicaragua of its sovereign rights and jurisdiction in its maritime zones. While Nicaragua views these rights as virtually unrestricted, each Party is contesting the legality of the conduct of the other in the same maritime areas. The legal aim of the claims and counter-claims is thus the same, and the connection between the two is clear. By admitting these two counter-claims, the Court will "achieve a procedural

economy whilst enabling [itself] to have an overview of the respective claims of the parties and to decide them more consistently".[387]

C. The Facts Supporting Colombia's Counter-claims with Respect to the Protection of the Environment of the Southwestern Caribbean Sea and the Habitat of the Raizales and other Inhabitants of the Archipelago

8.10. This sub-section addresses the facts that underlie Colombia's two counter-claims in relation to the environment of the Southwestern Caribbean Sea and the habitat of the Raizales and other inhabitants of the Archipelago.

8.11. The events that will be discussed are evidence of the failures of Nicaragua to exercise due diligence with respect to the marine environment and ecosystems of the Southwestern Caribbean Sea, and the habitat of the Raizales and other inhabitants of the Archipelago. Noteworthy is the fact that those events have occurred not only in the waters of Nicaragua's EEZ, but also within the territorial sea of Colombia. They concern activities of predatory fishing by Nicaraguan vessels that not only threaten the marine environment but also endanger the habitat of the inhabitants of the Archipelago, in particular the Raizales.

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[387] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 257, para. 30.

8.12. As indicated, some of the alarming events that support Colombia's counter-claims have taken place within the territorial sea of Colombia and Joint Regime Area with Jamaica (Section (1)). Others have occurred within the area of the Seaflower Biosphere Reserve and the Seaflower Marine Protected Area (Section (2)).

(1) ACTIVITIES OF PREDATORY FISHING IN THE TERRITORIAL SEA OF COLOMBIA AND JOINT REGIME AREA

8.13. During the period from 19 November 2012 until 27 November 2013, three incidents occurred within Colombia's territorial sea and Joint Regime Area with Jamaica as shown in **Figure 8.1** and described below.

8.14. On 13 January 2013, the Colombian patrol aircraft A.R.C. "802" observed the presence of two vessels flying the Nicaraguan flag fishing illegally in Colombian waters, in the territorial sea of Serranilla, namely the "Charlie Junior IV"[388] and the "Capt. Alex II".[389] The Colombian aircraft performed a VHF communication call to the vessels, but received no answer.

8.15. On 28 April 2013, the Colombian helicopter A.R.C. "202", during air patrols in the area of Bajo Nuevo and Bajo Alicia, reported the presence of the Nicaraguan fishing vessel

[388] Latitude 15º49.0N; Longitude 80º 00.3W (Territorial Sea of the Colombian Island of Serranilla). See Annex 30: Colombian Navy, Communication No. 0080, 16 Jan. 2013.

[389] Latitude 15º50.0N; Longitude 80º 01.0W (Territorial Sea of the Colombian Island of Serranilla). See *Ibid*.

"Al John",[390] together with three speedboats and about 20 canoe type boats (*cayucos*), fishing with divers. Radio calls were made via VHF channel 16 without any response. Upon noticing the presence of the helicopter, the Nicaraguan vessel picked up the boats and other craft and left the area. It is worth noting that the activities of the "Al John" are well-known to Nicaragua, which mentions the vessel in its Memorial.[391]

8.16. Also, on 28 April 2013, the Colombian Air Unit A.R.C. "202" reported to the A.R.C. "Caldas" that it had observed the presence in the area of Bajo Alicia, in the Joint Regime Area with Jamaica, of the Nicaraguan fishing vessel "Papa D", anchored with about 25 accompanying canoe type boats (*cayucos*) and carrying out unauthorized fishing activities with divers. After several calls by the Colombian Naval unit, the Capitan of the "Papa D" explained that he was in Colombian waters by accident, due to engine failure. Subsequently, the Colombian authorities proceeded to board and inspect the fishing vessel at Lat. 16º04.5N, Long. 79º21.4W. Approximately 200 pounds of illegally caught Queen Conch were found. Moreover, upon checking, it appeared that the crew did not correspond to eight members as said by the captain, but eleven, and the number of fishermen was not fifty but seventy-two. The vessel was therefore detained for the illegal exploitation of Colombian resources and contraventions to Merchant Marine

[390] Latitude 15º59.3N; Longitude 79º51.8W. (Bajo Alicia in the Colombia and Jamaica Joint Regime Area). See Annex 59: Colombian Navy, Communication No. 070824, 7 Jun 2014; Annex 95: Photos, Event "Al John" 28 Apr. 2014.

[391] Memorial of Nicaragua, para. 2.36.

standards. The motor vessel and its crew were transferred to San Andrés for further proceedings.[392]

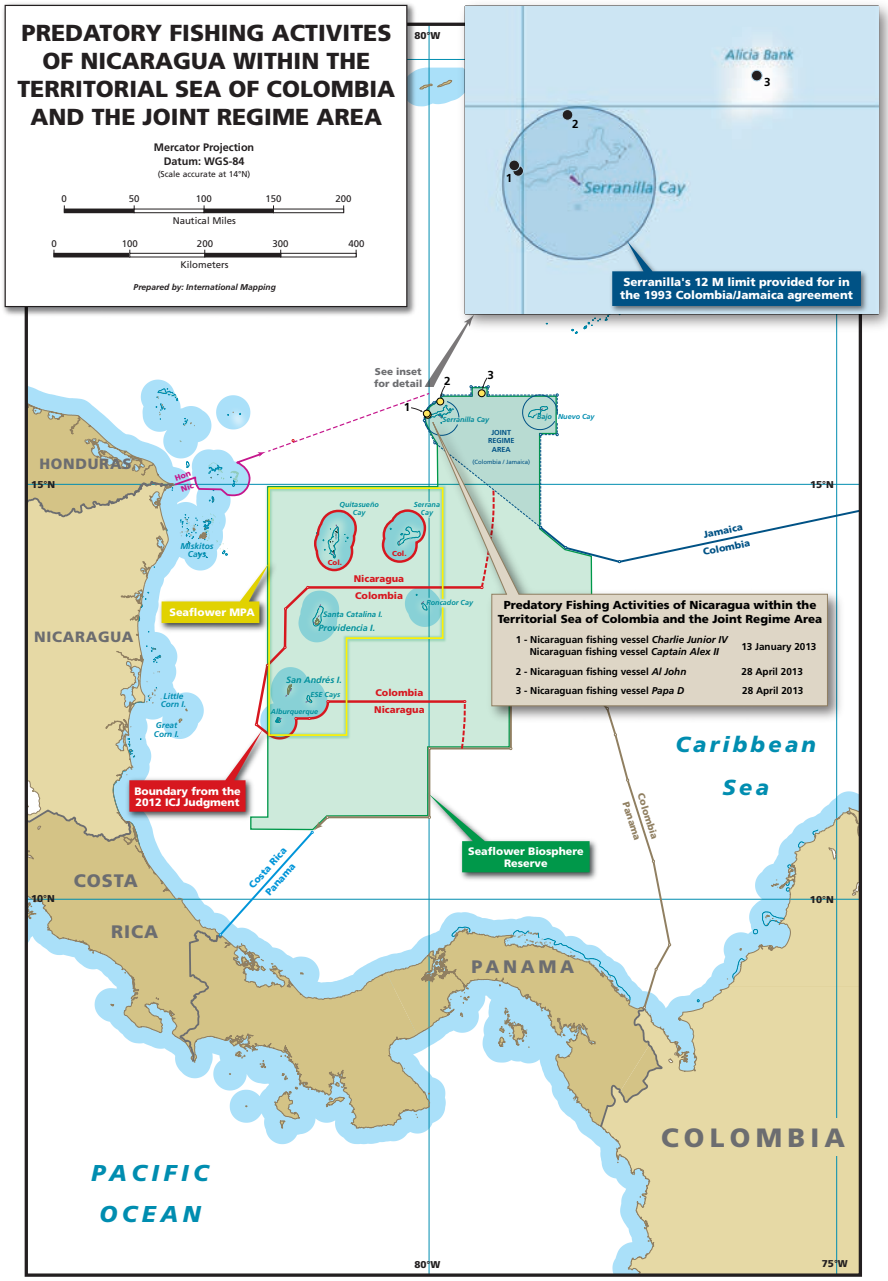

Figure 8.1

392 Annex 34: Colombian Navy, Communication No. 0877, 30 Apr 2013; Annex 96: Photos, Event "Papa D" 28 Apr. 2014.

(2) ACTIVITIES OF PREDATORY FISHING IN THE SEAFLOWER BIOSPHERE RESERVE AND SEAFLOWER MARINE PROTECTED AREA

8.17. During the period from the 2012 Judgment until 27 November 2013, further incidents occurred. Fourteen examples of such activities involving Nicaraguan fishing vessels will be presented below. These events mainly occurred in the Luna Verde area, which is situated in part of the Seaflower Biosphere Reserve declared by UNESCO and the Seaflower Marine Protected Area as depicted in **Figures 2.2 and 2.3**. Many of these incidents infringed international law in multiple ways, including by use of predatory fishing practices such as fishermen fishing with divers and scuba tanks, overfishing, and overcrowded fishing vessels, which imperil the health and lives of the people on board. The said incidents are described below and are depicted in **Figure 8.2**.

8.18. The first series of incidents involved the Nicaraguan ship "Pescasa 35". This vessel was spotted no less than twice in seven months carrying out predatory fishing practices. It should be noted that the captain of the ship repeatedly claimed, as a justification, that he was duly authorized to carry out such conduct by the Nicaraguan Government. The facts as described in the Colombian Navy Reports are the following:

(1) On 9 May 2013, the Colombian A.R.C. "Caldas" detected the Nicaraguan fishing vessel "Pescasa 35", together with two motorboats O/B with four crew

members on each, and 18 canoe type boats (*cayucos*) with two crew members in each of them, fishing Queen Conch with divers in the Seaflower Biosphere Reserve and Seaflower Marine Protected Area.[393] The A.R.C. "Caldas" invited them to suspend this type of fishing. Subsequently, the A.R.C. "Caldas" lodged a protest before the Port of San Andrés;

(2) On 5 October 2013, during a normal naval patrol, the A.R.C. "Caldas" observed the same Nicaraguan fishing vessel "Pescasa 35"[394], with 78 persons on board (which was far in excess of the number of people it was licensed to carry, making the conditions on the vessel inhumane) and 5 canoe type boats (*cayucos*), again carrying out fishing activities with divers. The A.R.C. "Caldas" informed the fishing vessel once again by VHF that she was conducting illegal fishing activities in the natural reserve of Seaflower, which is protected by UNESCO. This time the captain of the "Pescasa 35" answered that he was authorized by the Nicaraguan government to perform this very activity, and stated that he would continue doing so.

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393 Latitude 14º47.6N; Longitude 81º57.6W (Seaflower Biosphere Reserve and Seaflower Marine Protected Area). See Annex 58: Commander of A.R.C. Caldas, Protest Attestation No. 027, 9 May 2014; Annex 97: Photos, Event "Pescasa 35" 9 May 2013; Annex 98: Video, Event "Pescasa 35", 9 May 2013.

394 Latitude 14º46.2N; Longitude 81º45.6W (Seaflower Biosphere Reserve and Seaflower Marine Protected Area). See Annex 43: Colombian Navy, Communication No. 678, 5 Oct. 2013; Annex 107: Photos Event "Pescasa 35", 5 Oct. 2013.

8.19. A second series of incidents reported during the relevant period concerns the Nicaragua vessel "Miss Sofia". According to the records of the Colombian Navy:

(1) On 4 July 2013, the Colombian maritime patrol aircraft A.R.C. "801" detected the "Miss Sofia" during a routine flight survey. The vessel was at Latitude 14°50'3"N, Longitude 81º45'0"W, in the Seaflower Biosphere Reserve and Seaflower Marine Protected Area, with auxiliary boats conducting predatory fishing operations with divers;[395]

(2) Again, on 4 September 2013, the "Miss Sofia" was reported by the same patrol aircraft and the A.R.C. "San Andrés" in the Luna Verde bank[396] illegally fishing lobster with divers;

(3) On 17 November 2013, the Colombian Frigate A.R.C. "Almirante Padilla" found two Nicaraguan fishermen drifting in a canoe type boat (*cayuco*) equipped with four scuba tanks and one regulator, clearly for illegal fishing,

[395] Annex 39: Colombian Navy, Communication No. 1693, 21 Aug. 2013; Annex 99: Video, Event "Miss Sofia", 4 July 2013.

[396] Latitude 14º56.1N; Longitude 81º50.0W (Seaflower Biosphere Reserve and Seaflower Marine Protected Area). See Annex 40: Colombian Navy, Chief of Naval Operations Summary Report, 24 Aug. 2013 and 4 Sep. 2013; Annex 41: Colombian Navy, Communication No. 427, 13 Sep. 2013; Annex 105: Photo, Event "Miss Sofía", 4 Sep. 2013.

and without any maritime safety equipment. [397] It was the frigate's duty to rescue them. Since the fishermen stated to be fishing with the Nicaraguan flagged vessel "Miss Sofia", the Colombian Navy then tried to contact the said vessel several times, with no success. The Colombian Navy had therefore, with the assistance of the Nicaraguan Naval Force, no other solution than to look for another vessel to which the two fishermen could be delivered. Finally, on 18 November 2013 they were rendered to another Nicaraguan fishing vessel, the "Caribean Star". Noteworthy is the fact that Nicaragua fully endorsed the activities of the "Miss Sofia" by presenting in its Memorial the event of November 2013 in an erroneous manner, claiming that it was Colombia, not the "Miss Sofia", which acted wrongfully.[398]

8.20. The repeated actions of the Nicaraguan vessel "Capt. Charly" constitute a third series of incidents that occurred between 19 November 2012 and 27 November 2013. What emerges from the Navy reports is as follows:

(1) On 23 July 2013, the Colombian ship A.R.C. "Caldas" and the helicopter A.R.C. "203" detected the Nicaraguan

[397] Latitude 14º45.6N; Longitude 81º46.6W (Seaflower Biosphere Reserve and Seaflower Marine Protected Area). See Annex 53: Colombian Navy, Communication No. 304, 20 Nov. 2013; Annex 52: Attestation of Good Treatment of the Crew, 17 Nov. 2013; Annex 112: Video, Event "Miss Sofía", 17 Nov. 2013; Annex 111: Photos, Event "Miss Sofia", 17 Nov. 2013.

[398] Memorial of Nicaragua, para. 2.30.

fishing vessel "Capt. Charly" undertaking predatory fishing with divers, using four canoe type boats (*cayucos*), in the Luna Verde bank.[399] During overflights performed by the A.R.C. "203", communication *via* VHF Channel 16 was established. The captain of the Nicaraguan vessel threatened that "if the units of the Navy again fly over, the crew would proceed to shoot toward the helicopter". The A.R.C. "Caldas" invited it to suspend his illegal fishing. Yet later, the Colombian ship detected the Nicaraguan flagged fishing vessel performing tasks of predatory fishing with divers again. It renewed its invitation to refrain from this type of fishing. However, no response was received. The Colombian Captain subsequently lodged a protest before the Port of San Andrés underlying the inadmissibility of this practice due to the permanent ban on fishing this species in the Seaflower Marine Protected Area;

(2) One month later, on 24 August 2013, the same fishing vessel was located by the patrol aircraft A.R.C. "801" at Latitude 014º51"2'N, Longitude 081º43"1'W, in the Seaflower Biosphere Reserve and Seaflower Marine Protected Area, once more fishing lobster with divers.[400]

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[399] Latitude 14º30"1'N; Longitude 81º58"1' (Seaflower Biosphere Reserve and Seaflower Marine Protected Area). See Annex 36: Colombian Navy, Chief of Naval Operations Summary Report, 23 Jul. 2013. [Note: Due to a typing error the name of the fishing vessel appears in the Report as "Capt. Charlie" instead of "Capt. Charly"].

[400] See Annex 40: Colombian Navy, Chief of Naval Operations Summary Report, 24 Aug. 2013 and 4 Sep. 2013; Annex 41: Colombian

8.21. Seven other incidents have been reported during the relevant period, involving the Nicaraguan vessels "Doña Emilia", "Lady Dee III", "Diego Armando", "Marco Polo", "Capt. Maddox", "Miss Joela", "Al John". As reported by the Colombian Navy:

(1) On 3 August 2013, the Nicaraguan fishing vessel "Doña Emilia" was spotted by the Colombian patrol Aircraft A.R.C. "801" in the Luna Verde area,[401] together with canoe type boats (*cayucos*), illegally fishing with divers and scuba tanks;

(2) On 24 August 2013, the Nicaraguan fishing vessel "Lady Dee III" was observed by the same Colombian patrol aircraft while it was fishing lobsters with divers in the Luna Verde area;[402]

Navy, Communication No. 427, 13 Sep. 2013; Annex 104: Video, Event "Capt. Charly", 24 Aug 2013.

[401] Latitude 14º48.4N; Longitude 81º53.5W (Seaflower Biosphere Reserve and Seaflower Marine Protected Area). See Annex 37: Colombian Navy, Communication No. 375, 6 Aug. 2013; Annex 101: Video, Event "Doña Emilia", 3 Aug. 2013; Annex 100: Photos Event, "Doña Emilia", 3 Aug. 2013.

[402] Latitude 14º 53"2'N; Longitude 81º39"5'W (Seaflower Biosphere Reserve and Seaflower Marine Protected Area). See Annex 40: Colombian Navy, Chief of Naval Operations Summary Report, 24 Aug. 2013 and 4 Sep. 2013; Annex 41: Colombian Navy, Communication No. 427, 13 Sep. 2013; Annex 103: Video, Event "Lady Dee III", 24 Aug 2013.

(3) On 5 October 2013, the Colombian A.R.C. "Caldas" noticed in the Luna Verde area[403] that the Nicaraguan fishing vessel "Diego Armando G", with 72 persons on board, was conducting predatory fishing operations with divers, six canoe type boats (*cayucos*) carrying on board four crew and one compressor, and one motorboat. The Colombian ship established contact *via* VHF, to inform the fishing vessel that she was conducting illegal fishing activities in the natural protected area of the Seaflower Biosphere Reserve. The Captain of the "Diego Armando G" answered that he was authorized to perform this activity by the Nicaraguan Government, and said he would continue this activity under authorization of his Government;

(4) On 9 October 2013, the Colombian ship A.R.C. "20 de Julio" reported that in the Luna Verde bank[404] the Nicaraguan fishing vessel "Marco Polo", with approximately 45 persons on board, together with a fiberglass boat of 26 feet and a 75HP engine, and 12 canoe type boats (*cayucos*) with three crewmembers in each, was performing predatory fishing operations with divers. The Nicaraguan vessel established communication by VHF

[403] Latitude 14º50"6' N; Longitude 81º42"6'W (Seaflower Biosphere Reserve and Seaflower Marine Protected Area). See Annex 42: Colombian Navy, Communication No. 677, 5 Oct. 2013; Annex 106: Photo, Event "Diego Armando G.", 5 Oct. 2013.

[404] Latitude 14º47"0'N; Longitude 81º46"0'W (Seaflower Biosphere Reserve and Seaflower Marine Protected Area). See Annex 45: Colombian Navy, Communication No. 059, 16 Oct. 2013; Annex 108: Photo, Event "Marco Polo", 9 Oct. 2013.

channel 16 with the A.R.C. "20 de Julio", calling upon the unit to stay away because her fishermen were fishing with divers;

(5) On 23 October 2013, the Colombian unit A.R.C. "Independiente" observed in the Luna Verde bank[405] that the Nicaraguan fishing vessel "Capt. Maddox" was carrying out predatory fishing activities with divers;

(6) The same day, the Nicaraguan fishing vessel "Miss Joela" was also reported by the A.R.C. "Independiente" carrying out similar activities in the same area;[406]

(7) On 26 November 2013, the Colombian A.R.C. "Almirante Padilla" detected in the area of Luna Verde[407] that the Nicaraguan fishing vessel "Al John", overcrowded and with scuba tanks and other diving gear on deck, was carrying out illegal fishing activities. The A.R.C. called the vessel *via* VHF Channel 16 in order to inform it that she was conducting predatory fishing activities in a protected area, but the vessel did not answer.

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405 Latitude 14º54.0N; Longitude 81º41.3W (Seaflower Biosphere Reserve and Seaflower Marine Protected Area). See Annex 48: Colombian Navy, Communication No. 202, 29 Oct. 2013; Annex 109: Photos, Event "Capt. Maddox", 23 Oct. 2013.

406 Latitude 14º52"0'N; Longitude 81º41"0'W (Seaflower Biosphere Reserve and Seaflower Marine Protected Area). See Annex 47: Colombian Navy, Communication No. 201, 29 Oct. 2013; Annex 110: Photos, Event "Miss Joela", 23 Oct. 2013.

407 Latitude 14º33"0'N; Longitude 81º54"6'W (Seaflower Biosphere Reserve and Seaflower Marine Protected Area). See Annex 55: Colombian Navy, Communication No. 2572, 12 Dec. 2013; Annex 54: Colombian Navy, Chief of Naval Operations Summary Report, 26 Nov. 2013.

8.22. The events presented above are only a selection of the destructive and illegal behaviour of a number of Nicaraguan vessels following the 2012 Judgment. This pattern is still ongoing. Far from decreasing, its intensity has remained unchanged, if not increased since the critical date. Nicaragua's international responsibility is engaged for having failed to exercise due diligence to control and prevent predatory activities of Nicaraguan fishing vessels that threaten the marine environment of the Southwestern Caribbean Sea as well as the habitat of the Raizales and other inhabitants of the Archipelago.

8.23. What is characteristic of the events discussed above is that they involve a number of more or less the same Nicaraguan vessels acting repeatedly under the protection of the Nicaraguan flag. Nicaragua was not only fully aware of these activities, but also consistently declined, and continues to decline, to intervene in order to halt the destructive practices of its fishing vessels. This has been taken by Nicaraguan fishermen as an authorization to continue to carry on their practices, not only during the relevant period, but also after 27 November 2013 as the responses from the Nicaraguan vessels mentioned above show.

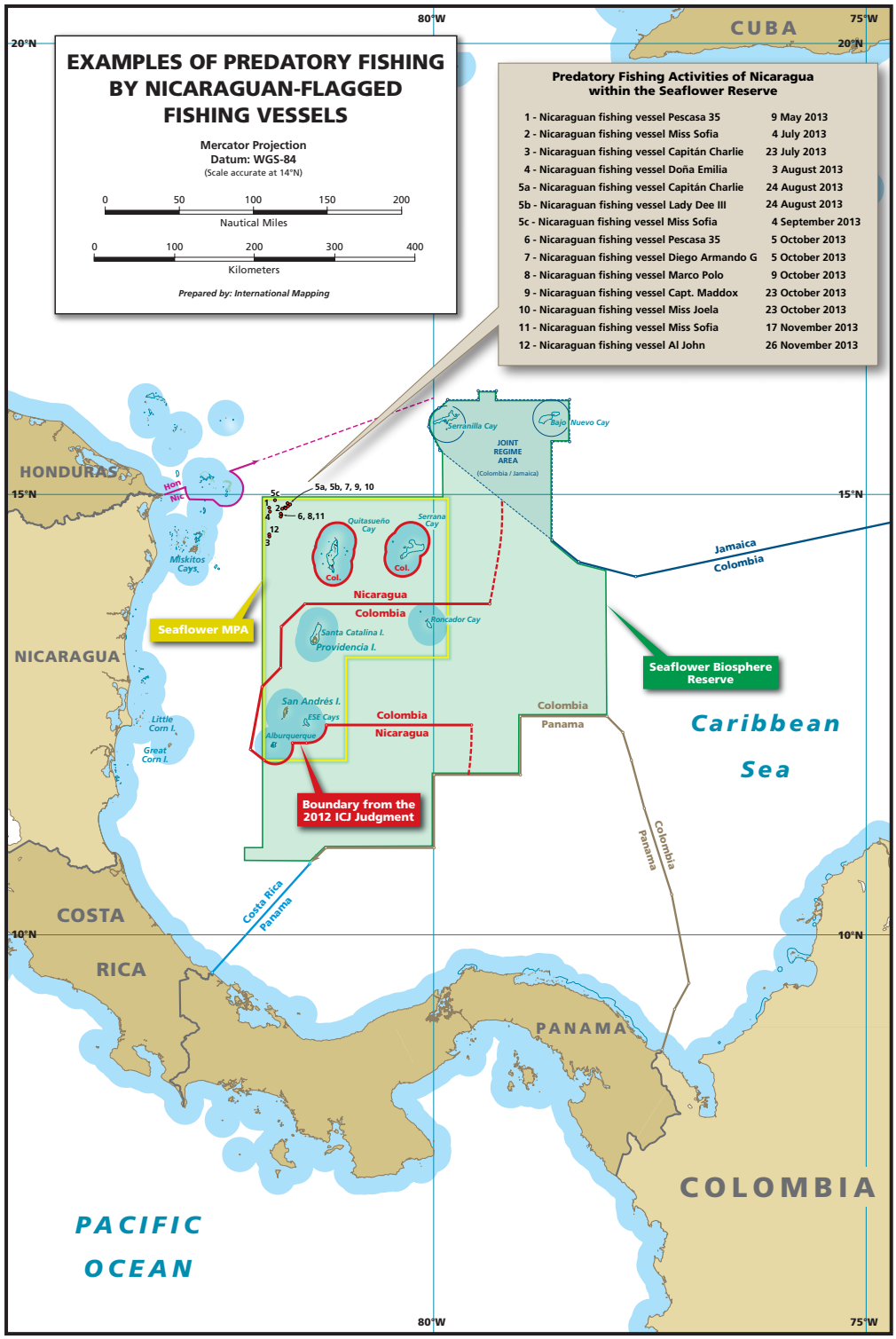
EXAMPLES OF PREDATORY FISHING BY NICARAGUAN-FLAGGED FISHING VESSELS
Mercator Projection
Datum: WGS-84
(Scale accurate at 14°N)
0 50 100 150 200
Nautical Miles
0 100 200 300 400
Kilometers
Prepared by: International Mapping
Predatory Fishing Activities of Nicaragua within the Seaflower Reserve
1 - Nicaraguan fishing vessel Pescasa 35 9 May 2013
2 - Nicaraguan fishing vessel Miss Sofia 4 July 2013
3 - Nicaraguan fishing vessel Capitán Charlie 23 July 2013
4 - Nicaraguan fishing vessel Doña Emilia 3 August 2013
5a - Nicaraguan fishing vessel Capitán Charlie 24 August 2013
5b - Nicaraguan fishing vessel Lady Dee III 24 August 2013
5c - Nicaraguan fishing vessel Miss Sofia 4 September 2013
6 - Nicaraguan fishing vessel Pescasa 35 5 October 2013
7 - Nicaraguan fishing vessel Diego Armando G 5 October 2013
8 - Nicaraguan fishing vessel Marco Polo 9 October 2013
9 - Nicaraguan fishing vessel Capt. Maddox 23 October 2013
10 - Nicaraguan fishing vessel Miss Joela 23 October 2013
11 - Nicaraguan fishing vessel Miss Sofia 17 November 2013
12 - Nicaraguan fishing vessel Al John 26 November 2013
CUBA
HONDURAS
NICARAGUA
COSTA RICA
PANAMA
COLOMBIA
PACIFIC OCEAN
Caribbean Sea
JOINT REGIME AREA
(Colombia / Jamaica)
Serranilla Cay
Bajo Nuevo Cay
Quitasueño Cay
Serrana Cay
Col.
Miskitos Cays
Santa Catalina I.
Providencia I.
Roncador Cay
San Andrés I.
ESF Cays
Albuquerque
Little Corn I.
Great Corn I.
Nicaragua
Colombia
Jamaica
Colombia
Colombia
Panama
Costa Rica
Panama
Seaflower MPA
Seaflower Biosphere Reserve
Boundary from the 2012 ICJ Judgment
80°W
75°W
20°N
15°N
10°N

Figure 8.2

8.24. The most illustrative case in this respect is the grave incident of February 2016, depicted in **Figure 8.3**, during which not less than four Nicaraguan flagged vessels, including the well-known "Miss Sofía", "Doña Emilia", "Capitán Charlie", and the "Lady Prem", were found in Colombia's territorial sea near Serrana, carrying out IUU fishing. After noticing the presence of the Colombian Navy, these vessels immediately left the area, leaving behind 73 fishermen, and abandoning 34 boats, 152 scuba tanks, 24 masks, 34 harnesses for scuba tanks, 26 pairs of fins, 30 diving regulators, 69 knives, 31 hammers, 35 hooks for fishing and 100 kilos of Queen Conch.[408] While the Court does not have jurisdiction to rule on a post-critical date event like this, Nicaragua's continued failure to live up to its obligations is striking.

[408] See Annex 60: Colombian Navy, Communication No. 20160042230059101, 9 Feb 2016; Annex 26: Note Verbale No. S-DISTD-16-013262 from the Ministry of Foreign Affairs of Colombia to the Embassy of Nicaragua in Bogotá, 10 February 2016; Annex 27: Note Verbale No. MRE/VM-AJ/0079/02/16 from the Ministry of Foreign Affairs of Nicaragua to the Ministry of Foreign Affairs of Colombia, 11 February 2016; Annex 112: Photos, Event "Doña Emilia", "Lady Prem", "Miss Sofia" and "Capitán Charlie", 8 Feb 2013. [Note: Due to a typing error the name of the fishing vessel appears in the Report as "Capt. Charlie" instead of "Capt. Charly"]

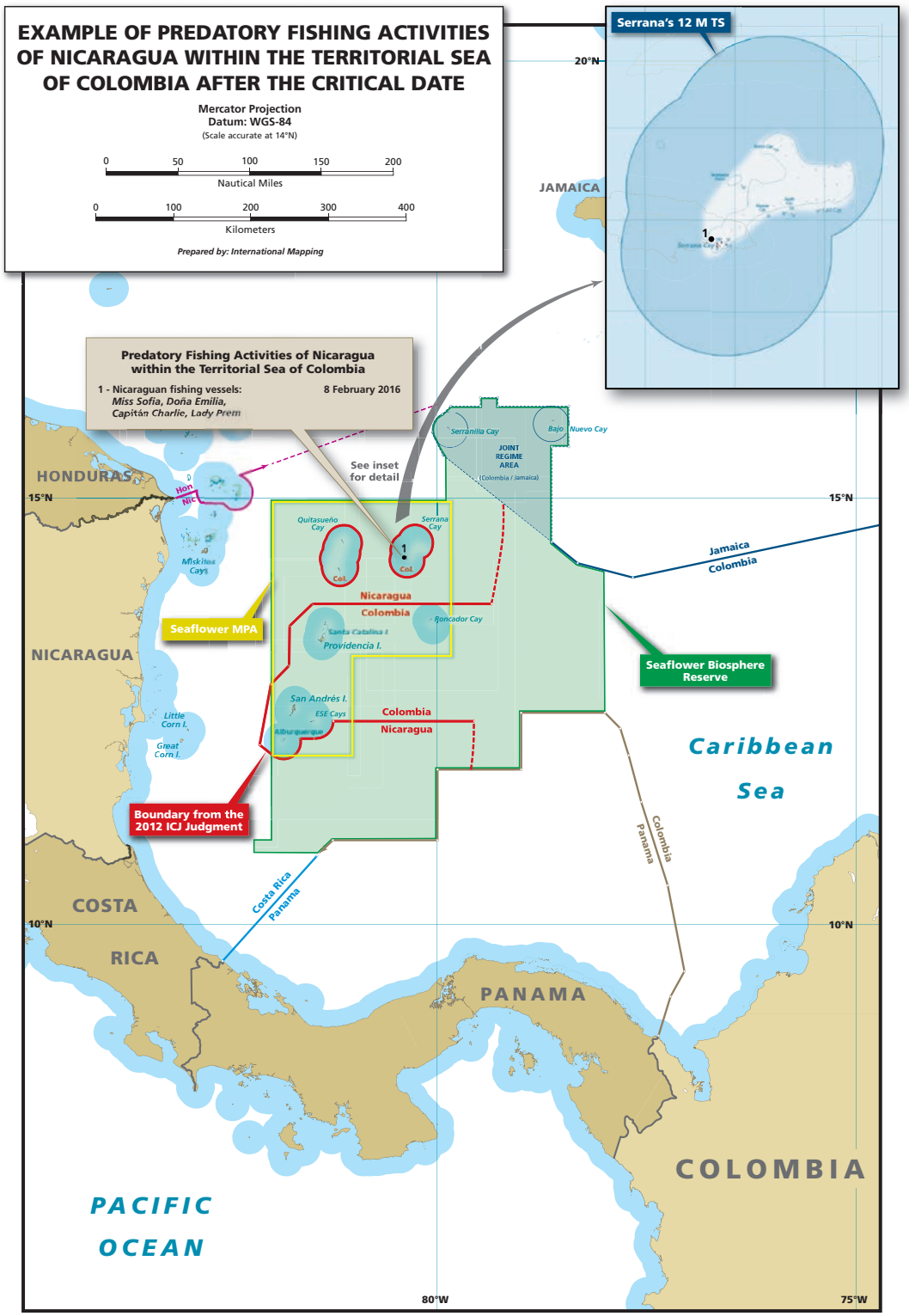
EXAMPLE OF PREDATORY FISHING ACTIVITIES OF NICARAGUA WITHIN THE TERRITORIAL SEA OF COLOMBIA AFTER THE CRITICAL DATE
Mercator Projection
Datum: WGS-84
(Scale accurate at 14°N)
0 50 100 150 200
Nautical Miles
0 100 200 300 400
Kilometers
Prepared by: International Mapping
Serrana's 12 M TS
Predatory Fishing Activities of Nicaragua within the Territorial Sea of Colombia
1 - Nicaraguan fishing vessels: Miss Sofia, Doña Emilia, Capitán Charlie, Lady Prem
8 February 2016
See inset for detail
JAMAICA
HONDURAS
NICARAGUA
COSTA RICA
PANAMA
COLOMBIA
Caribbean Sea
PACIFIC OCEAN
JOINT REGIME AREA
(Colombia / Jamaica)
Serranilla Cay
Bajo Nuevo Cay
Quitasueño Cay
Serrana Cay
Cet
Mískitos Cays
Nicaragua
Colombia
Roncador Cay
Santa Catalina I.
Providencia I.
San Andrés I.
ESE Cays
Albuquerque
Little Corn I.
Great Corn I.
Seaflower MPA
Seaflower Biosphere Reserve
Boundary from the 2012 ICJ Judgment
Jamaica
Colombia
Colombia
Panama
Costa Rica
Panama
20°N
15°N
10°N
80°W
75°W

Figure 8.3

8.25. All these events confirm the well-founded nature of Colombia's two counter-claims. They are concrete evidence of Nicaragua's failures under customary international law to preserve and protect the environment and to exercise due diligence.

8.26. In the sections that follow, Colombia will address first, the failures upon which the first counter-claim is based – that is, Nicaragua's violation of its duty of due diligence to protect and preserve the marine environment of the Southwestern Caribbean Sea – and secondly, the failures upon which Colombia's second counter-claim is based – that is, Nicaragua's violation of its duty of due diligence to prevent infringements of the right of the inhabitants of the San Andrés Archipelago, in particular the Raizales, to benefit from a healthy, sound and sustainable habitat within the Southwestern Caribbean Sea.

D. Nicaragua's Violation of its Duty of Due Diligence to Protect and Preserve the Marine Environment of the Southwestern Caribbean Sea

8.27. Two particular violations of customary international law by Nicaragua may be identified here. The first violation concerns Nicaragua's failure to prevent Illegal, Unreported and Unauthorized (IUU) fishing within the relevant maritime zones of the Southwestern Caribbean Sea (Section 1). The second violation relates to Nicaragua's failure to comply with the duty of due diligence to prevent pollution of the Southwestern Caribbean Sea (Section 2).

(1) NICARAGUA'S FAILURE TO PREVENT ILLEGAL, UNREPORTED AND UNAUTHORIZED (IUU) FISHING

8.28. Fishing has historically played a major role in the Southwestern Caribbean Sea. Fully aware of this, Caribbean States have adopted numerous measures for ensuring the sustainable management of fishing resources, and particularly of endangered species. The most harvested species in the maritime area appertaining to Colombia and Nicaragua, more specifically in the Luna Verde / Cape bank, and around Quitasueño and Serrana, are the Queen Conch and the Caribbean Spiny Lobster.

8.29. The Queen Conch is listed under Appendix II of the CITES Convention, to which both Colombia and Nicaragua are parties. Appendix II lists species that are not necessarily now threatened with extinction, but that may become so unless exploitation is closely controlled. For this reason, only the Conference of the Parties to the Convention can decide upon the removal of a species that is listed under Annex II. Queen Conch fishing has also received increased attention at the regional level.[409]

[409] One important step has been the Declaration of Panama City, which was adopted by the Working Group on Queen Conch of the Caribbean Fisheries Management Council (CFMC), the Organization for the Fisheries and Aquaculture Sector of the Central American Isthmus (OSPESCA), the Western Central Atlantic Fishery Commission (WECAFC) and the Caribbean Regional Fisheries Mechanism (CRFM). See: Declaration of Panama City, CFMC/OSPESCA/WECAFC/CRFM Working Group on Queen Conch, Panama City, 23-25 October 2012, Available at: ftp://ftp.fao.org/FI/DOCUMENT/news/QCWG/Declaration_QCWG_Eng_adopted.pdf. (Last visited: 10 Nov 2016); WECAFC members, including Colombia and Nicaragua, have further adopted a Regional Queen Conch

8.30. The Caribbean Spiny Lobster, for its part, is recognized as a species that could rapidly become endangered.[410] Even though

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Fisheries Management and Conservation Plan, including recommendations as to the adoption of stricter regulations on autonomous diving techniques, and regional cooperation in coordinated patrolling "as many countries of the region lack the resources to enforce their maritime space". See: M.C. Prada, R. S. Appeldoorn, Draft Regional Queen Conch Fisheries management and Conservation Plan, CFMC/WECAFC/OSPESCA/CRFM/CITES, June 2015, p. 8, Available at:
http://www.fao.org/fi/static-media/MeetingDocuments/WECAFC16/Ref20e.pdf (Last visited: 10 Nov 2016); Support for the Regional Plan has recently been reiterated by the Sixteenth WECAFC Meeting, Guadeloupe, 20-24 June 2016. See: Western Central Atlantic Fishery Commission (2016) Recommendation WECAFC/15/2014/3 On the Regional Plan for the Management and Conservation of Queen Conch in the WECAFC Area, 2016. Available at:
http://www.wecafc.org/en/documents/category/17-recommendations.html?download=76:wecafc-15-2014-3 (Last visited 10 Nov 2016) and, Western Central Atlantic Fishery Commission, Recommendation WECAFC/16/2016/1, On the Regional Plan for the Management and Conservation of Queen Conch in the WECAFC Area – addendum to Recommendation WECAFC/15/2014/3 p. 1-2. Available at: http://www.fao.org/3/a-bo087e.pdf (Last visited: 10 Nov 2016). These efforts were endorsed at the universal level at the Sixteenth meeting of the Conference of the Parties (COP) to CITES, in COP Decision 16.141 to 16.146. See: Sixteenth meeting of the Conference of the Parties, Decision 16.141-16.146, Regional cooperation on the management of and trade in the Queen Conch (*Strombus gigas*) pp. 33-34 Available at: https://www.cites.org/sites/default/files/eng/dec/valid16/E16-Dec.pdf (Last visited 10 Nov 2016).

[410] Several FAO Reports have long voiced concern that Spiny Lobster is being fully or overexploited throughout much of its range. It is noteworthy that already back in 2006, at the Fifth Regional Workshop on the Assessment and Management of Caribbean Spiny Lobster (Mérida, Yucatán, Mexico, 19-29 September 2006), Nicaragua was listed among the States whose national populations of Spiny Lobster is overexploited. See: FAO Fisheries Report No. 826 FIE/R826 (Bi), Fifth Regional Workshop on the Assessment and Management of Caribbean Spiny Lobster, Mérida, Yucatán, Mexico, 19-29 September 2006, Available at:
ftp://ftp.fao.org/docrep/fao/010/a1518b/a1518b00.pdf (Last visited 10 Nov 2016).
See also: FAO Fisheries Report No. 788 SLAC/R788 (Tri), Report of the Twelfth Session of the Commission and of the Ninth Session of the Committee for the Development and Management of Fisheries in the Lesser Antilles, Port of Spain, Trinidad and Tobago, 25 - 28 October 2005. Available at:

Nicaragua is not party to the SPAW Protocol to the Cartagena Convention, Spiny Lobster is listed in Annex III of this protocol. Several other measures have been adopted for the sustainable management of Spiny Lobster fishing in the regional context of the Caribbean. For example, the Organization for the Fisheries and Aquaculture Sector of the Central American Isthmus (OSPESCA), to which Nicaragua is a member, adopted Regulation OSP-02-09 in 2009.[411] This regulation provides for a total ban on catching through diving, the starting period of which has been left undefined.

8.31. Despite regional efforts to protect the Queen Conch and the Caribbean Spiny Lobster, Nicaragua has shown no willingness to preserve those vulnerable fishing resources. For instance, according to the 2014 Regional Queen Conch Fisheries Management and Conservation Plan, 1.650 Nicaraguan fishermen are engaged in fishing Queen Conch, working in up to 70 canoe type boats (*cayucos*) and 22 industrial vessels. With such an "army" of overcrowded fishing vessels, Nicaragua is the

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http://www.fao.org/3/a-a0285t.pdf (Last visited 10 Nov 2016) and, FAO Fisheries and Aquaculture Report SLC/FIPS/SLM/R1095 (Bi), Report of the First Meeting of the OSPESCA/WECAFC/CRFM/CFMC Working Group on Caribbean Spiny Lobster, Panama City, Panama, 21 – 23 October 2014. Available at:
http://www.fao.org/3/a-i4860b.pdf (Last visited 10 Nov 2016)

411 Annex 84: Central American Integration System, Regional Unit for the Fisheries and Aquaculture, Regulations OSP-02-09 on Regional Management of Caribbean Lobster Fisheries (*Panulirus argus*), 21 May 2009, Art. 13. Support for Regulation OSP-02-09 was also expressed by the Sixteenth WECAFC Meeting (Guadeloupe, 20-24 June 2016). See: Western Central Atlantic Fishery Commission (2016), Recommendation WECAFC/16/2016/2 on Spiny Lobster management and conservation in the WECAFC area, p. 3-5. Available at:
http://www.fao.org/3/a-bo087e.pdf. (Last visited: 10 Nov 2016).

second most important producer of the species, with 640 metric tons in 2013. Up to 90 percent of this production is exported, resulting in an annual income in 2013 of some 9 million US dollars.[412]

8.32. Nicaragua has also indulged in this pattern of over-exploitation after the critical date in this case. For the years 2015 and 2016, the Nicaraguan Institute of Fisheries and Aquaculture (INPESCA) adopted Executive Resolutions PA-No. 001-2015 of 6 January 2015 and PA-No. 001-2016 of 4 January 2016, that fix an export quota of 589,670 kg, which corresponds to three million nine hundred thousand (3,900,000) specimens of Queen Conch. Additionally, this legislation provides an additional quota for the extraction of Queen Conch aimed for scientific research of 45,359 kg, equivalent to 45.36 metric tons.[413] This shows that the pre-critical date events on which Colombia's counter-claims are based were not isolated occurrences.

8.33. Nicaragua has also been involved in predatory heavy Spiny Lobster fishing by means of diving. In 2007, with the enactment of Law No. 613, Nicaragua formally banned commercial fishing of all species through diving, both in the

[412] M. C. Prada, R. S. Appeldoorn, Draft Regional Queen Conch Fisheries management and Conservation Plan, CFMC/WECAFC/OSPESCA/CRFM/CITES, June 2015, p. 23 Available at: http://www.fao.org/fi/static-media/MeetingDocuments/WECAFC16/Ref20e.pdf (Last visited 10 Nov 2016).

[413] Annex 14: Nicaraguan Institute for Fishing and Aquaculture – INPESCA, Executive Resolution PA-No. 001-2015 and Annex 15: Nicaraguan Institute for Fishing and Aquaculture – INPESCA, Executive Resolution PA-No. 001-2016.

Caribbean Sea and the Pacific Ocean. The ban, as established by Article 16, was to become enforceable three years after the enactment of the Law, i.e. by 2010. However, this time-limit was twice extended, first by Law No. 753 of 2011and then by Law No. 836 of 2013, the latter establishing 26 March 2016 as the starting date for the prohibition. Astonishingly, yet another legislative measure enacted subsequently by Nicaragua's National Assembly in 2016 (Law No. 923 of that year) eventually removed altogether a specific date for the enforcement of the provision.[414] In other words, Nicaragua has simply continued to carry out its policy of exploiting Spiny Lobster fishing by means of diving. Nothing could better attest to this intention than the fact that, as reported by the OSPESCA/WECAFC/CRFM/CFMC Working Group on Caribbean Spiny Lobster: "Nicaragua have total allowable catches (TACs) for Caribbean spiny lobster, and Nicaragua suspended them in 2012 after gaining territorial rights over a disputed area in the Atlantic allowing the country to expand its fishing zone."[415]

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414 Annex 10: National Assembly of the Republic of Nicaragua, Law No. 613 of 7 February 2007, on the Protection and Safety of Persons Dedicated to the Activity of Diving; Annex 11: National Assembly of the Republic of Nicaragua, Law No. 753 of 22 February 2011, on the Protection and Safety of Persons Dedicated to the Activity of Diving; Annex 12: National Assembly of the Republic of Nicaragua, Law No. 836 of 13 March 2013, Amending and Adding Law No. 613 of 2007; Annex 16: National Assembly of the Republic of Nicaragua, Law No. 923 of 1 March 2016, Amending Article 16 of Law No. 613 of 2007.

415 FAO Fisheries and Aquaculture Report SLC/FIPS/SLM/R1095 (Bi), Report of the First Meeting of the OSPESCA/WECAFC/CRFM/CFMC Working Group on Caribbean Spiny Lobster, Panama City, Panama, 21 – 23 October 2014, p.6, para.32. Available at: http://www.fao.org/3/a-i4860b.pdf. (Last visited 10 Nov 2016).

8.34. This conduct speaks volumes as to how Nicaragua interprets the 2012 Judgment: namely, as a license to engage in predatory fishing practices that harm the marine environment and exhaust fishing resources under the extraordinary pretext that, prior to that decision, Colombia had "depriv[ed] Nicaragua of its rights to benefit from the full enjoyment of its rich fishing areas."[416] In short, Nicaragua explicitly suggests that it wants "the full enjoyment of its rich fishing areas" without any need to observe its corresponding customary international law obligations.

8.35. Nothing could be more at odds with the spirit of regional efforts taken in the Caribbean context to conserve the natural resources of the area. The failure of Nicaragua to adopt appropriate legislative and administrative measures for the protection of the living resources of the Southwestern Caribbean Sea itself constitutes a violation of the duty to exercise due diligence with respect to the protection and preservation of the marine environment. However, it is not this aspect that Colombia wishes to stress in the context of the present sub-section. What is even more serious is Nicaragua's failure to prevent or control IUU fishing within the Southwestern Caribbean Sea. This failure is in clear violation of customary international law with respect to the conservation of living resources. As noted by ITLOS, "[T]he conservation of the living resources of the sea is an element in the protection and

[416] Memorial of Nicaragua, para. 2.22.

preservation of the marine environment".[417] And to recall what the Court said in the *Pulp Mills* case, due diligence not only comprises adopting appropriate rules and measures, it requires "a certain level of vigilance in their enforcement and the exercise of administrative control".[418]

8.36. As shown by the events described above, Nicaragua not only has failed to prevent its fishermen and vessels from engaging in illegal fishing activities; its policy has been to justify these activities under the pretext that it is Colombia, not Nicaragua, that acts wrongfully. In its Memorial, on the basis of a systematically erroneous presentation of the facts, Nicaragua claims that "Colombia has regularly harassed Nicaraguan fishermen in Nicaraguan waters, particularly in the rich fishing ground known as 'Luna Verde'".[419] Quite apart from the fact that it has been Nicaragua that has harassed the fishermen of the Archipelago in accessing and exploiting their traditional fishing grounds,[420] with respect to a number of "incidents" on which Nicaragua relies, Colombia did nothing more than inform Nicaraguan fishermen that they were acting illegally. Yet, Nicaragua now claims that it is Colombia, not the Nicaraguan fishing vessels, that have acted illegally.[421] This is totally disingenuous. What is clear is that, by adopting such a posture,

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417 *Southern Bluefin Tuna (New Zealand* v. *Japan; Australia* v. *Japan), Provisional Measures, Order of 27 August 1999*, para. 70.

418 *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010*, pp. 79-80, para. 197.

419 Memorial of Nicaragua, para. 2.28.

420 See paras. 9.18-9.23 *infra*.

421 Memorial of Nicaragua, paras. 2.30, 2.32, 2.36 and 2.37.

Nicaragua has demonstrated its full support for and endorsement of the predatory activities mentioned above.

8.37. These activities squarely qualify as IUU fishing under universally accepted definitions.[422] There is no need to expound on the obligation that Nicaragua had towards Colombia for the events of IUU fishing that occurred within the territorial sea of

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[422] See the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU) (Available at: ftp://ftp.fao.org/docrep/fao/012/y1224e/y1224e00.pdf. Last visited 10 Nov 2016), endorsed by the 120th Session of the FAO Council on 2 June 2001 as well as by WECAFC countries in the Castries Declaration on Illegal, Unreported and Unregulated Fishing of 28 July 2010. It defines IUU fishing as follows:

> "3.1 Illegal fishing refers to activities:
>
> […]
>
> 3.1.2 Conducted by vessels flying the flag of States that are parties to a relevant regional fisheries management organization but operate in contravention of the conservation and management measures adopted by that organization and by which the States are bound, or relevant provisions of the applicable international law; or
>
> 3.1.3 In violation of national laws or international obligations, including those undertaken by cooperating States to a relevant regional fisheries management organization.
>
> 3.2 Unreported fishing refers to fishing activities:
>
> […]
>
> 3.2.2 Undertaken in the area of competence of a relevant regional fisheries management organization which have not been reported or have been misreported, in contravention of the reporting procedures of that organization.
>
> 3.3 Unregulated fishing refers to fishing activities:
>
> […]
>
> 3.3.2 In areas or for fish stocks in relation to which there are no applicable conservation or management measures and where such fishing activities are conducted in a manner inconsistent with State responsibilities for the conservation of living marine resources under international law.

Colombia. It is clear that, insofar as Nicaragua failed to take action with respect to these events promptly decried by Colombian authorities, Nicaragua is responsible for having violated its customary law obligation not to tolerate illicit activities within a maritime zone falling under Colombia's sovereignty.

8.38. Nicaragua's responsibility is also engaged for the events that have occurred within areas of the Seaflower Biosphere Reserve and the Seaflower Marine Protected Area, notwithstanding that parts of these areas are situated within Nicaragua's exclusive economic zone. For instance, under the FAO Code of Conduct on Sustainable Fishing, which Nicaragua has fully endorsed both unilaterally and jointly with other Caribbean States, all States have a duty to ensure that "only fishing operations allowed by them are conducted within waters under their jurisdiction and that these operations are carried out in a responsible manner".[423] It follows that Nicaragua has to abide by its obligation regarding IUU fishing regardless of where the events have occurred, whether in its own or in another State's maritime zones. The obligations contained in Articles 8.1.1 and 8.1.5 of the FAO Code of Conduct refer to "All States".

8.39. Nicaragua has itself recognized the obligations incumbent on it in this respect. For example, Nicaragua endorsed the efforts

[423] FAO, Code of Conduct for Responsible Fisheries, Rome, 1995. Available at: http://www.fao.org/3/a-v9878e.pdf (Last visited 10 Nov 2016).

against IUU fishing that Caribbean States have adopted in the context of the Western Central Atlantic Fishery Commission (WECAFC). Consistent with customary international law, the 2010 Castries Declaration on Illegal, Unreported and Unregulated Fishing recognizes the primary responsibility of the flag State for taking "measures to ensure that nationals do not support or engage in IUU fishing".[424] This commitment, which WECAFC members have undertaken towards one another, extends to the entire area under the sovereignty or jurisdiction of a WECAFC member. Insofar as both Nicaragua and Colombia are members of WECAFC, Nicaragua has a specific duty of due diligence to prevent IUU fishing in addition to its customary international law obligation.

8.40. Finally, it is necessary to recall once more the special character of the area in question. The Seaflower area is both a Biosphere Reserve under the MAB program and a Marine Protected Area under the SPAW Protocol. According to Article 10 of the Cartagena Convention: "The Contracting Parties shall, individually or jointly, take all appropriate measures to protect and preserve rare or fragile ecosystems, as well as the habitat of depleted, threatened or endangered species, in the Convention area. To this end, the Contracting Parties shall endeavour to establish protected areas. The establishment of such areas shall

[424] Organisation of Eastern Caribbean States (OECS) Secretariat, Castries Declaration on Illegal, Unreported and Unregulated Fishing, 2nd Special Meeting of the CRFM Ministerial Council, Castries, St Lucia, 28 July 2010. Available at: ftp://ftp.fao.org/FI/DOCUMENT/wecafc/15thsess/ref11e.pdf (Last visited 10 Nov 2016).

not affect the rights of other Contracting Parties and third States. In addition, the Contracting Parties shall exchange information concerning the administration and management of such areas."

8.41. The Seaflower Marine Protected Area implements the object and purpose of Article 10 of the Cartagena Convention. As party to the latter convention, Nicaragua has therefore a general duty to refrain from acting in a way that foreseeably undermines the purposes sought by Article 10. By failing to prevent IUU fishing in the Convention area, Nicaragua failed to abide by this obligation, which is again one of good faith and due diligence. It is true that Article 10 states that the establishment of a protected area by a party to the Convention shall not "affect the rights of other Contracting Parties". It would, however, fly in the face of basic principles of good faith and reasonableness to interpret these rights of other contracting parties as including the right to tolerate IUU fishing within the protected area established by another party based on the provisions of the Cartagena Convention. Given that the Seaflower Biosphere Reserve is also recognized in the context of UNESCO and the MAB Program, this strengthens the customary duty of due diligence incumbent upon Nicaragua.

(2) NICARAGUA'S FAILURE TO PREVENT POLLUTION OF THE SOUTHWESTERN CARIBBEAN SEA

8.42. In addition to its failure to prevent IUU fishing, Nicaragua has failed to exercise due diligence to prevent pollution of the Southwestern Caribbean Sea, as reflected in the Cartagena

Convention and under "applicable international rules and standards"[425].

8.43. The Cartagena Convention provides in its Articles 5 and 6 that:

> "**Article 5 Pollution from ships**
>
> The Contracting Parties shall take all appropriate measures to prevent, reduce and control pollution of the Convention area caused by discharges from ships and, for this purpose, to ensure the effective implementation of the applicable international rules and standards established by the competent international organization.
>
> **Article 6 Pollution caused by dumping**
>
> The Contracting Parties shall take all appropriate measures to prevent, reduce and control pollution of the Convention area caused by dumping of wastes and other matter at sea from ships, aircraft or manmade structures at sea, and to ensure the effective implementation of the applicable international rules and standards."[426]

8.44. However, Nicaragua has not made any efforts to prevent, reduce or control pollution in the area. The events of 16 December 2012, depicted in **Figure 8.4**, concerning the Nicaraguan fishing vessel "Lady Dee I", in particular, infringed customary international law and Articles 5 and 6 of the Cartagena Convention. During the inspection of the "Lady Dee

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[425] Annex 17: Cartagena Convention, Article 5.

[426] Annex 17: Cartagena Convention, Articles 5 and 6; Pollution from ships and pollution caused by dumping is also addressed in the MARPOL Convention and Annexes thereto, to which both Nicaragua and Colombia are parties.

I", officials of Colombia's Navy noted that its crew had plundered the vessel before abandoning it, leaving only waste and approximately 3.000 gallons of oily residues, which Colombia's officials had to remove in order to avoid further environmental damage. Colombia raised this incident through available diplomatic means.[427]

[427] Latitude 15°28.1N, Longitude 80°15.4W (Territorial Sea of the Colombian island of Serrana). See Annex 29: Colombian Navy, Communication No. 101, 22 Dec 2012; Annex 28: Colombian Navy, Communication No. 2175, 17 Dec 2012; Annex 22: Note Verbale No. E-16 from the Embassy of Colombia in Managua to the Ministry of Foreign Affairs of Nicaragua, 14 January 2013; Annex 23: Note Verbale No. MRE/SCPE/014/01/13 from the Ministry of Foreign Affairs of Nicaragua to the Embassy of Colombia in Managua, 14 January 2013; Annex 24: Note Verbale No. MRE/DGAJ//0014//13 from the Embassy of Colombia in Managua to the Ministry of Foreign Affairs of Nicaragua, 17 January 2013.

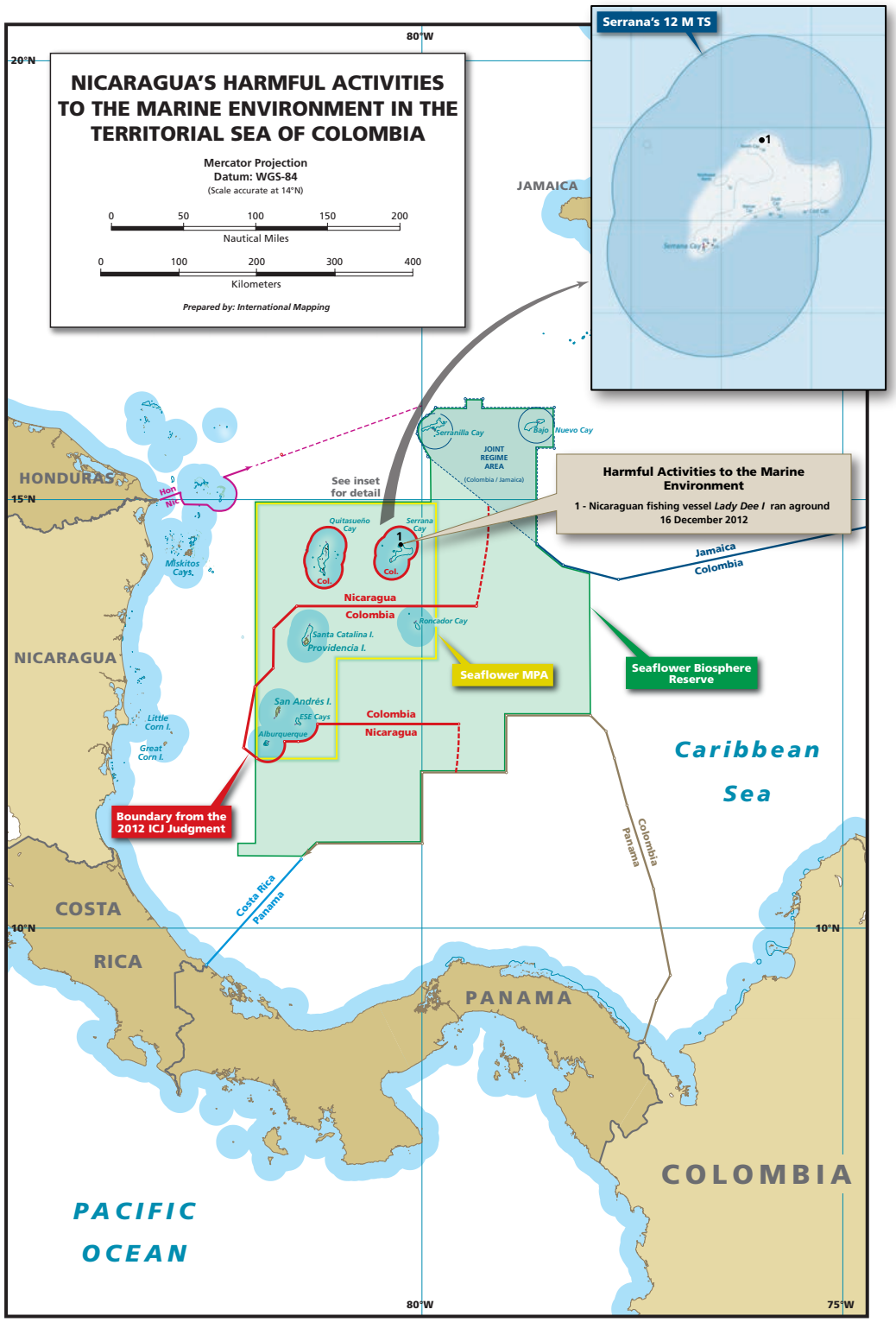
NICARAGUA'S HARMFUL ACTIVITIES TO THE MARINE ENVIRONMENT IN THE TERRITORIAL SEA OF COLOMBIA
Mercator Projection
Datum: WGS-84
(Scale accurate at 14°N)
0 50 100 150 200
Nautical Miles
0 100 200 300 400
Kilometers
Prepared by: International Mapping
Serrana's 12 M TS
1
Harmful Activities to the Marine Environment
1 - Nicaraguan fishing vessel Lady Dee I ran aground 16 December 2012
See inset for detail
JAMAICA
HONDURAS
NICARAGUA
COSTA RICA
PANAMA
COLOMBIA
Caribbean Sea
PACIFIC OCEAN
Serranilla Cay
Bajo Nuevo Cay
JOINT REGIME AREA
(Colombia / Jamaica)
Quitasueño Cay
Serrana Cay
Col.
Nicaragua
Colombia
Roncador Cay
Santa Catalina I.
Providencia I.
Seaflower MPA
Seaflower Biosphere Reserve
San Andrés I.
ESE Cays
Albuquerque
Little Corn I.
Great Corn I.
Miskitos Cays
Boundary from the 2012 ICJ Judgment
Jamaica
Colombia
Costa Rica
Panama
Colombia
Panama
20°N
15°N
10°N
80°W
75°W

Figure 8.4

8.45. The failures by Nicaragua to prevent IUU fishing and pollution of the maritime zones of the Southwestern Caribbean Sea pose important threats to the habitat of depleted, threatened or endangered fishing species and other forms of marine life. They also pose threats to the habitat of the Raizales and other inhabitants of the Archipelago. It is to this latter threat that the next section turns.

E. Nicaragua's Violation of its Duty of Due Diligence To Protect the Right of the Inhabitants of the Archipelago To Benefit from a Healthy, Sound and Sustainable Habitat

8.46. The protection of the marine environment of the Southwestern Caribbean Sea is also crucial for the preservation of the environment of the Archipelago as the habitat of the Raizales. The events discussed above have endangered the habitat of the Raizales and other inhabitants of the Archipelago. This forms an independent breach of Nicaragua's obligations towards Colombia.

8.47. Nicaragua has failed to exercise due diligence under customary international law to "prevent harmful fishing activities and harvesting of vulnerable species" (Section (1)), and has failed to exercise due diligence to prevent the degradation of the marine habitat of the Raizales (Section (2)).

8.48. These wrongful acts are different from those identified under the first counter-claim, where what was at stake was Nicaragua's violation of its duty of due diligence to protect and

preserve the marine environment of the Southwestern Caribbean Sea. Nicaragua's failures identified under the second counter-claim have instead a direct negative impact on the communities, that is the Raizales and the other inhabitants of the Archipelago, in so far as they threaten the right of these peoples to benefit from a healthy, sound and sustainable habitat. Nicaragua's failure to prevent harmful fishing activities has negative consequences on the local population by impairing their access to fishing resources, which are essential to their livelihood and health,[428] "living space" [429] and "quality of life".[430]

(1) NICARAGUA'S FAILURE TO EXERCISE DUE DILIGENCE TO PREVENT HARMFUL FISHING PRACTICES

8.49. Nicaragua has failed to prevent harmful fishing activities in Colombia's territorial waters, as well as in the Seaflower Biosphere Reserve and Marine Protected Area, by allowing the use of destructive fishing methods, including overfishing and fishing with divers and scuba tanks. The uncontrolled use of these materials will inexorably lead to the rapid exhaustion of the resources essential for the well-being and habitat of the

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[428] *Legality of the Threat or Use of Nuclear Weapons Case, Advisory Opinion, I.C.J. Reports 1996 (I)*, pp. 241-242, para. 29; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 41 para. 53.

[429] *Legality of the Threat or Use of Nuclear Weapons Case, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 241-242, para. 29; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 41 para. 53.

[430] *Legality of the Threat or Use of Nuclear Weapons Case, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 241-242, para. 29; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 41 para. 53.

Raizales and the other inhabitants of the Archipelago.

8.50. As explained in Chapter 2, the Seaflower Biosphere Reserve and the Marine Protected Area are crucial to the protection of the habitat and well-being of the Raizales. Harmful fishing activities in this protected area are prohibited by Colombia. It is the duty of Nicaragua to ensure that its vessels also respect these prohibitions. Nicaragua's responsibility stems from it being the flag State or licensor of the vessels that have been involved in the events described earlier in this chapter.

8.51. It has been proven that Nicaraguan fishing vessels have engaged in repeated harmful fishing activities, without any kind of effective control being exercised by Nicaragua. During the relevant period, numerous events constituting excessive and harmful fishing practices occurred, mainly in the Luna Verde area. All these involved Nicaraguan fishing vessels using divers and scuba tanks in disregard for the obligation to protect and preserve the marine environment.

8.52. The protection of the habitat of the Raizal indigenous peoples, which includes their traditional fishing grounds, stems from the need to ensure the continuity of their use of the area's natural resources, which in turn allows them to maintain their way of life. This connection has aptly been stressed by Inter-American Court of Human Rights in the *Sarayaku* case, which found that "the right to use and enjoy the territory would be meaningless for indigenous and tribal communities if that right

were not connected to the protection of natural resources in the territory."[431]

8.53. As was shown in Chapter 2, the Raizales are heavily dependent on their ancestral fishing activities. Insofar as Nicaragua has failed to prevent the predatory fishing activities carried out by Nicaraguan fishing vessels in the traditional fishing grounds of the Raizales, it has also failed to exercise due diligence in preserving their habitat.

(2) NICARAGUA'S FAILURE TO EXERCISE DUE DILIGENCE TO PREVENT THE DEGRADATION OF THE MARINE HABITAT OF THE RAIZALES AND OTHER INHABITANTS OF THE ARCHIPELAGO

8.54. Nicaragua's approach contravenes international law and the need to adopt a preventive and anticipatory approach to the protection of the marine habitat of vulnerable communities. Nicaragua considers that it is enough that President Ortega addressed President Santos' stated concern about the preservation of the Seaflower Marine Biosphere Reserve, which is an essential element of the Raizales' habitat.[432] For example, Nicaragua limits itself to stating that "(o)n 5 December 2012, President Ortega promised that Nicaragua would protect the areas of the original Seaflower Reserve, now located in Nicaragua's exclusive economic zone, as it would the rest of the areas that are now recognized as being part of the Nicaraguan

[431] I/A Court H.R., Case of the *Kichwa Inigenous Peolple of Sarayaku v. Ecuador*, Judgment (Merits and Reparations) 27 June 2012, pp. 36-37, paras. 146-147.

[432] Memorial of Nicaragua, para. 2.57.

maritime areas".[433]

8.55. Nicaragua has acknowledged the need to protect the biodiversity reservoir that constitutes the Seaflower Biosphere Reserve; yet thus far, its promises have been no more than empty words. Compliance with international law is not dependent on mere promises; in particular, where a fragile marine habitat is at stake, international law requires proactive action and not conscientious neglect and feinted ignorance.

8.56. The attitude of Nicaragua within international fora relevant for the protection of the Seaflower Biosphere Reserve shows a lack of due diligence regarding the need to prevent degradation of the marine habitat of the Raizales.

8.57. At its 26th Meeting of 10-14 June 2014, for instance, the International Coordination Council (ICC) of the Man and Biosphere Programme (MAB) encouraged both Nicaragua and Colombia to continue their dialogue to address issues relating to the Seaflower Biosphere Reserve.[434] It is noteworthy that both the Advisory Committee and the ICC stressed the need for both Parties to cooperate in ensuring that any change in the status of the Seaflower Reserve would not entail a lowered level of

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433 Memorial of Nicaragua, para. 2.57.

434 International Co-ordinating Council of the Man and the Biosphere (MAB) Programme, Twenty-sixth session (10-14 June 2014, Paris), Final Report, Document SC-14/CONF.226/15, p. 85. Available at: http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/SC/pdf/SC14-CONF-226-15-MAB-ICC_Final_Report_en_8-7-2014.pdf (Last visited Nov 2016).

environmental protection in the area.

8.58. Nicaragua, however, progressively disengaged from playing an active role in ensuring the Raizales' continued enjoyment of a healthy, sound and sustainable habitat. Particularly telling is Nicaragua's conduct concerning the status of the Seaflower Biosphere Reserve. This issue was the object of discussion in the MAB's Advisory Committee's meeting, held from 14 to 20 March 2014.[435] On that occasion, Nicaragua conceded that it had *no information* about the area that would enable it to establish protective measures and ensure the area's sustainable use, thereby threatening the sustainability of the Raizales' habitat. Nicaragua also noted that it had not taken any decision as to whether it would even maintain the Reserve as part of the MAB Programme.

8.59. Nicaragua has, therefore, failed to demonstrate its commitment to maintain the current level of protection of the Reserve and, by logical consequence, the sustainability of the marine habitat of the Raizales and other inhabitants of the Archipelago. As of 2014, Nicaragua had not participated in discussions within the International Co-ordinating Council (ICC) of the MAB Programme. This continued negligence

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435 International Co-ordinating Council of the Man and the Biosphere (MAB) Programme, Twenty-sixth session, Item 16 of the provisional agenda: Information on Seaflower Biosphere Reserve case, Document SC-14/CONF.226/14. Available at: http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/SC/pdf/SC-14-CONF-226-14-Information_on_Seaflower-eng-rev.pdf (Last visited 10 Nov 2016).

confirms that Nicaragua is not taking any positive steps as required under customary international law to exercise due diligence to prevent the degradation of the marine habitat of the inhabitants of the Archipelago.

8.60. Colombia acknowledges that each biosphere reserve remains within an area under the sovereign rights of the State or States where it is situated.[436] The ICC, however, has an important role in ensuring the maintenance of an adequate level of protection for a given area. This is even more so when, as in the present case, a State other than the one having established the Biosphere Reserve acquires sovereign rights, as well as duties, over part of such an area. Participation in the ICC is therefore crucial to assess the conduct of a State and its willingness to abide by its obligation to protect the marine environment and the human habitat of communities dependent on an area as fragile as the Seaflower Biosphere Reserve. The attitude of Nicaragua shows no willingness to abide by its duty of due diligence in the protection of the Seaflower Biosphere Reserve or, consequently, the marine habitat of the Raizales and other inhabitants of the San Andrés Archipelago.

8.61. Such an attitude is contrary to customary international law. The Court has been clear in linking the "general obligation

[436] In a press release dated 30 August 2013, the Colombia Ministry of Foreign Affairs declared that the "Seaflower Biosphere Reserve, [was] registered in UNESCO's Man and the Biosphere Programme, by means of a sovereign act of Colombia and is subject to national legislation. Therefore, it would not be in the field of competence of UNESCO to determine the management program for such Reserve" (Annex 1).

to ensure that activities under their control or jurisdiction respect the environment of other States"[437] to the right of human beings (*i.e.*, the Raizales and other inhabitants of the Archipelago) to benefit from a sustainable environment (or a habitat) that allows them to enjoy "living space… quality of life [and] health".[438]

F. Conclusion

8.62. For all of the above reasons, Colombia's two counter-claims relating to Nicaragua's violation of its obligation to preserve and protect the marine environment and the habitat of the Raizal population and other inhabitants of the San Andrés Archipelago, and to exercise due diligence in this regard, are fully substantiated, both factually and in law.

8.63. Colombia requests the Court to declare these violations and to adjudge that Nicaragua is to desist promptly from them and to give Colombia guarantees of non-repetition. The Court is also requested to order Nicaragua to compensate Colombia for the material harm it has suffered as a result of Nicaragua's violations. This compensation should cover any financially assessable damage including loss of profits, and its form and amount is to be determined at a later phase of the proceedings,

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[437] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010*, p. 78, para. 193; *Legality of the Threat or Use of Nuclear Weapons Case, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 241-242, para. 29.

[438] *Legality of the Threat or Use of Nuclear Weapons Case, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 241-242, para. 29; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 41, para. 53.

following established practice.

Chapter 9

THIRD COUNTER-CLAIM: NICARAGUA'S INFRINGEMENTS OF THE ARTISANAL FISHING RIGHT TO ACCESS AND EXPLOIT THE TRADITIONAL BANKS

A. Introduction

9.1 As mentioned in Chapter 3,[439] section D above, both Parties have repeatedly recognized the importance of protecting the traditional fishing rights of the inhabitants of the Archipelago. Nevertheless, as early as February 2013, the President of Colombia was informed of incidents between the Nicaraguan Naval Force and the artisanal fishermen of the Archipelago. As the President of Colombia stated during the Governors summit in San Andrés of 18 February 2013:

> "I have heard that some people have complained that there have been problems with certain Nicaraguan authorities, which threaten them, or they say they have to ask permission to be able to fish here […].
>
> On this point, I will say the following so that it will be absolutely and totally clear: I have given peremptory and precise instructions to the Navy; the historical fishing rights of fishermen will be made respected, whatever happens. Nobody will have to ask permission from anybody to go fishing where they had been fishing before.
>
> This type of incident should not occur again, and the Navy indeed will increase its presence or the

[439] Chapter 3, Sec. D, paras. 3.58, 3.86, 3.87 *supra*.

> number of vessels that it has, so that no such incident will occur again." [440]

9.2 The Presidents of Colombia and Nicaragua, already at the end of 2012 during the meeting in Mexico City, had undertaken constructive discussions as to the importance of recognizing and protecting the rights of the artisanal fishermen of the Archipelago. At that time, President Ortega was aware of this problem, as the following statement makes clear:

> "Another preoccupation of [President] Santos is the future of the Raizales fishermen, the community inhabitants of the San Andrés Archipelago. It is reasonable that he be worried about the future of the fishermen; because there are fishermen out there who have manifested their fear to sail because now Nicaragua is already displaying its Naval Forces. But the Nicaraguan Naval Forces are instructed not to detain any fisherman...". [441]

9.3 In the same vein, in response to the above-mentioned statement of the President of Colombia, President Ortega again stated that the artisanal fishermen of the Archipelago will be allowed to "fish freely" in Nicaragua's maritime zones until a mechanism, distinct from the one that generally applies to industrial fishermen – which requires obtaining a permit from INPESCA –, is put in place.[442] In his statement, President Ortega asked General Avilés not to request any document from

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[440] Preliminary Objections of Colombia, Annex 10, p. 113.

[441] Annex 75: Radio La Primerísima, *Nicaragua exercises peaceful sovereignty over its waters*, 5 Dec 2012.

[442] Annex 76: Radio la Primerísima, *Powerful interests want a confrontation with Colombia*, 21 Feb 2013.

the artisanal fishermen of the Archipelago since the special mechanism, which would, in particular, set a list of the artisanal fishermen and their boats, had yet to be established.[443] General Avilés, as well as the other authorities that were being addressed by President Ortega, were told not to interfere with the artisanal fishing activities of the inhabitants of the Archipelago.[444]

9.4 The foregoing notwithstanding, Colombia is compelled to raise a counter-claim for infringements of the recognized customary artisanal fishing rights of the inhabitants of the Archipelago that are directly attributable to Nicaragua. For while it is true that President Ortega has been on many occasions supportive of the rights of the inhabitants of the Archipelago, those rights have been continuously violated by Nicaragua by reason of the conduct of its Naval Force.

9.5 After addressing below the direct-connection requirement under Article 80 of the Rules of Court, Colombia will demonstrate that Nicaragua's Naval Force has been following an active strategy of intimidation towards the artisanal fishermen of the Archipelago. By threats and pillaging, the Naval Force of Nicaragua has basically rendered the assurances of President Ortega meaningless. In contrast with the situation of the Nicaraguan fishermen, who continue to fish in the relevant areas despite the so-called "incidents" referred to by the Applicant, most of the artisanal fishermen of the Archipelago have stopped

[443] Annex 76: Radio la Primerísima, *Powerful interests want a confrontation with Colombia*, 21 Feb 2013.
[444] *Ibid*.

going to the traditional banks located in the maritime zones ruled to appertain to Nicaragua, as well as the fishing grounds which, although located in Colombia's maritime zones, require crossing those of Nicaragua.

B. The Direct Connection with the Subject-Matter of Nicaragua's Claims

9.6 The counter-claim relating to Nicaragua's infringements of the customary artisanal fishing right to access and exploit the traditional banks is based on events that occurred in the aftermath of the 2012 Judgment in the maritime zones that were found to appertain to Nicaragua – such as Cape Bank and its extension East of the 82° West Meridian known as Luna Verde. There is in fact an obvious temporal and geographic overlapping between Nicaragua's claims and Colombia's counter-claim inasmuch as the time frame and the relevant geographical area are exactly the same in both instances.

9.7 As to the nature of the conduct involved, it suffices to say that Colombia's counter-claim relates to the Nicaraguan Naval Force's harassment of the artisanal fishermen of the Archipelago. Accordingly, there is a parallel between the alleged conduct of the Colombian Navy *vis-à-vis* Nicaraguan fishermen and the Nicaraguan Naval Force's treatment of the artisanal fishermen of the Archipelago. The only difference is one of degree since, while Nicaragua's claims against the Colombian Navy can hardly be portrayed as incidents at all, the

conduct of the Nicaraguan Naval Force is far more grave, since it involves coercive measures in the form of seizure of the artisanal fishermen's products, fishing gear, food and other personal property.

9.8 With respect to the requirement that the counter-claim be based on the same legal principles or instruments as the main claim or pursue the same legal aim, this condition is also met. The applicable law to the dispute brought before the Court in both instances is customary international law. Nicaragua's claims concern customary rules relating to the coastal State's rights to exploit marine resources in its own exclusive economic zone. Colombia's counter-claim relates to customary rights to access and exploit marine resources located in that same maritime zone.

9.9 In the present case, the Parties are pursuing the same legal aims since they are both seeking to establish the international responsibility of the other by invoking violations of customary rules relating to the harvesting of fishing resources within the maritime zones of Nicaragua.

9.10 Thus, the legal connection is also fulfilled. For the foregoing reasons, the counter-claim is to be considered admissible according to Article 80 of the Rules of Court.

C. The Intimidating Conduct of the Nicaraguan Naval Force

9.11 Before addressing the conduct of the Nicaraguan Naval Force, Colombia must point out that, unfortunately, Nicaragua has used these proceedings, as well as those in the case concerning the *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast*, as an opportunity to deprive the customary artisanal fishing rights of the inhabitants of the Archipelago of any meaning.

9.12 Thus, the Agent of Nicaragua found appropriate, at the conclusion of his oral pleading in the other pending case, to stress the following:

> "30. Mr. President, last week Nicaragua observed that during the *Territorial and Maritime Dispute* case Colombia never advanced any argument regarding the purported ancestral fishing rights of the autochthonous population of San Andrés, the Raizales. Let me be clearer, there is not a single reference to the Raizal community in Colombia's written or oral pleadings in the previous case. None. Zero.
>
> 31. Colombia's attempt to appeal to emotions is not based on the Judgment having caused any prejudice to the few thousand Raizales. First of all, allow me also to recall that despite that omission that Colombia now tries to make up for, President Ortega offered to grant artisanal fishing rights to the Raizales in waters that the Judgment recognized as Nicaraguan. President Ortega took this decision because the Raizal community shares deep ties with the Nicaraguan Caribbean communities.
>
> 32. Second, it suffices to note the distances between the islands such as Providencia and the

> banks and cays to understand that no artisanal boat can actually reach those points in the north. For example, the closest bank, Quitasueño, is located at 61 nautical miles from the nearest inhabited island of Providencia. Similarly, Roncador and Serrana are located at 77 and 88 nautical miles respectively, and Serranilla, being the farthest, is located at 170 nautical miles from Providencia. [Tab 43 on] On the screen, you can see the artisanal boats used by the Colombian Raizales. They are not equipped for such distances. Furthermore, all incidents that have been reported by Nicaragua in the case discussed last week involved only industrial boats, further confirming that no artisanal boats reach those distances. [Tab 43 off]."[445]

9.13 Some telling points can be made in response to this statement. First of all, it is surprising that Nicaragua thought it convenient to stress that Colombia had not put forward the argument of the historical fishing rights of the inhabitants of the Archipelago in the *Territorial and Maritime Dispute* case. The statement may, thus, be understood as suggesting that Colombia's so-called omission demonstrates the implausibility of these rights. But Colombia has already demonstrated that the existence of traditional fishing rights is to be distinguished from the question of relevant circumstances justifying the shifting of a maritime delimitation line. The former are often invoked independently from the drawing of the boundary in order to allow certain nationals to fish where they have done so

[445] *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Public Sitting 9 October 2015, CR 2015/29*, original, p. 50, paras 30-32 (Agent). Footnotes omitted.

customarily.[446] Accordingly, the Arbitral Tribunal in the second stage of the proceedings between Eritrea and Yemen found that the existence of a traditional fishing regime did not depend "upon the drawing of an international boundary".[447]

9.14 After having admitted that the President of Nicaragua had acknowledged the existence of these historical fishing rights in waters that were recognized to appertain to Nicaragua, the Agent of Nicaragua nevertheless asserted that there can in fact be no such rights in the maritime zones adjudicated to Nicaragua since the fishermen of the Archipelago do not have the means to reach the locations in question. In other words, the repeated recognition of the existence of traditional fishing rights by the highest authorities of Nicaragua is suddenly deprived of any useful effect on the grounds that the Raizales of the Archipelago would have to make the distance between, for example, Providencia and Luna Verde, by paddling on a canoe. But artisanal fishing in the Southwestern Caribbean Sea is not tantamount to subsistence fishing in the San Juan River.

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446 *Award of the Arbitral Tribunal in the second stage of the proceedings (Maritime Delimitation) between Eritrea and Yemen, Decision of 17 Dec 1999*, paras 103-112; Article 5(1) of the Agreement between the Government of the Republic of Indonesia and the Government of Papua New Guinea concerning maritime boundaries between the Republic of Indonesia and Papua New Guinea and co-operation on related matters, 1980; Agreement between the Government of Papua New Guinea and the Government of Solomon Islands concerning the administration of the special areas, 1989; Memorandum of Understanding between the Government of Australia and the Government of the Republic of Indonesia regarding the operations of Indonesian traditional fishermen in areas of the Australian exclusive fishing zone and continental shelf, 1974.

447 *Award of the Arbitral Tribunal in the second stage of the proceedings (Maritime Delimitation) between Eritrea and Yemen*, Decision of 17 Dec 1999, para. 110.

9.15 In this respect, the finding of the Arbitral Tribunal in the second stage of the proceedings between Eritrea and Yemen is revealing:

> "… the term 'artisanal' is not to be understood as applying in the future only to a certain type of fishing exactly as it is practised today. 'Artisanal fishing' is used in contrast to 'industrial fishing'. It does not exclude improvements in powering the small boats, in the techniques of navigation, communication or in techniques of fishing; but the traditional regime of fishing does not extend to large-scale commercial or industrial fishing nor to fishing by nationals of third States …, whether small-scale or industrial."[448]

9.16 As already addressed in Chapter 2,[449] the practice evidenced by the historical documents and affidavits supplied attests to the fact that the inhabitants of the Archipelago first relied on schooners, sloops and catboats, and later on *lanchas* equipped with outboard or on-board engines, in order to reach the rich fishing grounds located on Cape Bank on both sides of the 82° West Meridian, as well as the banks surrounding the islands of Quitasueño, Serrana, Bajo Nuevo, Serranilla and Roncador.

9.17 Finally, the Agent of Nicaragua referred to the fact that since all the incidents that have been reported by Nicaragua

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[448] *Award of the Arbitral Tribunal in the second stage of the proceedings (Maritime Delimitation) between Eritrea and Yemen*, Decision of 17 Dec 1999, para. 106.

[449] Chapter 2, Sec. C (2), paras 2.77-2.81 *supra*.

concerned industrial vessels, it must follow that there are no artisanal fishing boats in the Nicaraguan maritime zones. But the explanation for the artisanal fishermen's reduced presence in the traditional banks located in the maritime zones adjudicated to Nicaragua is entirely different.

9.18 The following excerpt from the affidavit by Mr Jorge De la Cruz De Alba Barker well illustrates the reasons behind the decision of many artisanal fishermen to abandon their ancestral banks:

> "In these areas we find other fishermen from the Nicaraguan coast, Bluefields and Corn Islands. We have no problems with them since we are the same people, we speak the same language. The problem is between Bogotá and Managua. Nowadays we cannot go to the North Cays because the decision whether they let us pass through is up to the Nicaraguan coastguard. There is the risk of being taken to the Nicaraguan coasts by the authorities. If you go to Quitasueño, the Nicaraguan coastguard will stop you on the way in and ask you whether you are passing through or fishing there. This happens when you go to Quitasueño and to Cape Bank. Usually they would stop the fishermen coming from San Andrés that are navigating west of and north of Providencia to reach Cape Bank or Quitasueño. Nowadays, after the [Court's] decision, we cannot circulate in peace in the waters that belong to Nicaragua. This happens in the trips between the islands and the North Cays and from cay to cay in the northern zone, especially in the trip out there. It is as if I had a house and had to cross through someone else's yard to get to my

> house. If they do not let me cross through their yard, I cannot get to my house. It is common to have our GPS, VHF radio, cigarettes and food supplies taken by them. They also strip the boats of all their equipment of any value. Usually, there are encounters with the coastguards during transit from the islands towards the North Cays. As opposed to the Colombian Navy that treats the Nicaraguan fishermen they find in Colombian waters well. The associations and co-operatives receive complaints of these cases. The fishermen feel intimidated since the Nicaraguan coastguards] have weapons. The problem is with the coastguards but I have no problems with the fishermen of Nicaragua, they are my people, my family. … With the Nicaraguan coast, we share the culture, they are very similar to us and we even have relatives there. We have traditionally shared the sea with the Nicaraguans."[450]

9.19 This statement is confirmed in other affidavits such as the one by Mr Antonio Alejandro Sjogreen Pablo, who stressed that:

> "We cannot go to the North Cays anymore because on several occasions we have crossed the Nicaraguan coastguard big *lanchas* and they stop us on the way to the fishing banks. They ask for coffee and food but it is a way to intimidate us because we cannot say no. They have their arms and board us. Because of that plenty of our people stopped going to Cape Bank and the North Cays. […] Since the 2012 decision, the situation of the artisanal fishermen has worsened because we feel threatened and with little security when we want to

[450] Annex 71.

> go fish in our traditional banks located farther from San Andrés and Providencia. But we have to continue to use and take advantage of the North Cays and Cape Bank because they ensure food security on the islands."[451]

9.20 Other artisanal fishermen have raised similar accusations against the Nicaraguan Naval Force, thus highlighting a pattern in the conduct of the Nicaraguan authority.[452] As a result of the Nicaraguan Naval Force's conduct, the artisanal fishermen have been forced to give up many of their traditional banks by modifying their fishing practices. For example, Mr Orlando Eduardo Francis Powell stressed in his affidavit that, because of the policy of intimidation pursued by the Nicaraguan Naval Force, he is scared to navigate in Nicaragua's maritime zones and, therefore, prefers going to Roncador although it is "a small bank compared to Quitasueño, Serrana and Cape Bank".[453] Similarly, Mr Ligorio Luis Archbold Howard's affidavit well illustrates the consequences of the Nicaraguan Naval Force's conduct on the activities of the artisanal fishermen. Although he still fishes in the Nicaraguan maritime zones located between, respectively, Providencia and Quitasueño, and Roncador and Serrana, he avoids the maritime zones of the Northern banks.

> "Right now I fish in Nicaragua's waters north and west of Providencia. But I do that because I know that I am close to home and can come back quickly if there are problems. But now I always go with someone else and remain close to Colombia's

451 Annex 72.
452 Annex 64; Annex 67; Annex 68; Annex 69; Annex 70.
453 Annex 68.

> waters. I do not go all the way to Serrana and Quitasueño because there are more possibilities of getting stopped by Nicaraguan fishermen or coastguard."[454]

9.21 In other words, by pillaging and threatening, the Nicaraguan Naval Force is successfully preventing on a recurring basis, or at the very least, seriously discouraging, the artisanal fishermen of the Archipelago from reaching their traditional banks located in the maritime zones adjudicated to appertain to Nicaragua and the Northern Banks of Quitasueño, Serrana, Serranilla and Bajo Nuevo. This constitutes a breach of the recognized customary fishing right, as well as of the peremptory instructions given by President Ortega to the Nicaraguan Naval Forces on 21 February 2013.

9.22 Additionally, while it is true that most of the artisanal fishermen of the Archipelago have made reference to the good relationships between the Raizales and other indigenous communities, some of them have emphasised that there are problems with the Nicaraguan industrial fishermen involved in predatory practices as well as acts of piracy.[455] As mentioned in the affidavit by Mr Landel Hernando Robinson Archbold:

> "We are afraid to go to the North cays nowadays. I know that Minival Ward, a member of the co-operative, was attacked by Nicaraguan fishermen when going to the North Cays. They took all of his products as well as his fishing and navigation gear and most of his gasoline. They left him in his 25 ft.

454 Annex 65.

455 *Ibid*.

lancha with barely enough gasoline to come back to Providencia".[456]

9.23 These Nicaraguan fishermen are not part of the indigenous communities of the Southwestern Caribbean Sea. The Nicaraguan Naval Force has the duty to ensure that the conduct of its private fishermen does not negate the customary artisanal fishing rights of the inhabitants of the Archipelago. By tolerating predatory fishing practices and criminal activities in the traditional banks of the artisanal fishermen of the Archipelago, the Nicaraguan Naval Force is also responsible for the breach of their customary right to access and exploit the traditional banks.

D. Conclusion

9.24 In the light of these circumstances, Colombia submits this counter-claim in order to protect the artisanal fishing rights to access and exploit the traditional banks, which have been exercised since time immemorial by the inhabitants of the San Andrés Archipelago, including the Raizal Population.

9.25 By way of this counter-claim Colombia seeks for the Court to rule that Nicaragua is under an obligation to cease and desist from preventing Colombian artisanal fishermen from accessing their traditional fishing grounds, and to fully respect the traditional, historic fishing rights of the Raizales and other

[456] Annex 62.

fishermen of the Archipelago to such grounds. The Court is also requested to order Nicaragua to compensate Colombia for the material harm it has suffered as a result of Nicaragua's violations. This compensation should cover any financially assessable damage including loss of profits, and its form and amount is to be determined at a later phase of the proceedings, following established practice.

Chapter 10

FOURTH COUNTER-CLAIM: NICARAGUA'S STRAIGHT BASELINES DECREE, WHICH IS CONTRARY TO INTERNATIONAL LAW, VIOLATES COLOMBIA'S SOVEREIGN RIGHTS AND MARITIME SPACES

A. Introduction

10.1. Colombia hereby counter-claims that Nicaragua, by adopting Decree No. 33-2013 of 19 August 2013, has extended its internal waters, its territorial sea, its contiguous zone, its EEZ and its continental shelf, in violation of international law, and, in so doing, has violated Colombia's sovereign rights and jurisdiction.[457] Accordingly, Colombia requests the Court to adjudge and declare that Nicaragua's Decree is inconsistent with international law and to order Nicaragua to adjust in order that it complies with the rules of international law concerning the drawing of the baselines from which the breadth of the territorial sea is measured.

10.2. In Section B, Colombia will demonstrate that its counter-claim is admissible under the criteria set out in Article 80, paragraph 1, of the Rules of Court. Section C will then show that, contrary to Nicaragua's assertions, its straight baselines are not justified on the basis of what the Court said in its 2012 Judgment about the baselines from which Nicaragua's 200

[457] Annex 13: Decree No. 33-2013, Baselines of the Marine Areas of the Republic of Nicaragua in the Caribbean Sea, 19 Aug 2013.

nautical mile limit is to be measured (Sub-section (1)) and the straight baselines do not comply with the customary international law principles governing the drawing of such baselines (Sub-sections (2) and (3)). Section D will then go on to show that Colombia's rights are infringed by Nicaragua's claimed straight baselines. These infringements relate to the unauthorized and unlawful extension of Nicaragua's Internal Waters (Sub-section 1), Territorial Sea (Subsection 2) and Exclusive Economic Zone (Subsection 3).

B. The Direct Connection with the Subject-Matter of Nicaragua's Claims

10.3. This section will show that Colombia's counter-claim is admissible as is directly connected with the subject-matter of Nicaragua's claims.[458] Earlier, Colombia reviewed the Court's jurisprudence concerning this matter.[459] It recalls that the correct method for addressing the direct connection requirement must begin with a clarification of the factual and legal considerations of Nicaragua's relevant claim (Sub-section (1)), to be followed by the same clarification with respect to Colombia's counter-claim (Sub-section (2)). From this exercise, the factual and legal connections may then be examined for their "sufficiency" (Sub-section (3)).

[458] In Chapter 7, Sec. B (1) *supra*, Colombia has demonstrated that the counter-claim comes under the jurisdiction of the Court.

[459] See Chapter 7, Sec. B (2) *supra*.

(1) FACTUAL AND LEGAL COMPONENTS OF NICARAGUA'S RELEVANT CLAIM

10.4. As recalled by the Court in its Judgment on the Preliminary Objections:

> "In its Application, Nicaragua indicates that the subject of the dispute it submits to the Court is as follows: 'The dispute concerns the violations of Nicaragua's sovereign rights and maritime zones declared by the Court's Judgment of 19 November 2012 and the threat of the use of force by Colombia in order to implement these violations.'"[460]

10.5. Nicaragua's contentions also appear in the submissions concluding its Memorial dated 3 October 2014 as well as in the body of its Memorial. These submissions, to the extent that they have not been rejected as inadmissible by the Court in its Judgment of 17 March 2016, contain two distinct claims: a claim that Colombia's Navy has violated Nicaragua's maritime zones and sovereign rights, and a claim that by adopting a Decree establishing its Integral Contiguous Zone, Colombia has violated Nicaragua's maritime zones and sovereign rights. Only the latter is relevant to the present discussion. It appears in Nicaragua's submissions as follows:

> "2. Nicaragua also requests the Court to adjudge and declare that Colombia must: … (i) revok[e] laws and regulations enacted by Colombia, which are incompatible with the Court's Judgment of 19 November 2012 including the provisions in the Decrees 1946 of 9 September 2013 and 1119 of 17 June 2014 to maritime areas which have been

[460] Judgment on the Preliminary Objections, p. 26, para. 53.

> recognized as being under the jurisdiction or sovereign rights of Nicaragua…".[461]

10.6. Insofar as facts are concerned, this claim refers to Decree 1946 of 2013, as subsequently modified and amended by Decree 1119 of 2014. These facts are characterized as follows:

- they have the *nature* of domestic legal acts fixing the extent of a maritime zone, namely Colombia's contiguous zone;

- Nicaragua contends that they concern locations that are in its maritime zones "as delimited in paragraph 251 of the Court Judgment of 19 November 2012";[462]

- they establish the competences that Colombia will exercise in this zone;

- the respective dates of adoption of these decrees are 9 September 2013 and 17 June 2014.

10.7. The legal considerations on which Nicaragua alleges that these juridical acts must be declared wrongful are that:

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461 Memorial of Nicaragua, Submission 2, p. 107.

462 *Ibid*., Submission 1(a), p. 107.

- they are not in conformity with the international law of the sea rules related to the delimitation of a coastal State's maritime zones;

- they violate Nicaragua's maritime zones "as delimited by para. 251 of the Court's Judgment of 19 November 2012," this delimitation having been fixed up to "the 200-nautical-mile limit from the baselines from which the breadth of the territorial sea of Nicaragua is measured," as mentioned twice at para. 251(4) of the Judgment;

- additionally, Nicaragua contends in its Memorial[463] that they violate Nicaragua's sovereign rights as established by the customary law of the sea, insofar as they attribute to Colombia some competences that fall under Nicaragua's jurisdiction.

10.8. Nicaragua asks the Court to order Colombia to revoke its Decrees, so that its sovereign rights and jurisdiction and the maritime zones it claims are fully respected.

[463] Memorial of Nicaragua, p. 66, para. 3.25, and p. 67, 3.27.

(2) FACTUAL AND LEGAL COMPONENTS OF COLOMBIA'S FOURTH COUNTER-CLAIM

10.9. On Colombia's side, the fact of which it complains is Nicaragua's Decree No. 33-2013[464]. It is characterized as follows:

- it has the nature of a domestic legal act fixing Nicaragua's straight baselines and, consequently, the extent of all Nicaragua's maritime zones in the Caribbean Sea, including its contiguous zone. Indeed, art. 1 of the Decree clearly states that its object is:

> "The straight baselines of the Republic of Nicaragua to be used to measure the breadth of its territorial sea, contiguous zone, exclusive economic zone and continental shelf in the Caribbean Sea shall be established."

- it explicitly contends that it is an application of the Court's findings in its Judgment of 19 November 2012. Indeed, according to recital V in this Decree:

> "That the International Court of Justice issued a historic judgement on 19 November 2012 regarding the Territorial and Maritime Delimitation between Nicaragua and Colombia in the Caribbean Sea, in which it found that the islands adjacent to the coast of Nicaragua in the Caribbean Sea are part

[464] Annex 13.

> of the respective coast and contribute to the establishment of the baselines".

- it is dated 19 August 2013.

10.10. The legal considerations upon which Colombia's counter-claim relies are that the Nicaraguan Decree:

- is not in conformity with the international law of the sea related to the delimitation of a coastal State's maritime zones, the breadth of which must be calculated from baselines drawn in conformity with certain rules;

- extends the limits of Nicaragua's maritime zones, including its contiguous zone and its EEZ, beyond the limits that international law and paragraph 251 of the Court's Judgment of 19 November 2012 establishes;

- violates Colombia's EEZ and continental shelf;

- violates Colombia's rights and jurisdiction by claiming absolute sovereignty, or sovereignty subject to innocent passage, in areas where Nicaragua has no absolute sovereignty, or where freedom of navigation and overflight are to be respected.

10.11. Colombia's request is that the Court declares that Nicaragua's Decree violates international law and Colombia's sovereign rights and maritime spaces.

(3) THE DIRECT CONNECTION

10.12. As can be seen, Nicaragua's claim and Colombia's counter-claim both concern conduct affecting their respective maritime spaces. Because Nicaragua purports to measure all of its maritime spaces by reference to its straight baselines, there is a direct connection with the subject-matter of the claims. Both are also from the same time period, and both concern the 2012 Judgment. The connection between Nicaragua's claim and Colombia's counter-claim is obvious in fact and in law. Moreover, their respective legal aims are the same. Thus, Colombia's counter-claim is admissible under Article 80 of the Rules of Court.

C. Nicaragua's Claimed Baselines Violate the Customary International Law Principles Governing the Drawing of Straight Baselines

10.13. Nicaragua's August 2013 Decree establishing straight baselines in the Southwestern Caribbean purports to be based on the Court's 2012 Judgment in the *Territorial and Maritime Dispute* case. Colombia will show that this justification finds no basis in the Court's Judgment (Sub-section (1)), before turning to the customary principles and rules governing the drawing of

straight baselines (Sub-section (2)) and how Nicaragua's baselines are clearly in breach of those rules (Sub-section (3)).

(1) THE COURT'S 2012 JUDGMENT DOES NOT JUSTIFY NICARAGUA'S STRAIGHT BASELINES

10.14. In its 19 November 2012 Judgment, the Court took note that Nicaragua had not yet adopted a position regarding the baselines from which the breadth of its territorial sea or other maritime zones were to be measured. In the Court's words "Nicaragua ha[d] not yet notified the Secretary-General of the location of those baselines under Article 16, paragraph 2, of UNCLOS". [465]

10.15. At paragraph 237 of that Judgment, the Court repeated that:

> "since Nicaragua has yet to notify the baselines from which its territorial sea is measured, the precise location of endpoint A cannot be determined and the location depicted on sketch-map No. 11 is therefore approximate." [466]

Consequently, the Court determined only the approximate location of endpoints A and B on sketch-map No. 11.

10.16. Subsequently, on 19 August 2013, Nicaragua adopted a decree related to the "Baselines of the Marine Areas of the Republic of Nicaragua in the Caribbean Sea."[467] On 26

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[465] 2012 Judgment, p. 683, para. 159.
[466] *Ibid.*, p. 713 , para. 237.
[467] Annex 13.

September 2013, pursuant to Article 16 of UNCLOS, Nicaragua deposited with the Secretary-General of the United Nations the list of geographical coordinates contained in its Decree No. 33-2013.[468]

10.17. The purpose of this decree, as stated in recital VI of the preamble and in Article 1, is not to set "normal" baselines, that is to say baselines which correspond to the low-water line along the coast, but a line composed of eight straight baseline segments. Article 2 of the decree specifies that these straight baselines shall connect a series of nine consecutive geographical coordinates, which, save for the first and last of them, are located on islands or cays in the Caribbean Sea east of the continental coast of Nicaragua. Article 3 stipulates that all the waters located between those straight baselines and the Nicaraguan mainland are to be considered interior waters. Appendix I of this decree gives the coordinates of nine geographical points:

- the first and ninth points are located on the mainland coast of Nicaragua, respectively at the Cabo Gracias a Dios and at Harbor Head, which are the easternmost extent of the land borders shared with Honduras and Costa Rica;

[468] Annex 90: Circular Communication from the Division for Ocean Affairs and the Law of the Sea – Office of Legal Affairs, No. M.Z.N.99.2013.LOS, 11 Oct. 2013.

- the seven other points are placed on various features located in the Caribbean Sea, off the coast of Nicaragua: Edinburg Cay, Miskitos Cays, Ned Thomas Cay, Man-of-War Cays, East of Great Tyra Cay, and both Little and Great Corn Islands (See **Figure 10.1**).

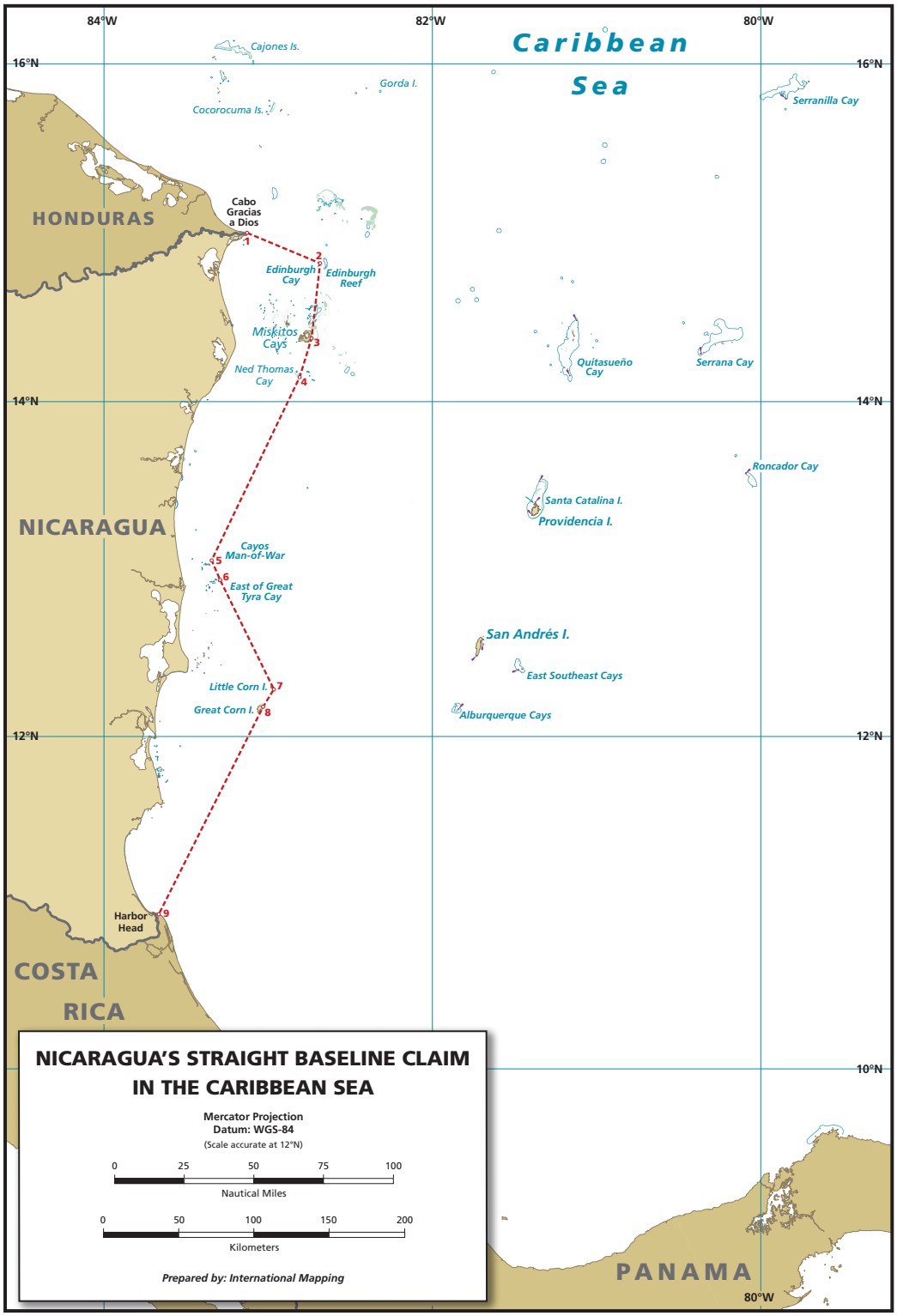
84°W
82°W
80°W
16°N
14°N
12°N
10°N
Caribbean Sea
Cajones Is.
Gorda I.
Cocorocuma Is.
Serranilla Cay
HONDURAS
Cabo Gracias a Dios
Edinburgh Cay
Edinburgh Reef
Miskitos Cays
Ned Thomas Cay
Quitasueño Cay
Serrana Cay
Roncador Cay
Santa Catalina I.
Providencia I.
NICARAGUA
Cayos Man-of-War
East of Great Tyra Cay
San Andrés I.
East Southeast Cays
Little Corn I.
Great Corn I.
Alburquerque Cays
Harbor Head
COSTA RICA
PANAMA
1
2
3
4
5
6
7
8
9
NICARAGUA'S STRAIGHT BASELINE CLAIM IN THE CARIBBEAN SEA
Mercator Projection
Datum: WGS-84
(Scale accurate at 12°N)
0 25 50 75 100
Nautical Miles
0 50 100 150 200
Kilometers
Prepared by: International Mapping

Figure 10.1

10.18. As noted above, the decree purports to be a mere application of the findings of the Court in its 2012 Judgment, mentioning, in recital V of its preamble, that "the International Court of Justice… found that the islands adjacent to the Coast of Nicaragua in the Caribbean Sea, are part of the relevant coastline and contribute to the determination of the baselines."

10.19. The Court did indeed consider at paragraphs 145 and 201 of the 2012 Judgment that a series of Nicaraguan islands "contribute to the baselines from which Nicaragua's entitlement is measured." This is undoubtedly correct: as islands (i) they perforce support baselines, and (ii) such baselines necessarily "contribute" to Nicaragua's baselines. But the Court neither implied nor decided that these islands necessarily allow Nicaragua effectively to re-design its entire mainland coast by establishing straight lines joining the islands.

10.20. At paragraph 201 of the 2012 Judgment, the Court said:

> "Since [some Nicaraguan] islands are located further east than the Nicaraguan mainland, they will contribute all of the base points for the construction of the provisional median line. For that purpose, the Court will use base points located on Edinburgh Reef, Muerto Cay, Miskitos Cays, Ned Thomas Cay, Roca Tyra, Little Corn Island and Great Corn Island." [469]

10.21. This paragraph says nothing about the appropriateness of Nicaragua constructing a series of straight baselines. Rather, it

[469] 2012 Judgment, p. 699, para. 201.

explains that solely for the construction of the provisional median line between Nicaragua and Colombia, the Court took account of certain islands as base points, because the islands are "located further east than the Nicaraguan mainland". But the fact that base points have been located on Nicaraguan islands says nothing about any Nicaraguan baselines between these islands; nor can the Judgment be read as a blanket authorization to draw straight baselines.

10.22. In a diplomatic note addressed to the Secretary-General of the United Nations, Colombia protested Nicaragua's decree, stating that the claimed straight baselines are wholly contrary to international law. Colombia stressed that these baselines:

> "do not relate to a coastline that is deeply indented and cut into or to a fringe of islands along the coast; they depart from the general direction of the coastline; and the sea areas lying within the lines are not sufficiently linked to the land domain to be subject to the regime of internal waters."[470]

Colombia's protest has received no answer as of the date of submission of this Counter-Memorial.

10.23. Colombia thus counter-claims that Nicaragua's claimed straight baselines are contrary to customary international law and cause direct injury to Colombia.

[470] Annex 25: Diplomatic Note No. S-GACIJ-13-044275 from the Minister of Foreign Affairs of Colombia to the Secretary-General of the United Nations, 1 November 2013.

(2) The Customary Nature of the Principles Governing the Drawing of Straight Baselines

10.24. In the 1951 *Fisheries* case,[471] the Court accepted for the first time that the breadth of the territorial sea could be determined not from the low-water mark of the mainland of a coastal State, but rather from the relevant low-water mark of the islands that border it (known in Norway as the "Skjærgaard"), and could take the form of straight lines joining appropriate points located on these islands.[472] Since then, the principle enunciated by the Court – that a coastal State may indeed be entitled to draw straight baselines, but only under certain geographical circumstances and in respect of certain rules, has become well established in international law and practice. The Court held in the *Fisheries* case that a coastal State can have recourse to straight baselines, in particular when that coast is fringed with islands, only if a number of conditions that can be summed up as follows are met: (i) such lines must be drawn so that they do not depart to any appreciable extent from the general direction of the coast; (ii) they must be drawn so that the sea areas lying within these lines are sufficiently closely linked to the land domain to be subject to the regime of internal waters; and (iii) it is legitimate to take into account certain economic

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471 *Fisheries case, Judgment of December 18th, 1951: I.C.J. Reports 1951*, p. 116.

472 *Ibid*., pp. 131 *et seq*.

interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage.[473]

10.25. The 1958 Convention on the Territorial Sea and the Contiguous Zone drafted only a few years after the *Fisheries* Judgment incorporated *in extenso* the rules of the Court on the application of straight baselines. Article 4 of that Convention reads:

> "1. In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.
>
> The drawing of such baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters."

As noted by some authors:

> "This provision [article 4, par. 1 and 2] follows the *Anglo-Norwegian Fisheries* case almost verbatim."[474]

10.26. Since 1958, the rules laid out in Article 4 of this Convention have been commonly used in State practice and international cases. They were subsequently included in the

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[473] See: R.R. Churchill & A.V. Lowe, *The Law of the Sea*, 3rd ed., Manchester University Press, 2010, p. 35. Available at Peace Palace Library.

[474] *Ibid*., pp. 37.

United Nations Convention on the Law of the Sea, Article 7 of which is taken from Article 4 of the 1958 Convention.

10.27. Evidence that these rules were recognized as a general practice accepted as law is regularly stressed in the doctrine:

> "The system [the drawing of straight baselines] is supported by extensive state practice, the decision of the ICJ in the Anglo-Norwegian Fisheries case, and in the continuity given to this regime by the core provisions of the Contiguous Zone and the LOSC."[475]

Authors also agree that:

> "…the method of straight base-lines was accepted in that early judgment of the International Court [Anglo-Norwegian Fisheries], and it has, as a principle, never been drawn into doubt since then. …
>
> Taking these provisions [article 4 of the 1958 Convention on the Territorial and article 7 of the 1982 Convention on the Law of the Sea] together it seems to be beyond dispute that the straight base-lines rule is firmly established — it can be applied if the conditions for the system, the existence of a deeply indented coastline or a fringe of islands along the coast, are satisfied."[476]

10.28. Nicaragua has never protested against this customary rule; to the contrary, it has signed and ratified the 1982

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475 D. R. Rothwell & T. Stephens, *The International Law of the Sea*, Hart Publishing, Oxford/Portland, 2010, Section 2 "Coastal Waters", pp. 43 *et seq*. Available at Peace Palace Library.

476 R. Bernhardt, "Custom and treaty in the law of the sea", *Collected courses of the Hague Academy of International Law*, Vol. 205, Brill/Nijhoff, Leiden/Boston, 1987, pp. 287-288. Available at Peace Palace Library.

Convention without submitting any reservation as to the content of Articles 5, 7 or 16. In the written pleadings in the *Territorial and Maritime Dispute* case, Nicaragua acknowledged the customary nature of the rules governing the drawing of maritime baselines by a coastal State. Thus, at paragraph 114 of the 2012 Judgment, the Court observed that:

> "…The Parties further agree that the relevant provisions of UNCLOS concerning the baselines of a coastal State … reflect customary international law."

10.29. Nicaragua is therefore bound to comply with the customary international rules on the drawing of baselines, including straight baselines.

(3) NICARAGUA'S BASELINES ARE IN BREACH OF CUSTOMARY INTERNATIONAL LAW PRINCIPLES

10.30. The customary principles governing straight baselines and their implementation in a specific coastline are reflected in Article 7 of UNCLOS. They may be summed up as follows:

- The use of straight baselines is an exception to the general principle set out in Article 5, according to which, the "normal baseline" for measuring the breadth of the territorial sea is the "low-water line along the coast". Indeed, as emphasized by the Court:

> "the method of straight baselines, which is an exception to the normal rules for the determination of baselines, may only be applied if a number of conditions are met. This method must be applied restrictively."[477]

The conditions in order for such exception to be implemented are stated in the first paragraph of Article 7 as follows:

> "In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured."

- When applicable, the drawing of straight baselines shall respect the "general direction of the coast" and shall only enclose stretches of sea that are "sufficiently closely linked to the land domain to be subject to the regime of internal water".

10.31. These two cumulative guidelines, reflected in paragraphs 1 and 3 of Article 7, read together with Article 5 of UNCLOS, indicate (a) the two alternative geographical circumstances that permit recourse to straight baselines, and (b) how these straight baselines may be drawn when permitted.

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[477] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001*, p. 103, para. 212.

10.32. As Colombia will show, Nicaragua's geographical situation is ineligible for recourse to straight baselines (Sub-section (a)), and Nicaragua's claimed baselines do not satisfy the legal requirements (Sub-section (b)).

(a) Geographical Circumstances Permitting Recourse to Straight Baselines Are Not Met

10.33. In the *Virginia Commentaries* on the 1982 Convention on the Law of the Sea, the section dedicated to Article 7 explains the circumstances in which recourse to straight baselines is allowed as follows:

> "7.9(b) Paragraph 1 lays down two specified geographical circumstances which permit the employment of the method of straight baselines for determining the baselines. One is where the coastline is "deeply indented and cut into"; the other is where "there is a fringe of islands along the coast in its immediate vicinity." The first phrase is taken, without change, from the judgment of the International Court of Justice in the *Fisheries* case, which referred to a coast such as that of Eastern Finnmark in Norway. The second expression, a slightly modified version of the one used by the Court in the same judgment covers the case where a number of islands of various size are spread out near the shore so as to form a continuous fringe along the coast."[478]

10.34. The preamble of Nicaraguan Decree No. 33-2013 asserts that Nicaragua's geographical situation corresponds to both hypotheses. According to recital IV, Nicaragua's coast would

[478] Virginia Commentary, p. 100. Available at Peace Palace Library.

present a "special configuration owing to the presence of numerous coastal islands closely linked by their history and economy to the mainland, and also owing to the fact that the coastline is deeply indented and cut into".

10.35. This is manifestly incorrect. In reality, Nicaragua's claim seems to rely on the contention that its coastline meets the second geographical condition, namely that there is "a fringe of islands along" its coast, such "fringe of islands" being said to lie "in its immediate vicinity". The 2012 Judgment remarked that Nicaragua's islands are "adjacent" to its coast (at paragraphs 159, 168, and 201), but that is far from being a "fringe of islands along its coasts", in "its immediate vicinity". To draw straight baselines, it is not sufficient that there exist adjacent islands; there must exist a "fringe of islands along the coast", in its "immediate vicinity". Neither of these requirements are met.

10.36. As noted in the Virginia Commentary:

> "the expression fringing islands … covers the case where a number of islands of various size are spread out near the shore so as to form a continuous fringe along the coast. The mere presence of a few isolated islands would not constitute a solid fringe. Such islands groups generally belong to one of the following categories: (i) islands which appear to form a unity with the mainland; or (ii) islands at some distance from the coast forming a screen which masks a large proportion of the coast from the sea"[479].

[479] Virginia Commentary, p. 100. Available at Peace Palace Library.

10.37. The first requirement for straight baselines is the existence of a "group" of islands. In other words, the islands must not be "relatively small in number". The Court made this clear in *Qatar* v. *Barhain*. In response to Bahrain's contention that it was entitled, under customary international law, to draw straight baselines connecting the outermost islands located off its main island, the Court emphasized that:

> "it would be going too far … to qualify them [the maritime features east of Bahrain's main islands] as a fringe of islands along the coast. The islands concerned are relatively small in number."[480]

10.38. Thus, a "fringe of islands" is necessarily a group of islands which is not "relatively small in number". By contrast, the "group of islands" lying off Nicaragua's coasts is relatively small in number, especially when their number and size is compared with the length of the mainland coast. With the exception of Cayo Mayor, in the Miskitos cays, and the two Corn Islands, all the other features are cays of very small size. Although Nicaragua has never given a precise description of the maritime features which comprise its allegedly "fringing islands", Nicaragua could only find seven geographical points on very tiny features as base points, when its mainland coast length measures some 453 kilometers.[481] By comparison, Bahrain's claimed "fringe of islands" were more numerous and more important in size (Hawar Island's length alone is about

[480] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001*, p. 103, para. 214.
[481] 2012 Judgment, p. 675, paras. 144 and 145.

30% of the length of the eastern coast of the main Bahrain Island). Yet, the Court considered that these islands were "relatively small in number."[482]

10.39. Even if the number was sufficient, a group of islands would not be considered a fringe of islands unless it forms a unity with the mainland. This is not the case with respect to Nicaragua's islands, most of which are located at considerable distances from the coast. The three main features – the Miskitos Cays and the Corn Islands – are located, respectively, at 22 and 30 nautical miles from the nearest mainland;[483] that is to say, more than twice the breadth of what would normally be the territorial sea.

10.40. If not so interconnected with the mainland that the group of islands appears to be its continuation – which is the case of most of the skjærgaard in Norway[484] – a group of islands can be seen as a fringe of islands if, under the second hypothesis, it "masks the coast."[485] This criterion has been confirmed in *Eritrea* v. *Yemen,* where the arbitral tribunal ruled that:

> "The relatively large islet of Tiqfash, and the smaller islands of Kutama and Uqban further west, all appear to be part of an intricate system of islands, islets and reefs which guard this part of the

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482 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001*, p. 103, para. 214.

483 See Figure 10.3.

484 *Fisheries case, Judgment of December 18th 1951: I.C.J. Reports 1951*, p. 116.

485 UN Office for Ocean Affairs and the Law of the Sea, *Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea*, 1989, p. 21. Available at Peace Palace Library.

> coast. This is indeed, in the view of the Tribunal, a 'fringe system' of the kind contemplated by article 7 of the Convention."[486]

10.41. In contrast, the islands adjacent to the Nicaraguan mainland coast clearly have no or very limited masking effect on that coast. This is the case even if one were to take into account not only the seven geographical features on which Nicaragua places its base points, but all the (tiny) land masses that are located east of the mainland coast. A projection of these different islands and features against the general direction of the Nicaraguan mainland coast reveals that such islands and features mask no more than 5 to 6 percent of the coast, as depicted in **Figure 10.2**.

[486] *Award of the Arbitral Tribunal in the second stage of the proceedings (Maritime Delimitation) between Eritrea and Yemen*, p. 369, para. 151.

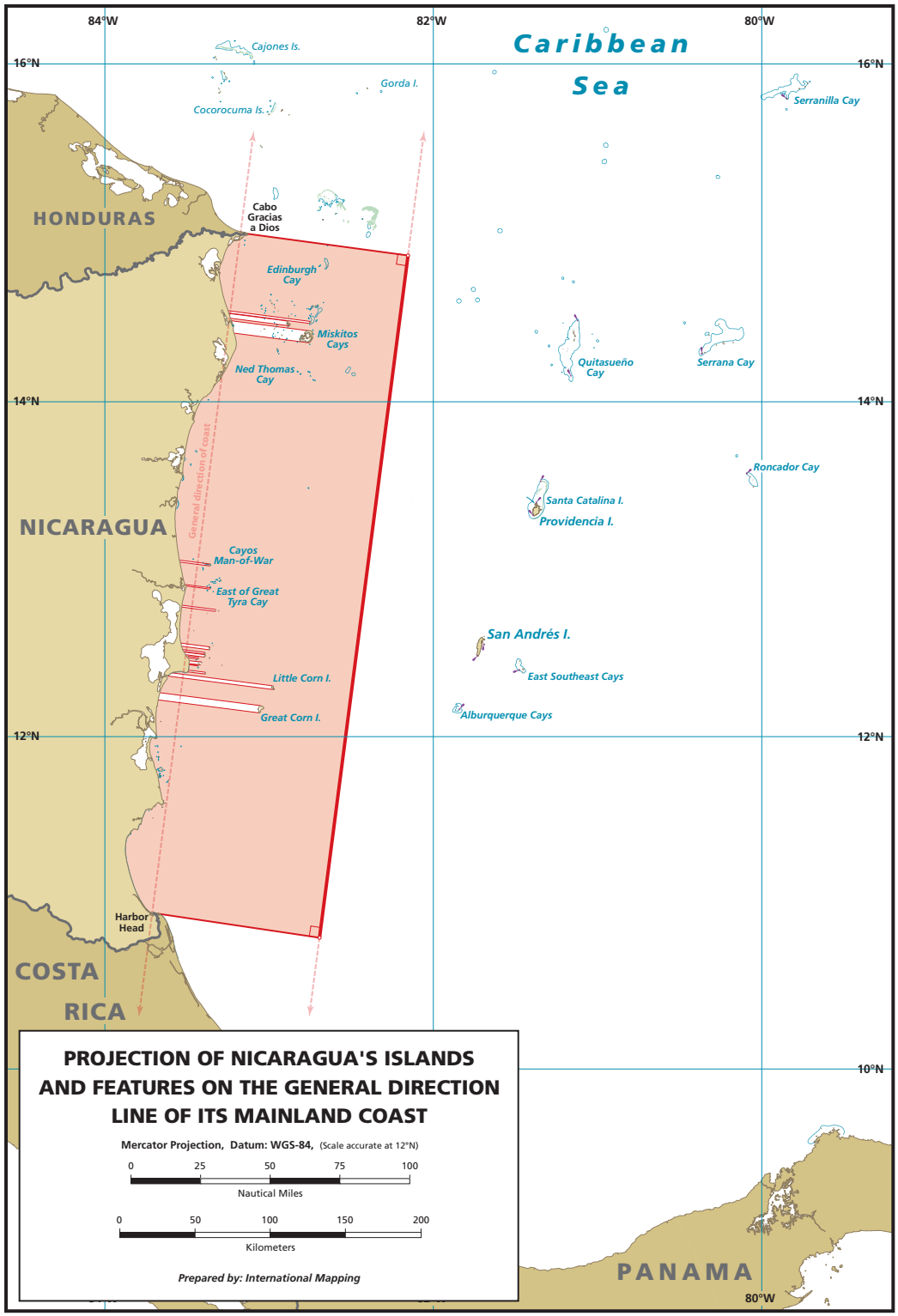
84°W
82°W
80°W
16°N
14°N
12°N
10°N
Caribbean Sea
Cajones Is.
Gorda I.
Cocorocuma Is.
Serranilla Cay
HONDURAS
Cabo Gracias a Dios
Edinburgh Cay
Miskitos Cays
Ned Thomas Cay
Quitasueño Cay
Serrana Cay
General direction of coast
Roncador Cay
Santa Catalina I.
Providencia I.
NICARAGUA
Cayos Man-of-War
East of Great Tyra Cay
San Andrés I.
East Southeast Cays
Little Corn I.
Great Corn I.
Alburquerque Cays
Harbor Head
COSTA RICA
PANAMA
PROJECTION OF NICARAGUA'S ISLANDS AND FEATURES ON THE GENERAL DIRECTION LINE OF ITS MAINLAND COAST
Mercator Projection, Datum: WGS-84, (Scale accurate at 12°N)
0 25 50 75 100
Nautical Miles
0 50 100 150 200
Kilometers
Prepared by: International Mapping

Figure 10.2

10.42. It may be possible to consider that some islands or cays which are located close to Nicaragua's main coast as "in its immediate vicinity". But this is not sufficient for Nicaragua to be allowed to draw straight baselines all along its coast. First, the requirement for straight baselines is that the entire "fringe of islands" lies in the immediate vicinity of the coast, not only a limited number of islands pertaining to a larger group. Second, *none* of the islands on which Nicaragua pretends to posit its base points can be considered to be in the "immediate vicinity" of the coast as shown in the table below and as depicted in **Figure 10.3**:

Nicaragua's geographical basepoints			**Corresponding Closest location on the mainland**	
Point	Coordinates	***Distance***	Coordinates	Ref.
Edinburgh Cay	82°40'W-14°49'N	***27.9 NM***	83°07'W-14°59'N	L2
Miskitos Cays	82°48'W-14°21'N	***22.4 NM***	83°11'W-14°19'N	L3
Ned Thomas Cay	82°48'W-14°08'N	***25.2 NM***	83°11'W-14°19'N	L4
Man-of-War Cay	83°20'W-13°03'N	***11.6 NM***	83°32'W-13°01'N	L5
Great Tyra Cay	83°17'W-12°-56'N	***12.7 NM***	83°30'W-12°54'N	L6
Little Corn Island	82°59'W-12°17'N	***30.0 NM***	83°29'W-12°23'N	L7
Great Corn Island	83°03'W-12°11'N	***28.4 NM***	83°29'W-12°23'N	L8

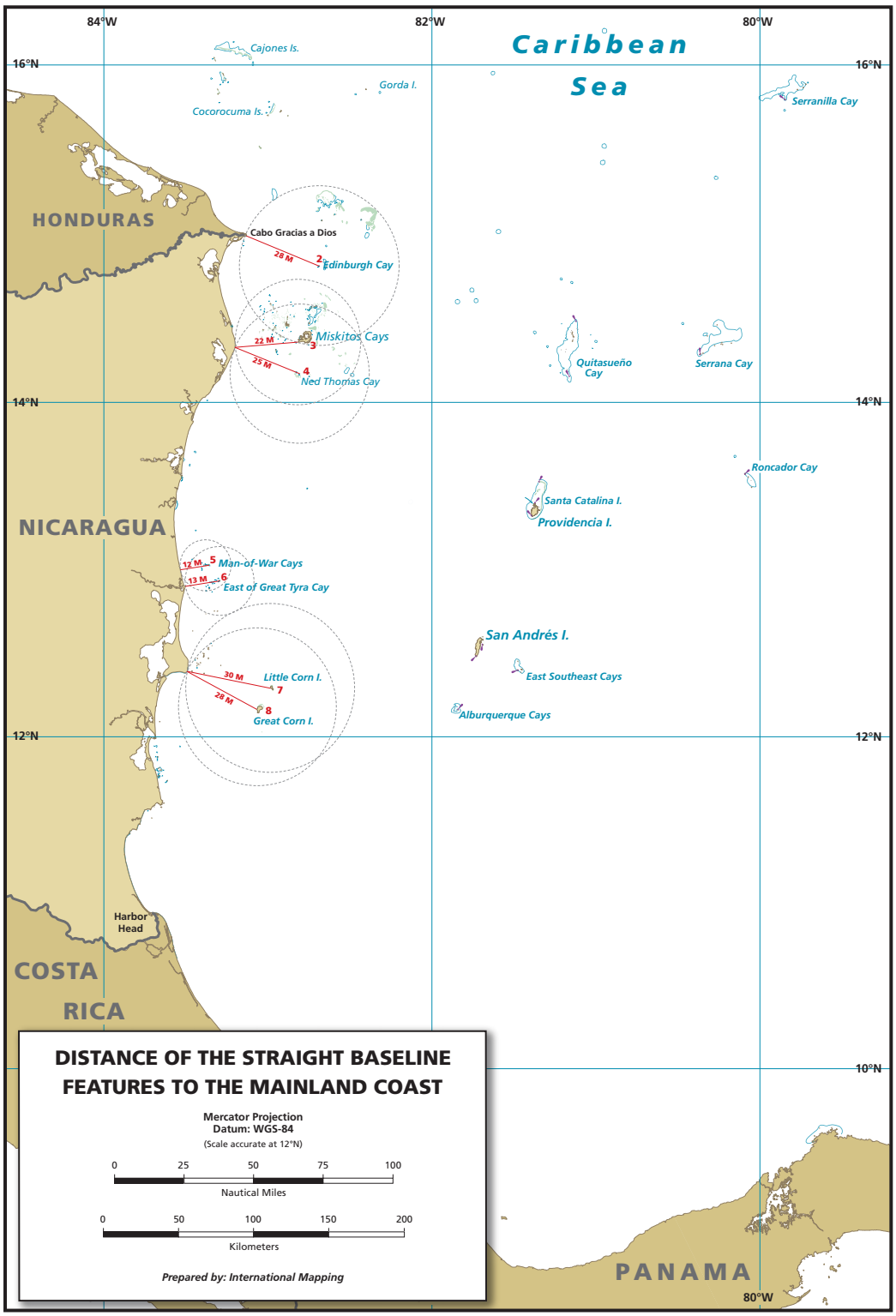
84°W
82°W
80°W
16°N
14°N
12°N
10°N
Caribbean Sea
Cajones Is.
Gorda I.
Cocorocuma Is.
Serranilla Cay
HONDURAS
Cabo Gracias a Dios
28 M
2
Edinburgh Cay
22 M
25 M
3
Miskitos Cays
4
Ned Thomas Cay
Quitasueño Cay
Serrana Cay
Roncador Cay
Santa Catalina I.
Providencia I.
NICARAGUA
12 M
5
Man-of-War Cays
13 M
6
East of Great Tyra Cay
San Andrés I.
East Southeast Cays
30 M
Little Corn I.
7
28 M
8
Great Corn I.
Alburquerque Cays
Harbor Head
COSTA RICA
PANAMA
DISTANCE OF THE STRAIGHT BASELINE FEATURES TO THE MAINLAND COAST
Mercator Projection
Datum: WGS-84
(Scale accurate at 12°N)
0 25 50 75 100
Nautical Miles
0 50 100 150 200
Kilometers
Prepared by: International Mapping

Figure 10.3

10.43. It follows that Nicaragua's geographic situation does not allow Nicaragua to draw straight baselines. But even if it were the case, it would not entitle Nicaragua to draw the straight baselines mentioned in Nicaragua's Decree No. 33-2013.

(b) Nicaragua's Claimed Baselines Do Not Meet the Necessary Requirements

(i) Nicaragua's Straight Baselines Depart from the General Direction of the Coast

10.44. As reflected in Article 7, paragraph 3, of UNCLOS, in circumstances where a State is allowed to draw straight baselines, those lines must follow "the general direction of the coast". This requirement is obviously different from the one set out in the definition of fringing islands according to which the relevant islands are to be located "along the coast in its immediate vicinity". As the Court noted in its Judgment in the *Fisheries* case, the general aim of the rules regarding straight baselines, including the requirement that the baselines follow "the general direction of the coast", is to reflect the general principle "that the belt of territorial waters must follow the general direction of the coast."[487] Moreover, the "spirit of Article 7", as explained by the United Nations Office for Ocean

[487] *Fisheries case, Judgment of December 18th, 1951: I.C.J. Reports 1951,* p. 129.

Affairs and the Law of the Sea, is not to "increase the territorial sea unduly."[488]

10.45. In Nicaragua's situation, it cannot connect long distant islands by straight baselines on the mere ground that the overall drawing of these baselines has approximately the same shape as the mainland coast. To follow "the general direction of the coast", the straight baselines may only extend to outermost islands and low-tide elevations of fringing islands in the "localities"[489] – and only in localities – where such islands effectively mask the mainland coast.[490] In the remainder of the coast, it is the "normal" baseline that must be followed.[491]

(ii) The Sea Areas Lying within the Straight Baselines Are Not Closely Linked to the Land Domain

10.46. The Court has also emphasized that, with respect to the drawing of straight baselines, another –

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[488] UN Office for Ocean Affairs and the Law of the Sea, *Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea*, 1989, pp.17-20. Available at Peace Palace Library.

[489] Convention on the Territorial Sea and the Contiguous Zone, 1958, Sec. II, Art. 4; UNCLOS, Sect. 1, Art. 7.

[490] It should also be recalled that in previous draft versions of what became the 1958 Territorial Sea Convention, the International Law Commission had inserted a supplementary rule limiting the length of all straight baselines to 10 nautical miles (See "Regime of the Territorial Sea" Art. 5(2) at United Nations, *Yearbook of the International Law Commission – Documents of the Sixth Session Including the Report of the Commission to the General Assembly*, 1954, Vol. II, p. 154. Available at Peace Palace Library).

[491] Convention on the Territorial Sea and the Contiguous Zone, 1958, Sec. II, Art. 3; United Nations Convention on the Law of the Sea, Sec. 2, Art. 5.

> "[f]undamental consideration, of particular importance…, is the more or less close relationship existing between certain sea areas and the land formations which divide or surround them. The real question raised in the choice of base-lines is in effect whether certain sea areas lying within these lines are sufficiently closely linked to the land domain to be subject to the regime of interna1 waters."[492]

10.47. Further, as explained by the United Nations Office for Ocean Affairs and the Law of the Sea:

> "The spirit of the rule is clearly that internal waters must be in fairly close proximity to land represented by islands or promontories. Sweden, in a statement to the International Law Commission, expressed the view that the criterion of the sufficient and close link means that '… the expanse of water in question is so surrounded by land, including islands along the coast, that it seems natural to treat it as part of the land domain'".[493]

10.48. To calculate whether Nicaragua's decree corresponds to this requirement, it should be kept in mind that: (a) the lengths of the straight baselines drawn by Nicaragua range from 7 nautical miles (between point 5 on Man-of-War Cay and point 6 East of Great Tyra Cay) to 83 nautical miles (between point 8 on Great Corn Island and Point 9 at Harbor Head); (b) the distance between the outermost island and the closest mainland reaches up to nearly 30 nautical miles; and, (c) the surface area

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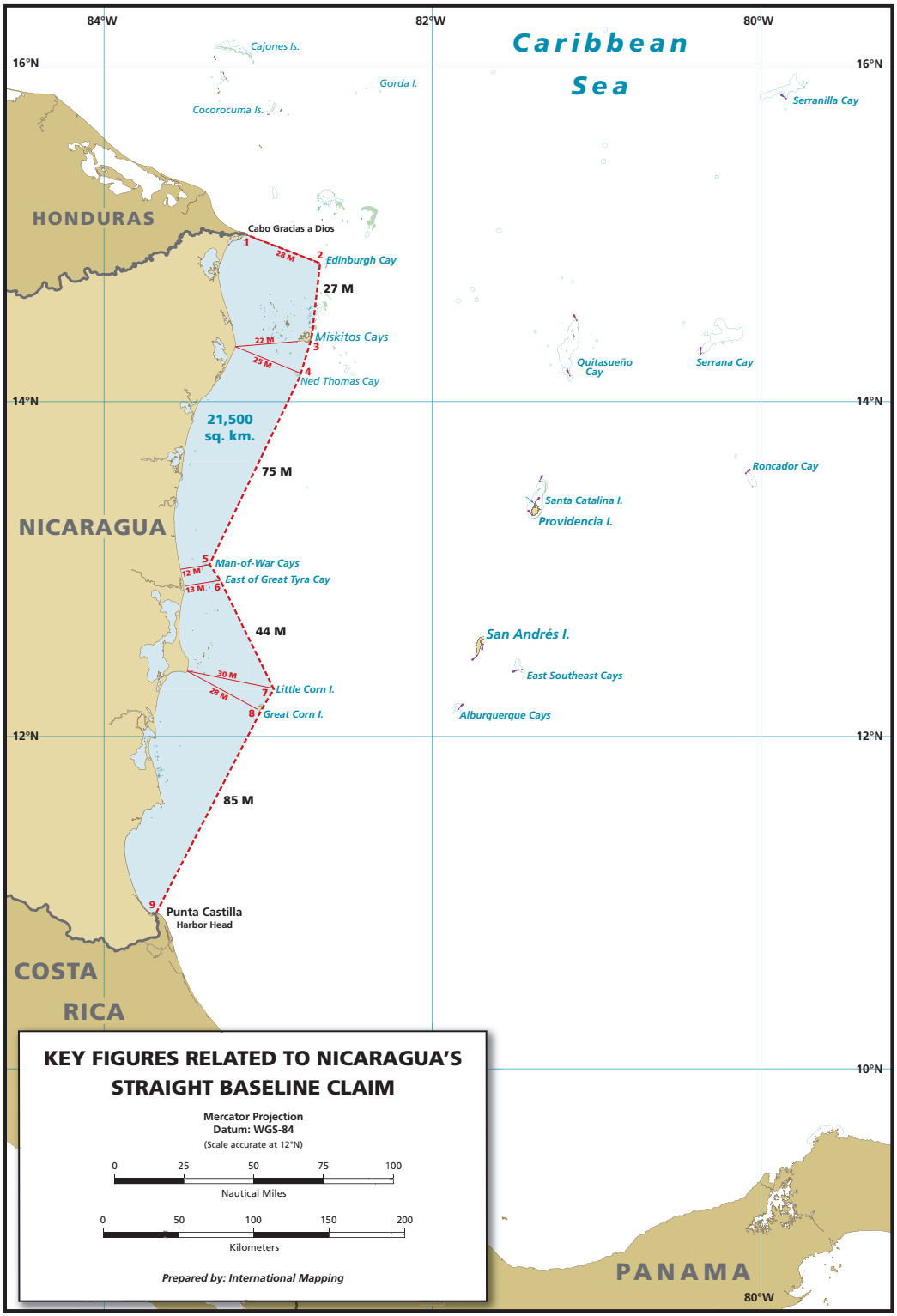
[492] *Fisheries case, Judgment of December 18th, 1951: I.C.J. Reports 1951*, p. 133.

[493] UN Office for Ocean Affairs and the Law of the Sea, *Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea*, 1989, p.26. Available at Peace Palace Library.

encompassed between these baselines and the mainland coastline of Nicaragua may be estimated at around 21,500 square kilometres, that is to say, half the size of the Netherlands. These key figures are depicted in **Figure 10.4**.

10.49. As a consequence, the effect of Nicaragua's straight baselines decree is to claim as internal waters substantial portions of the Southwestern Caribbean (see blue area in **Figure 10.4**). Most of this area is not even enclosed in what should be seen as Nicaragua's territorial sea measured according to the normal baselines.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22 M
25 M
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Ned Thomas Cay
Quitasueño Cay
Serrana Cay
21,500 sq. km.
75 M
Roncador Cay
Santa Catalina I.
Providencia I.
NICARAGUA
5
12 M
Man-of-War Cays
13 M
6
East of Great Tyra Cay
44 M
San Andrés I.
East Southeast Cays
30 M
28 M
7
Little Corn I.
8
Great Corn I.
Alburquerque Cays
85 M
9
Punta Castilla
Harbor Head
COSTA RICA
PANAMA
KEY FIGURES RELATED TO NICARAGUA'S STRAIGHT BASELINE CLAIM
Mercator Projection
Datum: WGS-84
(Scale accurate at 12°N)
0 25 50 75 100
Nautical Miles
0 50 100 150 200
Kilometers
Prepared by: International Mapping

Figure 10.4

10.50. There are neither geographical nor legal reasons to consider the sea areas enclosed between Nicaragua's claimed straight baselines and its mainland coast as internal waters. These areas represent an extensive surface, equal to that of the Kattegat Sea between Sweden and Denmark. These areas are not isolated from the maritime space beyond Nicaragua's sovereignty, since the adjacent islands of Nicaragua are nowhere close enough to constitute an interlocking system of territorial seas.[494] To the contrary, the vast majority of these areas are directly and openly connected with seas outside the sovereignty of Nicaragua. Therefore, there is no objective reason for subjecting the vast maritime areas located within Nicaragua's straight baselines to the regime of internal waters, with the corresponding effect that each of Nicaragua's maritime zones (territorial sea, contiguous zone, EEZ and continental shelf) is artificially extended seaward.

10.51. In the light of the above, it is clear that, by its Decree No 33-2013, Nicaragua has claimed an exorbitant baseline in the Caribbean Sea which is not only contrary to international law, but also has adverse effects on the rights of other States including Colombia.

[494] See Figure 10.5.

D. Colombia's Rights Are Infringed by Nicaragua's Claimed Baselines in the Caribbean Sea

10.52. Nicaragua's unlawful decision to establish a system of straight baselines to determine the limit from which the breadth of its maritime zones are measured has directly infringed Colombia's rights in the Caribbean Sea, in the following ways:

- by extending its internal waters eastward, Nicaragua denies the right of innocent passage and freedom of navigation in vast stretches of sea in which these rights and freedoms should be enjoyed (Sub-section (1));

- by extending the territorial sea of Nicaragua, Colombia's navigational rights have also been unduly restrained (Sub-section (2));

- and by extending Nicaragua's exclusive economic zone, Nicaragua has created an artificial overlap with Colombia's entitlement to its exclusive economic zone and continental shelf (Sub-section (3)).

(1) The Closing by Nicaragua of the Waters within Its Straight Baselines Violates Colombia's Rights

10.53. As explained, Nicaragua's claimed baselines purport to redefine a large belt of sea east of Nicaragua's mainland, the

breadth of which extends up to 30 nautical miles, as Nicaragua's internal waters. Since internal waters are considered as a continuation of the mainland, Nicaragua's claim is that it enjoys full sovereignty over this area, with no exception. Moreover, it denies any right of innocent passage to foreign flagged vessels of all States, since there is no such clear right, in customary international law, in internal waters.[495]

10.54. As a consequence, any foreign ship that would cross, even unwillingly, the straight baselines drawn by Nicaragua would immediately fall under the sovereign jurisdiction of Nicaragua, with possible extreme consequences:

> "by entering foreign ports and other internal waters, ships put themselves within the territorial jurisdiction of the coastal State. Accordingly, that State is entitled to enforce its laws against the ship and those on board, subject to the normal rules concerning sovereign and diplomatic immunities, which arise chiefly in the case of warships."[496]

10.55. It must be emphasized that the enactment by Nicaragua of Decree No. 33-2013 implies not only that it can deny any right of passage to Colombia in what would become internal waters, but also that it may forbid any maritime access to them.

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[495] Both the 1958 Convention on the Territorial Sea and the Contiguous Zone and UNCLOS (to which Colombia is not a Party) contain provisions establishing a right of innocent passage in waters enclosed as internal waters as a consequence of the drawing of straight baselines. But, as mentioned by authors: "That, at least, is the position under the Conventions: the position in cases where such lines are drawn in exercise of rights under customary law is less clear, the Anglo-Norwegian Fisheries case making no reference [*sic*] the preservation of rights of innocent passage in these circumstances," R. R. Churchill & A.V. Lowe, *op. cit.*, p. 61. Available at Peace Palace Library.

[496] *Ibid*.

This is the exact opposite of the regime that would apply if Nicaragua's baselines were normal baselines in compliance with international law. In that situation, there would be no internal waters of such a huge magnitude. Colombia would have the right of freedom of passage in what properly was Nicaragua's territorial sea, and freedom of navigation and overflight in what should be Nicaragua's EEZ.

10.56. The denial of these rights as a result of Nicaragua's straight baselines decree thus directly infringes Colombia's rights.

(2) Nicaragua's Claim that its Territorial Sea Extends Further East than what International Law Authorizes Infringes Colombia's Rights

10.57. Similarly, the effect of Nicaragua's straight baselines claim is to push the external limit of its territorial sea far east of the 12-mile limit that would apply if the baselines were correctly drawn.

10.58. This has important adverse consequences for all States, including Colombia. Indeed, Nicaragua may exercise sovereignty in its territorial sea, including exercising police powers over ships and persons located therein, enacting laws and regulations without any limitation as to their subject-matter and enforcing them against any person present within its territorial sea and the air space above it. The only limitation is that, in its territorial sea, Nicaragua cannot refuse innocent

passage of ships, but there is no corresponding right to overflight.

10.59. By drawing straight baselines that lie at an average of 25 nm from the mainland coast, Nicaragua has extended the outer limit of its territorial sea by an average of 25 nm, as shown in **Figure 10.5** below. Such extension directly impedes the rights to which Colombia is entitled in a maritime zone which, under international law, can only be Nicaragua's EEZ. As noted by two authors:

> "Whilst the extent of coastal state sovereignty in the territorial sea is not clearly articulated it is possible to discern its extent from a review of customary international law, state practice, and other relevant provisions of the convention. It is clear that the coastal state has sovereignty over all the resources which are found within the territorial sea, and unlike allowances which are made in the EEZ or continental shelf regime for access rights by third states or even the equitable sharing of resources, nothing equivalent prevails within the territorial sea except in the case of arrangements that may predate the LOSC or have a historic basis".[497]

10.60. The rights of Colombia that are impeded by Nicaragua's extension of its territorial sea are, *inter alia*, the right to freedoms of navigation and overflight by aircraft, including military ones, and the laying of cables and pipelines. All these rights are of a customary nature.

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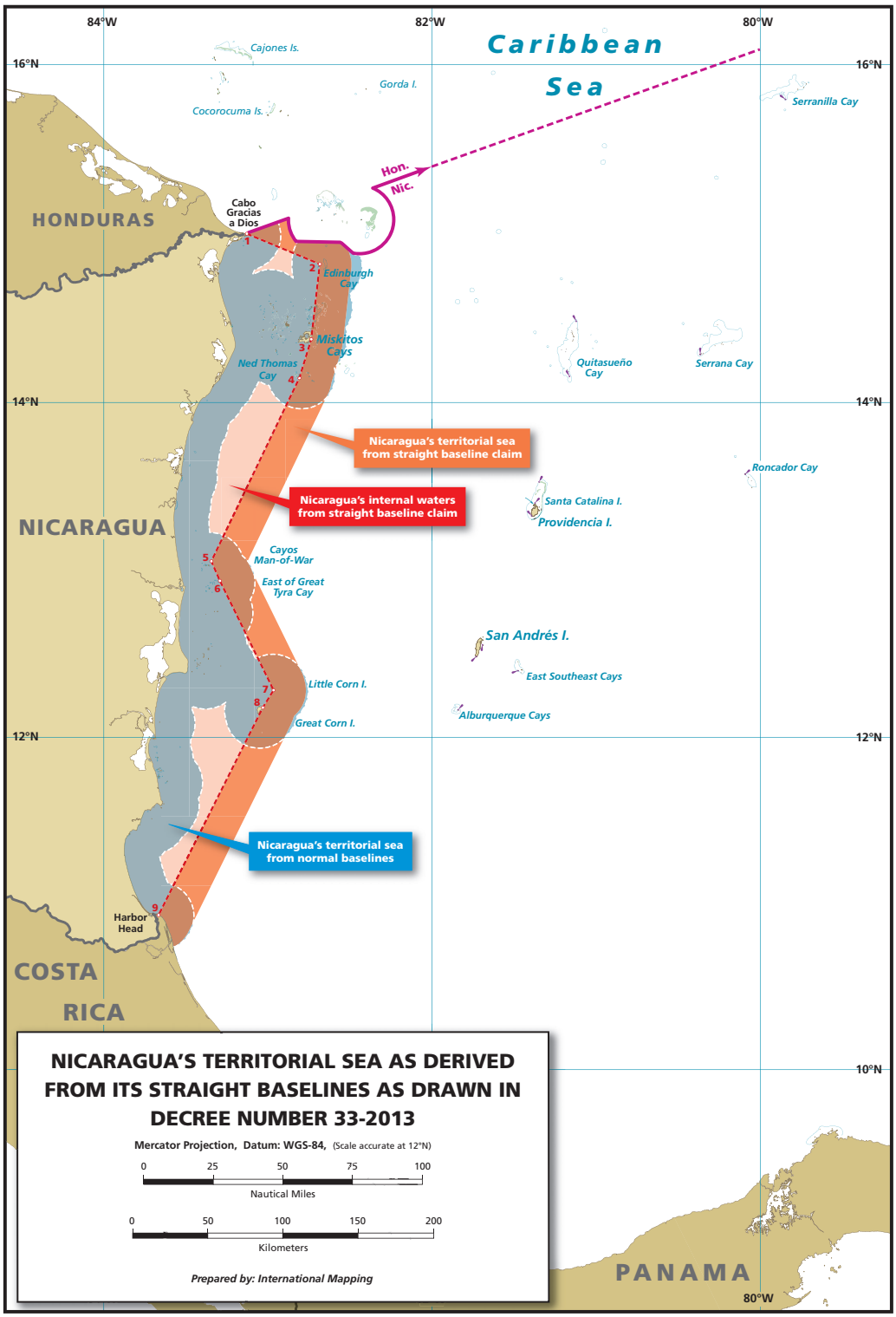
[497] D. Rothwell & T. Stephens, *op.cit.*, p. 69. Available at Peace Palace Library.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Nicaragua's territorial sea from straight baseline claim
Nicaragua's internal waters from straight baseline claim
Roncador Cay
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Providencia I.
NICARAGUA
Cayos Man-of-War
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Little Corn I.
Great Corn I.
Alburquerque Cays
Nicaragua's territorial sea from normal baselines
Harbor Head
COSTA RICA
PANAMA
NICARAGUA'S TERRITORIAL SEA AS DERIVED FROM ITS STRAIGHT BASELINES AS DRAWN IN DECREE NUMBER 33-2013
Mercator Projection, Datum: WGS-84, (Scale accurate at 12°N)
0 25 50 75 100
Nautical Miles
0 50 100 150 200
Kilometers
Prepared by: International Mapping

Figure 10.5

(3) THE INFRINGEMENT OF COLOMBIA'S RIGHT TO A 200-MILE EXCLUSIVE ECONOMIC ZONE

10.61. Under international customary law, a coastal State is entitled to limited sovereign rights in a zone extending up to 200 miles "from the baselines from which the breadth of the territorial sea is measured."[498] It is also entitled to a continental shelf up to the same external limit.

10.62. This principle was applied by the Court in its 2012 Judgment when it decided that the delimitation of the maritime boundary between Nicaragua and Colombia in the Southwestern Caribbean Sea was not to go beyond the limit – identified by the Court with endpoints A and B – of the "200-nautical-mile limit from the baselines from which the territorial sea of Nicaragua is measured."[499] But, as noted above, the Court also immediately observed that:

> "since Nicaragua has yet to notify the baselines from which its territorial sea is measure, the precise location of end-point A cannot be determined."[500]

10.63. As it radiates to successive seaward zones, Nicaragua's Decree No 33-2013 has the effect of pushing Nicaragua's EEZ and continental shelf into EEZ and continental shelf areas further east into areas where Colombia has an entitlement. By drawing straight baselines from the outermost islands and features located

498 UNCLOS, Art. 57.
499 2012 Judgment, para. 237.
500 *Ibid*.

west of its mainland coast, Nicaragua unlawfully extends its entitlements into areas which are more than 200 nautical miles from the baselines it could lawfully claim.

10.64. This is an additional reason why Nicaragua's enactment of its straight baselines decree has infringed the legitimate rights of Colombia justifying Colombia's counter-claim.

E. Conclusion

10.65. For the above reasons, Colombia submits that Nicaragua's Presidential Decree No. 33-2013 of 19 August 2013 is in violation of international law and of Colombia's sovereign rights and maritime spaces, and therefore, must be adjusted in order that it complies with the rules of international law concerning the drawing of the baselines from which the breadth of the territorial sea is measured.

Chapter 11

SUMMARY

11.1. The scope of the dispute before the Court concerns not only the conduct of Colombia in the portions of the Southwestern Caribbean Sea to which Nicaragua's claims are directed, but also the conduct of Nicaragua in the same maritime areas and within the same timeframe.

11.2. The conduct of both Parties falls to be assessed in the light of the special characteristics of the Southwestern Caribbean Sea and the applicable principles and rules of customary international law.

11.3. These special circumstances include the following:

- The Southwestern Caribbean Sea is a semi-enclosed sea within which the San Andrés Archipelago is situated. The islands comprising the Archipelago, over which Colombia has sovereignty, form a political, social, environmental and economic unit.

- The inhabitants of the Archipelago, including the Raizal community, are dependent on artisanal fishing in their traditional fishing banks, eco-tourism and the marine environment, which

constitute an essential part of their habitat, livelihood and culture.

- The Southwestern Caribbean Sea is an ecologically fragile maritime area consisting of an inter-connected and interdependent eco-system. It is highly vulnerable to predatory fishing practices, depletion of the living resources, pollution and other destructive practices. Colombia has taken the lead in protecting and preserving the marine environment of this area by, *inter alia*, establishing the Seaflower Biosphere Reserve and the Seaflower Marine Protected Area, and by entering into various bilateral and multilateral agreements to this end.

- This part of the Caribbean Sea is also of major security concern inasmuch as it constitutes a major trafficking route for drug smuggling and other transnational crimes. Colombia has been particularly diligent in this regard and has secured a wide network of agreements with concerned States directed to adequately respond to these threats.

11.4. Both Parties have rights and obligations under international law by which their respective conduct falls to be considered.

11.5. While Nicaragua has sovereign rights to explore and exploit the natural resources situated within its exclusive economic zone, it also has obligations arising under international law, which it ignores in its pleadings. These include the obligation to protect and preserve the marine environment, exercise due diligence over its nationals and licensed vessels operating in the maritime area, respect the rights of the inhabitants of the Archipelago to a healthy, sound and sustainable environment, and respect the traditional fishing rights of those inhabitants. Furthermore, Nicaragua has the obligation to have due regard for the rights of Colombia in exercising its sovereign rights.

11.6. Colombia also possesses important rights and duties in the Southwestern Caribbean, including in areas that fall within maritime zones that have been adjudicated to Nicaragua pursuant to the Court's 2012 Judgment. These include the right of freedom of navigation and overflight, the right to monitor activities in the area for a number of purposes, the duty to protect and preserve the marine environment and the habitat of the Archipelago's community and to exercise due diligence in this regard, and the right to ensure that the artisanal fishing rights of the inhabitants of the Archipelago, including the Raizales, are safeguarded and respected.

11.7. Colombia has shown that it has not violated Nicaragua's sovereign rights or maritime spaces. Pursuant to its freedoms of navigation and overflight, Colombia has the right to be present

in Nicaragua's EEZ and to exercise its duties under international law having due regard to the rights of Nicaragua and other States.

11.8. Nicaragua's claim that Colombia violated its sovereign rights by harassing its fishing vessels is not supported by the facts. Many of the "facts" on which Nicaragua relies are based on erroneous information and others post-date the critical date (the date when Colombia ceased to be bound by the Pact of Bogotá). The claims are also inconsistent with Nicaragua's contemporaneous statements and conduct, which confirm that there were no "incidents" that could have given rise to a complaint at the time they allegedly occurred, and that the relevant facts were not even brought to the attention of Nicaragua's political leaders until well after its Agent in The Hague had instituted the present proceedings. Moreover, it has not been demonstrated that Colombia ever prevented Nicaragua from enjoying its sovereign rights within its EEZ.

11.9. The claim that Colombia violated Nicaragua's maritime spaces by the enactment of a decree establishing an Integral Contiguous Zone around the islands of the Archipelago is equally misconceived. Apart from the fact that there is no incompatibility between the establishment of a contiguous zone by one State and the exercise of sovereign rights by a neighbouring State in its EEZ, Colombia has demonstrated that neither the configuration of the Integral Contiguous Zone, nor the jurisdiction that Colombia exercises within it, violates

customary international law. Furthermore, Nicaragua is unable to show that Colombia has in any way prejudiced Nicaragua in exercising sovereign rights within its EEZ by virtue of the enactment of a decree establishing an Integral Contiguous Zone.

11.10. It follows that none of the remedies that Nicaragua seeks in its Memorial are justified. In short, based on the facts and the law, Colombia has not violated Nicaragua's sovereign rights or maritime spaces.

11.11. In contrast, Nicaragua has breached several international obligations binding on it that have caused serious prejudice to Colombia. Accordingly, pursuant to Article 80 of the Rules of Court, Colombia is lodging four counter-claims against Nicaragua. As Colombia has shown, under the Pact of Bogotá the Court has jurisdiction to rule on these counter-claims, and each of them, being directly connected with the subject-matter of Nicaragua's claims, is admissible.

11.12. Colombia's first and second counter-claims are inter-related. The first counter-claim is based on Nicaragua's breach of its obligation to protect and preserve the marine environment and to exercise due diligence in this regard. Colombia has documented numerous instances in which fishing vessels licensed by Nicaragua have engaged in predatory and destructive fishing practices, both within Colombia's territorial sea and in other parts of the Southwestern Caribbean in violation of these obligations.

11.13. Colombia's second counter-claim is also based on Nicaragua's failure to exercise due diligence with respect to the protection and preservation of the marine environment. In this instance, however, the counter-claim is based on the consequential failure of Nicaragua to prevent the degradation of the marine habitat of the inhabitants of the Archipelago, including in particular the Raizales, who depend on the environmental integrity and sustainability of their traditional fishing grounds and habitat.

11.14. Colombia's third counter-claim arises as a result of Nicaragua's infringement of the traditional artisanal fishing rights of the inhabitants of the Archipelago. While Nicaragua's President has committed Nicaragua to recognize the traditional fishing rights of the Raizales, in practice Nicaragua's Naval Force has harassed and intimidated Colombia's fishermen, thus preventing them from being able to access and enjoy their traditional fishing rights.

11.15. Colombia's fourth counter-claim is in response to the enactment by Nicaragua of a decree purporting to establish a system of straight baselines connecting scattered islands off its mainland coast. These baselines are contrary to the rules governing the drawing of straight baselines and are thus in violation of international law. Because the effect of such baselines is to enlarge in an impermissible manner the extent of Nicaragua's internal waters, territorial sea, contiguous zone and

exclusive economic zone, they directly prejudice Colombia's maritime rights and spaces.

11.16. Accordingly, Colombia is requesting the Court to adjudge and declare that Nicaragua has violated its international obligations *vis-à-vis* Colombia and to order Nicaragua to desist from these violations; to pay compensation for the material damage caused, including loss of profits; and to give Colombia appropriate guarantees and assurances of non-repetition.

SUBMISSIONS

I. For the reasons stated in this Counter-Memorial, the Republic of Colombia respectfully requests the Court to reject the submissions of the Republic of Nicaragua in its Memorial of 3 October 2014 and to adjudge and declare that

1. Nicaragua has failed to prove that any Colombian naval or coast guard vessel has violated Nicaragua's sovereign rights and maritime spaces in the Caribbean Sea;

2. Colombia has not, otherwise, violated Nicaragua's sovereign rights and maritime spaces in the Caribbean Sea;

3. Colombia's Decree 1946 of 9 September 2013 establishing an Integral Contiguous Zone is lawful under international law and does not constitute a violation of any of Nicaragua's sovereign rights and maritime spaces, considering that:

   a. The Integral Contiguous Zone produced by the naturally overlapping concentric circles forming the contiguous zones of the islands of San Andrés, Providencia, Santa Catalina, Alburquerque Cays, East-Southeast Cays, Roncador, Serrana, Quitasueño and

Serranilla and joined by geodetic lines connecting the outermost points of the overlapping concentric circles is, in the circumstances, lawful under international law;

b. The powers enumerated in the Decree are consistent with international law; and

4. No Colombian action in its Integral Contiguous Zone of which Nicaragua complains is a violation of international law or of Nicaragua's sovereign rights and maritime spaces.

II. Further, the Republic of Colombia respectfully requests the Court to adjudge and declare that

5. Nicaragua has infringed Colombia's sovereign rights and maritime spaces in the Caribbean Sea by failing to prevent its flag or licensed vessels from fishing in Colombia's waters;

6. Nicaragua has infringed Colombia's sovereign rights and maritime spaces in the Caribbean Sea by failing to prevent its flag or licensed vessels from engaging in predatory and unlawful fishing methods in violation of its international obligations;

7. Nicaragua has infringed Colombia's sovereign rights and maritime spaces by failing to fulfil its international legal obligations with respect to the environment in areas of the Caribbean Sea to which said obligations apply;

8. Nicaragua has failed to respect the traditional and historic fishing rights of the inhabitants of the San Andrés Archipelago, including the indigenous Raizal people, in the waters to which they are entitled to said rights; and

9. Nicaragua's Decree No. 33-2013 of 19 August 2013 establishing straight baselines violates international law and Colombia's maritime rights and spaces.

III. The Court is further requested to order Nicaragua

10. With regard to submissions 5 to 8:

a. To desist promptly from its violations of international law;

b. To compensate Colombia for all damages caused, including loss of profits, resulting from Nicaragua's violations of its international obligations, with the amount

and form of compensation to be determined at a subsequent phase of the proceedings; and

c. To give Colombia appropriate guarantees of non-repetition.

11. With regard to submission 8, in particular, to ensure that the inhabitants of the San Andrés Archipelago enjoy unfettered access to the waters to which their traditional and historic fishing rights pertain; and

12. With regard to submission 9, to adjust its Decree No. 33-2013 of 19 August 2013 in order that it complies with the rules of international law concerning the drawing of the baselines from which the breadth of the territorial sea is measured.

IV. Colombia reserves its right to supplement or amend these submissions.

CARLOS GUSTAVO ARRIETA PADILLA
Agent of Colombia

The Hague, 17 November 2016

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