INTERNATIONAL COURT OF JUSTICE

DISPUTE CONCERNING

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

(NICARAGUA V. COLOMBIA)

ADDITIONAL PLEADING

OF THE REPUBLIC OF NICARAGUA ON COLOMBIA'S COUNTERCLAIMS

4 March 2019

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CR	Colombia's Rejoinder
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CHAPTER I. INTRODUCTION

1.1 Nicaragua submits this Additional Pleading on Colombia's counter-Claims in accordance with the Court's Order of 4 December 2018[1]. On 17 November 2016, Colombia filed its Counter-Memorial together with four counter-claims[2]. Colombia counter-claimed that Nicaragua breached:

> (1) "Its duty of due diligence to protect and preserve the marine environment of the Southwestern Caribbean Sea"[3];
> (2) "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"[4];
> (3) "The artisanal fishing right to access and exploit the traditional banks"[5];
> (4) Colombia's sovereign rights and maritime zones by enacting its straight baselines Decree No. 33-2013 of 19 August 2013[6]

1.2 By Order of 15 November 2017, the Court decided that only the third and fourth counter-claims were admissible[7]. Nicaragua addresses both remaining counter-claims in this Additional Pleading.

1.3 Nicaragua recalls that these proceedings where originally instituted by an Application filed by Nicaragua on 26 November 2013. On 3 October 2014 Nicaragua filed its Memorial stating two claims: (1) that Colombia had violated Nicaragua's maritime zones as delimited in the Court's Judgment of 19 November 2012 and its sovereign rights and jurisdiction in these zones and (2) that Colombia violated the obligation not to use or threaten to use force.[8]

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[1] I.C.J., Order, 4 December 2018, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Counter-Claims.*
[2] *See* CCM, Chapters 7-10.
[3] CCM, para. 8.2.
[4] CCM, para. 8.2
[5] CCM, Chapter 9.
[6] CCM, Chapter 10.
[7] I.C.J., Order, 15 November 2017, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Counter-Claims*, paras. 82(A)(3) and (4).
[8] *See* in particular NM, Chapters II and III.

1.4 On 19 December 2014, Colombia raised preliminary objections on which the Court ruled on 17 March 2016 finding that it has jurisdiction over the first of Nicaragua's claims[9], and also that the dispute that existed at the date on which Nicaragua filed its Application did not concern Colombia's violation of the prohibition of the use or threat to use force[10]. Despite the fact that Nicaragua did not engage in further discussion with respect to its second claim in its Reply and will not do so in this Additional Pleading, this does not mean that the facts invoked by Nicaragua in support of this claim have become irrelevant to the dispute between the Parties.[11] On the contrary, Colombia's violations of Nicaragua's sovereign rights and jurisdiction have continued to this day and its conduct has become even more hostile in nature.[12]

1.5 This procedural summary evidences that Colombia has made use of every possible tool in an attempt to distract the Court's attention from the real core issue, which is Colombia's public rejection of the 2012 Judgment and subsequent violations of Nicaragua's sovereign rights and jurisdiction as recognized therein; which, pursuant to Articles 59 and 60 of the Court's Statute is unconditionally binding.

1.6 In Chapter II of this Additional Pleading Nicaragua will demonstrate that Colombia has not established either the existence of the so called "traditional fishing rights" it claims or their alleged infringement by Nicaragua. Furthermore, Nicaragua will show that the current state of the law of the sea does not allow for the survival of any alleged traditional fishing rights within another country's Exclusive Economic Zone.

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[9] I.C.J., Judgment, 17 March 2016, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia),Preliminary Objections, Reports 2016*,p. 33, para. 74, and p. 43, para. 111(2).
[10] *Ibid.*, p. 33, para. 78 and p. 42, para. 111(1)(c).
[11] *See* NR, Chapter IV.
[12] Nicaragua will supplement the record of these incidents by presenting evidence of additional events that have occurred since it submitted its Reply.

1.7 Chapter III will prove that Nicaragua has complied with international law in establishing its straight baselines, while Colombia's own practice, which is the standard which Colombia could claim to be held in this case, does not comply with international law.

CHAPTER II. THE TRADITIONAL FISHING RIGHTS THAT COLOMBIA CLAIMS DO NOT EXIST AND NICARAGUA HAS NOT INFRINGED THEM IN ANY EVENT

2.1. Colombia continues to argue that Nicaragua has infringed the "traditional fishing rights" of the inhabitants of the San Andrés Archipelago. This claim fails now, as it did before, for the four reasons Nicaragua explained in its 15 May 2018 Reply. That is:

- "traditional fishing rights" of the sort Colombia claims, even if they may previously have existed, were extinguished by the regime of the EEZ;

- President Ortega's public statements intended to defuse the tense political situation created by Colombia's angry rejection of the Court's 2012 Judgment did not change the legal situation;

- in any event, Colombia has not discharged—and cannot discharge—its burden of proving that the traditional rights it claims ever existed in fact; and

- Colombia has also not discharged its burden of proving that Nicaragua has infringed those putative rights.

2.2. Nothing in Colombia's Rejoinder changes any of these conclusions. Indeed, as Nicaragua will show, Colombia's replies to Nicaragua's arguments only underscore the weakness of its case in all respects. Sections A-D of this Chapter, respectively, demonstrate why Colombia's replies on each of the above four points are unpersuasive.

A. Traditional Fishing Rights Were Extinguished by the EEZ Regime

2.3. Nicaragua showed in its Reply that the adoption of the EEZ regime extinguished traditional fishing rights of the sort that Colombia claims in these

proceedings.[13] Colombia disagrees and argues that the traditional fishing rights it claims survived the emergence of the regime of the EEZ.[14] In doing so, however, Colombia is reduced to repeated mischaracterizations of Nicaragua's arguments.

2.4. Colombia claims, for example, that "Nicaragua in the end mainly relies on one single paragraph of an UNCLOS provision [i.e., Article 62(3)[15]] to put forward its thesis that traditional fishing rights have been extinguished in the EEZ."[16] That is not true. In fact, Nicaragua presented a detailed analysis of the text of UNCLOS[17] (which Colombia agrees constitutes customary international law binding on both Parties here), the context,[18] the *travaux préparatoires*[19] and the case law, including the jurisprudence of this Court,[20] all of which confirm the conclusion that the EEZ regime extinguished traditional fishing rights within its waters.

2.5. Indeed, as Nicaragua showed, the entire scheme of the EEZ excludes the possibility of enduring traditional fishing rights for other States and/or their nationals. The very purpose of the regime of the EEZ is to make a coastal State's right over the living resources *exclusive*, exactly as the term "exclusive economic zone" suggests. In the words of the *Virginia Commentary*: "The importance of the concept of exclusivity is that the coastal State, *to the exclusion of other States and entities*, has sole jurisdiction as regards the resources of the zone, and has the right to exercise its discretion in respect of those resources."[21]

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[13] NR, paras. 6.3-6.30.
[14] CR, Chapter 5, argument heading C.
[15] Article 62(3) provides that "[i]n giving access to other States to its exclusive economic zone under this article, the coastal State shall take into account all relevant factors, including, *inter alia*, … the need to minimize economic dislocation in States whose nationals have habitually fished in the zone or which have made substantial efforts in research and identification of stocks."
[16] CR, para. 5.18.
[17] NR, paras. 6.8-6.12.
[18] *Ibid*., paras. 6.13-6.17.
[19] *Ibid*., paras. 6.18-6.21.
[20] *Ibid*., paras. 6.22-6.29.
[21] Satya N. Nanda & Shabtai Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. II (1993), p. 519 (emphasis added).

2.6. Multiple provisions of Part V of UNCLOS make the exclusivity of the coastal States' rights clear. These include, *inter alia*:

- Article 56, which gives coastal States exclusive "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources" of the zone;

- Article 58, which specifies the rights of other States and limits them to the freedom of navigation, overflight, and the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms;

- Article 60, which accords coastal States "the exclusive right to construct and to authorize and regulate the construction and operation" of artificial islands and other installations and structures;

- Article 61, which gives coastal States authority "to determine the allowable catch of the living resources in its exclusive economic zone";

- Article 62(4), which requires nationals of other States fishing in the EEZ to "comply with the conservation measures and with the other terms and conditions established in the laws and regulations of the coastal State"; and

- Article 73(1), which provides that a coastal State "may in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention".

2.7. All of these provisions make clear that the coastal State has exclusive sovereign rights and jurisdiction over the natural resources of its EEZ. To the extent other States and their nationals may wish to fish in the EEZ of the coastal State, Article 62 makes clear they may only do so with the express authorization of the latter and subject to any conditions it may establish.

2.8. Colombia's Rejoinder tellingly does not engage in an analysis of any of these provisions, much less address their significance as a whole. It confines itself only to the dismissive—and mistaken—assertion that "Nicaragua in the end mainly relies" only on Article 62(3) to show that "traditional fishing rights have been extinguished in the EEZ."[22]

2.9. Article 62(3) is important but, as stated, it is far from the only provision on which Nicaragua relies. The significance of Article 62(3) is that it shows that the drafters of UNCLOS specifically considered what account should be taken of the historical fishing practices of other States and their nationals, and decided that they should constitute only one consideration among others that a coastal State should weigh in exercising its sovereign right to give or deny access to other States to the living resources of its EEZ.

2.10. Indeed, the *travaux* on this point could not be clearer. They underscore the conclusion that flows from the plain text of the Convention. As Nicaragua explained in its Reply, a number of States took the view that the Convention should protect their historic fishing practices in waters that were in the process of being transformed into EEZs.[23] That position was decisively rejected in favour of according coastal States the exclusive sovereign rights provided for in Part V.[24]

2.11. Colombia does not dispute this point. Indeed, it does not say anything at all. Its Rejoinder is entirely silent on the *travaux* and the clear conclusion that

[22] CR, para. 5.18.
[23] NR, paras. 6.18-6.21.
[24] *Ibid.*

flows from them. Colombia's silence is a tacit admission that its position now cannot stand in the face of the Convention's negotiating history.

2.12. Another critical point on which Colombia maintains a studied silence is the holding of the Chamber of the Court in the *Gulf of Maine* case, which Nicaragua highlighted in its Reply.[25] As Nicaragua explained, the Chamber ruled that the adoption of the EEZ had the effect of extinguishing any historic fishing rights:

> "Until very recently … these expanses were part of the high seas and as such freely open to the fishermen not only of the United States and Canada but also of other countries, and they were indeed fished by very many nationals of the latter. … But after the coastal States had set up exclusive 200-mile fishery zones, the situation radically altered. *Third States and their nationals found themselves deprived of any right of access to the sea areas within those zones* and of any position of advantage they might have been able to achieve within them. As for the United States, any mere factual predominance which it had been able to secure in the area was transformed into a *situation of legal monopoly to the extent that the localities in question became legally part of its own exclusive fishery zone*. Conversely, to the extent that they had become part of the exclusive fishery zone of the neighbouring State, no reliance could any longer be placed on that predominance."[26]

2.13. The Chamber's holding by itself refutes Colombia's case. By virtue of Nicaragua's 2002 declaration establishing an EEZ, "third States *and their nationals*" were "deprived of any right of access to the sea areas" in that zone. Nicaragua acquired a "legal monopoly" over the natural resources of its EEZ. Colombia's failure even to mention the *Gulf of Maine* case shows that it cannot reconcile its position with the Court's jurisprudence.

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[25] *Ibid*., paras. 6.22-6.23.

[26] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States), Judgment, I.C.J Reports 1984* (hereinafter "*Gulf of Maine*"), p. 246 at pp. 341-342, para. 235 (emphases added).

2.14. Even as it fails to address case law from the Court that is directly on point, Colombia accuses Nicaragua of "deliberately ignor[ing]" the awards in the *Arbitration regarding the Delimitation of the Abyei Area* and the *Arbitration between Barbados and the Republic of Trinidad and Tobago*.[27] According to Colombia, "[t]he former concluded that 'the transfer of sovereignty should not be construed to extinguish traditional rights to the use of land (or maritime resources)'",[28] and the "second specifically mentioned that, notwithstanding the delimitation, Trinidad and Tobago had an obligation to grant 'Barbados access to fisheries within [its] EEZ'".[29] Nicaragua did not previously discuss either decision because neither is relevant to the issues in dispute in this case. Still less can either overcome the weight of the Chamber's ruling in the *Gulf of Maine* case.

2.15. The *Abyie* arbitration is irrelevant for two reasons. It dealt with issues of (a) sovereignty over (b) land territory. This case, in contrast, deals with issues of sovereign rights and jurisdiction over maritime areas in the EEZ. And *Barbados v Trinidad and Tobago* is irrelevant because it does not stand for the proposition Colombia claims. The tribunal did *not* rule that *UNCLOS* obliged Trinidad and Tobago to grant Barbados access to fisheries within its EEZ. It determined only that *in light of specific formal representations that the Agent of Trinidad and Tobago made to the tribunal during the case*, it "ha[d] assumed an obligation … to negotiate in good faith an agreement with Barbados that would give Barbados access to fisheries within the EEZ of Trinidad and Tobago, subject to the limitations and conditions spelled out in that agreement …".[30] Nicaragua, in

[27] CR, para. 5.20.
[28] *Ibid*. (citing *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).
[29] *Ibid*. (citing *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* (hereinafter "*Barbados v. Trinidad and Tobago*"), R.I.A.A., Vol. XXVII, p. 227, para. 292.
[30] *Barbados v. Trinidad and Tobago*, para. 292.

contrast, has never committed itself to, or entered, an agreement with Colombia granting it access to any of the resources in its EEZ.

2.16. Colombia also argues that the *Eritrea/Yemen* case supports it position. As Nicaragua previously showed, however, that case offers no help to Colombia.[31] The tribunal was asked to determine the parties' maritime boundary only at the second stage of the proceedings. Before that, at the first stage, it awarded certain islands to Yemen and, based on its concerns for the livelihoods of Eritrean fishermen who had fished near the islands "since times immemorial", ruled: "Yemen shall ensure that the traditional fishing regime of free access and enjoyment for the fishermen of both Eritrea and Yemen shall be preserved for the benefit of the lives and livelihoods of this poor and industrious order of men."[32]

2.17. At the second stage, the parties specifically asked the tribunal to delimit their maritime boundary, "taking into account the opinion that it will have formed on questions of territorial sovereignty, the United Nations Convention on the Law of the Sea, *and any other pertinent factor"*.[33] In other words, the tribunal was empowered by express agreement of the parties to look beyond the terms of UNCLOS in delimiting the maritime boundary. The *Eritrea/Yemen* decision must therefore be viewed as *sui generis* and its holding limited to the unique circumstances of that case.

2.18. Colombia further suggests that it would be anomalous to find that the EEZ regime extinguished traditional fishing rights. It says

> "Colombia fails to see the reason why traditional fishing rights should be perceived as being contrary to the exclusive rights of the coastal State within the EEZ. After all, States enjoy full-fledged sovereignty, which is also exclusive, within their territory, but Nicaragua does not

[31] *See* NR, paras. 6.24-6.29.
[32] *Eritrea v. Yemen*, First Stage of the Proceedings (Territorial Sovereignty and Scope of the Dispute), Award (9 Oct. 1998), para. 526.
[33] *Ibid*., para. 7 (emphasis added).

> dispute that traditional rights have generally been preserved both in the land territory, internal waters and territorial sea of States."[34]

2.19. If Colombia "fails to see" the difference between (a) land territory and the territorial sea, and (b) the EEZ, it is the result of willful blindness. The legal regime relating to land sovereignty (including internal waters) is, of course, beyond the scope of UNCLOS and is governed only by general international law. The legal regime relating to the territorial sea is a hybrid; it is governed by both UNCLOS *and* general international law. Article 2(3) of the Convention makes this clear. It provides: "The sovereignty over the territorial sea is exercised subject to this Convention *and to other rules of international law*."

2.20. The legal regime of the EEZ is different from both. It is a novel creation of UNCLOS itself and governed by the provisions of Part V of the Convention. While Article 2(3) makes room for "other rules of international law" to apply broadly in the territorial sea, the same is not true in the EEZ. Under Article 58(2), "other pertinent rules of international law apply to the exclusive economic zone" only "*in so far as they are not incompatible with this Part*."

2.21. Colombia considers Article 58(2) "reminiscent of Article 2(3)"[35] but it is not. Indeed, what is striking about the two provisions is how dissimilar they are. In the territorial sea, other rules of international law apply without qualification. In the EEZ, they apply if and only to the extent that they are not incompatible with the legal regime established in Part V.

2.22. Since Part V of UNCLOS gives the coastal State "exclusive" rights to the fish and other living resources in its EEZ, any derogation from that exclusivity, unless explicitly included in Part V, would be incompatible with that Part of the Convention. The defining characteristic of the EEZ is exactly the exclusivity of

[34] CR, para. 5.15.
[35] *Ibid*., para. 5.19.

coastal States' sovereign rights and jurisdiction. To use the Court's words, the regime of the EEZ gives coastal States a "legal monopoly" over the natural resources in the zone.[36] Other States "*and their nationals* [are] deprived of any right of access to the sea areas within those zones"[37] regardless of their historical fishing practices.[38]

2.23. Precisely for these reasons, Colombia gets no mileage from its citations to the *Fisheries (United Kingdom v. Norway)* case or to the *Fisheries Jurisdiction* cases.[39] With respect to the former, Colombia itself states the reason: "the Court found in favour of Norway because it could not be said that its historic claim conflicted with customary international law."[40] Here, in contrast, it *can* be said that Colombia's historic claim conflicts with the legal regime of the EEZ, which now forms part of customary international law.

2.24. Concerning the *Fisheries Jurisdiction* cases, Colombia says "this precedent … attests to the fact that historic rights, which do not seek to negate the coastal State's rights, can exist regardless of the fact that the particular maritime area used to be part of the high seas."[41] Even if that were true when the case was decided in 1974—eight years before UNCLOS came into existence and ten years before the Court first recognized the EEZ regime "as consonant at present with

[36] *Gulf of Maine*, para. 235.
[37] *Ibid.*
[38] Colombia mischaracterizes Nicaragua's argument as being that "what is required is a 'carve-out' explicitly preserving traditional rights." CR, para. 5.16. That is not Nicaragua's position. Carve-outs for historic rights like those contained Articles 15 (concerning the delimitation of the territorial sea), 9(6) (concerning historic bays), or 51(1) (concerning traditional fishing in archipelagic waters) are certainly instructive. But what is required, at very least, is a provision making other rules of international law applicable, like the *renvois* contained in Article 2(3), 19, 21, 31, 34, 87 and 138.
[39] *See* CR, paras. 5.17 & 5.24.
[40] *Ibid*., para. 5.17.
[41] *Ibid*., para. 5.24.

general international law"[42]—it is not pertinent today . Historic rights of other States cannot exist in the coastal State's EEZ.

2.25. In the end, Colombia appears to recognize the essential incompatibility between its claim in this case and the EEZ regime. It acknowledges that "the incompatibility may be true in relation to competing assertions of States aiming at regulating and managing the living resources of the coastal State."[43] It tries to get around this problem by repackaging its claims as being about the private rights of its citizens, and taking the position that "Colombia neither claims sovereignty nor sovereign rights within Nicaragua's EEZ. Colombia is not even claiming rights on its own behalf since the traditional fishing rights are in fact private rights vested on the artisanal fishermen of the San Andrés Archipelago."[44]

2.26. This distinction makes no difference. The existence of foreign fishing rights, whether sovereign or private in character, are equally incompatible with the "legal monopoly" the EEZ regime creates for the benefit of coastal States. As the Chamber of the Court clearly stated in *Gulf of Maine*, other States "and their nationals" are equally deprived of access to the resources of the zone without the permission of the coastal State.[45]

2.27. Nicaragua observes by way of conclusion that finding that traditional fishing rights can co-exist with the regime of the EEZ would be inconsistent with the very purpose of UNCLOS. The Convention's first preambular paragraph states that the States Parties were "[p]rompted[] by the desire to settle, in a spirit of mutual understanding and cooperation, *all issues relating to the law of the sea* …". The Conference President, Ambassador T.B. Koh of Singapore, underscored

[42] *Gulf of Maine*, para. 94.
[43] CR, para. 5.14.
[44] *Ibid*. Colombia is, in other words, attempting to exercise diplomatic protection on behalf of its nationals. If this had been alleged when it formulated its Counter-claims, it would have been required to show that its nationals had exhausted local remedies before its claims on their behalf in this case could be considered admissible. *See* International Law Commission ("ILC") *Draft Articles on Diplomatic Protection with commentaries* (2006), Article 14(1).
[45] *Gulf of Maine*, para. 235.

the significance of a comprehensive agreement in his remarks to the Informal Plenary and Group of Legal Experts tasked with preparing the final clauses:

> "Our prime concern is the establishment of a completely integrated legal order for the use of the oceans and its resources and potential. All else must be subordinated to and subserve this purpose. This is the function of the Preamble and the Final Clauses. They must not be allowed to create such contention as would obscure and obstruct the overriding objective, hamper the work of the Conference and imperil our chances of success.
>
> We must seek to preserve intact, and protect, the efficacy and durability of the body of law which we are trying to create in the form of a Convention encompassing *all issues and problems relating to the law of the sea as a package* comprising certain elements that constitute a single and indivisible entity."[46]

2.28. To create space in this "package" agreement "encompassing all issues and problems relating to the law of the sea" for the operation of external legal rules that are incompatible with the "integrated legal order for the use of the oceans and its resources" would introduce exactly the contention and confusion that the drafters of the Convention sought to avoid. Colombia's argument that traditional fishing rights of the sort it claims in this case survived the creation of the EEZ regime must therefore be rejected.

B. President Ortega's Attempts to Diffuse a Tense Political Situation Do Not Change the Legal Situation

2.29. Colombia also claims that President Ortega's statements in which he expressed willingness to take account of Colombia's concerns about the Raizales' fishing practices, provided suitable mechanisms could be put in place, constitute

[46] "Note by the President on the Final Clauses," UN Doc. FC/1 (23 July 1979), *reproduced in* Renate Platzöder (ed.), *Third United Nations Conference on the Law of the Sea: Documents, Vol. XII*, p. 349 (1987) (emphasis added).

an "express recognition" of their traditional fishing rights. It is mistaken. As Nicaragua showed in its Reply,[47] President Ortega's statements were, in fact, exercises in statesmanship intended to diffuse the political tension created by Colombia's rejection of the Court's 2012 Judgment.

2.30. Colombia does not—nor could it—deny the circumstances in which President Ortega's statements were made. Colombia's furious reaction to the 2012 Judgment, which led it to withdraw from the Pact of Bogotá, are well known and indisputable.

2.31. Colombia also does not deny that all of President Ortega's statements "recognizing" the Raizales' traditional fishing rights were expressly conditional:

- in the 26 November 2012 statement in which President Ortega stated that Nicaragua would respect the rights of the inhabitants "to fish and navigate those waters, which they ha[d] historically navigated", he also indicated that "*artisanal fishermen would require an authorization from the relevant Nicaraguan authorities*";[48]

- in the 1 December 2012 statement in which he said that Nicaragua would "respect the ancestral rights of the Raizales", President Ortega noted that "*mechanisms*" *would have to be established in order to* "*ensure the right of the Raizal people to fish*";[49]

- in his February 2013 statement, he expressed openness to working with Colombia, and proposed a bilateral commission to "*work on an agreement between Colombia and Nicaragua to regulate this situation ….*";[50]

[47] NR, paras. 6.63-6.75.
[48] CCM, para. 3.94 (emphasis added).
[49] *Ibid.* (emphasis added).
[50] *Ibid.*, Annex 76 (emphasis added).

- in his November 2014 statement, President Ortega indicated that "while the 2012 delimitation will have to be implemented, guarantees to the Raizal communities of the Archipelago *will also have to be included in the agreement to be negotiated with Colombia*";[51] and

- in his November 2015 statement, he declared that Nicaragua "understand[s] that patience is necessary in order to finally reach the conditions for the Court's Judgment to be ratified by the Colombian Parliament. And there we have engagements, as I said, with the Raizales Brothers regarding their Fishing Rights, *which will have to be arranged later*".[52]

2.32. Colombia tries to take advantage of President Ortega's "recognition" of the Raizales' traditional fishing rights without also accepting the conditions he specified. Even as Colombia acknowledges, as it must, that "President Ortega often addresses both matters in conjunction",[53] it nevertheless argues that Nicaragua "is mistaken in suggesting that artisanal fishing rights do not exist independently of mechanisms to be approved by Nicaragua".[54] But Colombia's argument is defeated by its own words. In its Counter-Memorial, Colombia itself rightly acknowledged that requiring mechanisms to be put in place "would have deprived the recognition of the Raizales' historic fishing rights of any meaning".[55]

2.33. Exactly so. A "right" subject to "authorization", conditioned on the adoption of "mechanisms" or subject to subsequent "agreement", is no right at all. Colombia cannot unilaterally accept Nicaragua's offer to accommodate the Raizales' interests without also accepting the explicit conditions placed on that

[51] *Ibid*, para. 3.94 (emphasis added).
[52] *Ibid*., Annex 78 (emphasis added).
[53] CR, para. 5.30.
[54] *Ibid*., para. 5.32 (quoting NR, para. 6.70 (internal quotation marks omitted)).
[55] CCM, para. 3.93.

offer. International law is not a buffet from which States are entitled to pick what they want and abjure what they do not.

2.34. Although it does not explicitly say so, Colombia appears to construe President Ortega's statements as giving rise to a binding unilateral undertaking.[56] Viewing the matter through that prism confirms that Nicaragua has not "recognized" the Raizales' traditional fishing rights. The Court stated in the *Nuclear Tests* cases:

> "It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. …
>
> Of course, not al1 unilateral acts imply obligation; but a State may choose to take up a certain position in relation to a particular matter with the intention of being bound—the intention is to be ascertained by interpretation of the act. *When States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for*."[57]

In the case concerning the *Frontier Dispute (Burkina Faso v. Republic of Mali)*, the Court was careful to point out that "it all depends on the intention of the State in question".[58]

2.35. Guiding Principle 3 of the ILC's 2006 "Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations" (the "Guiding Principles") states: "To determine the legal effects of such declarations,

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[56] *See* CR, para. 5.29, fn 475 (quoting *Nuclear Tests (Australia* v *France), Judgment, I.C.J. Reports 1974*, p. 267, para. 43*; Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 472, para. 46).

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

[58] *Case concerning the Frontier Dispute (Burkina Faso v. Republic of Mali)*, Judgment of 22 December 1986, *I.C.J. Reports 1986*, p. 573, para. 39.

it is necessary to take account of their content, of all the factual circumstances in which they were made, and of the reactions to which they gave rise."[59]

2.36. In this case, the circumstances in which President Ortega's statements were made do not reflect an unqualified intent to be bound. As stated, they were made in the context of the highly charged political situation created by Colombia's rejection of the Court's 2012 Judgment. President Ortega was trying to bring Colombia back to the table by offering to take account of the concerns it had expressed.

2.37. Indeed, President Santos' statements following a December 2012 meeting between the two Heads of State make this perfectly clear:

> "We will continue seeking for the rights of Colombians to be restored, that The Hague judgment seriously affected. We met with President Ortega. We explained our position very clearly: we want that the rights of Colombians and the Raizal population, not only in terms of artisanal fishermen rights but other rights, be guaranteed and restored. *He understood*. We told him that we need to handle this situation with cold head, in a diplomatic and friendly fashion, as this kind of issues should be handled to avoid incidents. *He also understood*. We agreed to establish communication channels to address all these points".[60]

2.38. President Ortega *understood,* according to President Santos. He did not *agree.* As President Santos explained, he was urging President Ortega to "handle th[e] situation with [a] cold head, in a diplomatic and friendly fashion [so as] to avoid incidents". That President Ortega did so should not be held against him by finding that he deliberately bound Nicaragua to a legal obligation to respect the traditional fishing rights Colombia claims for the Raizales.

2.39. According to Guiding Principle 7 of the Guiding Principles:

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[59] ILC, *Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations* (hereinafter "*Guiding Principles*"), Guiding Principle 3 (2006) (emphasis added).
[60] CCM, Annex 74 (emphases added).

> "A unilateral declaration entails obligations for the formulating State *only if it is stated in clear and specific terms. In the case of doubt as to the scope of the obligations resulting from such a declaration, such obligations must be interpreted in a restrictive manner.* In interpreting the content of such obligations, weight shall be given first and foremost to the text of the declaration, together with the context and the circumstances in which it was formulated."[61]

2.40. To the extent that President Ortega statements were made "in clear and specific terms", they were expressly conditioned on working out appropriate "mechanisms", including an agreement, with Colombia. Colombia's case is based on ignoring the conditions President Ortega specified.

2.41. Nicaragua is not "attempt[ing] to render [President Ortega's] words without troublesome legal consequences"[62] or otherwise trying "to diminish the value of its President's statements",[63] as Colombia wrongly contends. To the contrary, Nicaragua stands by those statements in their entirety. As President Ortega indicated, Nicaragua is ready to accommodate Colombia's concerns about the Raizales' artisanal fishing interests, provided that the two sides work out appropriate mechanisms *via* a bilateral agreement that respects Nicaragua's exclusive sovereign rights and jurisdiction as recognized in the Court's 2012 Judgment. As Nicaragua has said before, it remains open in the spirit of brotherhood and good neighbourly relations, to work with Colombia to reach a bilateral agreement that takes account of Colombia's and Nicaragua's concerns, including the fishing needs of the Indigenous population of both nations[64].

[61] *Guiding Principles*, Guiding Principle 7 (emphasis added).
[62] CR, para. 5.27.
[63] *Ibid*., para. 5.33.
[64] NR, para. 6.76.

C. Colombia Has Not Proven the Existence of the Rights It Claims

2.42. In its Reply, Nicaragua showed that Colombia's traditional rights claim should be rejected for the additional reason that it had failed to prove that the Raizales traditionally fished in areas that the Court determined to appertain to Nicaragua in 2012.[65] Colombia's Rejoinder accuses Nicaragua of "trying to silence the voice of the Raizales".[66] Nicaragua is doing no such thing. It is merely taking Colombia's evidence on its own terms for purposes of showing that it does not prove what Colombia says it does.

2.43. Colombia appears to recognize the weakness of its case. It thus begins its response on this point by addressing "the standard of proof for establishing the existence of traditional fishing rights",[67] and arguing for a comparatively lax standard. According to Colombia, "the matter of proof must be approached with common sense" in light of the fact that "Colombia is invoking rights vested in a small community of artisanal fishermen that live in an important but, nevertheless, relatively remote region of the Southwestern Caribbean Sea".[68] It cites to two cases for support, neither of which are apposite.

2.44. First, Colombia cites to the *South China Sea (Philippines v. China)* arbitration, in which the tribunal stated that "traditional fishing rights constitute an area where matters of evidence should be approached with sensitivity".[69] The tribunal never stated, however, that the standard of proof should be lower; it considered only that the absence of "official record[s]"[70] was not necessarily inconsistent with the existence of such rights. More importantly, the issue was not really in dispute in that case. Both parties claimed that their fishermen had

[65] NR, paras. 6.47-6.62.
[66] CR, para. 5.35.
[67] *Ibid*., para. 5.36.
[68] *Ibid*.
[69] *Ibid*. (quoting *South China Sea (Philippines v. China)*, PCA Case No. 2013-19, Award (12 July 2016) (hereinafter "*South China Sea*"), p. 315, para. 805).
[70] *South China Sea*, p. 315, para. 805.

traditionally fished in the vicinity of Scarborough Shoal, the only location at issue.[71] Thus, even assuming that the tribunal adopted a lower standard of proof (*quod non*), it was entirely justified in doing so given the parties' mutual claims.

2.45. The same is true of the second case Colombia cites: *Navigational and Related Rights (Costa Rica v. Nicaragua)*.[72] In that case, the Court noted in passing that the subsistence fishing activities in questions were "not likely to be documented in any formal way in any official record",[73] but it did not lower the standard of proof. There too, there was no dispute that there had been subsistence fishing in the area for a very long period of time.[74] Nicaragua did not contest this. The standard of proof issue therefore did not arise.

2.46. In this case, as in any other, "it is the duty of the party which asserts certain facts to establish the existence of such facts".[75] And because Colombia is claiming that the Raizales' alleged traditional fishing rights arose as a matter of local custom,[76] it is required to establish the existence of facts showing a "constant and uniform practice" by the Raizales that was "accepted as law by the Parties".[77] This it cannot do. Indeed, whatever standard of proof may be applied, Colombia's claim still fails. Colombia's evidence simply does not support the

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[71] *Ibid*. ("With respect to Scarborough Shoal, the Tribunal accepts that the claims of both the Philippines and China to have traditionally fished at the shoal are accurate and advanced in good faith.").
[72] CR, para. 5.36 (quoting *Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, I.C.J. Reports 2009, p. 213, para. 141).
[73] *Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, I.C.J. Reports 2009, p. 213, para. 141.
[74] *Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, I.C.J. Reports 2009, p. 213, para. 141 ("The Court recalls that the Parties are agreed that all that is in dispute is fishing by Costa Rican riparians for subsistence purposes. … Subsistence fishing has without doubt occurred over a very long period. … [T]he Parties agree that the practice of subsistence fishing is long established.").
[75] *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 71, para. 162.
[76] CCM, p. 140 (Ch. 3, argument heading D(1)).
[77] *Right of Passage over Indian Territory (Portugal v. India), Merits, Judgment, I.C.J Reports 1960*, p. 40; *see also Asylum (Colombia/Peru), Judgment, I.C.J Reports 1950*, p. 276 ("a constant and uniform usage practised by the States in question").

conclusion that the Raizales have fished "since time immemorial"[78] in waters that are now within Nicaragua's EEZ.

2.47. The only evidence Colombia submitted with its Counter-Memorial consisted of 11 affidavits gathered in a period of two weeks in 2016 just before the Counter-Memorial was filed.[79] In its Reply, Nicaragua explained why those affidavits—taken at face value—actually *disprove* Colombia's claims.[80] In particular, they show that any historic fishing took place largely in the vicinity of Colombia's islands, not in Nicaragua's EEZ.[81] Although some of the younger affiants do assert that they have more recently fished in what are now Nicaraguan waters, the clear story that emerges from the affidavits read as a whole is that some Raizales started venturing further from shore only in recent decades as a result of improving technology and the depletion of fish stocks in their traditional, near-shore fishing grounds.[82]

2.48. Colombia's Rejoinder does not respond directly to any of these points. It begins instead with a rhetorical point. Colombia argues that "it would be … remarkable if these traditional fishing activities … were to be located only on the Colombian side of the 2012 line … as if the drawing of a line could influence the conduct of the artisanal fishermen retroactively".[83] Nicaragua, of course, is not arguing that "the drawing of a line could influence the conduct of the artisanal fishermen retroactively". What Nicaragua is arguing is that the evidence shows that Colombia's fishermen historically operated in waters closer to the islands

[78] CCM, para. 3.102 ("The artisanal fishermen of the archipelago have been fishing in their traditional fishing grounds since time immemorial …."); *Ibid*., para. 2.64 ("Since time immemorial, [the Raizales] have navigated all of the Southwestern Caribbean in search of resources, such as fish and turtles.").
[79] *See* NR, para. 6.50.
[80] *Ibid*., paras. 6.51-6.57.
[81] *Ibid*., paras. 6.51-6.55 (citing Annexes 63, 66, 67, 68, 70).
[82] *Ibid*., paras. 6.55-6.57 (citing Annexes 62, 63, 67).
[83] CR, para. 5.39.

where they reside that now fall on Colombia's side of the boundary, not on Nicaragua's side.

2.49. There is nothing "remarkable" about this. It is true for two simple reasons, both of which are evident from Colombia's affidavits. First, there was no need for the fishermen to venture far from Colombia's islands in the past because there were a lot of fish close to shore.[84] Second, past technological limitations prevented regular distant fishing ventures.[85]

2.50. Colombia attempts to make it appear its affidavits say more than they do by excerpting carefully selected snippets. But a more thorough examination of the statements in their entirety only confirms that none of the Raizales' traditional fishing grounds lie on Nicaragua's side of the maritime boundary.

2.51. Colombia's citations to the affidavits fall into three categories. First, Colombia cites six that expressly refer to Cape Bank,[86] a maritime feature in Nicaragua's EEZ. According to Colombia: "Many of the affiants consider that Cape Bank constitutes one of the most important traditional grounds for the artisanal fishermen of the Archipelago."[87] This is rank mischaracterization of what its affiants said. Colombia tellingly does not cite even a single one of the affidavits (or any other source) for the proposition just stated.[88] Rather, it only cites them for the subsequently stated propositions that "*Luna Verde* is [a] part of Cape Bank",[89] that Cape Bank "is considered by artisanal fishermen as 'one of the best places to fish'",[90] and that "some of the affiants expressly mention 'Cape Bank'".[91] This is a far cry from proving that "Cape Bank constitutes one of the most important traditional grounds". Indeed, a review of the six affidavits

[84] *See, e.g.*, CCM, Annexes 62, 63, 67; *see also* NR, para. 6.56.
[85] *See, e.g.*, CCM, Annexes 63, 65, 69; *see also* NR, para. 6.55.
[86] CR, para. 5.42 (citing CCM, Annexes 62, 65, 68, 70, 71, 72).
[87] *Ibid*., para. 5.41.
[88] *See ibid.*
[89] *Ibid*. (citing CCM, Annex 71).
[90] *Ibid*., para. 5.42 (citing CCM, Annex 68).
[91] *Ibid*. (citing CCM, Annexes 62, 65, 68, 70, 71, 72).

Colombia cites about Cape Bank reveals that *none* of them state that it is a traditional fishing ground, much less one of the most important ones.[92]

2.52. Take, for example, one of the affiants that Colombia cites for "expressly mention[ing]" Cape Bank: Mr. Landel Hernando Robinson Archbold.[93] The only time he mentions Cape Bank is to say he does not go there: "I do not fish up to La Esquina and Cape Bank."[94] Another affiant Colombia cites for "expressly mention[ing]" Cape Bank is Mr. George de la Cruz de Alba Barker.[95] But he too does not state that Cape Bank is a traditional fishing ground. To the contrary, when talking about Cape Bank, he admits: "We have been carrying out these activities *since the 1980s and 1990s*."[96] The statements of the other four affiants cited by Colombia similarly do not support Colombia's position.[97]

2.53. The second category of citations (to five affidavits) is to those that "point to locations that are obviously part of [Cape Bank's] shallow, as well as its deep-sea, grounds such as the '82° West Meridian', 'Luna Verde', 'Great Corn Island and Little Corn Island', 'Rosalind Bank', 'Bobel cay' and 'Cape Gracias a Dios'".[98] Although the five affidavits cited do indeed "point to" these locations, none asserts that any of them are traditional fishing grounds. In fact, some of the affidavits prove the opposite.

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[92] *See* CCM, Annexes 62, 65, 68, 70, 71, 72.
[93] *Ibid*., Annex 62.
[94] *Ibid*., Annex 62.
[95] *Ibid*., Annex 71.
[96] *Ibid*., Annex 71 (emphasis added). Colombia suggests in passing that traditional fishing rights may crystallise over a timeframe of five decades or less. *See* CR, para. 5.49. Nicaragua does not agree. Although the exact period of time that must elapse for traditional fishing rights to crystallise is not set in stone, a span only of decades is not enough. In the *Eritrea/Yemen* arbitration, the arbitral tribunal recognized a "traditional fishing regime" in an area where fishermen were fishing and navigating "[s]ince times immemorial". *Eritrea/Yemen*, First Stage, Award (9 October 1998), para. 127. Similarly, in the *South China Sea* arbitration, the arbitral tribunal recognized "traditional fishing rights" in an area where fishing had been "carried out for generations". *South China Sea*, p. 315, para. 806. Colombia itself appears to endorse this standard. In its Counter-Memorial, Colombia twice alleged that fishing had taken place "since time immemorial". CCM, paras. 2.64 & 3.102. A timeframe of five decades or less is plainly insufficient.
[97] *See* CCM, Annexes 65, 68, 70, 72.
[98] CR, para. 5.42 (citing CCM, Annexes 63, 64, 65, 69, 71) (footnotes omitted).

2.54. Take, for example, the affidavit of Mr. Domingo Sanchez McNabb.[99] Colombia cites it as one that "point[s] to … Cape Gracias a Dios".[100] And indeed, Mr. McNabb does twice "point to" Cape Gracias a Dios. The first time, he states: "[W]e used to go up to Cabo Gracias a Dios in Honduras *in search of new fishing banks*."[101] The fact that Mr. McNabb would go to Cape Gracias a Dios "in search of new fishing banks" only shows that it is *not* a traditional fishing ground. The second time, Mr. McNabb avers: "Artisanal fishermen began to use some technological elements like, for example, radios, radars and GPS. These technological improvements greatly facilitated the fishing expeditions going farther, to the 82nd meridian and even close to cape Gracias a Dios."[102] Here again, this statement shows that ventures "to the 82nd meridian and even … cape Gracias a Dios" were a recent development, not a historical practice.

2.55. The third category of citations (also to five affidavits) is to those that "mention[] other important traditional banks that are located on the Nicaraguan side of the 2012 line, such as 'Julio Bank', 'Far Bank' and 'North East Bank'".[103] Although the five affiants in question "mention" these fishing banks, that does not prove they are traditional fishing grounds.

2.56. In fact, one affiant states only that he "ha[s] fished" in those banks;[104] another indicates merely that he must be "careful" if he wants to fish in those banks;[105] and another two simply state that the fishermen "know" those banks,[106] or that the banks are "known" to them.[107] None of these statements, even taken at face value, prove that the banks in question are traditional fishing grounds.

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[99] CCM, Annex 69.
[100] CR, para. 5.42 (citing CCM, Annex 69).
[101] CCM, Annex 69 (emphasis added).
[102] *Ibid*., Annex 69.
[103] CR, para. 5.44 (citing CCM, Annexes 62, 63, 64, 65, 66).
[104] CCM, Annex 64.
[105] *Ibid*., Annex 62.
[106] *Ibid*., Annex 66.
[107] *Ibid*., Annex 63.

2.57. One—and only one—affiant (Mr Ligorio Luis Archbold Howard) states that the "fishing grounds of Far Bank, North East and Julio Banks are traditional fishing grounds of Providencia".[108] But this lone, bare and conclusory statement does not provide any substantiating information that might enhance its credibility. Indeed, other portions of Mr. Howard's statement tend to undermine it. In particular, he states: "Our parents and grandparents did not know about the maritime limits in those waters; they used to fish in Bobel Cay close to Honduras, Serrana, Quitasueño, Serranilla and Southwest Cay [Alburquerque]".[109]Conspicuously absent from his mention of places his parents and grandparents "used to fish" are Julio Bank, Far Bank and North East Bank.

2.58. By showing that Colombia's affidavits do not support the claim that its artisanal fishermen traditionally fished in waters that are now within Nicaragua's EEZ, Nicaragua is thus not "trying to silence the voice of the Raizales".[110] To the contrary, it is listening carefully to their voices and drawing the conclusions that follow from their own words.

D. Colombia Still Has Not Proven that Nicaragua Infringed the Raizales' Traditional Fishing "Rights"

2.59. Colombia contends that, by its conduct, Nicaragua has infringed the Raizales' traditional fishing rights. This claim fails in the first instance because no such rights exist for the reasons explained above in Sections A-C. It also fails because Colombia has not come forward with any reliable evidence supporting its argument.

2.60. In its Reply, Nicaragua methodically reviewed Colombia's evidence in this respect and showed that none of it is reliable enough to support Colombia's

[108] *Ibid*., Annex 65.
[109] *Ibid*.
[110] CR, para. 5.35.

claim.[111] Colombia conspicuously did not offer any direct or contemporaneous evidence to support its claims. The evidence cited in its Counter-Memorial consists either of political statements[112] or affidavits from nine of the aforementioned affiants, none of whom claim to have themselves been the object of Nicaragua's conduct.[113] They attest only to actions they understand to have been directed at other people. Their evidence is, in short, hearsay.

2.61. Two years passed between the time of Colombia's November 2016 Counter-Memorial and its November 2018 Rejoinder. And six months passed between Nicaragua's May 2018 Reply and Colombia's Rejoinder. But Colombia submitted no additional evidence in support of this aspect of its claim with its Rejoinder. Nicaragua considers this, by itself, revealing. If Nicaragua were truly conducting the "active strategy of intimidation"[114] and "pillaging"[115] that Colombia claims, it is reasonable to expect the Colombia would have gathered additional evidence during the two years between its Counter-Memorial and Rejoinder.

2.62. Instead of coming forward with new or better evidence, Colombia takes a different tack. In particular, it adopts the *tu quoque* fallacy. As Colombia sees it, Nicaragua cannot complain about the adequacy of Colombia's evidence because its own evidence is equally bad. According to Colombia, Nicaragua's "Reply makes no attempt to hide the two different yardsticks that it applies *vis-à-vis*, on the one hand, its own claims and, on the other hand, Colombia's counter-claim."[116]

2.63. Nicaragua disagrees that the evidence it submitted in support of its claim in chief is comparable to the evidence Colombia presented in support of its

[111] NR, paras. 6.78-6.6.93.
[112] *Ibid*., para. 6.78-6.79.
[113] *Ibid*., paras. 6.87-6.93.
[114] CCM, para. 9.4.
[115] *Ibid*, para. 9.5.
[116] CR, para. 5.63.

counter-claim. Among other things, Nicaragua submitted multiple audio warnings the Colombian navy issued to Nicaraguan vessels operating in their own waters.[117] In any event, the quality of the parties' evidence is a matter for the Court to decide. Colombia cannot excuse the inadequacy of its own evidence by hiding behind its criticisms of Nicaragua's.

2.64. In addition to its *tu quoque* defense, Colombia's also returns to the affidavits presented with its Counter-Memorial and cites them again for many of the same, second-hand assertions it previously advanced. It cites, for example, the affidavit of Mr Alfredo Rafael Howard Newball for the proposition that "[t]hey [i.e., the Nicaraguan navy] stop them, they take away their products, their equipment and they threaten and mistreat them".[118] Yet in his affidavit, Mr Newball's assertion is introduced with the statement that "After the 2012 decision, *we do hear that the fishermen have difficulties with the Nicaraguan coastguard*. …"[119] In other words, his statement is based on hearsay about what may have happened to others, not his own personal experience.

2.65. Colombia also cites the affidavit of Mr George de la Cruz de Alba Barker for the assertion that "[i]t is common to have our GPS, VHF radio, cigarettes and food supplies taken by them".[120] But when one examines Mr de la Cruz de Alba Barker's affidavit, he does not appear to be claiming that he himself was the victim of the alleged conduct. His statement is presented in general terms, as if he is referring to conduct experienced by others.[121] Indeed, perhaps more telling is the fact that he claims that "[t]he [fishermen's] associations and co-operatives

[117] *See, e.g.*, NR, Annex 32.
[118] CCM, para. 5.68.
[119] *Ibid*., Annex 67, p. 6.
[120] CR, para. 5.68.
[121] CCM, Annex 71.

receive complaints of these cases".[122] Yet Colombia has provided no record of any such complaints.

2.66. An analysis of all nine of the affidavits Colombia presented with its Counter-Memorial in support of this aspect of its claim shows that not a single one of its witnesses claims to have himself been the object of any "pillaging" or "intimidation" by Nicaraguan authorities.[123] Colombian cannot build a case on such a weak foundation. As the Court recalled in *Croatia v. Serbia*, "'testimony of matters not within the direct knowledge of the witness, but known to him only from hearsay, [is not] of much weight'."[124]

2.67. The very few other items of evidence that Colombia's Reply refers to are equally unreliable and insufficient to sustain Colombia's case. Colombia points, for example, to the 2014 recommendation of a Committee of Experts of the International Labour Organisation ("ILO") in which it is stated that "Raizal fishers have to cross Nicaraguan maritime territory, *which is reported to* give rise to difficulties and the payment of fines."[125] This too is obvious hearsay, and does not contain any of the specifics the would be required to support a finding of fact.

2.68. More interesting is what the recommendation says about the position of the Government of Colombia:

> "The Government adds that *the waters in which the small-scale fishers of the Raizal community traditionally fished continue to belong to Colombia* and the fishers can

[122] *Ibid*.
[123] *See generally ibid*., Annexes 63-65, 67-72.
[124] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Merits, Judgment, I.C.J Reports 2015*, p. 78, para. 197 (quoting *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 42, para. 68).
[125] CR, para. 5.69 (quoting ILO, Committee of Experts on the Application of Conventions and Recommendations, "Observations (CEACR) – adopted 2014, published 104rd ILC session (2015), Indigenous and Tribal Peoples Convention, 1989 (No. 169) – Colombia (Ratification: 1991)", available at: https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO::P13100_COMMENT_ID,P13100_LANG_CODE:3182299,en:NO (last visited 21 February 2019).

> continue their work as they did before the ruling of the ICJ of November 2012. With regard to the right of the inhabitants of San Andrés to have access to traditional fishing areas, the Government specifies that *such fishing areas are located precisely around the keys and that these areas were not affected by the ICJ ruling*, as they consisted of territorial waters awarded to Colombia, together with the sovereignty of the islands and the seven keys".[126]

The recommendation thus not only fails to support Colombia's case, it actually defeats it.[127]

2.69. Colombia also mentions Annex 20 to Nicaragua's Reply, which is said to "refer[] to three incidents that involved the Nicaraguan Naval Force and Raizal fishermen",[128] and Annex 12 to Nicaragua's Memorial, which Colombia says "attests to the fact that the artisanal fishermen are impeded of performing their work because of the conduct of the Nicaraguan Naval Force".[129] Neither of those documents constitutes meaningful proof of Colombia's claims.

2.70. Annex 20 to Nicaragua's Reply is a news account from Colombia in which the Commander of the Colombian Navy is quoted for the stated proposition. Few details are provided other than a reference to "an incident in which a Colombian fishing group was inspected and apparently expelled from a border zone between

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[126] ILO, Committee of Experts on the Application of Conventions and Recommendations, "Observations (CEACR) – adopted 2014, published 104rd ILC session (2015), Indigenous and Tribal Peoples Convention, 1989 (No. 169) – Colombia (Ratification: 1991)", available at: https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO::P13100_COMMENT_ID,P13100_LANG_CODE:3182299,en:NO (last visited 8 February 2019).

[127] Colombia is obviously embarrassed about the position it took before the ILO. It expends considerable effort in its Rejoinder trying to explain it away. CR, para. 5.55-5.61. In the end, Colombia is effectively reduced to arguing that the State organ that took the position stated, the Ministry of Labour's Office of Cooperation and International Relations, "failed to provide even a shred of evidence to support its assertion that the traditional fishing sites were precisely located in the vicinity of areas not affected by the decision". CR, para. 5.56. Even if that were true, the point is that Colombia cannot be allowed to speak out of both sides of its mouth. Colombia cannot take one position when it is acting in a defensive posture before the ILO and then expect the Court to accept the opposite proposition when it is acting in an affirmative posture in these proceedings.

[128] CR, para. 5.70.

[129] *Ibid.*

the two countries by the Naval Force of Nicaragua."[130] The reference to a "Colombian fishing group" could just as plausibly be to a commercial fishing group as an artisanal fishing group. More telling in Nicaragua's view is Colombia's response to these alleged incidents. The Commander of the Navy indicated that the Navy would "implement[] all capabilities that the Navy has so that it is ready to enforce respect for all fishermen in the area."[131] In other words, Colombia responded by exercising sovereign rights and jurisdiction in Nicaragua's EEZ.

2.71. Annex 12 to Nicaragua's Memorial is a 2013 "Report on the Status of the Natural Resources and the Environment" prepared by the Comptroller General of the Department of San Andrés, Providencia and Santa Catalina. It is, in other words, a Colombian government document. In any event, all it says is that "Nicaraguan authorities were very aggressive, and now, with this new ruling, they can detain them while transiting through their waters and seize the product, and/or their vessels."[132] In the first place, the context of this statement leaves it unclear whether it is talking about commercial or artisanal fishermen. Moreover, the statement that Nicaraguan authorities were "very aggressive" is entirely unsubstantiated, and so vague and broad as to be effectively meaningless. Still further, the statement that with the 2012 Judgment Nicaragua "can detain" Colombian fishermen is forward-looking; i.e., it is a statement of what *might happen*, not what *has happened*.

2.72. Here again, Nicaragua considers other portions of the report even more revealing. In sections relating to "traditional fishing location[s]" and "industrial fishing location[s]", it states:

[130] NR, Annex 20.
[131] *Ibid*.
[132] NM, Annex 12, p. 11.

"**Traditional Fishing Location**

San Andres Island artisanal fishermen distribute themselves throughout the entire shelf, using points of reference for fishing grounds such as: Outside Bank (Northern San Andres Island), Under the Lee (Western side of San Andres Island), Southend Bank (Southern San Andres Island), Albuquerque Cays (50 km to the SSW of San Andres Island), and Meridian 82 on the boundary with Nicaragua.

In Providencia and Santa Catalina, fishing takes place in the interior and the exterior of the barrier reef, close to the reef terrace, respecting the park area and the protected marine area. According to Arango and Marquez (1995), the specific work areas are El Faro, Taylor Reef, Morning Star, Northest Bank, South Banks, and North Banks.

Industrial Fishing Location

In all of the Banks of the northern area such as Roncador, Serrana and Quitasueño, in the common regime áreas with Honduras and Jamaica, such as Serranilla, Bajos Alicia and Nuevo, and in Luna Verde or La Esquina".[133]

2.73. Consistent with the statements of the Colombian government to the ILO cited above, the report thus suggests that the Raizales' traditional fishing grounds were located principally around the three main islands and that areas located further from shore were the province of industrial fishermen. Colombia has therefore failed to make its case that Nicaragua has infringed the Raizales' traditional fishing right, assuming they even exist (*quod non*).

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[133] *Ibid*., p. 9.

2.74. For all the foregoing reasons, Nicaragua respectfully submits that Colombia's counter-claim in respect of the alleged traditional fishing rights of the Raizales should be rejected.

CHAPTER III. NICARAGUA'S BASELINES

3.1. This chapter addresses Colombia's fourth counter-claim to the effect that Nicaragua's legislation on straight baselines is not in accordance with customary international law.[134] This chapter will set out Nicaragua's submission that its legislation on straight baselines is in accordance with both customary law and the relevant provisions of the United Nations Convention on the Law of the Sea (Convention).

3.2. In the Reply, Nicaragua included a discussion of Colombia's straight baseline practice involving both Colombia's Caribbean and Pacific coasts.[135] The Reply concluded that:

> "In seeking to prove that Nicaragua's straight baselines have not been determined in accordance with article 7 of the Convention and the corresponding rules of customary international law, Colombia is relying on an interpretation of those rules that it has not applied to itself in determining its own straight baselines in the Caribbean Sea and the Pacific Ocean. Nicaragua's straight baselines are in accordance with the rules as interpreted and applied by Colombia in establishing its own legislation on straight baselines."[136]

In light of that conclusion one would have expected a forceful rebuttal in the Rejoinder. However, there is only silence. Nicaragua regrets that silence, as it is not particularly helpful in assisting the Court in sorting out the points of agreement and disagreement between the Parties. In view of the significance of Colombia's own practice, section A of the present chapter briefly recapitulates the main points of the Reply in this regard.

[134] CCM, para. 7.6.d; CR, para. 6.1.
[135] NR, Chapter 7 *passim*.
[136] NR, para. 7.60.g.

3.3. Nicaragua established its system of straight baselines through Decree No. 33-2013.[137] In addition, Nicaragua has used basepoints on Nee Reef, London Reef and Blowing Rock, which are seaward of the straight baselines, in determining the outer limits of Nicaragua's territorial sea and the 200-nautical-mile limit of its exclusive economic zone. Section B of this chapter addresses the amendment of Decree No. 33-2013 subsequent to the filing of the Reply and the arguments of the Rejoinder in relation to the basepoints on Nee Reef, London Reef and Blowing Rock.

3.4. Section C of this chapter explains that Nicaragua's mainland coast and islands allow the drawing of straight baselines and that these baselines have been established in accordance with international law. The focus of this section is on refuting the Colombian argument to the contrary contained in chapter 6 of the Rejoinder.

3.5. The conclusions of this chapter are contained in Section D.

A. Colombia's Straight Baseline Practice: The Elephant in the Room

3.6. In the Reply, Nicaragua included a discussion of Colombia's straight baseline practice involving both Colombia's Caribbean and Pacific coasts.[138] The Rejoinder does not deign to spend one word on Nicaragua's discussion of Colombia's straight baseline practice. As will be demonstrated in section C of this chapter, that practice remains highly relevant for assessing Colombia's current criticism of Nicaragua's straight baselines. The present section briefly recapitulates the main argument of Nicaragua's Reply on Colombia's straight baseline practice, and the subsequent analysis will cross-refer to the present section.

[137] NR, Annex 1.
[138] NR, Chapter 7 *passim*.

3.7. Paragraph 7.8 of the Reply discussed the length of the straight baseline segments of Nicaragua and observed that these straight baselines are unexceptional as regards their length (between 44 and 83 nautical miles) viewed against the practice of other States, and that Colombia's own straight baselines system includes baselines measuring respectively 130.5, 81.6 (two segments), and 76.8 nautical miles in length.

3.8. Paragraph 7.19 of the Reply discussed Colombia's practice in relation of the term "deeply indented and cut into" contained in article 7, paragraph 1, of the Convention. The paragraph showed that the part of the Colombian coast under consideration "is less indented and cut into than the coast of Nicaragua between Monkey Point and the terminus of land boundary with Costa Rica," which is enclosed by Nicaragua's straight baselines. Figure 1 reproduces Figure 7.2 of the Reply, which depicts the relevant Colombian coast and straight baseline.

Figure 1. Colombia's straight baselines

3.9. Paragraph 7.42 of the Reply discussed Colombia's practice in relation to the requirement that a fringe of islands has to lie in the immediate vicinity of the coast to allow the drawing of straight baselines as contained in article 7, paragraph 1, of the Convention. It showed that "Colombia's own baseline practice again indicates that Colombia has not held itself to the standards it now seeks to impose on Nicaragua." One of Colombia's islands discussed in this example is more distant from the coast than one of the islands on which Nicaragua's basepoints are located. It is also more distant from the Colombian coast than many of the islands of Nicaragua that are inside Nicaragua's system of straight baselines. Figure 2 reproduces Figure 7.8 of the Reply, which depicts the relevant Colombian coast, islands and straight baselines.

Figure 2. Colombia's straight baselines (Pacific)

3.10. Paragraph 7.53 of the Reply compared the area of the sea enclosed by Nicaragua's straight baselines to Colombia's enclosure in the area of the Bahia de Bonaventura, in reply to Colombia's argument that Nicaragua was encroaching on the rights of third States. It showed that "Colombia's straight baselines in the Bahia de Bonaventura are thus much more expansive that those of Nicaragua along its Caribbean coast". Figure 3 compares Figures 7.9 and 7.10 of the Reply, which depict the sea areas enclosed by Nicaragua's straight baselines and those enclosed by Colombia's straight baselines in the Bahia de Bonaventura.

Figure 3. Sea areas enclosed by Nicaragua's straight baselines compared with those enclosed by Colombia's straight baselines in the Bahía de Bonaventura

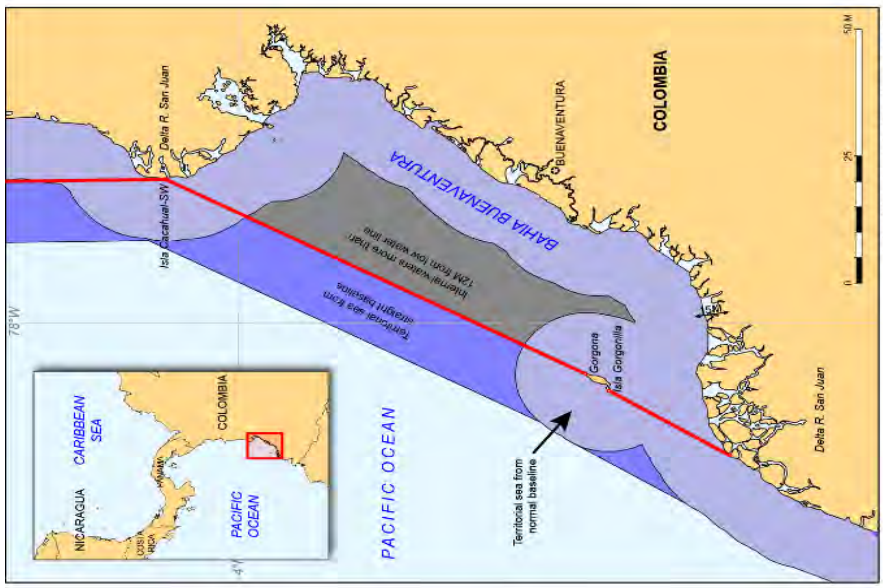


Figure 7-10
Colombia's Straight Baselines (Pacific)
showing areas of internal waters more than 12M from low water line

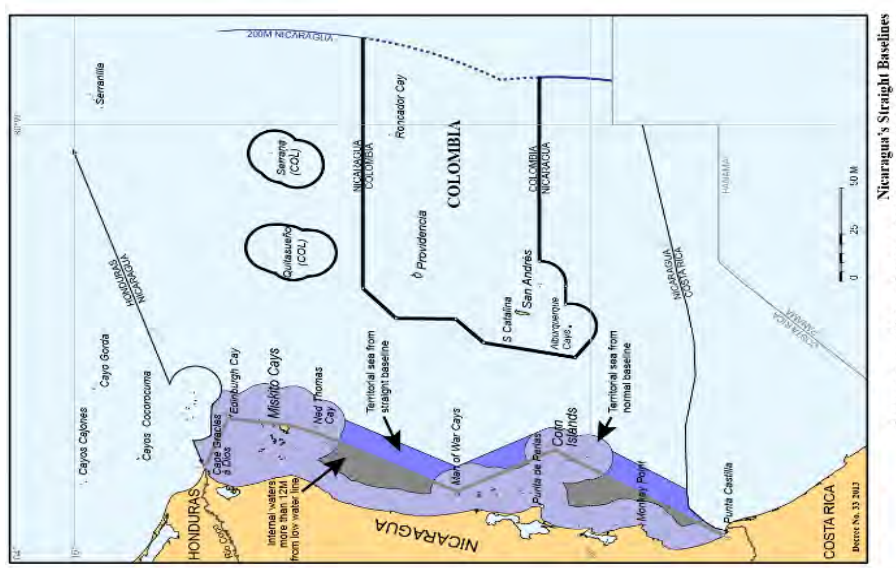


Figure 7-9
Nicaragua's Straight Baselines
showing areas of internal waters more than 12M from low water line

Figures 7-9 and 7-10 from NR

3.11. As this review indicates, Colombia's own practice in relation to critical aspects of the regime of straight baselines is comparable to that of Nicaragua and on some points Nicaragua's practice is more moderate. In that light, Colombia's current criticism can only be regarded as insincere. Its silence in the face of Nicaragua's demonstration of this in the Reply cannot have been due to an oversight. It reflects Colombia's embarrassment at having its hypocrisy exposed.

B. Nicaragua's Normal Baselines and Decree No. 33-2013 Establishing Straight Baselines

3.12. In Chapter VII of the Reply, Nicaragua discussed its Decree No. 33-2013 establishing a system of straight baselines along its Caribbean coast and the normal baseline along that coast.[139] As was pointed out,[140] the preambular paragraphs of the Decree indicate that Nicaragua exercises its sovereignty, rights and jurisdiction over its maritime zones in accordance with international law.[141] The preamble further observes that Nicaragua ratified the United Nations Convention on the Law of the Sea on 3 May 2000, and that in the determination of straight baselines in the Caribbean Sea, Nicaragua is acting in accordance with the Convention.[142] As will be further discussed below, Colombia's Rejoinder does not provide any convincing argument to cast doubt on Nicaragua's adherence to the Convention's provisions on the determination of the baselines from which to measure the breadth of the territorial sea.

3.13. Nicaragua's straight baseline segment between points 8 and 9 defined in Annex I to Decree No. 33-2013 at that time was under review.[143] Point 9 with

[139] NR, paras 7.7-7.12, 7.14-7.15 and 7.56-7.59.
[140] NR, para. 7.7.
[141] Decree No. 33-2013, Preamble, para. I. (NR, Annex 1).
[142] *Ibid*., Preamble, paras. II and VI.
[143] NR, para. 7.12.

the geographical coordinates 10° 55' 52.0" N; 083° 39' 58.1" W, was located on the coast of Harbour Head Lagoon. The Court in its Judgment of 2 February 2018 in *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua) and Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua)* confirmed Nicaragua's sovereignty over Harbor Head Lagoon and the sandbar separating it from the Caribbean Sea.[144] However, the Court held that this part of the coast of Nicaragua would not be attributed a territorial sea in the delimitation involving Nicaragua and Costa Rica.[145] As a consequence, point 9 defined in Annex I to Decree No. 33-2013 no longer abutted on Nicaragua's territorial sea.[146] Having completed its review of the implications of the Court's Judgment, Nicaragua has determined the coordinates of the most southern basepoint of its system of straight baselines anew. This new basepoint 9, with geographical coordinates 10° 57'56.6" N; 83° 44' 41.2" W, is located on Barra Indio Maíz (Greytown).[147] This change of Nicaragua's most southern basepoint defining its straight baselines does not make any material difference in relation to Nicaragua's analysis of Decree No. 33-2013 in the context of Colombia's counter claim concerning Nicaragua's straight baselines.[148]

3.14. In the Reply, Nicaragua, explained that the basepoints of its straight baselines have been determined in accordance with articles 5 and 7 of the

[144] *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua) and Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua) Judgment 2 February 2018*, para. 205(2).
[145] *Ibid*, para. 105.
[146] NR, para. 7.12.
[147] Presidential Decree No. 17-2018, Decree of Reform to Decree No. 33 2013, "Baselines of the Maritime Spaces of the Republic of Nicaragua in the Caribbean Sea", Annex I (reproduced in Annex 2 to this pleading) The text of Decree is also available on the website of the Division for Oceans and the Law of the Sea of the UN Secretariat (http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/NIC.htm) (last visited 21 February 2019).
[148] For the reasons set out at NR, Chapter VII, section F, the change of Nicaragua's most southern basepoint defining its straight baselines does not have any impact on the location of the outer limit of Nicaragua's exclusive economic zone at 200 nautical miles.

Convention, which reflect customary international law. Two of these basepoints are located on the low-water line along Nicaragua's mainland coast, while the remaining seven points are located on the low-water line of Nicaragua's fringing islands.[149] The Rejoinder does not contest that the basepoints that have been used by Nicaragua in this connection are valid basepoints.[150] On the other hand, the Rejoinder does take issue with basepoints of Nicaragua that are located on a number of features off Nicaragua's coast seaward of the straight baselines.

3.15. According to the Rejoinder, the basepoints that Nicaragua has placed along the low-water line of Nee Reef, London Reef off the Miskito Cays and Blowing Rock to the south of Great Corn Island, have never "been referenced in Nicaragua's own official domestic legal acts".[151] The Rejoinder also complains that these points were not included in the list contained in the Annex to Decree 33-2013, and that, in consequence, Nicaragua did not comply with the notification requirements of article 16 of the United Nations Convention on the Law of the Sea.[152] Through these assertions, Colombia demonstrates that it has failed to seriously engage with Nicaragua's domestic legislation and practice and has a poor understanding of article 16 of the Convention.

3.16. As a preliminary point, it may be noted that Nee Reef, London Reef and Blowing Rock are within 12 nautical miles of Cayo Miskito (Nee Reef and London Reef) and Great Corn Island (Blowing Rock). That makes these features, even if they all were low-tide elevations, eligible to be used as part of

[149] NR, paras 7.14 and 7.15.
[150] CR, para. 6.2.
[151] CR, para. 6.9.
[152] CR, paras 6.8-6.9.

Nicaragua's baselines in accordance with article 13, paragraph 1, of the United Nations Convention on the Law of the Sea.[153]

3.17. Nicaragua's Law N° 420 on Maritime Spaces of 15 March 2002 provides that the baselines from which the breadth of the territorial sea is measured are straight baselines or the low-water line along the coast.[154] Law N° 420 thus provides for the option of combining the two methods, as Nicaragua as a matter of fact has done along its Caribbean coast.

3.18. In June of 2013, following the Court's 2012 Judgment in *Territorial and Maritime Dispute*, Nicaragua made a submission on the outer limits of its continental shelf to the Commission on the Limits of the Continental Shelf (CLCS) in accordance with article 76 of the Convention. The Executive Summary of Nicaragua's submission has been published on the website of the CLCS.[155] Page 4 of the Executive Summary contains a figure of the 200-nautical-mile-limit of Nicaragua and the basepoints that have been used to determine that limit. This figure is reproduced in Figure 4, while adding Nicaragua's straight baselines. As can be appreciated from Figure 4, the basepoints for determining the 200-nautical-mile limit include basepoints on Nee Reef, London Reef and Blowing Rock, which are located seaward of the straight baselines. In accordance with the Rules of Procedure of the Commission, a communication was circulated to all Member States of the United Nations, including States Parties to the Convention, in order to make

[153] Article 13, paragraph 1, provides:

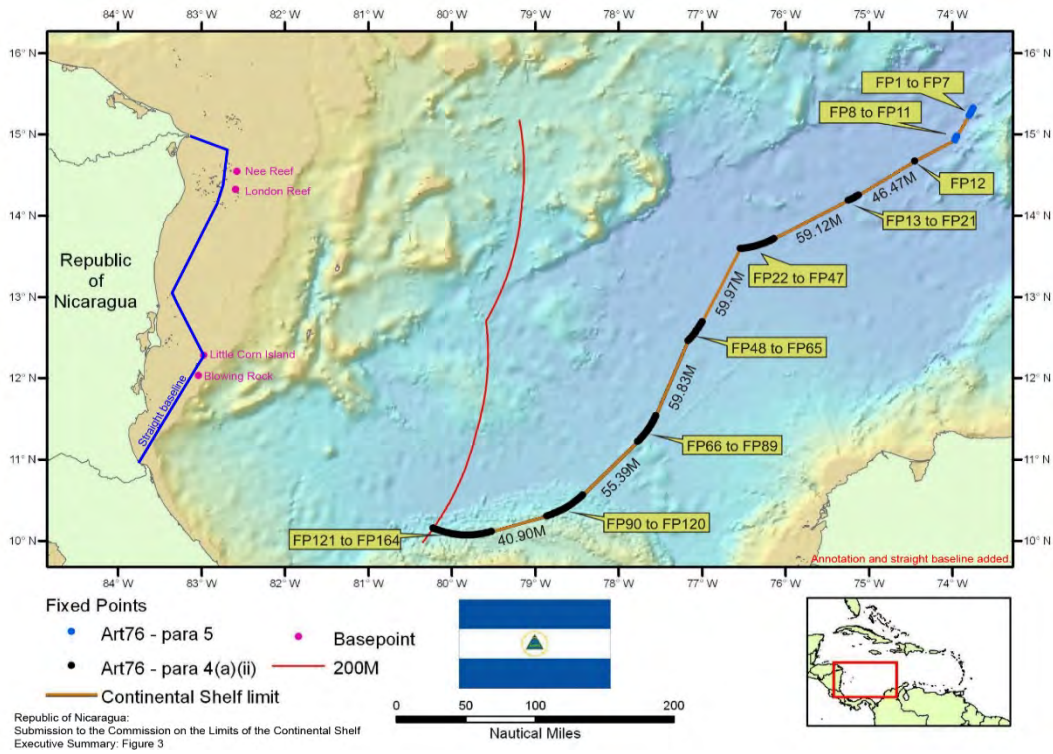
> A low-tide elevation is a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide. Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea.

[154] Law N° 420 on Maritime Spaces, article 3 (reproduced in Annex 1 to this pleading).

[155] Available at http://www.un.org/Depts/los/clcs_new/submissions_files/nic66_13/Executive%20Summary.pdf. (last visited 21 February 2019)

public the Executive Summary of the submission, including all charts and coordinates contained therein.[156] That is, contrary to what Colombia claims, Nicaragua is not now for the first time using these basepoints, but they were already used and publicized six years ago.

Figure 4. Nicaragua's Submission to CLCS with Straight Baseline added



[156] Receipt of the Submission made by the Republic of Nicaragua to the Commission on the Limits of the Continental Shelf (CLCS.66.2013.LOS (Continental Shelf Notification) of 1 July 2013; available at http://www.un.org/Depts/los/clcs_new/submissions_files/nic66_13/clcs66_2013.pdf). (last visited 21 February 2019).

3.19. Colombia's claim that the baselines on Nee Reef, London Reef and Blowing Rock are not included in Annex I to Decree 33-2013 is disingenuous, to say the least. As the title of Annex I indicates, it is concerned with providing information on the geographical coordinates of the basepoints of Nicaragua's straight baselines, not the baseline on features beyond those straight baselines.

3.20. The Rejoinder's assertion that Nicaragua did not comply with article 16, paragraph 2, of the Convention, by not including a reference to baselines on Nee Reef, London Reef and Blowing Rock in its 2013 communication to the Secretary-General of the United Nations is equally misguided.[157] Article 16 of the Convention provides:

> "1. The baselines for measuring the breadth of the territorial sea determined in accordance with articles 7, 9 and 10, or the limits derived therefrom, and the lines of delimitation drawn in accordance with articles 12 and 15 shall be shown on charts of a scale or scales adequate for ascertaining their position. Alternatively, a list of geographical coordinates of points, specifying the geodetic datum, may be substituted.
> 2. The coastal State shall give due publicity to such charts or lists of geographical coordinates and shall deposit a copy of each such chart or list with the Secretary-General of the United Nations."

3.21. As article 16, paragraph 1, indicates, the obligation contained in it is concerned with article 7, 9, 10, 12 and 15 of the Convention, and not articles 5 and 13, dealing respectively with the baseline along the coast of the mainland or islands and low-tide elevations. In compliance with article 16, paragraph 2, Nicaragua has submitted information on its straight baselines to the Secretary-General of the United Nations.

3.22. The Rejoinder submits that since the baselines on Nee Reef, London Reef and Blowing Rock are not mentioned in Decree 33-2013, "Colombia will not

[157] CR, para. 6.9.

discuss the existence –undemonstrated by Nicaragua − nor the[ir] relevance, if any".[158] As was set out above, the premise of Colombia's submission is without basis. That Decree 33-2013 did not refer to these baselines is explained by the fact that the Decree was only concerned with straight baselines. As was observed above at paragraph 3.18, the use of the low-water line along Nee Reef, London Reef and Blowing Rock was publicized in 2013 in connection with Nicaragua's continental shelf submission to the CLCS.

3.23. Colombia's submission that Nicaragua has not demonstrated the existence of these basepoints is also wrong as a matter of law. Article 5 of the Convention provides that "Except where otherwise provided in this Convention, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State." As the Award of the Annex VII Tribunal in *Guyana v. Suriname* indicates, there is a presumption that the low-water line as marked is the normal baseline. As the Award indicates, that presumption may be challenged by the other party to the proceedings. In *Guyana v. Suriname* the Tribunal concluded in this respect:

> "396. Guyana also objected to Suriname's basepoint S14, which Suriname had identified relying on what Guyana claimed to be an inaccurate chart. The chart in question, NL 2218, was produced by the Netherlands Hydrographic Office (with the assistance of the Maritime Authority Suriname) in June 2005 after the proceedings in this arbitration had commenced. In addition, Guyana claims that another Dutch chart, NL 2014, as well as satellite imagery, "disprov[e] the existence of a low-tide coast at Vissers Bank where Suriname placed its purported basepoint S14."
>
> 396. The Tribunal is not convinced that the depiction of the low-water line on chart NL 2218, a chart recognised as official by Suriname, is inaccurate. As a result, the Tribunal accepts the basepoint on Vissers Bank, Suriname's basepoint S14."

[158] CR, para. 6.10.

3.24. Contrary to Guyana, Colombia has not presented any evidence that the baselines as depicted by Nicaragua in the Executive Summary of its submission to the CLCS might be inaccurate. In that light, there is no reason not to accept the low-water line along Nee Reef London Reef and Blowing Rock as part of the baseline of Nicaragua.

3.25. However, to avoid any doubt that Nicaragua has determined the outer limit of its exclusive economic zone in accordance with the Court's 2012 Judgment in *Territorial and Maritime Dispute* – the Judgment references to a point on that outer limit –[159] the Nicaraguan Navy carried out a survey of Nee Reef and London Reef in January and February of 2019. Basepoints on those reefs control the outer limit of Nicaragua's exclusive economic zone running northwards from Point A established by the Court in 2012. The survey by the Nicaraguan Navy confirms the continued existence of low-tide elevations at both reefs. The report on this survey is included in Annex 5 to this pleading.

3.26. Blowing Rock, to the south of Great Corn Island, is a popular site for scuba diving and regularly visited by tourists. The website of Corn Island Dive Center describes it as:

> "One of Nicaragua's best dive sites, Blowing Rock is a favorite among our divers. Located approximately 7 miles (11 km) from Corn Island, this giant pinnacle of volcanic boulders attracts vast amounts of marine life. The base of the pinnacle rests around 80 feet (24 meters) and towers upwards, breaking the surface to form a small rocky island."[160]

[159] The operative part of the Judgment provides that from point 1 on the maritime boundary between Nicaragua and Colombia "the maritime boundary line shall continue due east along the parallel of latitude (co-ordinates 13° 46′ 35.7″ N) until it reaches the 200-nautical-mile limit from the baselines from which the breadth of the territorial sea of Nicaragua is measured" (*Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012*, pp. 719-720, para. 251 (4)). The Court refers to the latter point as Point A in paragraph 237 of its judgment.

[160] Dives Sites (available at https://www.cornislanddivecenter.com/dive-sites/) (last visited 31 January 2019)

C. Nicaragua's Mainland Coast and Islands Allow the Drawing of Straight Baselines and These Baselines are in Accordance with International Law

3.27. The current section sets out that the geography of the Nicaraguan coast allows the drawing of straight baselines and that the baselines that have been established are in accordance with customary law as reflected in article 7 of the Convention. Subsection a. explains that the Rejoinder distorts the Reply's discussion of the Court's Judgments in *Black Sea* and *Territorial and Maritime Dispute*. Subsection b. considers the Colombian argument that Nicaragua has provided insufficient data on the islands along its Caribbean coast. That argument misrepresents Nicaragua's presentation of the facts. These islands are a geographic reality that Colombia itself has recognized. Subsection c. explains that the islands adjacent to Nicaragua's coast constitute a fringe of islands in the immediate vicinity of the coast in the sense of article 7, paragraph 1, of the Convention. Subsection d. addresses the point that the southern part of Nicaragua's coast is deeply indented and cut into, another geographical situation that allows the drawing of straight baselines. Finally, subsection e. explains that the waters enclosed by Nicaragua's straight baselines are closely linked to the land domain, as is required by paragraph 3 of article 7.

a. COLOMBIA'S ARGUMENT ON *BLACK SEA* AND *TERRITORIAL AND MARITIME DISPUTE* IS ERRONEOUS

3.28. In the Reply, Nicaragua explained that Colombia's Counter-Memorial had distorted the relationship between Decree 33-2013 and the Court's 2012

Judgment.[161] The Rejoinder does not address the Reply's arguments on the relation between Decree 33-2013 and the Judgment. The Reply also explained that the Counter-Memorial ignored the fact that the 2012 Judgment characterized the islands off Nicaragua's Caribbean coast as fringing islands.[162] The Reply further observed that the Court at the same time referred to the isolated nature of the feature QS32 on the Bank of Quitasueño and in that connection drew a comparison to the Court's treatment of Serpents' Island in *Black Sea*.[163] As the Court observed in relation to Serpents' Island, counting that isolated island "as a relevant part of the coast would amount to grafting an extraneous element onto Ukraine's coastline".[164] Nicaragua submits that these findings indicate that Nicaragua's fringing islands have a close relationship to Nicaragua's mainland coast and that they are in that respect to be distinguished from isolated features that are unconnected to the mainland coast.

3.29. The Rejoinder spins a convoluted argument on the Court's jurisprudence, submitting that the Court made these findings on Nicaragua's islands and Serpents' Island in the context of maritime delimitation disputes.[165] However, one will look in vain in the 2012 Judgment for any support that the Court characterized Nicaragua's islands as fringing islands *because* the case was concerned with maritime delimitation. The islands were characterized as such due to their geographical relationship to the mainland coast of Nicaragua. That geographical relationship did not undergo any changes since 2012.

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[161] *Territorial and Maritime Dispute (Nicaragua* v *Colombia), Judgment, I.C.J. Reports 2012,* p. 624. NR, para.7.7-7.12.
[162] NR, para. 7.22
[163] NR, paras 7.22-7.23.
[164] *Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports 2009*, pp. 109-110, para. 149.
[165] CR, paras 6.13-6.26

3.30. There is no need to further address the Rejoinder's argument on *Black* Sea and *Territorial and Maritime Dispute*. The whole argument, which takes up a large part of the Rejoinder's Chapter on Colombia's counter claim on Nicaragua's straight baselines, is based on a false premise. The Rejoinder argues that Nicaragua claimed that the Court's 2012 Judgment recognized its coastal islands as a fringe of islands, the term used in article 7, paragraph 1, of the Convention.[166] However, that is not the case. In the Reply, Nicaragua explicitly pointed out that "the 2012 Judgment in two instances refers to respectively the "Nicaraguan fringing islands" and the "islands fringing the Nicaraguan coast"."[167] At no point did the Reply claim that the Court referred to these islands as a fringe of islands in the sense of article 7 of the Convention.

b. NICARAGUA'S FRINGING ISLANDS ARE A GEOGRAPHICAL REALITY

3.31. The Parties clearly remain divided on whether Nicaragua's fringing islands constitute a fringe of islands in the sense of article 7, paragraph 1, of the Convention, and its customary law equivalent. However, the focus of Colombia seems to have shifted to some extent. In the Counter-Memorial, Colombia concentrated on the distance of the most seaward islands off Nicaragua's mainland coast, while totally ignoring that between these islands and that mainland coast there are numerous other islands.[168] In the Reply, Nicaragua explained that this was not the proper approach for determining the existence of a fringe of islands, but that instead it is necessary to look at the geographical relationship between all the islands concerned and between those

[166] See *e.g.* para. 6.14.
[167] NR, para. 7.22 (footnote omitted). The quotation from the judgment of the Court may be found at *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012*, p. 671, para. 135 and p. 678, para.145.
[168] *See* NR, paras 7.29-7.32.

islands and the mainland coast.[169] The Reply concluded that, looking at the relevant geography from that perspective, there is a fringe of islands along Nicaragua's mainland coast.

3.32. In the Rejoinder, Colombia changes tack and no longer focusses exclusively on the islands on which the basepoints of Nicaragua's straight baselines are located. Nonetheless, Colombia continues to weave this unwarranted focus on the islands on which basepoints are located throughout the Rejoinder.[170] In this additional pleading, Nicaragua to the contrary will focus on the matter that is at the heart of this issue, namely: do the Nicaraguan mainland coast and the entirety of the islands fringing it allow the drawing of straight baselines in accordance with article 7 of the Convention?

3.33. In the Reply, Nicaragua pointed out that there are numerous islands along its Caribbean coast, which are located between that mainland coast and the islands on which the basepoints of its system of straight baselines are positioned. As Nicaragua observed, the total number of the islands along its Caribbean coast is 95, all of which are listed in Annex 31 to the Reply.[171] The Rejoinder complains that Nicaragua does not name all the islands or identify their location and the Rejoinder refers to them as "unidentified features" and "so-called islands".[172]

3.34. Colombia's argument is irrelevant. Article 7 does not contain any requirement that individual features of a fringe of islands have to be identified to qualify for considering them in drawing straight baselines. What counts is the geographical reality and not nomenclature. A fringe of islands is a fringe

[169] *See* NR, paras 7.29-7.32.
[170] See *e.g.* CR, paras 6.34 and 6.42.
[171] *See* NR, para. 7.26.
[172] See *e.g.* CR, paras 6.28-6.29, 6.32, 6.34, 6.39, 6.43, 6.47.

of islands because of its location, not the specific identification of each of the islands concerned.

3.35. In any event, Colombia's claims that the islands are unidentified and their location is unspecified are patently incorrect. Annex 31 of Nicaragua's Reply, listing the islands, consists of a table with three columns. The first column is entitled 'Location', providing the location of the group of which individual islands are a part. The second column is entitled 'Cays', providing the names of the specific cays. And the third column provides a count of the numbers of islands in each individual group. On the basis of this information all of these islands can be identified without difficulty on the relevant nautical charts.[173]

3.36. Actually, Colombia never has had any difficulty in identifying the islands that fringe Nicaragua's mainland coast and in recognizing their insular status. The Colombian Rejoinder in *Territorial and Maritime Dispute (Nicaragua v. Colombia)* contains numerous figures that include the islands that are listed in Annex 31 to Nicaragua's Reply in the present proceedings.[174] Figure R-5.4 of the Colombian Rejoinder in that prior case is reproduced as Figure 5 of this pleading. As this Figure shows, Colombia not only had no difficulty in identifying the islands fringing Nicaragua's coast, but also acknowledged that they are entitled to a territorial sea.[175] It may be observed that Colombia's own figure clearly illustrates that all of Nicaragua's islands generate overlapping territorial sea entitlements, conforming their close proximity and interconnectedness.

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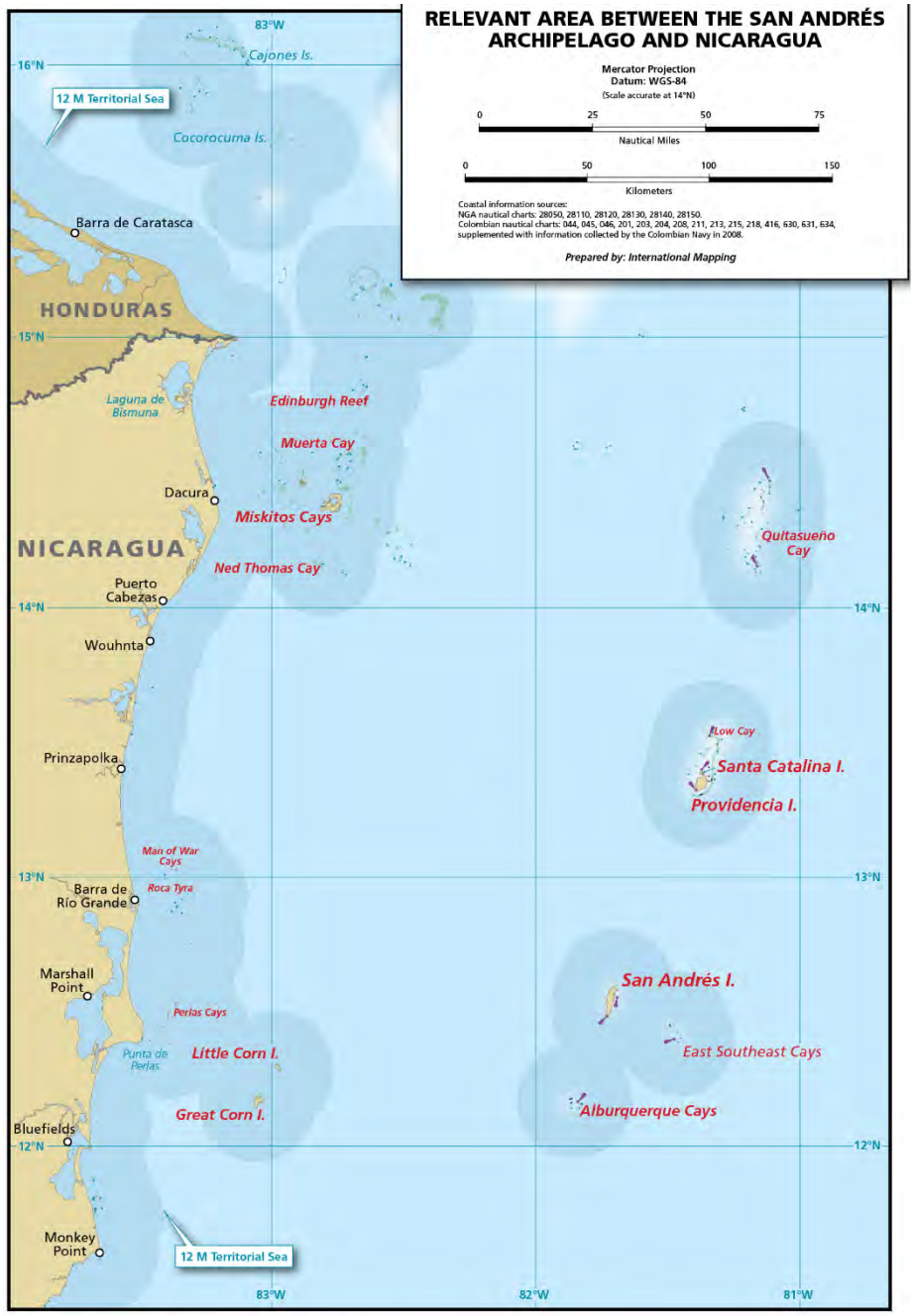
[173] *See* for example NGA charts 28110, 28120 and 28130 presented by Colombia in CR Figures 6.2a and 6.2b.

[174] See *e.g.* CR, *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Vol. II, p. 112, Figure R-5.4 and p. 113, Figure R-5.5.

[175] Nicaragua considers that Figure R-5.4 does not necessarily depict the territorial sea of Nicaragua correctly in its entirety. In that connection it may also be noted that this figure was produced prior to Nicaragua enacting its system of straight baselines in 2013.

Figure 5. Nicaragua's Islands and interconnecting Territorial Sea identified by Colombia



CR Figure R 5-4 from *Nicaragua v Colombia* (2012) 112 **Figure R-5.4**

3.37. Even in the current Rejoinder, in which Colombia all of a sudden has difficulty in identifying and locating Nicaragua's islands, the graphics undercut Colombia's story. Figures CR 6.2, CR 6.2a and CR 6.2c, depicted on pages 308 to 310, include the islands the text of the Rejoinder has such difficulty in locating.

3.38. Without going into further detail to refute an argument that is baseless, it suffices to observe that the islands are also identified in academic studies that discuss the importance of the cays and the sea area off Nicaragua's mainland coast for its indigenous population.[176] The sketch map reproduced in Figure 6 is included in Bernard Nietschmann's *Between Land and Water; The Subsistence Ecology of the Miskito Indians, Eastern Nicaragua*.[177] The sketch map identifies the various island groups off Nicaragua's Caribbean coast, most of them by name. Figure 7 contains a sketch map from the study *Indigenes Management mariner Ressourcen in Zentralamerika* and shows the northern part of Nicaragua's coast, including the numerous islands studding the Caribbean Sea off that mainland coast.[178]

[176] For a further discussion of these publications see below at subsection e.

[177] B. Nietschmann *Between Land and Water; The Subsistence Ecology of the Miskito Indians, Eastern Nicaragua* (Seminar Press, New York and London, 1973).

[178] V. Sandner Le Gall *Indigenes Management mariner Ressourcen in Zentralamerika: Der Wandel von Nutzungsmustern und Institutionen in den autonomen Regionen der Kuna (Panama) und Miskito (Nicaragua)* (Geographischen Institut der Universität Kiel; Kieler Geographische Schriften, vol. 116).

Figure 6. Nicaraguan Indigenous Groups

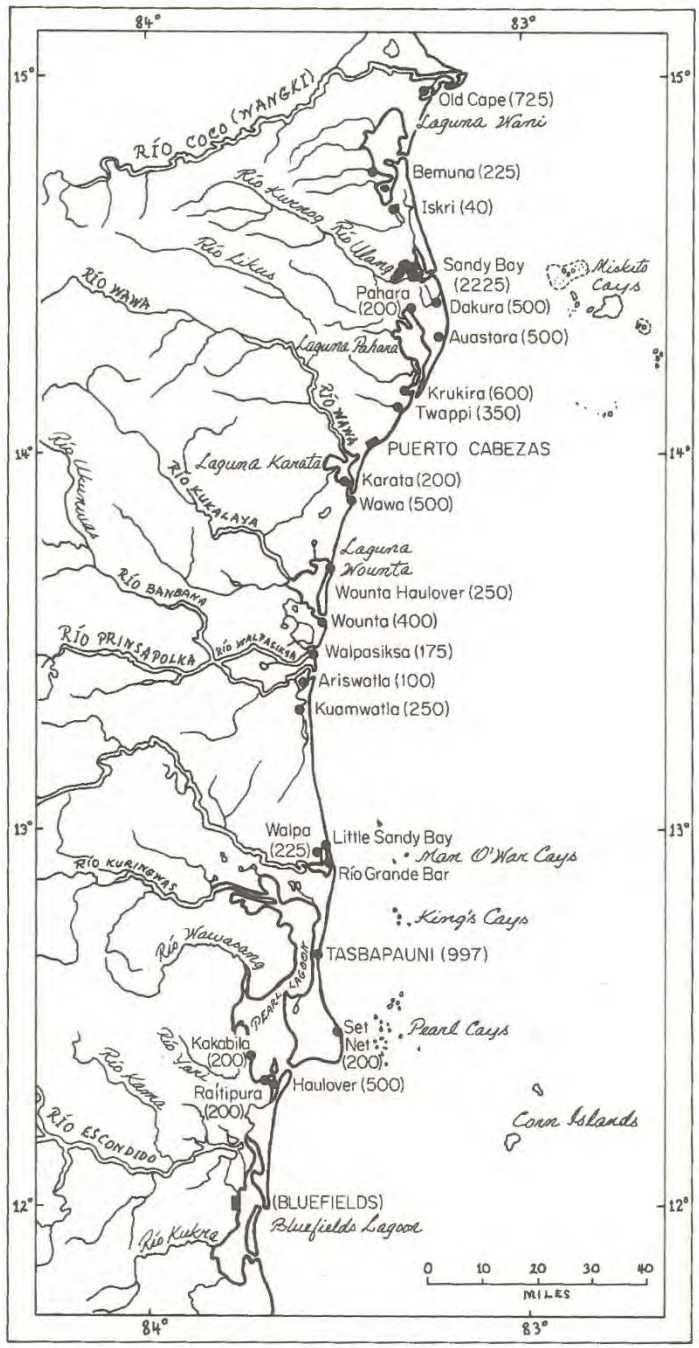
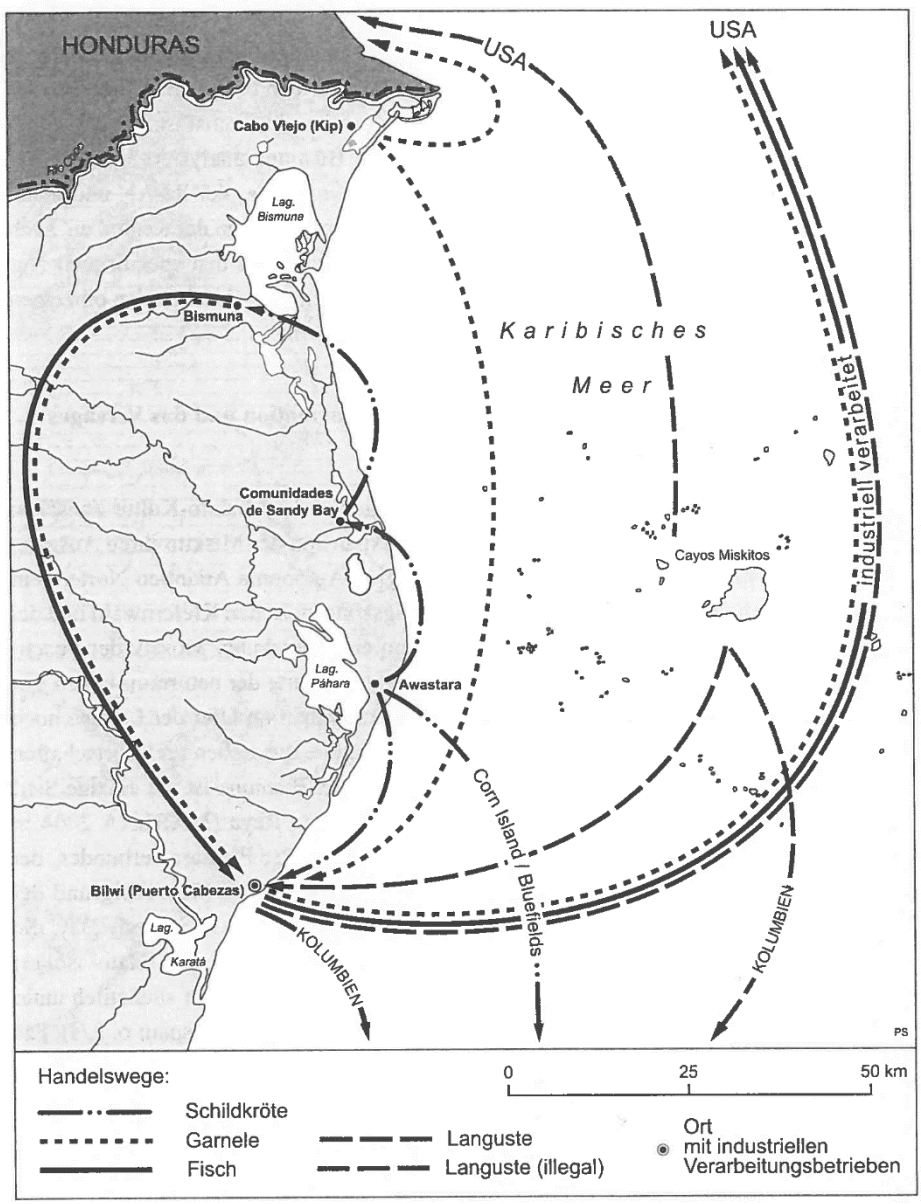


Figure 7. Nicaraguan Indigenous Management of Maritime Areas



c. NICARAGUA'S FRINGING ISLANDS CONSTITUTE A FRINGE OF ISLANDS IN THE IMMEDIATE VICINITY OF THE COAST

3.39. Article 7, paragraph 1, provides that straight baselines may be drawn "if there is a fringe of islands along the coast in its immediate vicinity". Nicaragua submits that this test is met in the case of its Caribbean coast. As was pointed out above, the characterization of these islands as fringing islands in the Court's 2012 judgment in *Territorial and Maritime Dispute* confirms the proximity of the islands to the mainland coast. The number of islands concerned and their location indicates that they constitute a fringe of islands. The different groups of islands, which are listed in Annex 31 of the Reply, inshore are close to the mainland coast and stretch out to sea.

3.40. The Rejoinder contests that the islands along Nicaragua's mainland coast constitute a fringe of islands in the sense of article 7, paragraph 1, and the identical rule of customary international law. In that connection the Rejoinder presents a number of arguments, which will be analyzed in turn.

3.41. First, this is again an instance in which the Rejoinder seeks to rely on the fanciful theory that in looking at the relation of islands and the mainland coast, the focus has to be on the islands on which the basepoints of the system of straight baselines are located. This approach is evident from paragraph 6.34 of the Rejoinder, which, in assessing whether there is a fringe of islands along Nicaragua's coast, exclusively focusses on the islands on which Nicaragua has placed the basepoints of its system of straight baselines. Paragraph 6.34 then concludes: "As shown on the Figure, [which identifies these basepoints] the different components of Nicaragua's so-called "fringe of islands" are simply too isolated from each other to be deemed as forming a "unity"." That conclusion might be warranted if those were the only islands off Nicaragua's mainland coast. However, as should be abundantly clear from the above

discussion of the islands off Nicaragua's coast, the geographical reality is completely different from Colombia's imagined reality consisting solely of 7 isolated features.

3.42. The Rejoinder next makes the claim that there is no "*continuous* fringe [of islands] along the coast" and submits that this is required by the rule of customary law as reflected in article 7 of the Convention.[179] Again, the Rejoinder erroneously focusses on the islands on which the basepoints of Nicaragua's straight baselines are anchored, to the exclusion the other islands of the total of 95 listed in Annex 31 to Nicaragua's Reply.[180]

3.43. As indicated above, Colombia's own straight baselines practice belies the restrictive interpretation of what may be considered to be a fringe of islands. As is evident from the example presented in Figures 2 and 3 of this pleading, Colombia has included a group consisting of two islands in its system of straight baselines. What is more, the practice of other States on which Colombia relies contradicts this restrictive interpretation of what constitutes a fringe of islands.[181] For instance, Norway, in the area of the coast off the city of Trondheim, has established a straight baseline between two basepoints identified as NM49 and NM50.[182] These points are located on respectively a rock southwest of Ertenbraken in the Vikna area and Utgrunnskjer in the Frøya area. These two basepoints are almost 85 kilometers apart. This approach indicates that the term fringe of islands does not have the restrictive

[179] CR, para. 6.35 (emphasis in the original).
[180] CR, para. 6.35.
[181] In discussing article 7 of the Convention and its customary law equivalent, the Rejoinder among others relies on the practice of Norway, Finland and Yemen (see *e.g.* CR, para. 6.45.)
[182] Regulations relating to the baselines for determining the extent of the territorial sea around mainland Norway; Laid down by Royal Decree of 14 June 2002 pursuant to the Act of 17 May 1814 relating to the Constitution of the Kingdom of Norway and Royal Decree of 22 February 1812 (English text reproduced in *Law of the Sea Bulletin* No. 49, p. 51 (available at http://www.un.org/Depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletinE49.pdf) (Last visited 21 February 2019).

scope that Colombia seeks to attach to it. A fringe of islands may include separate groups of islands, as is the case for the fringe of islands along the coast of Nicaragua.

3.44. The Rejoinder also submits that the islands along Nicaragua's mainland coast do not form a unity with that coast because the islands have a limited masking effect.[183] Colombia already made this argument in the Counter-Memorial. In the Reply, Nicaragua explained that this argument was defective on a number of counts. First, in determining the masking effect of Nicaragua's islands, the Counter-Memorial failed to take into account a large part of those islands. Second, it was observed that the Counter-Memorial did not offer any explanation as to why it took a strictly frontal projection in determining the extent of the masking effect.[184] The Rejoinder is silent on both counts and also ignores the fact that the Reply pointed out that even under Colombia's restrictive approach, if properly applied, 25 percent of Nicaragua's mainland coast is masked by islands.[185] Instead, the Rejoinder simply continues to rely on the figure of 5 to 6 percent that is based on an erroneous application of Colombia's unjustified method of frontal projections.[186]

3.45. Without providing any explanation as to why Colombia's approach of only using a frontal projection in determining the masking effect of Nicaragua's islands is justified, the Rejoinder criticizes Nicaragua's approach to determining that effect. As Nicaragua explained in the Reply, there is no specific rule for determining the masking effect of islands. However, it was

[183] CR, paras. 6.36 and following.
[184] *See* NR, para. 7.34-7.35.
[185] NR, para. 7.35.
[186] CR, para. 6.41. In a footnote to that paragraph the Rejoinder submits that: "Even assuming, as Nicaragua claims, that the relevant length of Nicaragua's Caribbean mainland coast was, for the sake of evaluating the masking effect, to be measured from Cabo Gracias a Dios in the north to Monkey Point in the South, this percentage would remain insignificant." It is submitted that using the term 'insignificant' for a figure of 25 percent – the percentage under Colombia's methodology to determine the masking effect if properly applied – is inappropriate.

submitted that an analogy might be found in the Court's approach to determining the seaward projection of the relevant coasts in connection with the delimitation of maritime boundaries. As the Reply also pointed out, the Court in those cases has never adopted a strictly frontal projection, a method Colombia proposed without any explanation in the Counter-Memorial.[187]

3.46. In the Rejoinder, Colombia refers to Nicaragua's calculations as 'fanciful' and refers to Nicaragua's reliance of the Court's case law as being 'absurd',[188] relying once again on the incorrect argument that "again Nicaragua relies on unidentified maritime features".[189]

3.47. The Rejoinder argues that Nicaragua's calculation is deprived of any factual basis, because, in making that calculation Nicaragua ignored the characteristics of the islands concerned. This is, using Colombia's own words, a 'fanciful and absurd' argument. In making its calculations, Nicaragua used the western coasts of the islands listed in Annex 31 to the Reply.[190] It is not clear what other characteristics should have been taken into account by Nicaragua in this connection.

3.48. A footnote to the Rejoinder gives a clue about what other characteristics Colombia thinks Nicaragua should have taken into account. That footnote refers to the dimensions of the islands concerned.[191] Indeed, the Rejoinder repeatedly highlights the dimensions of these islands.[192] However, the size of

[187] NR, para. 7.35.
[188] CR. para. 6.39.
[189] CR, para. 6.39.
[190] The masking calculations were done using the extent of the western coast of each of the islands – combined into the major groupings identified in NR, Annex 31 – as illustrated by NR Figure 7-5.
[191] CR, para. 6.39, footnote 612.
[192] *See e.g.* CR, para. 6.34 using the words 'miniscule', "small" and "very small" to refer to some of Nicaragua's islands. It should be noted that this characterization is not always completely apt.

islands is irrelevant in determining whether they can qualify as islands that can be taken into consideration in applying article 7 of the Convention. For instance, basepoints NM49 and NM50 of Norway's system of straight baselines, discussed above, are small rocks. Reference may also be had to the case of Yemen. As the Rejoinder observes, Nicaragua and Colombia agree that *Eritrea/Yemen (second stage)* is a relevant precedent in this case.[193] The tribunal there held that islands off the coast of Yemen had a masking effect.[194] The islands concerned are depicted in Figure 7.4 at page 169 of the Reply. As that figure indicates, many of these islands are of very small size. There is no indication in the tribunal's award that the size of islands may disqualify them in considering the masking effect.

3.49. The Rejoinder also criticizes Nicaragua's reliance on the case law on the delimitation of maritime boundaries for determining a methodology to establish the masking effect of islands. Colombia's assertion that the Reply only relies on a sketch map from the Court's judgment in *Black Sea* is misleading.[195] The Reply referred to that sketch map by way of example.[196] That example can be easily supplemented by others examples. It suffices to refer to the Court's discussion of the determination of the relevant coasts of Nicaragua and Colombia in the 2012 Judgment. Those relevant coasts do not project only strictly frontally, i.e. at 90-degree angle.[197]

For instance, the Rejoinder refers to the small Miskito Cays, while the largest of the cays, the homonymous Miskito Cay measures more than 35 square kilometers.

[193] CR, para. 6.37.

[194] *Award of the Arbitral Tribunal in the Second Stage of the Proceedings between Eritrea and Yemen (Maritime Delimitation)*, p. 369, para. 151.

[195] CR, para. 6.40.

[196] NR, para. 7.35, footnote 505, which reads "This [i.e. the rejection of a strictly frontal projection] is for instance illustrated by Sketch-map No.5 included in the Court's judgment in *Black Sea*".

[197] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012*, pp. 679-680, paras. 151-153 and Sketch map 6.

3.50. The Rejoinder also submits that the analogy that Nicaragua draws between the methods for determining the masking effect of islands and the determination of the relevant coasts in delimitation cases does not hold.[198] However, the Rejoinder does not offer any justification as to why that is so, and as a matter of fact does not offer any guidance at all on how to go about determining the masking effect of islands in the concrete case.

3.51. Nicaragua submits that the analogy with the Court's case law on the determination of the relevant coast in delimitation cases is helpful in determining a methodology for establishing the masking effect of islands. Both situations are concerned with establishing the relationship between different geographical entities: in the case of maritime delimitation law, the relationship between the relevant coast and the relevant area off that relevant coast, and in the case of the masking effect of islands, the relationship between islands and the mainland coast. The rejection of using a strictly frontal projection in the case of determining the relevant area can be seen as a recognition of the fact that geography is too complex to be captured in a dogmatic mathematical approach relying solely on a 90° angle of a frontal projection. Nicaragua submits that this explanation applies with equal force in determining the relationship between islands and the mainland. It would not do justice to the often-complex geographical circumstances to force that relationship into the straitjacket of a 90° angle of a frontal projection as Colombia is doing.

3.52. The example of Yemen further illustrates that Colombia's current pleading concerning the masking effect is far-fetched. Figure 7.4 at p. 169 of the Reply depicts the part of the Yemeni coast that the tribunal considered to be masked

[198] CR, para. 6.40.

by islands.[199] As the Figure illustrates, in particular the central part of the Yemeni coast only has small islands in front of it that, using Colombia's frontal projection method, hardly have any masking effect. The weakness of the Colombian argument is even more clearly illustrated by the practice of Norway. Figure 8 shows a part of the Norwegian coast in the area of the city of Trondheim. In this area, Norway has drawn straight baselines between island groups that are located seaward of the mainland coast. However, those islands only mask the northern and southern extremities of the mainland coast, while most of that mainland coast faces the open sea if one were to apply Colombia's method of frontal projections in determining the masking effect of islands.

Figure 8. Norwegian Straight Baseline in the Trondheim Area

[199] *Award of the Arbitral Tribunal in the second stage of the proceedings (Maritime Delimitation) between Eritrea and Yemen*, p. 369, para. 151.

3.53. The Rejoinder also submits that Nicaragua's islands do not meet the criterion of being "in the immediate vicinity" of the coast, as is required by article 7 of the Convention and customary international law. In that connection, the Rejoinder again seeks to focus the attention of the Court on the seven islands on which Nicaragua has located basepoints of its straight baselines, and once more harps on its *leitmotif* that the allegedly unidentified islands lying landward of the straight baselines in that connection should not be taken into account.[200] As the Rejoinder observes:

> "Since, according to Nicaragua, the westernmost "islands" (not the seven "main" islands) are near the mainland coast, the whole "fringe", including the "main" islands that are not "near" the coast, meets the "immediate vicinity" requirement. [...] This argument is wholly unsubstantiated."[201]

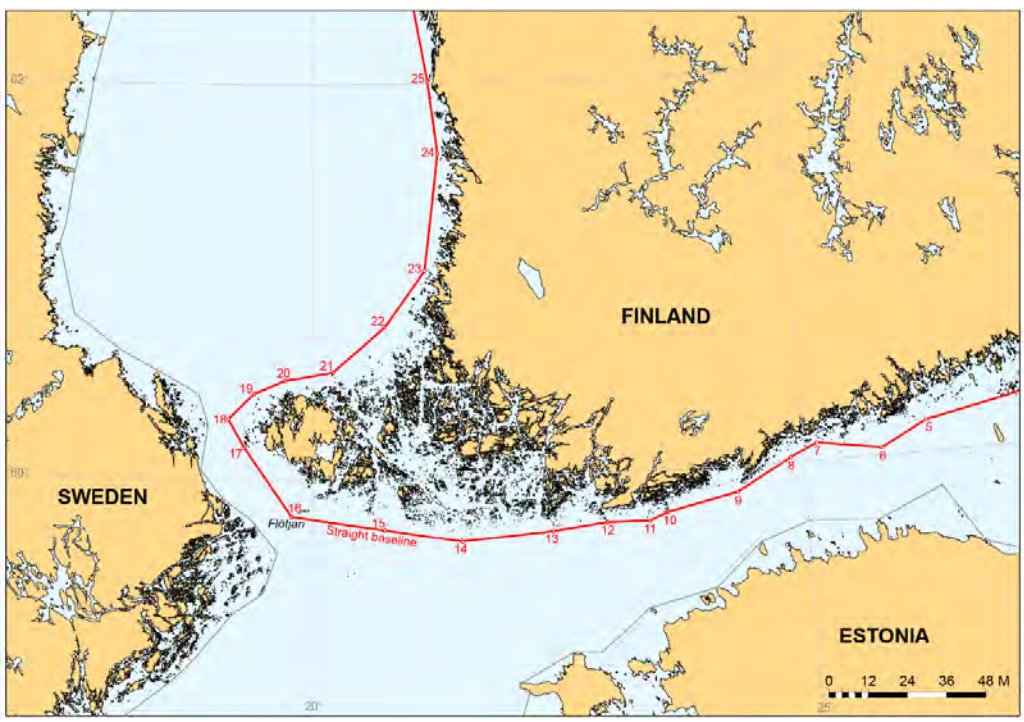
What Colombia is claiming here is that all islands concerned have to be in the immediate vicinity of the coast and not only the islands that are closest to the coast. However, the Rejoinder immediately contradicts this premise in discussing the practice that Nicaragua invoked in support of its position.

3.54. In the Reply, Nicaragua discussed the coasts of Finland, Norway and Yemen, pointing out that the outermost islands in those cases where at a larger or similar distance from the coast as the outermost islands of Nicaragua's fringing islands.[202] The Rejoinder ignores this geographical fact, and simply observes that "straight baselines were drawn to enclose an intricate system of islands, the *inner edge of which is indeed very close to the mainland*".[203] The argument that these cases concern an intricate system of islands that are all closely connected is easily disproved by the figures in the Reply, depicting the

[200] CR, paras 6.42-6.44.
[201] CR, paras 6.43-6.44.
[202] NR, paras 7.38-7.40
[203] CR, para. 6.45 (emphasis of the original deleted; emphasis added).

relevant straight baselines of Norway and Finland.[204] Norway's basepoints 21 and 25 are located on features that are a considerable distance from other islands, and, as was also observed in the Reply, a much larger distance from the mainland.[205] In the case of Finland, reference may in particular be had to basepoint 16 on Flötjan, which, on Colombia's view of things would be an isolated minuscule feature that would not be entitled to a basepoint in the system of straight baselines (see Figure 9 included in this pleading).[206]

Figure 9. Finland's Straight Baselines



[204] Respectively Figure 7.6 at p. 173 of Nicaragua's Reply and Figure 7.7 at p. 174 of Nicaragua's Reply.
[205] NR, para. 7.39.
[206] Decree No. 993 on the Application of the Act on the Delimitation of the Territorial Waters of Finland of 31 July 1995 (available at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/FIN_1995_Decree.pdf, section 1.(Last visited 21 February 2019).

3.55. At this point, it should not come as a surprise that Colombia's argument concerning "an intricate system of islands, the inner edge of which is indeed very close to the mainland" is also disproved by its own straight baselines practice. As is evident from the example presented in Figures 2 and 3, Colombia has included a group consisting of two islands in its system of straight baselines. Colombia's own practice indicates that two islands apparently may qualify as an intricate system of islands. These islands also do not meet the Rejoinder's exacting standard of being very close to the mainland.

3.56. Finally, reference may be had to *The Law of the Sea; Baselines*, on which Colombia in its pleadings repeatedly relies, but on this issue conveniently ignores. The publication makes the following observation about the words "in the immediate vicinity":

> "It is generally agreed that with a 12-mile territorial sea, a distance of 24 miles would satisfy the conditions. […] It is important to realize that this concept applies to the inner edge of the fringe of islands because the fringe itself might be of considerable width."[207]

To put this observation in perspective, it may be noted that the *outermost* islands enclosed by Nicaragua's fringing islands are only a couple of nautical miles seaward from the distance of 24 nautical miles from the mainland mentioned in *The Law of the Sea; Baselines*. The *inner edge* of Nicaragua's fringing islands is well within that distance.

3.57. The Rejoinder also seeks to conjure up a rule of customary international law to the effect that "a distance ranging from 25 to 30 nautical miles between the coast and the islands is generally accepted as not excessive".[208] There is no

[207] Office for Ocean Affairs and the Law of the Sea, United Nations, *The Law of the Sea; Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea*, (New York, 1989), para. 46.
[208] CR, para. 6.48 (footnote omitted).

such rule of customary international law. First of all, it may be observed that Colombia agrees that article 7 of the Convention is identical to customary international law on the matter.[209] Article 7 does not contain any reference to Colombia's imaginary rule. Furthermore, in this instance Colombia does rely on *The Law of the Sea; Baselines*. However, instead of quoting that publication's observations on the phrase "in its immediate vicinity", the Rejoinder refers to an argument that is concerned with a different matter.[210] The comment of that publication on the phrase "in its immediate vicinity" as quoted in the preceding paragraph of this pleading, indicates that the inner edge of the fringe of islands may be located at 24 nautical miles from the mainland and the outer edge well beyond that distance as "the fringe itself might be of considerable width".[211] That conclusively disproves Colombia's alleged rule of customary international law.

d. NICARAGUA'S SOUTHERN COAST IS DEEPLY INDENTED AND CUT INTO

3.58. In the Reply, Nicaragua explained that, contrary to what Colombia argued in the Counter-Memorial, Nicaragua relied on the two circumstances that allow the drawing of straight baselines, namely the presence of a fringe of islands or a coast that is deeply indented and cut into.[212] The Rejoinder does not seriously engage with this argument, but simply observes that a "mere glance at the map reveals that the mainland coast lying behind the straight baseline segment between Great Corn Island and Harbour Point (this point is now known as Barra Indio Maíz [Greytown]) is not "deeply indented and cut into". Geography being what it is, Nicaragua cannot demonstrate the

[209] See *e.g.* CR, para. 6.35.
[210] CR, para. 6.49.
[211] Office for Ocean Affairs and the Law of the Sea, United Nations, *The Law of the Sea; Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea*, (New York, 1989), para. 46.
[212] NR, paras 7.17-7.19.

contrary."[213] However, it is not that simple. As the Reply pointed out, Colombia's own practice has been to draw straight baselines along coasts that are less indented and cut into than the coast of Nicaragua between Monkey Point and the terminus of land boundary with Costa Rica.[214] The Rejoinder is silent on this point. Norway's practice in relation to the Trondheim area, discussed above at Figure 8, further illustrates that the Rejoinder's "mere glance at the map" test is deficient. That area can be described as approximately forming a rectangle. The shorter sides are formed by the islands to the north and the south of that sea area. The longer sides by Norway's mainland coast and the straight baselines Norway has established in this area. This indentation is similar to that of the Nicaraguan coast between Monkey Point and the terminus of land boundary with Costa Rica.

e. THE SEA AREAS WITHIN NICARAGUA'S STRAIGHT BASELINES ARE CLOSELY LINKED TO ITS LAND DOMAIN

3.59. The Rejoinder takes issue with Nicaragua's explanation as to why the sea areas lying within its straight baselines are "sufficiently closely linked to the land domain to be subject to the regime of internal waters", as is provided by article 7, paragraph 3, of the Convention.[215] The Rejoinder's discussion comes down to the argument that Nicaragua has not proven that there is a sufficiently close link, but does not dispute the calculations that the Reply provides in that connection.[216] And again, the Rejoinder is silent on the Reply's comparison of Nicaragua's and Colombia's practice, which showed that "Colombia's straight

[213] CR, para. 6.52.
[214] NR, para. 7.19.
[215] CR, paras 6.54-6.57.
[216] *See*, CR, paras 6.56 and 6.57. For the Nicaraguan argument see NR, paras 7.49-7.53.

baselines in the Bahia de Bonaventura are thus much more expansive than those of Nicaragua along its Caribbean coast".[217]

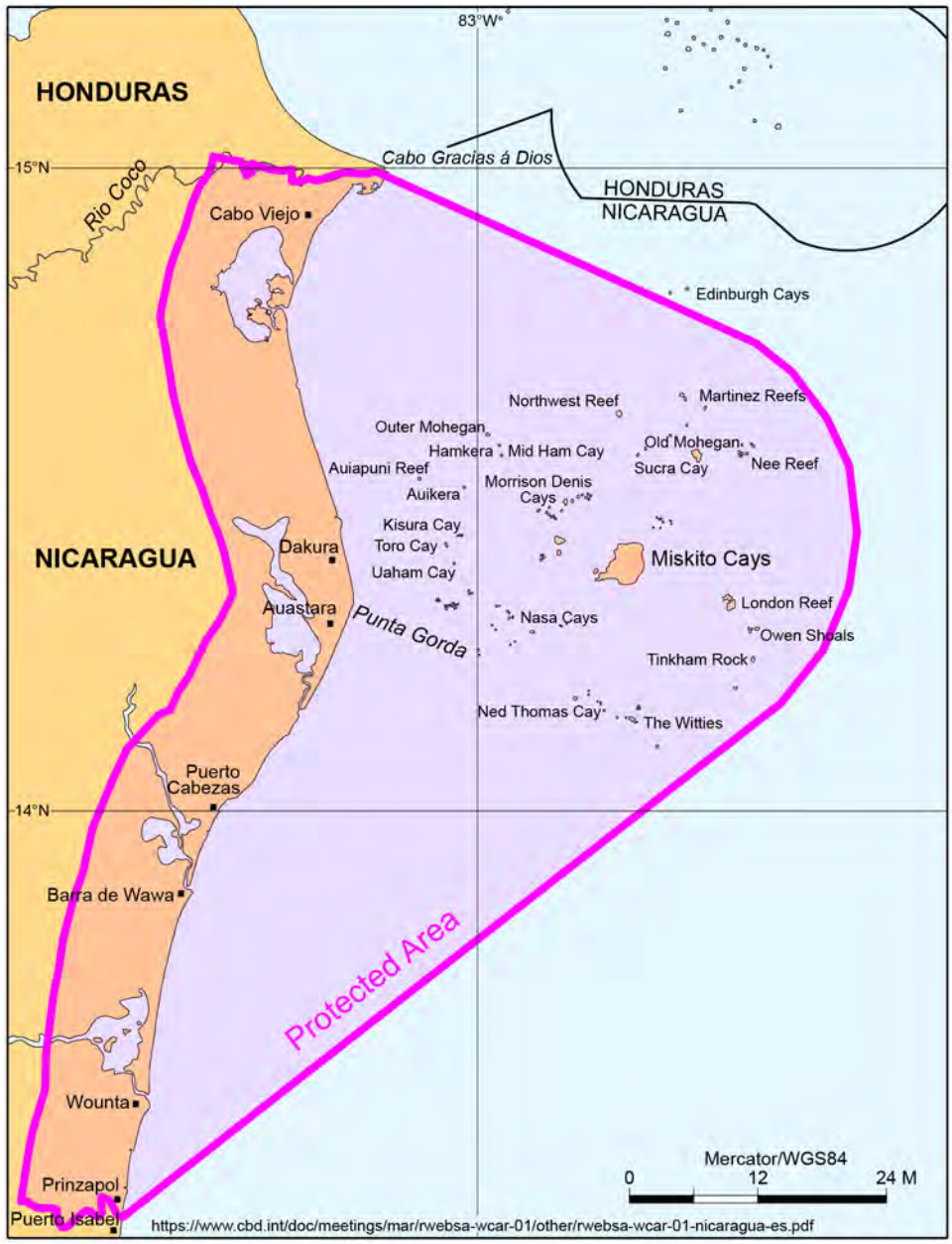
3.60. Apart from the mathematical test that Nicaragua applied in the Reply to demonstrate that the sea areas lying within its straight baselines are sufficiently closely linked to the land domain to be subject to the regime of internal waters, reference may also be had to the importance of these waters to Nicaragua's indigenous population. In a study published in 2007 focusing on the northern part of Nicaragua's coast, Sandner Le Gall observes that "the area around the Cayos Miskitos on the basis of its natural and spatial characteristics is an important economic area for the Miskito Indians for fisheries, lobster and turtle hunting".[218] The close connection between the Miskito Cays and the mainland coast is also witnessed by the Marine Biological Reserve that Nicaragua has established in this area since 1991, which comprises both a part of the coastal strip and the Cayos Miskitos. The limits of the reserve are identified in Figure 10 of this pleading. This area was designated as a wetland of international importance under the Ramsar Convention on 8 November 2001.[219]

[217] NR, para. 7.53. For a depiction of these two cases *see* NR, Figure 7.9 at p. 181 and Figure 7.10 at p. 189.

[218] V. Sandner Le Gall *Indigenes Management mariner Ressourcen in Zentralamerika: Der Wandel von Nutzungsmustern und Institutionen in den autonomen Regionen der Kuna (Panama) und Miskito (Nicaragua)* (Geographischen Institut der Universität Kiel; Kieler Geographische Schriften, vol. 116), p. 223. The original German text reads "*ist das Gebiet um die Cayos Miskitos aufgrund der naturräumlichen Ausstattung zum einen ein wichtiger Wirtschaftsraum für Fischerei, Langusten- und Schildkrötenfang für die Miskito*". *See* Annex 4 to this pleading.

[219] See *Annotated List of Wetlands of International Importance - 48/427*, p. 48 Cayos Miskitos y Franja Costera Immediata (available at https://rsis.ramsar.org/sites/default/files/rsiswp_search/exports/Ramsar-Sites-annotated-summary-Nicaragua.pdf?1549025253). (Last visited 21 February 2019)

Figure 10. Extent of the Cayos Miskitos Marine Biological Reserve



3.61. Niestschmann, in his study *Between Land and Water,* provides a discussion of the shallow waters along Nicaragua's coast from Cape Gracias a Dios in the north to San Juan del Norte in the south:

> "The shelf is widest off Cape Gracias a Dios, going out 75 or more miles and gradually decreasing in width southwards toward San Juan del Norte. It has a very gentle gradient and rarely exceeds 50 fathoms in depth anywhere […]. This area has the largest sea turtle feeding grounds anywhere in the Western Hemisphere […], dominated by *Zostera* and *Thalassia* turtle grasses. These marine grasses are efficient producers of energy and make important contributions to the productivity of tropical waters […]. The underwater marine pastures, or "turtle banks" support remnant populations of the once abundant Atlantic green turtle (*Chelonia mydas mydas*). The turtle banks may occur as isolated patches, 2 to 3 miles in diameter, or in large areas where the banks are close together. […] Much of the Coastal Miskito food procurement activity, such as patterns and amounts of labor inputs, timing of meat-getting pursuits, and distances travelled, are closely adjusted to the green turtle migratory patterns and habitats."[220]

3.62. Niestschmann provides a more detailed description of the traditional relationship of Nicaragua's indigenous population to the sea areas along the Caribbean coast in the publication *Conservation, Self-determination, and the Miskito Coast Protected Area, Nicaragua*.[221] As he observes:

> "The coastal communities also comprise marine territories. A large part of the Miskito Platform of 900 kilometers in width, is divided en delimited marine territories that often extend for many kilometers from the beach to the sea, depending on the traditional patterns of use of the resources of the biogeography of the continental shelf (Figure 8).[222] Since much of the hunting and

[220] B. Nietschmann *Between Land and Water; The Subsistence Ecology of the Miskito Indians, Eastern Nicaragua* (Seminar Press, New York and London, 1973), pp. 92-93. *See* Annex 3 to this pleading.

[221] B. Nietschmann "Conservación, autodeterminación y el Área Protegida Costa Miskita, Nicaragua" *Mesoamérica* 1995 Vol. 29, pp. 1-55. A pdf of the article is available through the website https://dialnet.unirioja.es/descarga/articulo/4011108.pdf (Last visited 21 February 2019)

[222] The reference to Figure 8 likely is a misprint. Figure 7 contained in the publication depicts the tenure areas along the entire Caribbean coast, which are discussed at this point, while Figure 8,

> fishing takes place in the open sea where there are reefs and banks of seagrass, the marine territories of the communities extend to the east to include these areas. The marine territories of ten communities of Sandy Bay, and Dakura and Awastara, for instance, extend up to include the coral reef zones and banks of sea food that surround the Cayos Miskitos (see Figure 8), a distance of more than 80 kilometers in its widest part. […] The Miskito marine and land territory is composed of a continuous extension of lands and waters that traditionally belong to the individual communities."[223]

3.63. Figure 11.A of this pleading reproduces Figure 7 from *Conservation, Self-determination, and the Miskito Coast Protected Area, Nicaragua*, whose caption in English reads *The traditional tenure of the sea of the Miskito communities of the coast*. Figure 11.B shows the same Figure with Nicaragua's straight baselines superimposed. As can easily be appreciated, the two areas overlap to a very large extent. Nicaragua submits that this more than suffices to meet the test that the sea areas lying within its straight baselines are sufficiently closely linked to the land domain to be subject to the regime of internal waters, as is required by article 7, paragraph 3, of the Convention.

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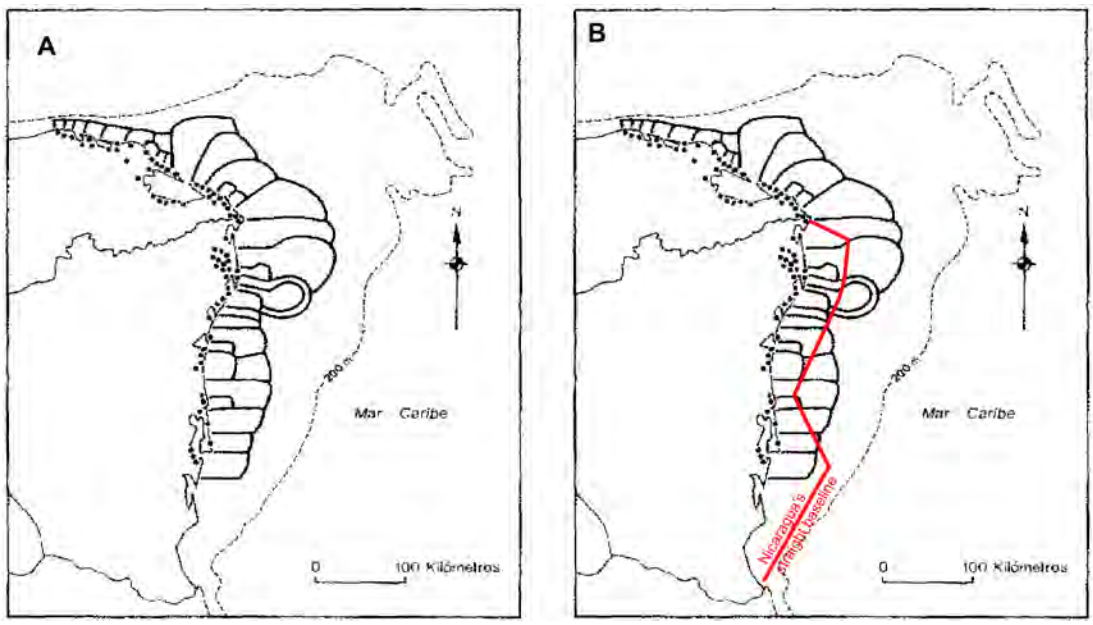
which is mentioned subsequently in this quotation, focusses on the tenure areas in the area of the Cayos Miskitos.

[223] Nietschmann "Conservación, autodeterminación y el Área Protegida Costa Miskita, Nicaragua" *Mesoamérica* 1995 Vol. 29, p. 17. The Spanish text reads "*Las comunidades costeñas cuentan también con territorios marinos. Gran parte de la Plataforma Miskita de 900 kilómetros de largo está seccionada en territorios marinos delimitados, que se extienden a menudo por muchos kilómetros de la playa al mar dependiendo de patrones tradicionales del uso de recursos y de la biogeografía de la plataforma continental (Figura 8). Como mucha de la caza y pesca en mar abierto se da donde hay arrecifes de coral y bancos de pastos marinos, los territorios marinos de las comunidades se extienden hacia el este para incluir estas áreas. Los territorios marinos de diez comunidades de Sandy Bay y de Dakura y Awastara, por ejemplo, se extienden hasta incluir las zonas de coral y pastos marinos que rodean los Cayos Miskitos (véase la Figura 8), una distancia de 80 kilómetros en su parte más ancha […] El territorio marino y terrestre miskito está compuesto por una extensión continua de tierras y aguas que por tradición pertenecen a las comunidades individuales*." Available at https://dialnet.unirioja.es/descarga/articulo/4011108.pdf (Last visited 21 February 2019)

Figure 11. Traditional tenure of the sea of the Miskito communities (A) Original Map (B) Overprinted with Nicaragua's straight baselines



D. Conclusions

3.64. Nicaragua holds that the preceding analysis does not require any adjustment to the Reply's refutation of Colombia's counter-claims on Nicaragua's straight baselines, and the basepoints located seaward of those straight baselines.[224] In summary, Nicaragua's Caribbean coast allows the drawing of straight baselines and these baselines have been established in accordance with article 7 of the Convention and the identical rule of customary international law. The basepoints seaward of those straight

[224] These conclusions are set out in NR, para. 7.60.

baselines on Nee Reef, London Reef and Blowing Rock similarly meet the criteria set out in the relevant provisions of the Convention.

3.65. What is perhaps most striking about the Colombian Rejoinder is its complete silence on Colombia's own practice. Instead of measuring Nicaragua's practice against Colombia's application of the rules of customary international law as reflected in the Convention, Colombia rather prefers to do so against self-serving arguments that have been concocted for the purposes of these proceedings and are in open contradiction to its own practice.

SUBMISSIONS

For the reasons given in its Reply and in this Additional Pleading, the Republic of Nicaragua requests the Court to adjudge and declare that the Counter-Claims of Colombia are rejected.

The Hague, 4 March 2019.

Carlos J. Argüello Gómez
Agent of the Republic of Nicaragua

CERTIFICATION

I have the honour to certify that this Additional Pleading and the documents annexed are true copies and conform to the original documents and that the translations into English made by the Republic of Nicaragua are accurate translations.

The Hague, 4 March 2019.

Carlos J. Argüello Gómez
Agent of the Republic of Nicaragua

LIST OF ANNEXES