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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2021

Public sitting

held on Monday 20 September 2021, at 3 p.m., at the Peace Palace,

President Donoghue presiding,

***in the case concerning* Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua *v.* Colombia)**

VERBATIM RECORD

ANNÉE 2021

Audience publique

tenue le lundi 20 septembre 2021, à 15 heures, au Palais de la Paix,

sous la présidence de Mme Donoghue, présidente,

***en l'affaire relative à des* Violations alléguées de droits souverains et d'espaces maritimes dans la mer des Caraïbes (Nicaragua c. Colombie)**

COMPTE RENDU

Present:	President	Donoghue
	Vice-President	Gevorgian
	Judges	Tomka
		Abraham
		Bennouna
		Yusuf
		Xue
		Sebutinde
		Bhandari
		Robinson
		Salam
		Iwasawa
		Nolte
	Judges *ad hoc*	Daudet
		McRae
	Registrar	Gautier

Présents : Mme Donoghue, présidente
M. Gevorgian, vice-président
MM. Tomka
Abraham
Bennouna
Yusuf
Mmes Xue
Sebutinde
MM. Bhandari
Robinson
Salam
Iwasawa
Nolte, juges
MM. Daudet
McRae, juges *ad hoc*

M. Gautier, greffier

The Government of Nicaragua is represented by:

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

as Agent and Counsel;

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

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

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

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

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

as Counsel and Advocates;

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

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

as Assistant Counsel;

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

as Scientific and Technical Adviser;

Ms Sherly Noguera de Argüello, MBA,

as Administrator.

The Government of Colombia is represented by:

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

as Agent;

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

as Co-Agent;

Le Gouvernement du Nicaragua est représenté par :

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

comme agent et conseil ;

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

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

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

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

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

comme conseils et avocats ;

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

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

comme conseils adjoints ;

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

comme conseiller scientifique et technique ;

Mme Sherly Noguera de Argüello, MBA,

comme administrateur.

Le Gouvernement de la Colombie est représenté par :

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

comme agent ;

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

comme coagent ;

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

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

as National Authorities;

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

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

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

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

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

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

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

as Counsel and Advocates;

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

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

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

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

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

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

as Counsel;

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

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

comme représentants de l'Etat ;

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

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

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

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

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

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

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

comme conseils et avocats ;

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

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

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

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

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

comme conseils ;

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

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

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

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

Mr. Sebastián Correa Cruz, Third Secretary,

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

Ministry of Foreign Affairs of Colombia;

Rear Admiral Ernesto Segovia Forero, Chief of Naval Operations,

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

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

Navy of the Republic of Colombia;

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

Ms Victoria Taylor, Cartographer, International Mapping,

as Technical Advisers;

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

as Legal Assistant;

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

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

as Advisers.

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

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

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

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

M. Sebastián Correa Cruz, troisième secrétaire,

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

ministère des affaires étrangères de la République de Colombie ;

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

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

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

marine de la République de Colombie ;

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

Mme Victoria Taylor, cartographe, International Mapping,

comme conseillers techniques ;

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

comme assistant juridique ;

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

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

comme conseillers.

The PRESIDENT: Please be seated. The sitting is open.

Before we start our judicial proceedings today, I would like to pay tribute, on behalf of the Court, to Judge James Crawford, our esteemed colleague and friend, who passed away on 31 May of this year.

Judge Crawford, an active and highly regarded Member of the Court since 2015, was a towering figure in international law and a role model for generations of lawyers. Born in 1948 in Adelaide, Australia, Judge James Crawford studied law and humanities at the University of Adelaide and obtained a doctorate in jurisprudence at Oxford University. In his extraordinary career, Judge Crawford distinguished himself both as an academic and as a practitioner. He was Professor of Law at the University of Adelaide, Challis Professor of International Law at the University of Sydney and, until his election to the Court, Whewell Professor of International Law at the University of Cambridge, where he also directed the Lauterpacht Centre for International Law. As an academic, he created an astonishing body of scholarship, including seminal works on key topics such as State responsibility and the creation of States in international law. As a practitioner, he was a well-renowned and a seasoned barrister, having been called to the Bar of the Supreme Court of New South Wales in 1987 and appointed senior Counsel in 1997. He also became a member of the Bar of England and Wales and co-founded a highly successful set of chambers in London in 2000.

Within his home country, Judge Crawford held a number of key positions, including being a member of the Australian Law Reform Commission, where he spearheaded the effort to recognize Aboriginal customary laws. At the international level, he had considerable experience as an arbitrator in the settlement of investor-state disputes and left his mark as a member of the International Law Commission from 1992 to 2001, where he served as Special Rapporteur on State responsibility for internationally wrongful acts, playing a crucial role in the adoption by the Commission of the final text of these draft Articles. As a member of the Institut de droit international, Judge Crawford made a significant contribution to the study and development of many other areas of international law.

Prior to his election to the International Court of Justice, Judge Crawford had already gained a wealth of experience pleading before this Bench. He first appeared as counsel before the Court in the case concerning *Certain Phosphate Lands in Nauru* in 1991. He was thereafter to become a

regular fixture in the Great Hall of Justice, addressing the Court in close to 30 contentious and advisory proceedings.

When Judge Crawford became a Member of this Court in February 2015, the qualities that had earned him his reputation as a giant in international law were immediately apparent. With his singularly agile mind, brilliant analytical skills and fine drafting, he was a true asset to this institution. He cared deeply about the Court and was firmly committed to the accomplishment of its mandate through constructive dialogue and reasoned debate.

Beyond Judge Crawford's remarkable professional achievements, he will also be remembered in equal measure for his warm, unassuming personality and his sharp sense of humour. The countless tributes that poured in following his untimely death are a testament to the deep respect and affection he inspired as a teacher, mentor and colleague.

Judge Crawford's passing is an enormous loss to international law and international justice, and to this Court, where he is sorely missed.

I would like now to invite you to stand and observe a minute's silence in memory of Judge James Crawford.

[The Court observed a minute's silence]

The PRESIDENT: Please be seated.

The Court meets today and will meet in the coming days to hear the Parties' oral arguments on the merits of the case concerning *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)*. Today, the Court will hear the first round of oral argument of Nicaragua.

Owing to the ongoing concerns and restrictions related to the COVID-19 pandemic, the Court has decided to hold these oral proceedings in a hybrid format, under Article 59, paragraph 2, of its Rules. The Court will continue to fulfil its mission through all means at its disposal, pending the normalization of the health situation.

The Court has taken great care to ensure the smooth conduct of this hybrid hearing. The Parties participated in technical tests over the course of the past week. Those tests were comprehensive and included, for example, tests of the interpretation system and the process for displaying demonstrative

exhibits such as PowerPoint slides and maps. However, while these tests can reduce the risk of technical difficulties, they cannot eliminate them. In the event that we experience any such difficulty, such as a loss of any audio input from a remote participant, I may have to interrupt the hearing briefly to allow the technical team to solve the problem.

In a hybrid hearing such as this one, all judges are able to view the speaker and any demonstrative exhibits, regardless of whether they are in the Great Hall or joining via video link. I would note that the following judges are present with me in the Great Hall of Justice: Vice-President Gevorgian and Judges Tomka, Abraham, Bennouna, Yusuf, Sebutinde and Nolte; while Judges Xue, Bhandari, Robinson, Salam and Iwasawa and Judges *ad hoc* Daudet and McRae are participating by video link. For reasons duly made known to me, Judge Cançado Trindade is unable to sit with us in these oral proceedings, either in person or by video link.

For this hybrid hearing, the Registrar informed both Parties that each of them could have up to four representatives present in the Great Hall of Justice at any one time and that the Court could make available, should a Party so desire, an additional room in the Peace Palace from which other members of the delegation could follow the proceedings via video link. The Registrar also informed the Parties that participation via video link would be available to the members of each delegation who would not be present in the Peace Palace.

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Since the Court included upon the Bench no judge of the nationality of either Party, each Party proceeded to exercise the right conferred upon it by Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case. Nicaragua first chose Judge Gilbert Guillaume, who resigned on 8 September 2015, and subsequently Professor Yves Daudet. Colombia first chose Professor David Caron and subsequently, following the death of Professor Caron in February 2018, chose Professor Donald McRae.

Article 20 of the Statute provides that "[e]very Member of the Court shall, before taking up his duties, make a solemn declaration in open court that he will exercise his powers impartially and

conscientiously". Pursuant to Article 31, paragraph 6, of the Statute, that same provision applies to judges *ad hoc*.

Professor Daudet has already made his solemn declaration at the sitting held on 28 September 2015, on the occasion of the proceedings on the preliminary objections raised by Colombia.

Since this is the first time that Professor McRae is participating in this case, he is required, in accordance with Article 8, paragraph 3, of the Rules of Court, to make a solemn declaration in relation to the present case.

Before inviting Professor McRae to make his solemn declaration, I shall first, in accordance with custom, say a few words about his career and qualifications.

Professor McRae, of Canadian and New Zealand nationalities, is Professor Emeritus and former Dean of Common Law at the Faculty of Law, at the University of Ottawa. He has extensive experience as counsel in the context of international fisheries and boundary arbitrations, and he has also appeared before this Court as counsel in *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the* Temple of Preah Vihear *(Cambodia* v. *Thailand)*. In the framework of the World Trade Organization, he has appeared as counsel before that organization's dispute settlement panels and Appellate Body and has also served as a member of several WTO panels. In addition, he has been a member and chair of various investment tribunals, including cases brought under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States and Chapter 11 of the North American Free Trade Agreement. He currently chairs an Arbitral Tribunal convened pursuant to Annex VII of the United Nations Convention on the Law of the Sea. Professor McRae is the former Editor-in-Chief of the Canadian Yearbook of International Law and has published widely on international law, including on law of the sea and international trade law. He is a member of the Institut de droit international, a member of the Royal Society of Canada, a Companion of the Order of Canada, and an Officer of the New Zealand Order of Merit. He was a member of the International Law Commission from 2007 to 2016. Professor McRae also served as judge *ad hoc* in the case concerning the *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile).*

I shall now invite Professor McRae to make the solemn declaration prescribed by the Statute, and I request all those present to rise. Professor McRae, please proceed.

Mr. McRAE:

"I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously."

The PRESIDENT: Thank you, Professor McRae. Please be seated. I take note of the solemn declaration made by Professor McRae and declare him duly installed as a judge *ad hoc* in the case concerning *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)*.

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I shall now briefly recall the principal procedural steps in this case.

On 26 November 2013, the Government of the Republic of Nicaragua filed in the Registry of the Court an Application instituting proceedings against the Republic of Colombia concerning a dispute in relation to, first, alleged violations by Colombia of Nicaragua's rights in maritime zones which, according to the Applicant, the Court declared to appertain to Nicaragua in its 2012 Judgment in the case concerning *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)* and, secondly, the threat of use of force by Colombia in the course of these violations.

As a basis for the Court's jurisdiction, Nicaragua invoked Article XXXI of the American Treaty on Pacific Settlement signed on 30 April 1948, and officially designated, according to Article LX thereof, as the "Pact of Bogotá".

By an Order of 3 February 2014, the Court fixed 3 October 2014 and 3 June 2015 as the respective time-limits for the filing of a Memorial by Nicaragua and a Counter-Memorial by Colombia. Nicaragua filed its Memorial within the time-limit thus fixed.

On 19 December 2014, within the time-limit prescribed by Article 79, paragraph 1, of the Rules of Court of 14 April 1978 as amended on 1 February 2001, Colombia raised preliminary objections to the jurisdiction of the Court.

By a Judgment of 17 March 2016, the Court found that it had jurisdiction, on the basis of Article XXXI of the Pact of Bogotá, to entertain the dispute between Nicaragua and Colombia

regarding the alleged violations by Colombia of Nicaragua's rights in the maritime zones which, according to Nicaragua, the Court declared in its 2012 Judgment appertain to Nicaragua.

By an Order of 17 March 2016, the Court fixed 17 November 2016 as the new time-limit for the filing of the Counter-Memorial of Colombia. Colombia filed that pleading within the time-limit thus prescribed. In Part III of its Counter-Memorial, Colombia, making reference to Article 80 of the Rules of Court, submitted four counter-claims.

At a meeting held by the President of the Court with the representatives of the Parties on 19 January 2017, Nicaragua indicated that it considered the counter-claims contained in the Counter-Memorial of Colombia to be inadmissible. By letters dated 20 January 2017, the Registrar informed the Parties that the Court had decided that the Government of Nicaragua should specify in writing, by 20 April 2017 at the latest, the legal grounds on which it relied in maintaining that the Respondent's counter-claims were inadmissible, and that the Government of Colombia should present its own views on the question in writing, by 20 July 2017 at the latest. Nicaragua and Colombia submitted their written observations on the admissibility of Colombia's counter-claims within the time-limits thus fixed.

By an Order of 15 November 2017, the Court found that two of the four counter-claims were admissible — namely, the third and the fourth. The third counter-claim concerns the alleged violation by Nicaragua of the customary artisanal fishing rights of the local inhabitants of the San Andrés Archipelago to access and exploit their traditional fishing grounds; the fourth counter-claim relates to the adoption by Nicaragua of Decree No. 33-2013 of 19 August 2013, which is alleged to have established straight baselines and to have had the effect of extending Nicaragua's internal waters and maritime zones beyond what international law permits, thereby violating Colombia's sovereign rights and maritime spaces. By the same Order, the Court directed Nicaragua to submit a Reply and Colombia to submit a Rejoinder relating to the claims of both Parties in the current proceedings, and fixed 15 May and 15 November 2018 as the respective time-limits for the filing of those pleadings. The Reply of Nicaragua and the Rejoinder of Colombia were filed within the time-limits thus fixed.

By an Order dated 4 December 2018, the Court authorized the submission by Nicaragua of an additional pleading relating solely to the counter-claims submitted by Colombia and fixed 4 March

2019 as the time-limit for the filing of that pleading. The additional pleading was filed by Nicaragua within the prescribed time-limit.

Following the closure of the written proceedings, by letter of 23 September 2019, the Nicaraguan Government, referring to Article 56 of the Rules of Court, requested the authorization of the Court to produce 19 new documents. By letter dated 3 October 2019, the Government of Colombia informed the Court that it was opposed to the granting of that request. By letters dated 16 October 2019, the Parties were informed that the Court had authorized the production of the above-mentioned documents by Nicaragua, and that the opportunity was available to Colombia to comment thereon and to submit documents in support of its comments. Within the time-limit of 16 December 2019, as fixed by the Court for that purpose, Colombia transmitted to the Court its comments on the new documents, as well as supporting exhibits and audio-visual material.

By letter of 30 July 2021, Nicaragua, referring to Article 56 of the Rules of Court, further requested the authorization of the Court to produce four additional new documents. By letter dated 16 August 2021, the Government of Colombia informed the Court that it objected to the production of these documents. By letters dated 1 September 2021, the Parties were informed that the Court had authorized the production of two of these new documents, and that the opportunity was available to Colombia to comment thereon and to submit documents in support of its comments. Within the time-limit of 9 September 2021, as fixed by the Court for that purpose, Colombia transmitted to the Court its comments on the two new documents, as well as supporting exhibits.

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Pursuant to Article 53, paragraph 2, of its Rules, the Court decided, after consulting the Parties, that copies of the written pleadings and documents annexed would be made accessible to the public, with the exception of certain annexes to and figures included in Colombia's written pleadings. In particular, the Court acceded to Colombia's request that these materials not be made accessible to the public on the basis that, under Colombian legislation, they are classified as secret or reserved for reasons of national security. While the Parties may, during this hearing, refer to the titles of these confidential documents as they appear in the list of annexes, they may not read out quotations from

them nor display slides showing all or part of them. With the exception of the above-mentioned materials, and in accordance with the Court's practice, all pleadings and documents annexed will be placed on the Court's website in due course.

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I would now like to welcome the delegations of the Parties. I note here the presence in the Great Hall of Justice of the Agent of Nicaragua and the Agent of Colombia, each accompanied by members of their respective State's delegation. I further note that other members of the delegations of the Applicant and the Respondent will be participating in the hearings by video link.

In accordance with the arrangements on the organization of the proceedings that have been decided by the Court, the hearings will comprise a first and second round of oral argument. The first round will begin with Nicaragua's presentation today of its arguments on its own claims, from 3 p.m. to 6 p.m. On Wednesday 22 September, Colombia will present its first round of argument, both on the claims of Nicaragua and on its own counter-claims, from 11 a.m. to 1 p.m. and then from 3 p.m. to 6 p.m. On Friday 24 September, Nicaragua will present its observations on the counter-claims of Colombia, from 3 p.m. to 5 p.m.

The second round of oral argument will open on the afternoon of Monday 27 September, with Nicaragua addressing the Court on its own claims from 3 p.m. to 5 p.m. On Wednesday 29 September, Colombia will present its second round of argument on the claims of Nicaragua and its own counter-claims, from 3 p.m. to 6 p.m. On Friday 1 October, Nicaragua will present its reply on the counter-claims of Colombia, from 3 p.m. to 4 p.m.

In this first sitting, Nicaragua may, if so required, avail itself of a short extension of time beyond 6 p.m., in view of the time taken up by these introductory remarks.

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

Mr. ARGÜELLO GÓMEZ:

1. Good afternoon. Thank you, Madam President, distinguished Members of the Court. It is always an honour to be before you, representing my country.

2. Before beginning my presentation, I would like to add my tribute to the memory of Judge James Crawford. As a member of the Bar that has had the honour of pleading before this Court, I was able to appreciate first-hand the eloquence and high academic standards of Judge Crawford, not only as a judge but also in his role as counsel in some of the many cases in which he pleaded before the Court, several in which Nicaragua was a party, including the case of the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)* which is the background of the present case before the Court.

3. Madam President, nine years ago, in April 2012, during the oral pleadings in the *Territorial and Maritime Dispute*, after an exhausting and exhaustive procedure that began with Nicaragua filing its Application on 6 December 2001 and went through preliminary objections filed by Colombia, and later the request to intervene by two States that had a special relation with the maritime interests of Colombia, I stated in my presentation:

> "So finally, more than ten years after Nicaragua filed its Application, we find ourselves in what is hopefully the final run in a case that has outrun, in length of time, the classic example of a long drawn out case: the *Barcelona traction* or the more recent case of *Cameroon* v. *Nigeria*."[1]

4. Unfortunately that hope turned out to be wishful thinking. Twenty years after we filed our Application in December of 2001 and nine years after the Judgment of the Court in this case on 19 November 2012, we are back to where we started.

5. When the *Territorial and Maritime Dispute* was filed, the situation was that Colombia claimed the 82nd meridian as a line of delimitation. On screen, we can appreciate a map of the area at the time the Application was filed. The position of Colombia was clear. All areas east of the meridian including the land (islands and cays), water and continental shelf were claimed by Colombia.

6. The Court decided at the preliminary objections phase of the case in its Judgment of 13 December 2007 that the 82nd meridian was *not* a line of delimitation but recognized Colombian sovereignty over the three main islands.

7. In its Judgment of 19 November 2012, the Court attributed sovereignty over all the islands and cays in dispute to Colombia as well as very substantial maritime areas to these small features.

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[1] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, CR 2012/8, p. 16, para. 13 (Argüello).

8. This maritime delimitation was unanimously decided by the Court, including the judges *ad hoc* appointed by the Parties, and was considered in many quarters to be especially beneficial to Colombian interests. The UN News headline read "UN court rules Colombia has sovereignty over islands claimed by Nicaragua"[2].

Reaction of Colombian authorities to the 2012 Judgment

9. The day the Judgment was delivered, the President of Colombia was very happy with the attribution of sovereignty to Colombia over the islands, but he stated that the other aspects of the Judgment on maritime delimitation were unacceptable and that Colombia "emphatically rejects that aspect of the judgment rendered by the Court today"[3].

10. The Foreign Minister of Colombia went even further, questioning the professional credentials of the Members of the Court. She stated that

> "[t]he enemy is the Court which did not based its decision on the law, that Judgment is full of inadequacies and one reads it and cannot believe that the states parties that conform the Court elected those judges to decide such an important Judgment"[4].

11. Other officials even questioned the moral capacity of Members and staff of the Court. For example, Ambassador Noemí Sanín, former Foreign Minister of Colombia, made some very offensive comments that I will not repeat here. She and a former deputy Minister of Justice wrote a book on the Judgment reiterating and amplifying these comments[5]. They were rewarded last year by the President of Colombia by appointing them as delegates of the presidency to the Colombian Foreign Affairs Commission. This Commission is charged, among other things, with reviewing and approving Colombia's position before this Court.

12. The object of recalling this event is not to cause embarrassment to the other Party for a diplomatic gaffe that is best forgotten. Because it was not a gaffe provoked by a passing emotion. *It is* the position that Colombia has consistently maintained since the Judgment was read. Colombia

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[2] "UN court rules Colombia has sovereignty over islands claimed by Nicaragua", UN News, 19 Nov. 2012, available at https://news.un.org/en/story/2012/11/426062-un-court-rules-colombia-has-sovereignty-over-islands-claimed-nicaragua#.VgmPLXqqpBd (accessed 14 Sept. 2021).

[3] Memorial of Nicaragua (MN), p. 23, para. 2.4.

[4] MN, p. 23, para. 2.5.

[5] "La llegada del Dragón. ¿Falló la Haya?", Noemí Sanín, Miguel Ceballos, 2013, available at https://www.amazon.com/llegada-del-Drag%C3%B3n-%C2%BFFall%C3%B3-Haya/dp/9583043451 (accessed 14 Sept. 2021).

today still will not accept that Nicaragua has maritime areas east of the 82nd meridian. It is the position that according to President Santos's statement they will defend with "cloak and sword"[6].

13. This initial reaction when the Judgment was delivered on 19 November was followed by the denunciation of the Pact of Bogotá on 27 November 2012, on which occasion President Santos stated that "[t]he borders between nations cannot be in the hands of a court of law. They must be drawn by agreement between the countries involved."[7]

14. On 18 September 2013, President Santos reiterated that the Judgment of the Court was not applicable. That the only way to affect Colombian territorial rights was by means of a treaty that had to be approved in accordance with the internal laws of Colombia[8].

15. On 2 May 2014, the Constitutional Court of Colombia determined that the Judgment could only be implemented by means of a treaty approved by Congress and ratified by the President[9].

16. Madam President, this is a disingenuous decision of the Constitutional Court. It should have been evident to *that* court that the Judgment of *this* Court was given on the basis of at least two treaties ratified by Colombia: the Charter of the United Nations and the Pact of Bogotá. Any supposed need for another treaty to implement the Judgment is simply an excuse for not complying.

17. During the lengthy process that led to the 2012 Judgment, Colombia had many opportunities for claiming that its Constitution did not allow that territorial questions be decided by the International Court of Justice. In fact, Colombia presented preliminary objections to the jurisdiction of the Court[10], but there is not one sentence in all the pleadings and arguments of Colombia in those 11 years of judicial process in which there is any hint that Colombia could not comply with the Judgment of the Court.

18. This is all the more telling if it is recalled that one of the arguments of Nicaragua for the invalidity of the 1928 Treaty — that is the treaty which was the basis for Colombia's claim of rights in that area — was precisely that it was a treaty that violated the mandates of the Nicaraguan

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[6] MN, p. 5, para. 1.8.

[7] MN, p. 372, Ann. 29.

[8] MN, pp. 30-31, para. 2.17.

[9] MN, Ann. 16.

[10] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 832.

Constitution[11]. What would be the situation if after the Court's Judgment attributing sovereignty to Colombia over the main islands of San Andrés and Providencia, Nicaragua had said that it could not accept the Judgment because it went against its Constitution? What would have been the situation of Nicaragua before world opinion and before this Court even though the constitutional question had been placed before the Court by Nicaragua?

Colombia continues to violate Nicaragua's rights

19. Madam President, the refusal of Colombia to comply with the Judgment and respect Nicaragua's rights in the Caribbean Sea has been consistently maintained to this day; it is one of open challenge to the authority of the Court. Mr. Reichler will go into more detail on all the activities by Colombian authorities that violate Nicaragua's rights. At this point, I will only briefly mention some very recent examples of Colombia's determination to continue ignoring and violating Nicaragua's rights.

20. Former President Uribe of Colombia, also a member of the Colombian Foreign Affairs Commission, recently reiterated a call for a referendum on the limits of Colombia with Nicaragua in the Caribbean Sea[12]; that is, on whether the Colombian people accept the Judgment of the Court. Mr. Uribe was president when the first Judgment of the Court on the preliminary objections was delivered on 13 December 2007, in which the Court determined that the 82nd meridian was not a boundary. Present-day President Duque himself had first proposed a referendum several years before being elected during his campaign for the presidency on 14 February 2018 calling for "a great popular consultation so that Colombians may reaffirm the position of the country of not being willing of ceding one millimetre beyond the 82nd meridian in the conflict of limits with Nicaragua"[13].

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[11] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, Memorial of Nicaragua, pp. 108-115, available at https://www.icj-cij.org/public/files/case-related/124/13870.pdf (accessed 16 Sept. 2021).

[12] "President Duque welcomes Uribe's proposal on 'popular consultation' to confirm border with Nicaragua. The initiative seeks to recognize the 82nd meridian as the limit with the Central American country", Semana, 1 Sept. 2021, available at https://www.semana.com/nacion/articulo/presidente-duque-ve-con-buenos-ojos-propuesta-de-uribe-sobre-consulta-popular-para-confirmar-limite-con-nicaragua/202112/ (accessed 14 Sept. 2021).

[13] "This Ivan Duque's proposal to govern Colombia", Radio Nacional de Colombia, 14 Feb. 2018, available at https://www.radionacional.co/cultura/esta-es-la-propuesta-de-ivan-duque-para-gobernar-colombia (accessed 16 Sept. 2021).

21. A few weeks ago, on 1 September, President Duque reiterated his proposal for a referendum and again stated that the 82nd meridian was still the border with Nicaragua[14]. The fact that this proposal for a referendum and this reiteration of Colombian claims of sovereignty up to the 82nd meridian was made practically on the eve of these hearings can only be construed as a direct challenge to the authority of the Court. *What more can one say?*

22. If there were any possible misunderstanding that these proposals for a referendum made by President Duque are simply political rhetoric, the following document will dispel this notion. The Colombian Ocean Commission — presided by the Vice-President and Foreign Minister of Colombia, Mrs. Marta Ramírez de Rincón — published a document in July of this year titled "Colombian Maritime Interests". The document states:

> "Colombia has a territory of approximately 2,070,408 km^2, of which . . . 44.85% [corresponds] to maritime territory (approximately 589,560 km^2 in the Caribbean . . .)"[15].

23. The document contains a graphic which is before you now. Out of 100 per cent of the territory of Colombia, 55 per cent is the mainland and 28.46 per cent is the Caribbean[16]. You will note several points that result from this document released under the authority of the Vice-President of Colombia:

— *First*, that the boundary with Nicaragua not only continues to be drawn down the 82nd meridian, a question that had already been decided by the Court in its Judgment of 2007 in the preliminary objections of the case.

— *Second*, that the northern boundary of the Colombian maritime "territory" is not the boundary fixed by the Court in the Judgment in the case of *Nicaragua* v. *Honduras*, but according to Colombia still is the boundary in a Treaty between Colombia and Honduras of 1986.

— *Third*, that the southern boundary of the Colombian maritime "territory" with Costa Rica is drawn in accordance with the Treaty of 1977 between Colombia and Costa Rica, and completely

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[14] "President Duque welcomes Uribe's proposal on 'popular consultation' to confirm border with Nicaragua. The initiative seeks to recognize the 82nd meridian as the limit with the Central American country", Semana, 1 Sept. 2021, available at https://www.semana.com/nacion/articulo/presidente-duque-ve-con-buenos-ojos-propuesta-de-uribe-sobre-consulta-popular-para-confirmar-limite-con-nicaragua/202112/, (accessed 14 Sept. 2021).

[15] "Colombian Maritime Interests", Colombian Ocean Commission, July 2021, p. 11, available at https://cco.gov.co/83-publicaciones/881-intereses-maritimos-de-colombia.html (accessed 14 Sept. 2021).

[16] "Colombian Maritime Interests", Colombian Ocean Commission, July 2021, p. 12, available at https://cco.gov.co/83-publicaciones/881-intereses-maritimos-de-colombia.html (accessed 14 Sept. 2021).

ignores the Judgment of the Court in which it determined the boundary between Nicaragua and Costa Rica in the Caribbean.

24. Madam President, shortly after assuming military command of the area of San Andrés and Providencia, Rear Admiral Hernando Mattos Dager gave an interview to the local media published on 3 January of this year, in which he reaffirmed that the Navy would watch over the Seaflower Biosphere Reserve. He stated: "For us, the Biosphere Reserve continues to be indivisible no matter if there is a Judgment that fixes its limits."[17] He further indicated: "We maintain our presence in the area and punish those actions that threaten the protection of this natural reserve, as for example the case of the substantial seizure of parrot fish that was recently undertaken"[18].

25. This Biosphere Reserve was created by Colombia in the year 2000[19] when Nicaragua had announced it would be bringing the case to the Court. The Biosphere Reserve encompasses all the area that was in dispute with Nicaragua and that was settled by the Judgment of the Court in 2012. The assertion by the military commander of the area, that Colombia will continue patrolling the area and controlling the environment including fisheries is simply stating that the Judgment of the Court will not be recognized, nor the maritime areas of Nicaragua be respected.

26. Just last week, ***as you*** Madam President recalle***d***, Colombia, in a last-minute manoeuvre, invoked the confidentiality of more than 80 documents annexed to its pleadings in order to conceal to the public the extent of the violations of Nicaragua's rights of which it was the author.

27. In conclusion, we have the President of Colombia calling for a referendum tabling the rejection of the 2012 Judgment of the Court, a publication of the Vice-President including the maritime areas of Nicaragua as Colombian, and the military commander of the area reaffirming that the Colombian Navy will ignore the Judgment. All of this just during the past few weeks and months.

28. Madam President, what can we hear from the distinguished representatives of Colombia now before the Court that will contradict what the highest civil and military authorities have said?

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[17] "We must prepare for possible similar events", El Isleño.com, 3 Jan. 2021, available at http://xn--elisleo-9za.com/index.php?option=com_content&view=article&id=21112%3Adebemos-prepararnos-ante-posibles-eventos-similares-en-las-islas&catid=60%3Aactualidad&Itemid=96 (accessed 14 Sept. 2021).

[18] "We must prepare for possible similar events", El Isleño.com, 3 Jan. 2021, available at http://xn--elisleo-9za.com/index.php?option=com_content&view=article&id=21112%3Adebemos-prepararnos-ante-posibles-eventos-similares-en-las-islas&catid=60%3Aactualidad&Itemid=96 (accessed 14 Sept. 2021).

[19] Https://coralina.gov.co/en/areas-protegidas-m/reserva-de-biosfera-seaflower.

Unless there is a declaration from the highest authority that Colombia will respect Nicaragua's rights resulting from the Judgment, what else can we listen to? What are we doing here?

29. The reality is that this is a singular situation. There have been several instances in which States decided not to appear before the Court, but none of those non-appearing States has made the incredibly disparaging statements that the Colombian authorities have made against the Court. Even in those situations — some very tense, like that during the *Hostages* case or the *Nicaragua* case against the United States — the non-appearing States have shown respect to the Court and somehow tried to resolve the issue *sub judice*.

30. Madam President, in the submissions of Nicaragua in its Memorial and Reply, the Court is requested to adjudge that Colombia must give "appropriate guarantees of non-repetition of its internationally wrongful acts"[20]. In the past the Court has noted on these types of requests that, "there is no reason to suppose that a State whose act or conduct has been declared wrongful by the Court will repeat that act or conduct in the future, since its good faith must be presumed" and therefore assurances and guarantees of non-repetition will be ordered only "in special circumstances"[21].

31. Madam President, the present circumstances are certainly "special" since the highest authorities of Colombia have repeatedly stated, even on the eve of these hearings, that they will not comply with the Judgment of the Court. The question then would be to determine what an appropriate guarantee would be. We wait to hear how Colombia thinks it can be relied upon to comply with the Court's Judgment.

32. Nicaragua for its part has reached the conclusion that any guarantee must also involve the continued cognizance of the Court on the question of compliance. For this reason, Nicaragua will include in its final submissions a request that the Court should remain available until it is evident that Colombia has complied with the Judgment of the Court and is respecting the rights of Nicaragua.

33. Madam President, Members of the Court, to conclude my pleading — the list of speakers who will follow me today is in this order: Professor Pellet will give a general presentation of the case before you; Mr. Reichler will discuss the facts regarding Colombia's violations of Nicaragua's rights

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[20] See MN, p. 108; Reply of Nicaragua (RN), p. 192.

[21] *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 267, para. 150.

and Professor Lowe will explain why Colombia's Integral Contiguous Zone is inconsistent with international law and will end his presentation with our request for remedies.

34. Thank you for your kind attention. May I please ask you to call Professor Pellet, Madam President.

The PRESIDENT: I thank the Agent of Nicaragua for his statement and I now invite Professor Alain Pellet to take the floor. You have the floor, Sir.

M. PELLET : Thank you very much, Madam President.

PRÉSENTATION GÉNÉRALE

1. Madame la présidente, Mesdames et Messieurs de la Cour, permettez-moi de dédier cette plaidoirie à la mémoire de mon ami de trente ans, James Crawford. Bien que je rende hommage à la manière dont, Webex mis à part, la Cour et son Greffe ont parfaitement su pallier les problèmes posés par le mauvais virus, j'espère que, une fois celui-ci terrassé, nous pourrons nous retrouver dans la solennité du Grand Hall de Justice sans appréhension et sans limitation du nombre de plaideurs et du public.

2. Madame la présidente, il me revient de faire une présentation générale de l'affaire telle que le Nicaragua la perçoit. J'insisterai sur les principaux points qui divisent encore les Parties, ainsi que sur les déficiences flagrantes de l'argumentation de la Colombie. Dans un premier temps, je montrerai que, quoi qu'en dise l'Etat défendeur, l'affaire n'est évidemment pas dépourvue de tout lien avec son refus obstiné de mettre en œuvre l'arrêt rendu par la Cour le 19 novembre 2012. J'examinerai ensuite la manière très particulière qu'a la Colombie de se targuer de droits qu'elle n'a pas et de dénier au Nicaragua ceux qui lui appartiennent. Enfin, je dirai quelques mots de la façon, tout aussi singulière, dont la Colombie s'efforce de limiter la portée de votre examen.

I. La portée de la requête et le refus de la Colombie d'appliquer l'arrêt de 2012

3. Madame la présidente, selon le fameux aphorisme de Louis Henkin et malgré l'opinion contraire de quelques universitaires chagrins[22], «[a]lmost all nations observe almost all principles of international law and almost all of their obligations almost all the time»[23]. Ce qui est vrai pour le droit international en général l'est tout autant — réserves académiques incluses[24] — s'agissant des arrêts de la Cour[25]. C'est ce qui confère un aspect exceptionnel à la présente affaire, qui résulte du refus continu de la Colombie de respecter la délimitation maritime que vous avez unanimement fixée dans votre arrêt de 2012[26].

1. Le refus persistant de la Colombie d'appliquer l'arrêt de 2012

4. Comme l'a signalé l'ambassadeur Argüello il y a un instant, tandis que la Colombie a accueilli avec entrain la décision relative à sa souveraineté sur l'archipel de San Andrés — qu'elle considère comme «définitive et sans appel», elle a, pour l'essentiel, rejeté le reste de l'arrêt en raison, selon les mots du président Santos, «d'omissions, d'erreurs, d'excès, d'incohérences que nous ne

[22] Voir notamment K. Davis et B. Kingsbury, «Obligation Overload: Adjusting the Obligations of Fragile or Failed States», Hauser Globalization Colloquium, 2010 (https://www.iilj.org/wp-content/uploads/2016/11/Davis-et-al-Obligation-Overload-2010.pdf).

[23] L. Henkin, *How Nations Behave: Law and Foreign Policy*, Columbia UP, New York, 2e éd., 1979, p. 47.

[24] E.A. Posner, «The Decline of the International Court of Justice», *John M Olin Program in Law and Economics Working Paper* No. 233, 2004, p. 26-31 https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1499&context=law_and_economics ; M. Reisman, «Metamorphoses: Judge Shigeru Oda and the International Court of Justice», *The Canadian Yearbook of International Law*, 1995, p. 185-222.

[25] Voir notamment le recensement opéré par E.A. Posner, *ibid*., p. 26-31, faisant en particulier référence à *Essais nucléaires (Nouvelle-Zélande c. France)*, *Personnel diplomatique et consulaire des Etats-Unis à Téhéran (Etats-Unis d'Amérique c. Iran)*, *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique)*, *Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria ; Guinée équatoriale (intervenant))*, *LaGrand (Allemagne c. Etats-Unis d'Amérique)*, *Avena et autres ressortissants mexicains (Mexique c. Etats-Unis d'Amérique)*. Voir aussi : A. Azar, *L'Exécution des décisions de la Cour internationale de justice*, Bruxelles, Bruylant, 2003 ; L. Nemer Caldeira Brant, *L'autorité de la chose jugée en droit international public*, LGDJ, 2003, p. 244-245 ; A. Ben Mansour, *La mise en œuvre des arrêts et des sentences des juridictions internationales*, Larcier, 2011 ; A. Llamzon, «Jurisdiction and Compliance», *EJIL* 2008, p. 815-852 ; M. Kamto, «Considérations actuelles sur l'inexécution des décisions de la Cour internationale de Justice», *Liber Amicorum Judge Thomas Mensah*, 2007, p. 215-233 ; E. Edynak, «L'exécution des décisions de la Cour internationale de justice en matière de délimitation maritime», *Les annales de droit*, 2013, p. 61-92 ; M. Shaw, *Rosenne's Law and Practice of the International Court: 1920-2015*, Brill, 5e éd., 2016, vol. I, chap. 4, par. 39-58.

[26] *Différend territorial et maritime (Nicaragua c. Colombie), arrêt, C.I.J. Recueil 2012 (II)*, p. 624.

pouvons accepter»[27]. Dans la foulée, la Colombie a dénoncé le pacte de Bogotá[28] en protestation contre l'arrêt de la Cour[29].

5. Le refus s'est fait, en apparence, moins catégorique après que le Nicaragua vous a saisi de l'affaire qui nous occupe, le 26 novembre 2013. Peut-être aiguillonnée par ses conseils, conscients du caractère intenable de cette fin de non-recevoir, la Colombie a cherché une manière moins injurieuse de faire obstacle à l'application de votre arrêt. Une sentence, en date du 2 mai 2014, de la Cour constitutionnelle (saisie par le président de la République) lui en a donné l'occasion :

> «[L]es décisions de la Cour internationale de Justice ayant trait à des différends frontaliers devront être incorporées dans l'ordre juridique interne au moyen d'un traité dûment ratifié et approuvé conformément aux dispositions de l'article 101 de la Constitution»[30].

6. Cette exigence vise, de manière assez navrante, à tenter de justifier *ex post*, deux ans après l'arrêt de la Cour, le refus abrupt du président Santos. Le résultat est que la Colombie s'est trouvée encouragée à considérer, de fait, votre arrêt de 2012 comme nul et non avenu. Cette attitude ne pose pas seulement de graves problèmes de principe ; elle a aussi des répercussions négatives très concrètes sur l'exercice par le Nicaragua des droits qui lui appartiennent dans les zones maritimes dans lesquelles votre arrêt lui a reconnu des droits souverains. La Colombie *continue* de violer ceux-ci ; elle *continue* de considérer ces zones comme lui appartenant ; elle *continue* à envoyer sa marine intimider les pêcheurs nicaraguayens...

7. Tout cela est fait sous le couvert de la sentence opportunément adoptée par la Cour constitutionnelle qui a été, par la suite, largement mise en avant par les autorités colombiennes pour

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[27] Allocution du président Juan Manuel Santos concernant l'arrêt de la Cour internationale de Justice, 19 novembre 2012 (MN, annexe 1). Voir aussi «Santos Guarantees Continuity in his Foreign Policy with Latin America», *America Economica*, 17 juin 2014 (http://www.americaeconomia.com/politica-sociedad/politica/santos-garantiza-continuidad-en-su-politica-exterior-con-latinoamerica?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+america-economia+(Am%C3%A9rica+Econom%C3%ADa en espagnol, et Mémoire du Nicaragua (MN), annexe 48 pour la traduction anglaise.)

[28] Lettre de la ministre colombienne des affaires étrangères au secrétaire général de l'Organisation des Etats américains, 27 novembre 2012 (GACIJ No.79357) (MN, annexe 19).

[29] Voir notamment Déclaration du président Juan Manuel Santos concernant la dénonciation du pacte de Bogotá, 28 novembre 2012 (MN, annexe 2).

[30] Arrêt C-269/14 du 2 mai 2014, *Actio popularis* d'inconstitutionnalité contre les articles II (en partie), V (en partie), XXXI et L de la loi nº 37 de 1961 portant approbation du traité américain de règlement pacifique (pacte de Bogotá) (Exceptions préliminaires de la Colombie (EPC), vol. II, annexe 4, p. 40) — traduction du Greffe.

ne pas s'acquitter des obligations résultant de l'arrêt de 2012[31] au prétexte que «tant qu'un nouveau traité n'aura pas été signé, les limites entre la Colombie et le Nicaragua demeureront celles qui ont été établies dans le traité Esguerra-Bárcenas, autrement dit, celles qui existaient avant que la Cour internationale de Justice rende son arrêt»[32]. Et ceci, Madame la présidente, est, en traduction, une citation extraite du discours du président Santos prononcé juste après que la sentence de la Cour constitutionnelle a été rendue ; cette citation figure sous l'onglet n° 4 du dossier des juges. Et, notre agent y a insisté, cela a continué — je saute moult épisodes...

8. Le 10 octobre 2019, la vice-présidente colombienne, Mme Marta Lucía Ramírez, critiquée après la publication d'une vidéo dans laquelle elle déclarait que «la mer de San Andrés était déjà perdue» en raison de l'arrêt de 2012, a assuré, sans même se référer à la possibilité de conclure un traité, qu'«à aucun moment je n'ai dit que le gouvernement se conformait ***[***à l'arrêt,***]*** ni qu'il devait s'y conformer»[33].

9. Bien que le Nicaragua eût fait savoir, par la voix de son président, qu'il n'était pas opposé à la conclusion d'un traité donnant effet à l'arrêt de 2012[34], aucune initiative ne semble avoir été prise pour procéder conformément aux prescriptions de la Cour constitutionnelle. Et les atteintes aux droits exclusifs du Nicaragua dans sa ZEE se poursuivent. Ainsi, il a été confirmé, récemment, que la marine nationale colombienne continue d'effectuer des patrouilles permanentes le long du 82e méridien[35]. Et, cette année encore, plusieurs cartes marines officielles ont été publiées

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[31] Voir notamment : ««It is possible to negotiate with Nicaragua in The Hague»: Carlos Gustavo Arrieta Colombia's agent to The Hague says there is bilateral disposition», *El Tiempo*, 22 novembre 2014 (Réplique du Nicaragua (RN), annexe 23 — non traduite) ; «Colombian Ambassador Reasoned Refusal to Abide by ICJ Ruling», *El Nuevo Diario*, 4 septembre 2015 (RN, annexe 25 — non traduite) ; «The Burden Falls on Nicaragua», *El Espectador*, 19 mars 2016 (RN, annexe 30 — non traduite).

[32] Discours du président Santos, 2 mai 2014 (MN, annexe 7).

[33] Trinchera, «¿Se rindió Colombia ante el fallo de La Haya de 2012?», 10 octobre 2019, https://www.trincheraonline.com/2019/10/10/se-rindio-colombia-ante-el-fallo-de-la-haya-de-2012/ — espagnol original : «En ningún momento he dicho ni que el Gobierno lo esté acatando (el fallo de La Haya), ni que se debe acatar, ni que hemos renunciado (al mar)».

[34] «Daniel : 40 ans après le martyre d'Allende, la paix doit prévaloir», *El 19 Digital*, 11 septembre 2013 (MN, annexe 39). Voir aussi «L'Assemblée nicaraguayenne favorable au dialogue avec la Colombie», *El Universal*, 12 septembre 2013 (MN, annexe 40) ; «Le Nicaragua propose à la Colombie de collaborer en vue de la mise en œuvre de l'arrêt de La Haye», *AFP*, 9 mai 2014 (MN, annexe 46) (http://www.noticiasrcn.com/internacional-america/nicaragua-propone-coordinar-fallo-haya-colombia).

[35] El Nuevo Siglo, «La Armada continúa patrullando el meridiano 82», 7 décembre 2019 https://www.elnuevosiglo.com.co/articulos/12-2019-la-armada-continua-patrullando-el-meridiano-82.

reproduisant les limites revendiquées par la Colombie avant que la Cour rende son arrêt[36], notamment celle projetée il y a un instant par l'agent ou une autre émanant de l'agence nationale des hydrocarbures. Plus remarquable encore : dans un discours prononcé tout dernièrement, le 1er septembre dernier, que notre agent a aussi évoqué, le président Duque a répété que la frontière maritime entre la Colombie et le Nicaragua était constituée par le 82e méridien et qu'il n'excluait pas de la faire confirmer par référendum[37].

10. Madame la présidente, il n'est peut-être pas inutile de rappeler une évidence : en vertu des articles 59 et 60 du Statut de la Cour, l'arrêt de 2012 est inconditionnellement obligatoire~~,~~ ***et*** définitif (dans son ensemble). De même, conformément à l'article 94 de la Charte des Nations Unies, les parties doivent se conformer à la décision de la Cour et ne peuvent pas se retrancher derrière leurs règles constitutionnelles pour s'y soustraire[38]. Comme la Colombie l'écrit, très justement, dans sa duplique : «For international legal purposes, the way domestic law describes itself is not decisive; it is international law's characterisation which is determinative.»[39]

2. L'objet de la requête — ses liens avec l'arrêt de 2012

11. En ce qui me concerne, je persiste à considérer que la Cour est dotée d'un pouvoir inhérent pour tirer les conséquences de la non-application de ses arrêts. Cela dit, comme vous l'avez relevé à juste titre dans votre arrêt de 2016 sur la compétence, «[l]e Nicaragua ne cherche pas à faire exécuter l'arrêt de 2012 en tant que tel»[40] ; et c'est la raison pour laquelle vous ne vous êtes pas prononcés sur cette question de principe, que le Nicaragua avait soulevée à titre subsidiaire[41]. L'objet de la présente affaire, tel que vous l'avez précisé, est de déterminer les conséquences des «violations par la

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[36] Agencia Nacional de Hidrocarburos de Colombia, Mapa de Tierras, 2m_tierras_010621, https://www.anh.gov.co/hidrocarburos/oportunidades-disponibles/mapa-de-tierras. Voir aussi : Presentation of Ministerio de Defensa Nacional, Dirección General Marítima, Autoridad Marítima Colombiana, p. 22 (Contract No. 245 DIMAR — ANH Year 2018).

[37] Https://www.semana.com/nacion/articulo/presidente-duque-ve-con-buenos-ojos-propuesta-de-uribe-sobre-consulta-popular-para-confirmar-limite-con-nicaragua/202112/.

[38] Voir Commission du droit international (CDI), Projet d'articles sur la responsabilité de l'Etat pour fait internationalement illicite et commentaires y relatifs, 2001, art. 3 et 12 (https://legal.un.org/ilc/texts/instruments/french/commentaries/9_6_2001.pdf).

[39] Duplique de la Colombie (DC), par. 4.102.

[40] *Violations alléguées de droits souverains et d'espaces maritimes dans la mer des Caraïbes (Nicaragua c. Colombie), exceptions préliminaires, arrêt, C.I.J. Recueil 2016 (I),* p. 42, par. 109.

[41] *Ibid.*, p. 39, par. 104 ; voir aussi p. 41, par. 107.

Colombie des droits du Nicaragua dans les zones maritimes dont celui-ci affirme qu'elles lui ont été reconnues par l'arrêt de 2012»[42].

12. Contrairement à ce qu'affirme la Colombie dans sa duplique, le Nicaragua does not «confuse what are in reality two distinct legal questions (compliance with the 2012 Judgment, and "alleged violations of Nicaragua's sovereign rights and maritime spaces") by amalgamating these separate questions into one»[43]. Comme la Cour l'a noté à juste titre, le Nicaragua constate que la Colombie ne respecte pas les droits souverains qui lui appartiennent dans la zone économique exclusive que l'arrêt de 2012 lui a reconnue. Or, comme vous l'avez fermement rappelé, «[p]river une partie du bénéfice d'un arrêt rendu en sa faveur doit, de manière générale, être considéré comme contraire aux principes auxquels obéit le règlement judiciaire des différends»[44].

13. L'affirmation de la Colombie appelle en outre trois observations :

— En premier lieu, elle revient à contester la position que vous avez prise dans votre arrêt sur les exceptions préliminaires : comme je l'ai rappelé, vous vous êtes abstenus de vous prononcer sur votre compétence concernant les questions relatives aux suites données (ou pas) à vos arrêts précisément *parce que* vous considérez que la requête du Nicaragua porte sur la question, distincte, du respect des droits lui appartenant — ce que vous avez constaté dans votre arrêt[45].

— D'ailleurs, et c'est ma deuxième observation, ce faisant vous avez confirmé un état de droit existant et n'avez pas accordé au Nicaragua de nouveaux droits : selon la jurisprudence dominante, ces droits préexistaient à votre arrêt[46].

— Troisièmement : de toute manière, la responsabilité de la Colombie ne pourrait être recherchée pour son comportement antérieur à l'arrêt de 2012 ; le Nicaragua ne vous le demande d'ailleurs pas. Toutefois, pour paraphraser votre arrêt de 2002~~,~~ cette fois, dans *Cameroun c. Nigéria*, celui de 2012 «précise de manière définitive et obligatoire la frontière ... maritime entre les deux Etats.

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[42] *Violations alléguées de droits souverains et d'espaces maritimes dans la mer des Caraïbes (Nicaragua c. Colombie), exceptions préliminaires, arrêt, C.I.J. Recueil 2016 (I),*, p. 34, par. 79.

[43] DC, par. 1.35

[44] *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Serbie-et-Monténégro), arrêt, C.I.J. Recueil 2007 (I)*, p. 91, par. 116.

[45] *Violations alléguées de droits souverains et d'espaces maritimes dans la mer des Caraïbes (Nicaragua c. Colombie), exceptions préliminaires, arrêt, C.I.J. Recueil 2016 (I)*, p. 42, par. 109, cité *supra*, par. 10.

[46] *Plateau continental de la mer du Nord (République fédérale d'Allemagne/Danemark) (République fédérale d'Allemagne/Pays-Bas), arrêt, C.I.J. Recueil 1969*, p. 22, par. 18. Voir aussi *Délimitation maritime dans la région située entre le Groenland et Jan Mayen (Danemark c. Norvège), arrêt, C.I.J. Recueil 1993*, p. 66-67, par. 64.

Tout doute étant levé à cet égard, la Cour [n'aurait pas dû être appelée à] envisager l'hypothèse dans laquelle [la Colombie] … ne respecterait pas» les droits souverains du Nicaragua tels qu'ils sont reconnus par l'arrêt[47]. Et tel est pourtant le cas en l'espèce.

14. C'est dire — et je vous cite à nouveau — que :

> «L'arrêt rendu en 2012 est incontestablement pertinent en la présente affaire, en ce qu'il détermine la frontière maritime entre les Parties et établit donc laquelle d'entre elles a des droits souverains en vertu du droit international coutumier dans les espaces maritimes qui font l'objet de la présente affaire.»[48]

II. Les droits respectifs des Parties en cause dans la présente affaire

15. Mesdames et Messieurs les juges, les droits appartenant au Nicaragua, quels sont-ils ? Ce sont ceux — seulement ceux, mais tous ceux — qui sont reconnus à un Etat riverain sur la ZEE par le droit international coutumier.

16. A cet égard également une précision s'impose.

17. Contrairement au Nicaragua, la Colombie n'est pas partie à la convention des Nations Unies sur le droit de la mer. Et elle se prévaut abondamment — surabondamment même — de cette situation pour écarter l'application des dispositions conventionnelles qui ne lui conviennent pas[49]. Mais cela ne l'empêche pas de tenter de tirer avantage de la convention lorsque celle-ci impose des obligations spécifiques aux Parties, quand bien même ces obligations ne sauraient être rattachées à une règle coutumière. Ainsi au paragraphe 4.90 de sa duplique, la Colombie rappelle avec insistance que

> «[a]s a party to UNCLOS, Nicaragua has accepted, by ratification, the interpretation of UNCLOS Article 33 as put forth in UNCLOS Article 303(2). … [Therefore] Colombia considers it to be irrelevant whether Article 303(2) reflects customary international law since, by ratifying UNCLOS, Nicaragua has accepted the authentic interpretation of the generic terms in Article 33 found in Article 303(2).»[50]

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[47] Voir *Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria ; Guinée équatoriale (intervenant)), arrêt, C.I.J. Recueil 2002*, p. 452, par. 318.

[48] *Violations alléguées de droits souverains et d'espaces maritimes dans la mer des Caraïbes (Nicaragua c. Colombie), exceptions préliminaires, arrêt, C.I.J. Recueil 2016 (I)*, p. 41-42, par. 109.

[49] Voir, par exemple, DC, par. 1.8, 2.33, 4.25, 4.48, 5.3 ; voir aussi contre-mémoire de la Colombie (CMC), par. 5.39.

[50] DC, par. 4.90. Voir aussi DC, p. 7, note 13.

Certes, Madame la présidente, *pacta tertiis non nocent* — mais *nec prosunt* ! —, les traités ne nuisent pas aux tiers mais ceux-ci ne peuvent pas non plus en profiter...

18. De notre côté, nous acceptons pleinement que seul le droit coutumier, raisonnablement interprété, fait droit entre les Parties. Nous admettons aussi que les dispositions de la convention puissent être complétées sur certains points par une pratique générale acceptée comme étant le droit — mais il en faudrait beaucoup pour qu'elle soit *modifiée* de cette manière alors qu'elle est expressément reconnue comme faisant droit entre la très grande majorité des Etats du monde ; à l'inverse, on peut légitimement considérer que cette acceptation particulièrement générale crée, après quarante ans, une présomption — non irréfragable, certes, mais solide — en faveur de la coutumiérisation de ces dispositions, sauf objections persistantes, spécifiques et publiques.

19. Mes collègues élaboreront davantage sur ce point à propos de certaines règles dont la Colombie donne une interprétation exorbitante — ou trop extensive, ou trop restrictive, selon les besoins de sa démonstration. Je m'en tiendrai pour ma part à une remarque générale sur un point récurrent dans la duplique et qui me paraît présenter une certaine importance : la question des droits des Etats non riverains («tiers», pour faire court) dans la ZEE.

20. Dans toute sa duplique, la Colombie tient un double langage qui peut être résumé en deux formules antagonistes :

— pour l'Etat tiers, tout ce qui n'est pas interdit est permis ;

— pour l'Etat côtier, tout ce qui est expressément permis doit être interprété restrictivement.

21. Ce diptyque est directement contraire à la position très sage du TIDM qui, dans l'affaire *Saïga II*, a déclaré — dans un passage d'ailleurs bizarrement cité par la Colombie elle-même[51] :

> «si la Convention attribue certains droits aux Etats côtiers et aux autres Etats dans la zone économique exclusive, il ne s'ensuit pas automatiquement que les droits qui n'ont pas été expressément attribués à l'Etat côtier reviennent aux autres Etats ou que, à l'inverse, les droits qui n'ont pas été attribués de manière spécifique aux autres Etats reviennent à l'Etat côtier»[52].

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[51] DC, par. 3.52.

[52] *Navire «SAIGA» (No. 2) (Saint-Vincent-et-les Grenadines c. Guinée), arrêt, TIDM Recueil 1999*, p. 56, par. 137.

1. Tout ce qui n'est pas interdit n'est pas permis

22. Pour des exemples de la première proposition (tout ce qui n'est pas interdit est permis) — que je tiens de toute manière pour inexacte dans sa généralité :

1) dès le paragraphe 1.12 de sa duplique, la Colombie affirme que «it does not need to prove that its conduct is expressly authorized under international law» — et, en effet, elle ne se soucie pas de le prouver ;
2) au paragraphe 2.33, la Colombie invoque un droit de contrôle sur un certain nombre d'activités menées dans la ZEE du Nicaragua «that are not specifically authorized in UNCLOS (to which Colombia is not a party) or under customary international law» ;
3) au paragraphe 5.13, la défenderesse affirme qu'il n'existe pas de «provision, under conventional or customary law, which would explicitly prohibit traditional fishing rights within the EEZ» in order to prevail itself of such rights.

23. Fort de cette conviction l'Etat défendeur prétend, plus généralement, à quantité de droits qu'il pourrait exercer dans la ZEE du Nicaragua alors que certains ne peuvent même pas l'être en haute mer.

24. D'une manière très générale, la volonté de la Colombie de tirer profit du droit international sans en respecter les obligations caractérise toute son argumentation. Pour ne prendre que trois exemples topiques :

— la Colombie fait le plus grand cas de l'obligation de tenir «dûment compte des droits et obligations des autres Etats» lorsque cette obligation incombe au Nicaragua[53] ; mais, alors que cette directive irrigue la convention de Montego Bay aussi bien que le droit coutumier de la mer dans son ensemble, l'Etat défendeur ne se montre guère soucieux de la mettre en œuvre dans sa «zone contiguë intégrale» ; l'expression est d'ailleurs parlante : l'ajout de l'adjectif «intégrale» entend clairement signifier qu'il s'agit de balayer toute prétention contraire ;
— autre exemple, également lié à l'instauration de cette zone d'un genre nouveau : la Colombie prétend relier, de façon assez incongrue, les îlots éloignés et inhabités de Quintasueño, Roncador, Serrana, Serranilla et Bajo Nuevo ; ceci ne correspond assurément pas à la vocation des zones

[53] DC, par. 4.22.

contiguës «tout court», qu'elles soient définies par la convention de 1982 ou par le droit coutumier ;

— troisième exemple, très remarquable : il concerne la manière dont la Colombie présente son argumentation à l'appui de la mesure reconventionnelle qu'elle a introduite au sujet des lignes de base droites du Nicaragua ; ces lignes seraient illicites car contraires aux dispositions de l'article 7 de la CNUDM (dont elle admet *pro causa* qu'il reflète des règles coutumières[54]) notamment du fait que la distance entre les points de base retenus serait excessive ; or celle qui sépare certains des points de base que la Colombie elle-même a adoptés est nettement supérieure. La Colombie s'est appliqué les critères mêmes qu'elle reproche au Nicaragua d'avoir choisis ; et,

— dans le même esprit, dans la loi n° 10 du 4 août 1978 proclamant sa ZEE, la Colombie revendique des droits souverains et une juridiction *exclusifs* dans cette zone[55], tout en empêchant le Nicaragua d'exercer *ces mêmes droits* dans la ZEE que la Cour lui a reconnue.

25. La prétention de la Colombie à exercer contrôles et contrainte en vue de la protection de l'environnement dans la ZEE nicaraguayenne illustre particulièrement bien mon propos. L'article 56 de la convention sur le droit de la mer précise que «l'Etat côtier a ... juridiction, conformément aux dispositions pertinentes de la Convention, en ce qui concerne ... la protection et la préservation du milieu marin»[56] ; la Colombie ne semble pas le contester dans son principe[57]. Quant à l'article 33, paragraphe 1 a), sur la zone contiguë, il énumère les domaines dans lesquels «l'Etat côtier peut exercer le contrôle nécessaire en vue de prévenir les infractions à ses lois et règlements douaniers, fiscaux, sanitaires ou d'immigration sur son territoire ou dans sa mer territoriale». «Juridiction» en matière de protection de l'environnement d'un côté (pour la ZEE), absence de toute mention de l'autre (pour la zone contiguë). La Colombie n'en affirme pas moins «that [it] has duties to protect the marine environment and that compliance with the said duties might entail "individual" actions»[58]

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[54] Voir DC, par. 6.2, 6.13 ou 6.26.

[55] Articles 7 et 8 de la loi n° 10 du 4 août 1978 fixant les règles en matière de mer territoriale, de zone économique exclusive et de plateau continental et régissant d'autres matières.

[56] Art. 56, par. 1 *b)* iii).

[57] Voir DC, par. 3.50 ou 4.21.

[58] DC, par. 2.78.

— actions individuelles que l'Etat défendeur, sans les nier, tente de minimiser afin d'en édulcorer le caractère illicite.

2. Tout ce qui est permis ne doit pas être interprété restrictivement

26. Le ton change lorsqu'il s'agit d'interpréter les droits du Nicaragua dans sa ZEE. C'est que (selon la Colombie) — et l'on en arrive à la seconde proposition — tout ce qui est expressément permis doit être interprété de manière restrictive.

27. Faute de trouver, dans le droit conventionnel ou coutumier, le moindre argument qui lui permettrait de justifier des limites à la juridiction du Nicaragua en matière de protection de l'environnement dans sa ZEE, la Colombie invoque la convention de Carthagène de 1983 en faisant totalement fi de son texte et de sa portée. En particulier, de deux de ses traits essentiels : d'une part, il s'agit d'un traité-cadre, essentiellement *non self-executing*, qui invite les Etats parties à approfondir leur coopération, notamment par la conclusion d'accords spécifiques ; d'autre part, la mise en œuvre de ses dispositions est subordonnée au respect du droit international[59]. A en croire la Colombie, les dispositions expresses de la CNUDM, ou leur équivalent coutumier, conférant des droits exclusifs à l'Etat côtier dans certains domaines n'en feraient pas partie.

28. Cette désinvolture colombienne à l'égard des droits du Nicaragua dans sa zone économique exclusive ne se borne pas à la protection de l'environnement, elle s'étend aussi à la pêche. A cet égard, la Colombie sort ce qui paraît lui tenir lieu d'atout-maître à maints égards dans cette affaire : les droits des Raizals.

29. Ici encore, l'article 56 est catégorique :

> «1. Dans la zone économique exclusive, l'Etat côtier a des droits souverains aux fins d'exploration et d'exploitation, de conservation et de gestion des ressources naturelles, biologiques ou non biologiques, des eaux surjacentes aux fonds marins, des fonds marins et de leur sous-sol» ;

mais cela ne dissuade pas la Colombie de se faire, avec ardeur, la championne des droits de pêche des Raizals car «the ecosystems of the Southwestern Caribbean Sea are inextricably linked to the livelihood, survival and basic human needs of vulnerable communities, such as the Raizales»[60]. Et d'invoquer, dans une bien-pensance admirable, «the right of the Raizales to live in a healthy and

[59] Voir notamment les articles 3 1), 6 1) et 4) ou 16.

[60] DC, par. 2.91 ; voir aussi, presque dans les mêmes termes, par. 2.98 ou 2.100.

sustainable environment»[61] together with its responsability «to ensure that the subsistence and traditional fishing activities of the Raizales are not undermined extends to the entire living space of such communities»[62]. A cette fin, la Colombie prétend être en droit d'exercer son contrôle sur tout dommage environnemental potentiel et s'opposer à ce qu'elle qualifie de pêches prédatrices des bateaux du Nicaragua menaçant les Raizals dans sa zone contiguë intégrale[63] et, plus largement encore, dans la ZEE du Nicaragua. Tout ceci alors même qu'elle semble reconnaître «la nature exclusive» des droits souverains du Nicaragua dans sa zone économique[64] tout aussi exclusive — et l'exclusivité est d'ailleurs la marque de ce qui est «souverain» ; et l'adjectif «exclusive» pour caractériser la zone économique ne laisse aucun doute à cet égard.

30. La question de la réalité de ces droits historiques sera abordée durant les audiences consacrées aux demandes reconventionnelles de la Colombie.

31. Je relève en outre que, si le Nicaragua a indiqué qu'il était disposé à discuter les droits de pêche éventuels des Raizals, il ne s'agissait que d'une offre de négociation, qui, elle non plus, n'est pas «self-executing» : le président Ortega «announced that it was agreed to "*open communication channels* to ensure the Raizal people their fishing rights"»[65]. Il n'a pas *reconnu* les droits de pêche traditionnels des Raizals, il a *proposé* de négocier pour leur assurer des droits. Et c'est bien ainsi que le président Santos l'avait compris : «These communication channels are a significant complement.»[66] Il faut noter au surplus que la Colombie n'a jamais invoqué les prétendus droits historiques des Raizals dans ses plaidoiries dans l'affaire du *Différend territorial et maritime*.

32. Mais il y a plus : la protection des droits allégués des Raizals, dont elle se dit tellement soucieuse, sert à la Colombie non seulement de prétexte pour s'adjuger, sans aucune base juridique, des «obligations» de protection de l'environnement ou de droits en matière de pêcheries dans la ZEE nicaraguayenne, mais aussi de justification pour revendiquer une zone contiguë «intégrale» aux

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[61] DC, par. 2.99 ; voir aussi par. 2.107, 2.109.

[62] DC, par. 2.107.

[63] *Ibid.* ; voir aussi par. 4.99.

[64] DC, par. 5.15.

[65] CMC, annexe 77, «Radio La Primerísima, Daniel ratified to Colombia his vocation for peace», 2 décembre 2012 — les italiques sont de moi (annexe non traduite). Voir aussi CMC, annexe 78, El 19 Digital, *President Daniel receives letters of credence from the ambassadors of Colombia, El Salvador, Germany and Italy*, 6 November 2015.

[66] *Ibid.*

contours très excessifs pour, en réalité, étendre les pêcheries industrielles colombiennes, comme le professeur Lowe le montrera tout à l'heure.

III. La portée des conclusions des Parties et de leur examen par la Cour

33. Mesdames et Messieurs les juges, la Colombie utilise une autre tactique pour s'exonérer de ses responsabilités : elle s'efforce de limiter la portée de votre examen, d'une part en interprétant de manière erronée et très excessive les conséquences de sa dénonciation du pacte de Bogotá ; d'autre part en analysant de manière tout aussi fallacieuse, mais cette fois abusivement restrictive, les conditions auxquelles l'exercice de votre compétence serait soumis.

1. Les conséquences de la dénonciation du pacte de Bogotá

34. Après avoir traité la Cour d'«ennemie de la Colombie»[67] — rien que ça ! —, la ministre colombienne des affaires étrangères a dénoncé le pacte de Bogotá dans une lettre adressée au secrétaire général de l'OEA le 27 novembre 2012[68]. Les conséquences de cette dénonciation doivent bien sûr être appréciées au regard du texte du pacte.

35. Conformément aux dispositions de l'article LVI, reproduit à l'onglet n° 5 du dossier des juges, la dénonciation colombienne a pris effet le 27 novembre 2013. La Colombie entend interdire à la Cour de connaître de tout fait postérieur à cette date. Sa position repose sur une confusion.

36. Il résulte de cet article LVI que la Cour ne pourrait se prononcer sur des faits postérieurs à la terminaison du pacte, qui ferait l'objet d'un nouveau différend, distinct de celui actuellement soumis à la Cour pour lequel celle-ci a reconnu avoir compétence. Mais l'article LVI n'empêche en aucun cas la Cour de décider de la licéité — ou de l'illicéité — de faits postérieurs qui ne font que confirmer que la Colombie n'a nullement l'intention de reconnaître les droits souverains de la juridiction du Nicaragua dans la ZEE que l'arrêt de 2012 lui a reconnus.

37. Il en va d'autant plus certainement ainsi qu'il s'agit de faits illicites à la fois composites et continus[69]. Du fait de son refus de reconnaître les limites des conséquences résultant de sa

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[67] «The Colombian Foreign Minister Calls The Hague an Enemy», *El Nuevo Herald*, 28 novembre 2012 (MN, annexe 30).

[68] Voir ci-dessus note 28.

[69] Voir les articles 14 et 15 des Articles de la CDI sur la responsabilité de l'Etat pour fait internationalement illicite.

dénonciation du pacte, la Colombie a passé entièrement sous silence dans son contre-mémoire les événements qui ont pris place après cette date fatidique et qu'elle a relégués dans une annexe à sa duplique.

38. Les deux affaires citées par la Colombie à l'appui de ses efforts pour écarter ces développements du débat — celle relative à *Certains biens* et celle sur les *Immunités juridictionnelles de l'Etat*[70] — sont sans aucun intérêt dans notre espèce : il s'agissait de savoir si des faits *antérieurs* à l'acceptation de la compétence de la Cour pouvaient relever de sa juridiction. Dans notre affaire, la question est de savoir quelle est la pertinence de faits *postérieurs* pour apprécier la validité de comportements à l'égard desquels la Cour a, d'ores et déjà, reconnu qu'elle avait compétence.

39. D'ailleurs, la Colombie elle-même recourt abondamment à des événements postérieurs à votre saisine pour établir le bien-fondé de ses prétentions. Pour n'en donner que deux exemples parmi beaucoup d'autres :

— tous les développements de sa duplique selon lesquels la conduite du Nicaragua minerait ses prétentions (ce sont les paragraphes 3.39 à 3.46) reposent *entièrement* sur des faits *postérieurs* à la dénonciation du pacte ; et,

— pour se défendre contre les griefs du Nicaragua relatifs à l'octroi du permis de pêche dans sa ZEE, la Colombie invoque une série de résolutions de la direction générale maritime (la DIMAR) adoptées entre 2014 et 2017[71].

Du reste, très couramment, la Cour n'hésite pas à se fonder sur des faits postérieurs à l'introduction de la requête (ou du compromis) pour motiver ses décisions[72].

40. Dans le même esprit, la Colombie fait une mauvaise querelle au Nicaragua lorsqu'elle prétend que celui-ci a introduit dans sa réplique une nouvelle réclamation («a «new claim»») portant sur les permis pétroliers qu'elle aurait proposés en violation des droits souverains du Nicaragua[73].

41. C'est confondre une conclusion et un moyen. En l'espèce, il s'agit d'un simple argument — un moyen — à l'appui de la conclusion par laquelle le Nicaragua prie la Cour de déclarer que la

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[70] Voir DC, par. 3.13-3.16.

[71] Voir DC, par. 3.112.

[72] Voir RN, par. 4.15-4.26.

[73] DC, par. 3.94.

Colombie agit en violation des droits souverains et de la juridiction lui appartenant dans les zones maritimes que la Cour lui a reconnues par son arrêt de 2012. Conformément à votre jurisprudence constante : «Il ne découle pas … du paragraphe 2 de l'article 38 du Règlement de la Cour que la latitude dont dispose l'Etat demandeur pour développer ce qu'il a exposé dans sa requête soit strictement limitée.»[74] La Cour a souligné en particulier qu'une telle conclusion ne saurait être tirée de ses décisions selon lesquelles la date pertinente pour apprécier la recevabilité d'une requête est la date de son dépôt car «ces prononcés ne se réfèrent pas au contenu des requêtes»[75] ; dès lors, «des incidents supplémentaires constituent des faits supplémentaires» pouvant être invoqués durant la procédure[76].

42. Autant une conclusion supplémentaire (*a submission*) modifiant substantiellement des demandes énoncées dans la requête ou s'y ajoutant — comme dans l'affaire *Diallo*, dont la Colombie fait grand cas[77] — ne serait pas recevable à ce stade, autant un moyen à l'appui d'une demande existante ne se heurte à aucune objection — du moment que l'autre partie est en mesure d'y répondre. C'est le cas ; la Colombie s'est en effet essayée à répliquer — à tort, comme M[e] Reichler le montrera dans un instant. Pour surplus de droit, j'ajoute que, en tout état de cause, si la Cour considérait qu'il s'agit d'une conclusion (au sens de *submission*), elle ne fait que préciser les demandes initiales du Nicaragua, et serait sans conteste recevable[78].

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[74] *Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria), exceptions préliminaires, arrêt, C.I.J. Recueil 1998*, p. 318, par. 99. Voir aussi *Demande en interprétation de l'arrêt du 11 juin 1998 en l'affaire de la* Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria), exceptions préliminaires *(Nigéria c. Cameroun), arrêt, C.I.J. Recueil 1999 (I)*, p. 38, par. 15.

[75] *Ibid.*, se référant à *Questions d'interprétation et d'application de la convention de Montréal de 1971 résultant de l'incident aérien de Lockerbie (Jamahiriya arabe libyenne c. Royaume-Uni), exceptions préliminaires, arrêt, C.I.J. Recueil 1998*, p. 26, par. 44, et *Questions d'interprétation et d'application de la convention de Montréal de 1971 résultant de l'incident aérien de Lockerbie (Jamahiriya arabe libyenne c. Etats-Unis d'Amérique), exceptions préliminaires, arrêt, C.I.J. Recueil 1998*, p. 130, par. 43) ; voir aussi *Demande en interprétation de l'arrêt du 11 juin 1998 en l'affaire de la* Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria), exceptions préliminaires *(Nigéria c. Cameroun), arrêt, C.I.J. Recueil 1999 (I)*, p. 38, par. 15.

[76] *Demande en interprétation de l'arrêt du 11 juin 1998 en l'affaire de la* Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria), exceptions préliminaires *(Nigéria c. Cameroun), arrêt, C.I.J. Recueil 1999 (I)*, p. 38, par. 15.

[77] DC, par. 3.95. Voir *Ahmadou Sadio Diallo (République de Guinée c. République démocratique du Congo), fond, arrêt, C.I.J. Recueil 2010 (II)*, p. 651, par. 21.

[78] Voir notamment *ibid*., p. 656-657, par. 40 ; *Différend territorial et maritime (Nicaragua c. Colombie), arrêt, C.I.J. Recueil 2012 (II)*, p. 665, par. 111-112 ; *Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras), arrêt, C.I.J. Recueil 2007 (II)*, p. 695, par. 110, citant partiellement *Certaines terres à phosphates à Nauru (Nauru c. Australie), exceptions préliminaires, arrêt, C.I.J. Recueil 1992*, p. 265-266, par. 65.

2. La question de l'intérêt pour agir

43. Madame la présidente, revenant insidieusement sur des questions de recevabilité de la requête, la Colombie prétend que la Cour ne peut se prononcer sur la conformité au droit international coutumier du décret de 1946 établissant une zone contiguë «intégrale» autour de l'archipel de San Andrés et de nombreux îlots inhabités qui en sont très éloignés, ceci car le Nicaragua n'aurait pas démontré que ses droits propres dans la ZEE auraient été violés[79].

44. Ils l'ont été, comme mes collègues le démontreront incessamment. Mais la question qui m'intéresse dans l'immédiat est un peu différente. Elle est de savoir si le Nicaragua serait recevable à se plaindre de l'établissement de cette zone, dans l'hypothèse où, contre toute attente, la Cour considérerait que l'extension et le régime de la «zone contiguë intégrale» que la Colombie s'est attribuée ne portent aucune atteinte aux droits du Nicaragua dans la zone maritime lui revenant conformément à l'arrêt de 2012.

45. Outre que l'on peut s'interroger sur la tardiveté de cette exception, la réponse ne peut faire aucun doute : que ce soit en vertu de la convention de Montego Bay ou du droit international coutumier, la délimitation — ou peut-être faudrait-il dire la «délinéation» puisqu'il s'agit de l'extension vers le large des espaces marins relevant d'un Etat particulier — intéresse la communauté internationale des Etats dans son ensemble et les obligations des Etats côtiers dans ces espaces sont l'exemple même d'obligations *erga omnes*[80].

46. Madame la présidente, Mesdames et Messieurs les juges, la Colombie n'a pas respecté les droits souverains et la juridiction du Nicaragua dans la zone économique exclusive que vous lui avez reconnue par votre arrêt de 2012. Elle y effectue des contrôles et des actes de contrainte à l'égard de navires — y compris nicaraguayens — en vue de faire respecter des droits imaginaires qu'elle aurait (ou qu'auraient ses ressortissants) en matière de protection de l'environnement et de pêcheries. Ce faisant l'Etat défendeur remet en cause non seulement l'autorité de vos arrêts mais aussi les principes fondamentaux du droit de la mer et «l'ordre juridique» des océans. Il cause en outre des préjudices

[79] Voir, par exemple, DC, par. 4.51.

[80] Voir, par exemple, *Pêcheries (Royaume-Uni c. Norvège), arrêt, C.I.J. Recueil 1951*, p. 132. Voir aussi sentence du tribunal arbitral rendue au terme de la première étape de la procédure entre l'Érythrée et la République du Yémen (souveraineté territoriale et portée du différend), décision du 9 octobre 1998, Nations Unies, *Recueil des sentences arbitrales*, vol. XXII, p. 250, par. 153.

matériels et moraux au Nicaragua, dont celui-ci est fondé à demander réparation, comme le montrera le professeur Lowe.

Madame la présidente, je vous remercie et je vous prie de bien vouloir donner la parole à M[e] Reichler.

The PRESIDENT: I thank Professor Pellet and I now give the floor to Mr. Paul Reichler. You have the floor, Sir.

Mr. REICHLER:

THE FACTS REGARDING COLOMBIA'S VIOLATIONS OF NICARAGUA'S RIGHTS

1. Madam President, Members of the Court, it is always an honour for me to appear before you, and it is a privilege to do so on behalf of Nicaragua in these proceedings. I am deeply grateful to the Court for allowing counsel to plead virtually from their home countries, and thus avoid the risks of international travel during this period of heightened public health concern.

2. Madam President, I want to applaud you for your very moving tribute to Judge Crawford today. He was indeed one of a kind. His passing is most definitely a great loss to the Court and the world, as it is for his many friends who loved and admired him, myself included.

3. My task today is to address the facts pertaining to the present dispute, concerning Colombia's violations of Nicaragua's sovereign rights and jurisdiction in Nicaragua's exclusive economic zone and continental shelf, as delimited by the Court in the Judgment of 19 November 2012.

4. I will discuss these facts under three headings in the following order: *first*, facts concerning Colombia's rejection of the Court's 2012 Judgment, including its refusal to accept the boundary established by the Court, and its ongoing insistence — to the present day — on its own sovereign rights and jurisdiction in areas located on Nicaragua's side of the delimitation line; *second*, facts concerning Colombia's establishment of a so-called Integral Contiguous Zone, encompassing parts of Nicaragua's EEZ and continental shelf, in furtherance of Colombia's assertion of sovereign rights and jurisdiction beyond the limits of the maritime areas attributed to it by the Court, and the revival, and maintenance to this day, of its pre-Judgment claim to all of the maritime space east of the

82nd meridian; and *third*, facts concerning the Colombian Navy's physical interference with Nicaragua's exercise of sovereign rights and jurisdiction in its EEZ, based on the assertion that the 2012 Judgment is inapplicable, and that Colombia is therefore entitled to exercise its own sovereign rights and jurisdiction in these waters.

5. Although, for clarity, I will discuss these three sets of facts under separate headings, they are all very closely linked, and constitute inseparable parts of the same dispute. All of Colombia's wrongful actions, including those of its navy, since Nicaragua's Application was filed, relate back to Colombia's rejection of the 2012 Judgment, its refusal to accept the boundary with Nicaragua established by the Court, and its reassertion of a claim to the entire area east of the 82nd meridian, the same claim that Colombia advanced before the Court, and the Court rejected.

6. In fact, pursuant to this revived claim, the Colombian Navy, upon confronting Nicaraguan coast guard vessels in this area, warned them, in recorded audio messages, some of which you will hear today, that the Court's Judgment was inapplicable, exactly as the President of Colombia first declared in November 2012; that all of the waters east of the 82nd meridian were Colombian, and that Nicaragua had no jurisdiction in these waters.

I. Colombia's rejection of the 2012 Judgment and the boundary fixed by the Court

7. The statements by Colombia's President denouncing the 2012 Judgment, disavowing it and rejecting the boundary fixed by the Court are set out in Nicaragua's Memorial. My purpose in reading some of them aloud today is not to rub salt in Colombia's self-inflicted wounds; nor is it to inflame passions by recalling remarks that are truly disturbing, not only for their impact on Nicaragua's own hard-won rights, but for their disregard of the rule of law, and for the sanctity of the judgments issued by the world's supreme judicial authority. Rather, Nicaragua invokes these statements here for the sole reason that they constitute the origin of the dispute that is presently before the Court, as well as the basis and the alleged justification for the actions subsequently carried out by Colombia, including by its navy, in flagrant violation of Nicaragua's rights, as determined by the 2012 Judgment. As such, these statements explain, and cannot be separated from, the unlawful conduct to which they gave rise, and thus, like those actions, constitute part of a single, indivisible dispute.

8. To be precise, Colombia did not reject or disavow the entire 2012 Judgment. It was perfectly content to accept and applaud the Court's ruling on sovereignty over disputed islands, which its President, Juan Manuel Santos, described as "a final and unappealable judgment on this issue"[81]. Colombia's rejection of the Judgment was selectively limited to the maritime boundary in the Caribbean Sea, which President Santos described as riddled with what he called "omissions, errors, excesses and inconsistencies that we cannot accept"[82]. The conclusion, in the President's own words, was: "Colombia — represented by its Head of State — emphatically rejects that aspect of the judgment rendered by the Court today"[83].

9. Within 10 days of the Judgment, Colombia formally denounced the Pact of Bogotá, withdrawing its acceptance of the Court's compulsory jurisdiction[84]. President Santos left no doubt that this was in further rejection of the Court's Judgment: "I have decided that the highest national interests demand that the territorial and maritime boundaries be fixed through treaties, as has been the legal tradition of Colombia, and not through judgments rendered by the International Court of Justice."[85]

10. It might have been hoped that Colombia, disappointed with this aspect of the Judgment, would eventually reconcile itself to it, and that its extreme reaction would ultimately give way to conduct more befitting a responsible State, like the one that gave the name of its capital to a historic agreement — the Pact of Bogotá — under which the States Parties agreed to submit their disputes with one another to the Court. Unfortunately, this was not the case. Ten months after the Judgment, in September 2013, President Santos again declared:

> "The Judgment of the International Court of Justice is not applicable — it is not and will not be applicable — until a treaty that protects the rights of Colombians has been celebrated, a treaty that will have to be approved in accordance with our

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[81] "Declaration of President Juan Manuel Santos on the Judgment of the International Court of Justice", 19 Nov. 2012, Spanish original available at https://www.cancilleria.gov.co/newsroom/news/alocucion-presidente-juan-manuel-santos-fallo-corte-internacional-justicia.

[82] *Ibid.*

[83] *Ibid.*

[84] Letter from Colombia to Secretary General of the Organization of American States dated 27 Nov. 2012 (GACIJ No. 79357).

[85] "Colombia denounces the Pact of Bogotá after Judgment of the ICJ", Deutsche Welle, 28 Nov. 2012, Spanish original available at https://www.dw.com/es/colombia-denuncia-pacto-de-bogot%C3%A1-tras-fallo-de-la-cij/a-16414772.

> Constitution. I repeat the decision I have made: the judgment of the International Court IS NOT APPLICABLE"[86].

11. Of even greater concern, upon making this statement, President Santos ordered the Armed Forces High Command to "defend with 'cloak and sword' the continental shelf Colombia has in the Caribbean Sea"[87]. The High Command understood this as a call to defend the entire maritime area historically claimed by Colombia east of the 82nd meridian, notwithstanding the delimitation effected by the Court's 2012 Judgment. Vice Admiral Hernando Wills Velez, the Commander of the Colombian Navy, responded to the President's call by declaring that his forces would "comply with the order of the Head of State to exercise sovereignty throughout the Colombian Caribbean Sea", since "the judgment of The Hague is inapplicable" and the Colombian Navy would fulfil its duty "to defend all the Colombian maritime space"[88].

12. And that is exactly what the Colombian Navy proceeded to do, including by interfering with, and preventing, Nicaragua's exercise of its sovereign rights and jurisdiction in its own EEZ, in areas that unmistakably fall on the Nicaraguan side of the boundary fixed by the Court, as I will describe in the third part of my presentation.

13. To conclude this first part, it is indisputable, and Colombia does not seriously attempt to dispute, that it denounced, rejected and refused to accept the maritime boundary fixed by the Court in its 2012 Judgment, and that, as of September 2013, by order of its President, its armed forces had pledged to disregard that Judgment and enforce Colombia's claims against Nicaragua, including its purported sovereign rights and jurisdiction, in areas east of the 82nd meridian that the Court had determined to fall within Nicaragua's EEZ. Nor can it now be disputed that this has remained Colombia's official position until today. This is what its current President, Ivan Duque, said as recently as 1 September 2021: "The 82nd Meridian is the boundary we have today with Nicaragua and that is why we are very clear that our Constitution says that Colombia's limits can only be

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[86] "Declaration of President Juan Manuel Santos on the integral strategy of Colombia on the Judgment of the International Court of Justice", 9 Sept. 2013, Spanish original available at https://www.cancilleria.gov.co/newsroom/news/colombia-presenta-su-estrategia-integral-frente-fallo-haya (emphasis in original).

[87] "Santos orders defense of the continental shelf with cloak and sword", *El Espectador*, 19 Sept. 2013, Spanish original available at https://www.elespectador.com/politica/santos-ordena-defender-plataforma-continental-a-capa-y-espada-article-447445/.

[88] *Ibid.*

modified through treaties; we are defenders of its integrality."[89] All of these statements by Colombia's Presidents can be found at tab 6 of your judges' folders.

II. Colombia's establishment of an Integral Contiguous Zone and renewed claim to all of the maritime space east of the 82nd meridian

14. This brings me to the second part of my presentation, Colombia's establishment of an Integral Contiguous Zone, and the renewal of its claim to all maritime space east of the 82nd meridian, despite the Court's rejection of that claim. The Integral Contiguous Zone was established by Presidential Decree No. 1946, on 9 September 2013[90]. Article 5 describes the "Contiguous Zone of the Western Caribbean Sea Insular Territories". Paragraph 1 of that Article declares a contiguous zone of 24 miles around the Western Caribbean Insular Territories, but this is expressly without prejudice to the provisions of paragraph 2, which extend it beyond 24 miles in order to "connect" the contiguous zones of the various islands of the San Andrés Archipelago, so that they form "a continuous zone and uninterrupted zone of the whole of the San Andrés, Providencia and Catalina Department"[91].

15. Upon introducing this Decree, President Santos displayed a map illustrating the extent of the newly created Integral Contiguous Zone[92]. This slide shows President Santos displaying his map. Next is the same Integral Contiguous Zone displayed by President Santos superimposed on the maritime boundary established by the Court, as reflected in sketch-map No. 11 from the Judgment. Here, we have highlighted in pink the areas where the Integral Contiguous Zone overlaps waters attributed by the Court to Nicaragua as its EEZ. As can easily be seen, the Integral Contiguous Zone depicted by President Santos in 2013 substantially transgresses areas subject to Nicaragua's exclusive sovereign rights and jurisdiction. All three of these maps of Colombia's Integral Contiguous Zone are at tab 7 of your judges' folders.

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[89] "Presidente Duque ve con buenos ojos propuesta de Uribe sobre 'consulta popular' para. confirmar límite con Nicaragua", *Semana*, 1 Sept. 2021, Spanish original available at https://www.semana.com/nacion/articulo/presidente-duque-ve-con-buenos-ojos-propuesta-de-uribe-sobre-consulta-popular-para-confirmar-limite-con-nicaragua/202112.

[90] Presidential Decree 1946 of 9 Sept. 2013, Spanish original available at https://www.cancilleria.gov.co/sites/default/files/Normograma/docs/decreto_1946_2013.htm.

[91] *Ibid.*

[92] Map presented by President Juan Manuel Santos, 9 Sept. 2013, Spanish original available at https://www.cancilleria.gov.co/print/7196 (mins. 7:43-8:16).

16. Here is another map of the Integral Contiguous Zone, provided by Colombia in its Rejoinder. This map, which is also at tab 8 of your folders, is helpfully entitled, by Colombia itself: "Areas of Colombia's ICZ lying beyond 24 M and within Nicaragua's EEZ"[93]. I am tempted to say: "QED". But there is much more to say, and it gets much worse for Colombia.

17. First, Colombia's transgression of Nicaragua's EEZ was exacerbated by the powers Colombia attributed to itself in its Integral Contiguous Zone. According to President Santos: "In this Integral Contiguous Zone we will exercise jurisdiction and control over all areas related to security and the struggle against delinquency, and over fiscal, customs, environmental, immigration and health matters and other areas as well."[94] This Presidential Decree is at tab 9 of your folders.

18. At tab 10, you will find that Decree 1946 itself specifies that

> "the Colombian State shall exercise in the established Integral Contiguous Zone *its sovereign authority* and the powers for the implementation and the necessary control regarding: *[inter alia]* environmental protection, cultural patrimony and the exercise of historic rights to fishing held by the State of Colombia"[95].

Colombia later modified the Decree by deleting the reference to fishing rights[96]. But, in practice, Colombia has continued to assert and enforce them, as you will soon see. In its Rejoinder, Colombia acknowledges that, under international law, "[t]he contiguous zone does not bestow upon the coastal State any territorial or sovereign rights"[97]. But those are exactly the rights that Decree 1946 expressly attributes to Colombia in its Integral Contiguous Zone, and that Colombia itself has continuously exercised.

19. As Professor Lowe will show, the rights a coastal State may exercise in a properly established contiguous zone, that is, one that does not extend across an international boundary, do not include control of fishing or environmental protection[98]. And, as Mr. Martin will show on Friday,

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[93] Rejoinder of the Republic of Colombia (RC), Volume II, 15 Nov. 2018, Figure CR 4.1.

[94] "Declaration of President Juan Manuel Santos on the integral strategy of Colombia on the Judgment of the International Court of Justice", 9 Sept. 2013, Spanish original available at https://www.cancilleria.gov.co/newsroom/news/colombia-presenta-su-estrategia-integral-frente-fallo-haya.

[95] Presidential Decree 1946 of 9 Sept. 2013, Art. 5.3. *(a)*. Spanish original available at https://www.cancilleria.gov.co/sites/default/files/Normograma/docs/decreto_1946_2013.htm.

[96] Presidential Decree 1119 of 2014 (modifying and adding to Presidential Decree of 9 Sept. 2013), Spanish original available at https://www.dimar.mil.co/sites/default/files/normatividad/dec11192014_0.pdf.

[97] RC, Vol. I, para. 4.115.

[98] See United Nations Convention on the Law of the Sea, Articles 33 (on contiguous zone) and 55-75 (on exclusive economic zone).

Colombia has no fishing rights, historic or otherwise, in any of the areas the Court determined to be within Nicaragua's EEZ. Yet, in practice, as I will come to in the final part of my presentation, Colombia has invoked its Integral Contiguous Zone, and the powers declared thereunder, as well as its resurrected claim to all of the maritime area east of the 82nd meridian, to justify its exercise of sovereign rights and jurisdiction in Nicaragua's EEZ, including its authorization of Colombian and foreign-flagged vessels to fish in Nicaragua's waters; and its prevention of Nicaraguan-authorized vessels from fishing or conducting marine scientific research in those same waters.

20. By 2014, it became clear that Colombia's pretentions to sovereign rights and jurisdiction in the areas determined by the Court to belong to Nicaragua went well beyond the limits of the Integral Contiguous Zone. President Santos declared at that time that Colombia's exclusive rights and jurisdiction extended over the entire area that Colombia had claimed prior to the Court's Judgment, as if the Judgment were never issued, that is, all the waters east of the 82nd meridian: "In consequence, for our country as long as a new treaty is not signed — the limits of Colombia with Nicaragua continue to be those established in the [1928] Esguerra-Bárcenas Treaty. That is to say, the limits previous to the International Court of Justice's Judgment."[99] This statement is at tab 11 of the folders.

21. This was not a mere rhetorical exercise. It was the position and policy of the Colombian State, as pronounced by the Head of State himself. And it has remained Colombia's official position. To this day, Colombia claims that its maritime rights and jurisdiction are limited not by the boundary fixed by the Court, but by the 82nd meridian, and that everything to the east is theirs, in complete abnegation of Nicaragua's judicially determined rights in this area. This map, which is at tab 12 of the folders, is from a PowerPoint presentation given by the Commander of the Colombian Navy, Admiral Hernando Wills Vélez, on 3 March 2015. It remains available today on a navy-connected website[100]. It is captioned "Areas of Responsibility of the National Navy". The map depicts Colombia's maritime boundaries in the Caribbean Sea and the Pacific Ocean. In the Caribbean, boundaries are shown with all of Colombia's neighbours, including Nicaragua, where the

[99] "Nicaragua Fears Losing the Sea", Taringa!, 3 May 2014, Spanish original available at http://www.taringa.net/posts/info/17784410/Nicaragua-teme-perder-el-mar.html.

[100] Admiral Hernando Wills Vélez, *Proyectando el Futuro, Poder Marítimo Colombiano*, pp. 5-6 (Areas of Responsibility of the National Army), Spanish original available at https://cidin.co/index.php/cidin/article/view/58/167.

boundary is depicted as the 82nd meridian. This is where, according to Colombia, Nicaragua's maritime jurisdiction ends.

22. The same PowerPoint presentation by the Commander of the Colombian Navy also includes this map, captioned "National Navy Areas of Operation"[101]. It, too, is at tab 13. I call your attention to the blue dot, in the upper left part of the map. As you can see, this dot is just to the east of the 82nd meridian, which depicts the outer limit of the Navy's area of operation in this zone. The map identifies the CESYP as the naval component responsible for enforcing Colombia's jurisdiction here. The initials stand for *Comando Específico de San Andrés y Providencia*, or, in English, "Specific Command for San Andrés and Providencia"[102].

23. And this is from a map published by the Colombian National Hydrocarbon Agency showing oil blocks that are described as available for concession, in relation to the boundary fixed by the Court in 2012[103]. The entire map is at tab 15. What you see here is the northwesternmost portion of the map, which shows that, in 2017, Colombia held out as available for concession oil blocks bounded in the west by the 82nd meridian, as if the Court's 2012 Judgment had never been issued. This map is still accessible on the National Hydrocarbon Agency's website[104]. After these oral hearings were scheduled, and soon before they were to commence, Colombia cleverly updated its website with a more sanitized version of the map[105], but the 2017 version has remained accessible along with it. The oil blocks along the 82nd meridian indisputably infringe on Nicaragua's EEZ and continental shelf. Colombia asserts that it has not awarded any concessions in these areas[106]. We have no reason to challenge that assertion. Experienced international oil companies would not be so foolish as to bid for exploration or drilling rights in a maritime area disputed by two States, especially when

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[101] Admiral Hernando Wills Vélez, *Proyectando el Futuro, Poder Marítimo Colombiano*, pp. 5-6 (Areas of Responsibility of the National Army), Spanish original available at https://cidin.co/index.php/cidin/article/view/58/167, p. 7.

[102] See for example "Comandante Fuerza Aérea visits the San Andrés Archipelago", Spanish original available at https://www.fac.mil.co/es/noticias/comandante-fuerza-aerea-visita-el-archipielago-de-san-andres.

[103] Agencia Nacional de Hidrocarburos de Colombia, Mapa de Tierras (2m_tierras_172017.pdf), 17 Feb. 2017, available at https://www.anh.gov.co/Asignacion-de-areas/Documents/2m_tierras_170217.pdf; see also RN, p. 113, para. 4.129, Figure 4.3.

[104] *Ibid*.

[105] Agencia Nacional de Hidrocarburos de Colombia, Mapa de Tierras (2m_tierras_010621), available at https://www.anh.gov.co/hidrocarburos/oportunidades-disponibles/mapa-de-tierras.

[106] RC, Vol. I, paras. 7.8; 3.92-3.99.

the International Court of Justice has already ruled against Colombia's claim. But the fact remains: various Colombian State organs, most conspicuously the Colombian Navy, continue to depict and regard these areas, up to the 82nd meridian, as subject to Colombia's exclusive sovereign rights and jurisdiction.

24. The Commander of Colombia's Navy has expressly confirmed this. In a 2019 interview, Admiral Evelio Ramírez Gáfaro was asked: "Does the Navy patrol the 82nd Meridian and help the Colombian fishermen in that jurisdiction?" The Admiral responded, as shown on your screens and at tab 16 of the folders:

> "The Navy has a permanent presence in that area. The operations carried out in the Archipelago of San Andrés, Providencia and Santa Catalina have resulted in . . . the capture of 29 persons for the crime of illegal fishing and the seizure of 15,460 kilograms of queen conch. In addition, our presence in the area of operations of the Archipelago Department creates conditions of security and tranquillity for the Colombian fishermen and artisanal fishermen of the region."[107]

25. In February 2021, Colombia protested the adoption of legislation by the Nicaraguan National Assembly protecting the Nicaraguan Caribbean Biosphere Reserve, which lies entirely within Nicaragua's EEZ and continental shelf, as determined by the Court[108]. Colombia's Note claimed that it alone may exercise jurisdiction over this area, which it still considers part of what it denominated as its own Biosphere Reserve before the 2012 Judgment. This was precisely the position expressed by Rear Admiral Hernando Mattos Dager, the Chief of Colombia's Naval Command for San Andrés and Providencia, the naval unit charged by Colombia with protection of the Reserve, just prior to the dispatch of Colombia's 2021 diplomatic Note: "For us, the Biosphere Reserve continues to be indivisible no matter if there is a court judgment that fixes its limits"[109]. None of these facts is, or can credibly be, disputed.

26. And these are not separate, isolated events. They are manifestations and integral parts of the same dispute, which arose from Colombia's denial of and refusal to recognize Nicaragua's rights in the maritime areas found to be Nicaraguan by the Court in its 2012 Judgment, and Colombia's

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[107] "La Armada continúa patrullando el meridiano 82", *El Nuevo Siglo*, 7 Dec. 2019, Spanish original available at https://www.elnuevosiglo.com.co/articulos/12-2019-la-armada-continua-patrullando-el-meridiano-82.

[108] Letter to the Court of 30 July 2021 from Nicaragua's Agent submitting Carta del Ministerio de Relaciones de la República de Colombia a la Embajada de la República de Nicaragua, 15 Feb. 2021, S-DVRE-21-003007.

[109] "Debemos prepararnos ante posibles eventos similares", El Isleño.com, 3 Jan. 2021, Spanish original available at http://www.xn--elisleo-9za.com/index.php?option=com_content&view=article&id=21112:debemos-prepararnos-ante-posibles-eventos-similares-en-las-islas&catid=60:actualidad&Itemid=96.

insistence that it alone enjoys sovereign rights and jurisdiction in all such areas lying east of the 82nd meridian, just as if the Court's Judgment were never issued. This is the dispute that Nicaragua presented to the Court in its Application, over which the Court accepted jurisdiction when it rejected Colombia's preliminary objection in this regard in its Judgment of 17 March 2016.

27. These are the facts pertaining to the Integral Contiguous Zone, and the reassertion of Colombia's claim to the entire area east of the 82nd meridian, and they are all well established by the evidence.

III. Colombia's physical acts of interference with Nicaragua's exercise of its sovereign rights and jurisdiction within its EEZ

28. Madam President, I turn now to the third and final part of my presentation, which addresses Colombia's physical acts of interference with Nicaragua's sovereign rights and jurisdiction —

The PRESIDENT: Excuse me, Mr. Reichler. May I kindly interrupt you before you begin the next section of your presentation.

Mr. REICHLER: Absolutely, Madam President.

The PRESIDENT: It seems like this would be a good time to adjourn for a coffee break of ten minutes.

Mr. REICHLER: Very well. I agree. Thank you, very much, Madam President.

The Court adjourned from 4.45 p.m. to 5 p.m.

The PRESIDENT: Please be seated. The sitting is resumed. I now give the floor back to Mr. Reichler to continue his presentation.

Mr. REICHLER:

28. Thank you, Madam President. I turn now to the third and final part of my presentation, which addresses Colombia's physical acts of interference with Nicaragua's sovereign rights and jurisdiction in its own EEZ, as defined by the Court in its 2012 Judgment. In its written pleadings, Nicaragua identified and offered proof of 51 such acts by Colombia's armed forces, particularly its

navy, from the beginning of 2013 to the end of 2018. These, too, are not separate, isolated events, but manifestations of the same dispute that began with Colombia's rejection of the Court's 2012 Judgment, its denial of Nicaragua's rights thereunder, its reversion to its pre-Judgment position that the boundary is the 82nd meridian, and its attribution to itself of sovereign rights and jurisdiction that exclusively belong to Nicaragua under the 2012 Judgment.

29. I will focus today on some of the more egregious of these actions by the Colombian Navy, which are sufficient in themselves to prove that Colombia has repeatedly, and deliberately, violated Nicaragua's rights in areas the Court adjudged to belong to Nicaragua, but which Colombia, in defiance of the Court's Judgment, continues to claim as its own.

30. As set out in Nicaragua's written pleadings, the Colombian Navy began to interfere with Nicaragua's sovereign rights and jurisdiction in its EEZ as early as February 2013, less than three months after the Court's Judgment and Colombia's rejection of it[110]. These violations continued and grew bolder thereafter. In the face of Colombia's denials of wrongdoing in its Counter-Memorial, Nicaragua's coast guard vessels began to record their radio communications with the offending Colombian naval ships. All of these recordings, including the ones I will play for you today, have been submitted as evidence annexed to Nicaragua's Reply.

31. On 18 March 2015, Nicaraguan coast guard vessel *CG-401* encountered the Colombian naval frigate *ARC Independiente* in the location now shown on your screens, and at tab 17 of your folders, well within Nicaragua's EEZ[111]. *CG-401* asked the *ARC Independiente* to state its objective in navigating in Nicaragua's waters[112]. The Colombian frigate responded, as you will now hear in the original Spanish, and see on your screens in English translation: "I inform you that you are in Colombian jurisdictional waters. The Colombian State has established that the ruling of The Hague is not applicable; therefore, the units of the navy of the Republic of Colombia will continue to exercise sovereignty of these waters."[113] A transcription of the original Spanish, and a translation

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[110] See MN, 3 Oct. 2014, paras. 2.39 *et seq*.

[111] RN, Ann. 2, Daily Navy Reports 2015-2017, p. 210 (map); para. 4.92; see also RN, Ann. 32, Audio Transcription of 18 Mar. 2015.

[112] RN, Ann. 32, Audio Transcription of 18 Mar. 2015.

[113] *Ibid*.

into French as well as English, are provided in your judges' folders. The same is true for the other incidents I will describe today.

32. The next one occurred five days later. On 23 March 2015, Nicaragua's *CG-401* again encountered Colombia's *ARC Independiente* within Nicaragua's EEZ, as shown here, and at tab 18[114]. This time, the Colombian ship was positioned approximately 300 metres from a Honduran-flagged industrial fishing vessel, the *Lucky Lady*, which had not been licensed by Nicaragua to conduct fishing activities. As *CG-401* approached the *Lucky Lady*, the *ARC Independiente* intervened, and issued the following warning to the Nicaraguan coast guard vessel, which I will not play aloud to save time, but you can see in transcription:

> "I inform you that the Colombian government has not abided by the ruling in The Hague; until that happens, the boats that are in the area, are under the protection of the government of Colombia. I invite you to maintain caution in these cases, keep the caution, captain, to avoid situations that you might regret later. Please refrain yourself from any intentions you have on that motorboat."[115]

33. These were not isolated incidents. Far from it. On 26 March 2015, three days later, Nicaragua's *CG-401* encountered the Colombian naval frigate *ARC 11 de Noviembre* in Nicaragua's EEZ, as depicted on the chart now on display, which is at tab 19 of your folders[116]. You can hear, and see in transcription, the message delivered by the Colombian ship: "I inform you that I am in the Colombian Archipelago of San Andrés and Providencia, protecting the historic fishing rights of the Colombian State, guaranteeing the security of all vessels present in the area and implementing operations against transnational crimes." After the captain of the Nicaraguan vessel protested that they were in Nicaraguan waters as determined by the International Court of Justice, the Colombian frigate responded:

> "Coast Guard of Nicaragua, this is the *ARC 11 de Noviembre*. According to the Colombian government, the ruling of The Hague is inapplicable, which is why I am in the Colombian Archipelago of San Andrés and Providencia, carrying out the work that I already informed you, and I invite you to maintain the caution required in these cases."[117]

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[114] RN, Ann. 2, Daily Navy Reports 2015-2017, p. 211 (map); see also RN, para. 4.108.

[115] RN, Ann. 32, Audio Transcription of 23 Mar. 2015.

[116] RN, Ann. 2, Daily Navy Reports 2015-2017, p. 212; RN, Ann. 32, Audio Transcription of 26 Mar. 2015; RN, para. 4.122.

[117] RN, Ann. 32, Audio Transcription of 26 Mar. 2015.

34. On the same date, while it was still in Nicaragua's EEZ, the *ARC 11 de Noviembre* ordered a Nicaraguan-flagged and Nicaraguan-licensed fishing vessel, the *Doña Emilia*, to stop fishing in what it called Colombian waters[118]. The incident occurred here, as depicted on the screen now and at tab 20 of your folders. The Colombian naval vessel's message was also recorded, and it was submitted as part of Annex 32 to Nicaragua's Reply[119].

35. On 5 April 2015, Nicaraguan coast guard vessel *BL-405* encountered another Colombian naval frigate, the *ARC San Andrés*, in the location depicted in the chart now on display, and at tab 21, and initiated communication with it[120]. Again, you can hear Colombia's response, and see the now-familiar words on your screens: "I inform you that I am in the Colombian Archipelago of San Andrés and Providencia, protecting the historic fishing rights of the Colombian State and guaranteeing the security of all vessels present and implementing operations against transnational crime."[121]

36. The same two vessels had another encounter two days later, on 7 April 2015[122], as now depicted on your screens and at tab 22 of your folders[123]. This time the *ARC San Andrés* broadcast this message to the Nicaraguan coast guard vessel, shown on your screens now:

> "I inform you that at this time your unit is 1.2 away from the *ARC San Andrés*, [Coast Guard] unit of the Republic of Colombia, it is located in [the] jurisdictional waters of the Archipelago of San Andrés and Providencia, enforcing the historic [fishing] rights of fishermen from the Republic of Colombia."[124]

37 On 12 September 2015, Nicaragua's *BL-405* encountered the industrial fishing vessel *Miss Dolores*, flying the Tanzanian flag, in this location, also shown at tab 23 of your folders[125]. It attempted to hail this unlicensed vessel, but received instead the following response from a nearby Colombian frigate:

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[118] RN, Ann. 2, Daily Navy Reports 2015-2017, p. 213 (map); RN, para. 4.93; see also RN, Ann. 32, Audio Transcription of 28 Mar. 2015; see also RN.

[119] RN, Ann. 32, Audio Transcription of 28 Mar. 2015.

[120] RN, Ann. 2, Daily Navy Reports 2015-2017, p. 215 (map); see also RN, para. 4.95.

[121] RN, Ann. 32, Audio Transcription of 5 Apr. 2015.

[122] RN, Ann. 32, Audio Transcription of 7 Apr. 2015; see also RN, para. 4.97.

[123] RN, Ann. 2, Daily Navy Reports 2015-2017, p. 216 (map).

[124] RN, Ann. 32, Audio Transcription of 7 Apr. 2015.

[125] RN, Ann. 2, Daily Navy Reports 2015-2017, p. 220 (map); see also RN, para. 4.109.

> "[T]his is the Coast Guard of the Navy of the Republic of Colombia, good afternoon. I inform you that I am in the Colombian Archipelago of San Andrés and Providencia, protecting the historical fishing rights of the Colombian State, guaranteeing the security of all vessels present in the area. You have not been authorized by the Colombian government to exercise visitation rights on the *Miss Dolores* flagship of Tanzania, which is fishing for the Colombian government. I ask you to stay away from the boat. We will remain in the area to guarantee its protection. I invite you to maintain the caution required in these cases."[126]

Here again, the audio recording is part of the record, and you are invited to verify the accuracy of our transcriptions, in English, French and Spanish. I am not playing the tape today in order to stay within my allotted time.

38. The frequency of Colombia's interventions, to assert and exercise its purported sovereign rights within Nicaragua's EEZ, to deny Nicaragua the exercise of its lawful rights, to protect Colombian-licensed industrial fishing vessels in Nicaragua's waters, and repeatedly deliver the same message that the Court's Judgment was not applicable, make clear that these incidents were part of a larger, government policy to assert Colombian jurisdiction over all of Nicaragua's waters east of the 82nd meridian. As declared by the Commander of Colombia's naval forces in San Andrés and Providencia, Rear Admiral Andrés Vásquez Villegas, on 3 December 2015: "There are no vetoed areas for our fishermen. We will continue to exercise national sovereignty and defend our sovereignty in the jurisdictional waters of Colombia."[127] This is at tab 24 of the folders.

39. Shortly after this statement, on 12 January 2016, the Honduran-flagged *Observer* was seen fishing in Nicaragua's EEZ by coast guard vessel *CG-403*, at this location, and as depicted at tab 25 of your folders[128]. The *Observer* was informed that it was in Nicaragua's waters and required a licence from Nicaragua to fish there[129]. The *Observer* responded, as recorded by the *CG-403*: "I did not know because the Colombian authorities allowed us to come and fish. They ordered us to come and work here."[130] A few hours later, the *CG-403* spotted the *Observer* fishing in the same area and attempted to hail it again[131]. This time, the recorded response came from a nearby Colombian naval

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[126] RN, Ann. 32, Audio Transcription of 12 Sept. 2015.

[127] "There are no vetoed zones for the fishermen in San Andrés: National Navy", *El País*, 3 Dec. 2015 (RN, Ann. 26).

[128] RN, Ann. 2, Daily Navy Reports 2015-2017, p. 223 (map); RN, para. 4.113.

[129] RN, Ann. 32, Audio Transcription of 12 Jan. 2016.

[130] RN, Ann. 32, Audio Transcription of 12 Jan. 2016.

[131] RN, Ann. 2, Daily Navy Reports 2015-2017, p. 224 (map); RN, para. 4.114.

frigate: "This is the vessel of the Navy of the Republic of Colombia. I inform you that the motorboat *Observer* is authorized to fish in this area by the Colombian maritime authority, according to the historic fishing rights of the State of Colombia."[132] When the *CG-403* objected, the Colombian naval vessel responded: "I inform you that the *Observer* and all Colombian vessels that are in the area are authorized by the Colombian General Maritime Directorate to carry out fishing activities in the area."[133]

40. A similar incident occurred on 6 January 2017. On that date, the Nicaraguan coast guard vessel *CG-405* encountered the Honduran-flagged *Capitán Geovanie* fishing without a licence in Nicaragua's EEZ, as depicted here, and at tab 26 of the folders[134]. *CG-405* ordered the *Capitán Geovanie* to leave the area, but a Colombian frigate soon arrived and instructed the *Capitán Geovanie*: *[original recording in Spanish]* "This the Coast Guard of Colombia. Upon receipt, proceed and continue your fishing task. You are in historically Colombian waters and our duty is to protect your task."[135] The Colombian frigate then turned its attention to Nicaragua's *CG-405*: *[original recording in Spanish]* "This is the Coast Guard of Colombia. Upon receipt, proceed to abort any attempt to board and any attempt to abort the fishing of the *Capitán Geovanie* motorboat." In response to the Nicaraguan coast guard vessel's protest, the Colombian vessel insisted: *[original recording in Spanish]* "The *Capitán Geovanie* is authorized by the Colombian maritime authority, fishing in historically Colombian waters."[136]

41. On 10 December 2018, Nicaragua's coast guard vessel *BL-405* encountered once again, the Honduran fishing vessel *Observer* conducting illegal fishing in Nicaragua's EEZ, as depicted here, and at tab 27 of your folders[137]. This time, the Nicaraguan authorities were able to board the *Observer*, where they discovered over 5,000 pounds of lobster and 150 lobster traps, as well as a

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[132] RN, Ann. 32, Audio Transcription of 12 Jan. 2016.

[133] *Ibid.*

[134] RN, Ann. 2, Daily Navy Reports 2015-2017, p. 229 (map); RN, para. 4.118.

[135] RN, Ann. 32, Audio Transcription of 6 Jan. 2017.

[136] *Ibid.*

[137] Letter of the Agent of Nicaragua to the International Court of Justice, Ref.: HOL-EMB-098-2019, 23 Sept. 2019, p. 2.

Colombian fishing licence[138] and a departure certificate issued in San Andrés in November 2018[139]. Nicaragua has submitted both of these official documents to the Court. The *BL-405* took the *Observer* into custody and began to escort it to a port in Nicaragua. Due to mechanical problems, the *Observer* stalled, and had to be towed by *BL-405*[140].

42. The following day, 11 December 2018, the Colombian Navy intervened. The frigate *ARC-53 Antioquía* ordered the *BL-405* to release the *Observer*[141]. The *BL-405* refused[142]. The Colombian frigate followed closely the *BL-405*, with the *Observer* in tow, and then, as the vessels manoeuvred for position, the tow line connecting *BL-405* with the *Observer* severed[143]. Notwithstanding Colombia's interference with Nicaragua's law enforcement efforts in its own EEZ, the *BL-405* managed to retake control of the *Observer* and to bring it to the Nicaraguan mainland at Bluefields[144].

43. In its written response, Colombia makes two assertions. First, it claims the *Observer* was merely transiting Nicaragua's waters, with lobster caught elsewhere. But the captain of the *Observer* has admitted that the boat was caught fishing in Nicaragua's waters without a Nicaraguan licence[145]. Second, Colombia claims that its naval frigate was threatened by the manoeuvres made by the much smaller Nicaraguan coast guard vessel. That is like an elephant claiming to be threatened by a mouse. But, even if Nicaragua's mouse were somehow endowed with supernatural powers, the real question — for which Colombia has no answer — is: why was a Colombian naval frigate challenging and interfering with Nicaragua's enforcement of its sovereign right to prevent illegal fishing activities in its own EEZ by a Honduran-flagged fishing boat?

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[138] Colombian Certificate of Fishing Patent (*ibid.*, Ann. 18 *(i)*).

[139] Colombian Set Sail (*ibid.*, Ann. 18 *(g)*).

[140] Letter of the Agent of Nicaragua to the International Court of Justice, Ref.: HOL-EMB-098-2019, 23 Sept. 2019, p. 3; Affidavit by Officer Bismarck Isidro Valle Castro (Ann. 17 *(b)*).

[141] Letter of the Agent of Nicaragua to the International Court of Justice, Ref.: HOL-EMB-098-2019, 23 Sept. 2019, p. 2.

[142] *Ibid.*

[143] *Ibid.* and Anns. 17 *(b)*, 17 *(f)*, 17 *(g)*, 17 *(h)* and 17 *(i)*.

[144] See Letter of Vice-Minister of the Interior of Nicaragua, Luis Cañas Novoa, to Minister for Foreign Affairs of Nicaragua, Denis Moncada Colindres, Mar. 2019 (*ibid.*, Ann. 11).

[145] Judgment of Nicaragua's Supreme Court of Justice No. 086, 26 Oct. 2020, p. 14. Spanish original available at https://www.poderjudicial.gob.ni/pjupload/sconten2012/pdf/certificacion_caso_observer.pdf; see also diplomatic Note MRE/DM-DM/DGAJST/00585/12/18 dated 22 Dec. 2018 (Ann. 6 to Letter of the Agent of Nicaragua to the International Court of Justice, Ref.: HOL-EMB-098-2019, 23 Sept. 2019, p. 2)

44. These incidents, all of them except for the last one, have occurred in or near the rich fishing area known as Luna Verde, depicted here in green, and at tab 28 of your folders. As you can see, it is plainly within Nicaragua's EEZ. Nevertheless, Colombia has made no secret of its encouragement of Colombian and foreign-flagged vessels to fish at Luna Verde. For example, resolution No. 4780, issued by the General Maritime Directorate of the Department of the Archipelago of San Andrés and Providencia on 24 September 2015, grants an "Industrial Commercial Fishing Permit" to the owner of the company Pesquera Serranilla to fish in "the area known as 'la esquina' or 'luna verde', which includes our insular territory and fishing zones"[146]. As this permit makes clear, it licenses "Industrial Commercial" fishing. That is what Colombia has regularly licensed at Luna Verde, in Nicaragua's EEZ. The evidence thus belies Colombia's claim that it only licenses small-scale, artisanal fishing by local island inhabitants in these waters. As Mr. Martin will show on Friday, even if Colombia's issuance of fishing licences were limited to artisanal fishing, which is not the case, this would still violate Nicaragua's exclusive fishing rights in its EEZ under well-established principles of customary international law.

45. These Colombian resolutions expressly authorize fishing by industrial commercial vessels "within the maritime jurisdiction of the Department of the Archipelago of San Andrés and Providencia", the contours of which are depicted on this official map[147]. The Court will observe that this purported maritime jurisdiction includes all the waters east of the 82nd meridian, as well as the notation, at the bottom left of the map: "Cortesía Armada República de Colombia", which means, "Courtesy of the Navy of the Republic of Colombia". These official Colombian documents are at tab 29 of your folders.

46. Colombia has also usurped Nicaragua's exclusive authority to license marine scientific research in its EEZ. On 8 October 2018, the Colombian naval frigate *ARC-51 Almirante Padilla* stopped the Mexican-flagged research ship, the *Dr. Jorge Carranza Fraser*, which had been licensed by Nicaragua under a research project funded by the United Nations Food and Agricultural

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[146] General Maritime Directorate, Resolution No. 4780 of 2015 (24 Sept. 2015), Preamble, Recital 1 (RN, Ann. 14); see also RN, para. 4.106.

[147] General Maritime Directorate, Resolution No. 2465 of 2016 (30 June 2016), Art. 4; see also *ibid*., Art. 8. (RN, Ann. 15); see Government of the Department of the Archipelago of San Andrés, Providencia and Santa Catalina, *Territorio*, https://www.sanandres.gov.co/index.php/archipielago/mapas/territorio, *y mapa geográfico* https://www.sanandres.gov.co/index.php/archipielago/mapas/mapa-geografico.

Organization[148]. The incident occurred along this route, depicted in red on this map, which was submitted to the Court by Colombia, and is included in the judges' folders at tab 30. Although the entire route followed by the Mexican research vessel, as shown by Colombia, was within Nicaragua's EEZ, the Colombian frigate forced it to leave the area, and prevented it from completing its mission. These facts are confirmed by correspondence from the Director General of Mexico's National Institute of Fishing and Aquaculture, which is part of the Mexican Department of Agriculture, to his Nicaraguan counterpart[149]. The Mexican Director General's letter, dated 16 April 2019, which is at tab 31 of your folders, and shown here in relevant part, explained that his institute's research vessel had been unable to complete its mission due to:

> "an interception by a marine military patrol from the government of a third country to the Jorge Carranza Fraser vessel during the cruise in the areas near the missing transects, indicating that it was sailing without permits in the waters of its marine jurisdiction, escorting the vessel Jorge Carranza Fraser until it departed the area".

47. There is no doubt about the identity of the "third country" referred to here by the Mexican official. Colombia itself acknowledges this. Nor is there any doubt that the Mexican vessel was navigating within Nicaragua's waters when it was "intercepted" by a "marine military patrol" from a third country. Colombia's own map, which I just showed you, demonstrates this.

48. All of this evidence — as well as the evidence of the dozens of other, similar incidents described in Nicaragua's pleadings — demonstrates the hypocrisy of Colombia's insistence, in its Rejoinder, that its actions in these waters have allowed Nicaragua to "continue to . . enjoy [its] sovereign rights . . [in its EEZ]"[150]. The evidence also belies Colombia's assertion that its actions reflect nothing more than its exercise of the right of freedom of navigation[151]. Earlier this month, Colombia's own President let the cat out of the bag, again, and dispensed entirely with these pretexts, as I displayed on your screens earlier: "The 82nd Meridian is the boundary we have today with Nicaragua". Freedom of navigation? That is not what the President of Colombia said. Nor is it what the Colombian Navy itself repeatedly told Nicaragua it was protecting. Rather, in the recorded words

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[148] Scientific Fishing Permit extended to Mexican vessel *Dr. Jorge Carranza Fraser*. Letter of the Agent of Nicaragua to the International Court of Justice, Ref.: HOL-EMB-098-2019, 23 Sept. 2019, p. 2, and Ann. 16.

[149] Letter from the National Institute of Fisheries and Aquaculture of Mexico to the Nicaraguan Institute of Fisheries and Aquaculture, 16 Apr. 2019, OFICIO-RJL-INAPESCA-DG-058-2019; Letter of the Agent of Nicaragua to the International Court of Justice, Ref.: HOL-EMB-098-2019, 23 Sept. 2019, Ann. 12.

[150] RC, Vol. I, para. 4.115.

[151] See RC, Vol. I, pp. 33-78.

of its naval commanders, it was engaging, repeatedly, in the exercise of Colombia's sovereign authority over these waters, and especially to protect Colombia's "historic fishing rights" in areas the Court declared to constitute Nicaragua's EEZ[152].

49. Colombia seeks to minimize the incidents by arguing that Nicaragua itself played them down in its public statements, avoiding mention of conflicts with Colombia at sea up to early 2014[153]. Nicaragua has already explained that its statements were intended to minimize tensions with a vastly more powerful neighbour, and to give Colombia time and space to accommodate itself to the Court's Judgment and an eventual settlement with Nicaragua on terms consistent with that Judgment[154]. However, as Colombia's violations of Nicaragua's rights continued, and grew more intrusive and threatening, Nicaragua began to protest them more vigorously, and to make recordings of them to provide irrefutable proof of those violations. Colombia has yet to offer a credible explanation of its actions.

50. Faced with its inability to defend the indefensible, Colombia seeks refuge in a casuistic jurisdictional argument that would erase all these incidents from the case, as if they never took place, on grounds that they are beyond the scope of the present dispute, hence outside the Court's jurisdiction. In its Counter-Memorial, Colombia simply refused to address any of the incidents that post-dated 27 November 2013, the date of its withdrawal from the Pact of Bogotá, arguing that these incidents were each separate disputes, each of which arose after the jurisdictional title for Nicaragua's Application had lapsed[155]. In its Rejoinder, Colombia likewise refused to discuss any of these incidents in the main body of its text, relegating its response to an appendix[156].

51. Madam President, Colombia can run from these incidents, but it cannot hide from them. Certainly not behind a half-baked jurisdictional argument. In its Judgment of 17 March 2016, the Court rejected Colombia's second preliminary objection, and affirmed its jurisdiction over: the

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[152] See, *inter alia*, Audio Transcription of 18 Mar. 2015, Audio Transcription of 23 Mar. 2015, Audio Transcription of 5 Apr. 2015, Audio Transcription of 7 Apr. 2015, Audio Transcription of 12 Sept. 2015 and Audio Transcription of 12 Sept. 2015 (RN, Ann. 32).

[153] RC, Vol. I, paras. 1.18; 3.41-3.45 *et seq*, citing *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)*, Preliminary Objections of Colombia, Ann. 46, p. 367.

[154] RN, para. 4.33, paras. 4.27-4.42; RC, Vol. I, Appendix, p. 14, para. 4.

[155] Counter-Memorial of the Republic of Colombia (CMC), Vol. I, 17 Nov. 2016, pp. 165-168.

[156] RC, Vol. I.

"dispute concerning the alleged violations by Colombia of Nicaragua's rights in the maritime zones which, according to Nicaragua, the Court declared in its 2012 Judgment appertain to Nicaragua"[157]. The Court found that this dispute existed as of the time that Nicaragua filed its Application on 26 November 2013, which it regarded as the critical date for jurisdictional purposes[158].

52. Colombia would interpret the Court's Judgment as limiting its jurisdiction only to acts by Colombia which occurred before that date. But the Judgment of 17 March 2016 does not say that. It does not limit the Court's jurisdiction to acts occurring before 26 November 2013; it affirms jurisdiction over the dispute that arose prior to that date. Thus, as Professor Pellet has explained, acts by Colombia afterwards that are part of the same dispute inevitably fall within the jurisdictional scope of this case.

53. The Court was called upon to decide what was fundamentally the same question, that is, whether subsequent and ongoing violations of the applicant State's rights relate back to the date the dispute arose, or whether they constitute new and separate disputes, in the case concerning *Legality of Use of Force (Yugoslavia* v. *Belgium).* In that case, NATO's bombing of targets in Yugoslavia, which was the subject of the dispute between the parties, began on 24 March 1999. This was before Yugoslavia made its Article 36 (2) declaration on 25 April 1999 and filed its Application four days later. Yugoslavia, like Colombia here, attempted to slice the dispute into discrete pieces. It argued that each bombing incident gave rise to a new and separate dispute distinct from the original one, such that bombings after 25 April 1999 fell within the jurisdiction of the Court even though the NATO bombing campaign began before that date.

54. The Court upheld Belgium's preliminary objection on the ground that the individual bombing incidents after Yugoslavia's Article 36 (2) declaration were part of the same dispute that arose prior to it, and thus, like the dispute itself, fell outside the scope of its jurisdiction. The Court explained that "each individual air attack could not have given rise to a separate subsequent dispute", because "Yugoslavia has not established that new disputes, distinct from the initial one, have arisen

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[157] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 35, para. 79.

[158] *Ibid.*, p. 9, para. 1, p. 39, para 101.

between the Parties since 25 April 1999 in respect of subsequent situations or facts attributable to Belgium"[159].

55. This was not the first time the Court ruled as such. In the *Fisheries Jurisdiction* case (*Germany* v. *Iceland*), Germany alleged violations of its rights by Iceland that post-dated its Application. The Court had no difficulty holding that it had jurisdiction over these actions, on the ground that they constituted part of the same dispute that was submitted in the Application:

> "The Court cannot accept the view that it would lack jurisdiction to deal with this submission. The matter raised therein is part of the controversy between the Parties, and constitutes a dispute relating to Iceland's extension of its fisheries jurisdiction. The submission is one based on facts subsequent to the filing of the Application, but arising directly out of the question which is the subject-matter of that Application [over which the Court had jurisdiction]."[160]

56. The same is true here. Colombia's violations of Nicaragua's EEZ rights after November 2013 were unquestionably part of the same dispute raised by Nicaragua in its Application over which the Court affirmed its jurisdiction. In the Court's language, the "dispute concerning the alleged violations by Colombia of Nicaragua's rights in the maritime zones which, according to Nicaragua, the Court declared in its 2012 Judgment appertain to Nicaragua"[161]. Because the Court ruled that it has jurisdiction over *this* dispute, all of the individual incidents that form part of it, or relate back to it, necessarily fall within the same jurisdictional competence. Just as each post-Application bombing of Yugoslavia did not give rise to a new dispute, separate from the one that arose when the bombings first commenced, neither did the Colombian Navy's recurring and repeated violations of Nicaragua's sovereign rights and jurisdiction in Nicaragua's EEZ constitute new disputes separate from the one raised by Nicaragua in its Application. And, just as Iceland's post-Application actions arose directly out of the subject-matter of Germany's Application, Colombia's actions after 2013 arose directly out of the subject-matter of Nicaragua's Application.

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[159] *Legality of Use of Force (Yugoslavia* v. *Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, pp. 134-135, paras. 29-30.

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

[161] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 34, para. 79.

57. As a consequence, Colombia cannot escape its international responsibility for violating Nicaragua's rights on jurisdictional grounds, any more than it can avoid its responsibility on the merits.

58. Madam President, Mr. Vice-President, Members of the Court, this concludes my presentation today. I thank you for your kind courtesy and patient attention, and I ask that you give the floor to my esteemed colleague, Professor Lowe.

The PRESIDENT: I thank Mr. Reichler and I now give the floor to Professor Vaughan Lowe.

Mr. LOWE: Thank you, Madam President. It is a privilege to appear before you and an honour to have been entrusted with this part of Nicaragua's submissions. May I begin by joining in the tribute to the late Judge Crawford. A colleague, a friend and an inspiration.

COLOMBIA'S INTEGRAL CONTIGUOUS ZONE IS INCONSISTENT WITH INTERNATIONAL LAW AND REMEDIES

1. Madam President, Members of the Court, nine years after your 2012 Judgment, Colombia is persisting in its attempts to establish Colombian maritime zones in areas that the Court has ruled are part of Nicaragua's EEZ. Colombia has no right to create special zones or an integral contiguous zone in Nicaragua's EEZ, period.

2. I shall focus on Colombia's Integral Contiguous Zone — its ICZ — which violates international law in various ways that I shall address shortly. But the main point is that Colombia must not continue to deny Nicaragua's rights under international law.

3. In 2012 the Court said that "the maritime boundary between Nicaragua and Colombia throughout the relevant area has now been delimited as between the Parties"[162]. That maritime boundary is shown on Sketch-map No. 11 in the Judgment, which is tab 32 in your folder[163].

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[162] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II),* p. 718, para. 250.

[163] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II),* p. 714, para. 238.

4. Colombia did not accept the Court's Judgment. In 2013 it declared what it called "an Integral Contiguous Zone through which we have unified the contiguous zones of all our islands and keys in the Western Caribbean Sea. We will continue to exercise full jurisdiction and control in this zone."[164]

5. The area of the ICZ is depicted in Figure 2.2 in Nicaragua's Memorial as an overlay on the Court's Sketch-map No. 11. It is on the screen, shaded in green, and it is tab 33 in your folder. As you can see, it extends, in the words of the Colombian President, "from the south, where the Albuquerque and East-Southeast keys are situated, and to the north, where Serranilla Key is located. Of course, it includes San Andrés, Providencia and Santa Catalina, Quitasueño, Serrana and Roncador islands, and the other formations in the area"[165]. Around half of the green ICZ lies in areas that the Court has determined are Nicaragua's maritime zones, as defined by the 2012 maritime boundary, which is drawn in red.

6. The details of the ICZ are set out in Colombia's Presidential Decree 1946 of 9 September 2013, which is tab 10 in your folder[166].

7. Nicaragua objected to the ICZ for three reasons: (i) it infringed the EEZ that the Court had decided in 2012 belonged to Nicaragua[167]; (ii) it asserted jurisdiction over matters not properly encompassed within a contiguous zone under customary international law (Colombia not being a party to UNCLOS)[168]; and (iii) it exceeded the maximum breadth of the contiguous zone — 24 nautical miles from the territorial sea baseline — as permitted under international law[169].

8. Nicaragua and Colombia have exchanged substantial written pleadings on this question; and Nicaragua maintains in full the arguments that it has set out there. Here, I shall address the key points that remain in dispute after Colombia's Rejoinder.

9. Colombia's essential argument is that "[u]nder customary international law, the jurisdictional powers that States can exercise in the contiguous zone, including those enumerated in

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[164] "Declaration of President Juan Manuel Santos on the integral strategy of Colombia on the Judgment of the International Court of Justice, 9 September 2013", MN, Ann. 4, p. 135.

[165] MN, Ann. 4, p. 135.

[166] MN, Ann. 9.

[167] MN, paras. 3.18, 3.20, 3.27.

[168] MN, paras. 3.21-3.26.

[169] MN, paras. 3.18-3.20.

Decree No. 1946 . . . are not incompatible with the sovereign rights a coastal State such as Nicaragua has within its EEZ"[170].

10. The main elements of Colombia's argument are:

(a) first, that the contiguous zone is not a maritime zone that needs to be delimited, but rather a "functional area" within which a coastal State has certain rights to protect its vital interests[171];

(b) second, the interests that it can protect are not confined to the four — customs, fiscal, immigration and sanitary regulations — set out in UNCLOS, Article 33, which Nicaragua says reflects customary international law;

(c) third, the provision in Article 33 (2) that "[t]he contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured" does not apply as a matter of customary international law to Colombia's western islands within the ICZ;

(d) fourth, there is no incompatibility or conflict between Colombia's contiguous zone rights and Nicaragua's EEZ rights, which can coexist and overlap; and

(e) fifth, in any event, it is not the *declaration* of the ICZ but only its actual *implementation* that could amount to a violation of international law.

(a) ***The contiguous zone is a maritime zone to be delimited***

11. I begin with the argument that the contiguous zone is not a maritime zone that needs to be delimited but a vague "functional area" of legal competence. International law has acknowledged what are in effect such areas. Under the doctrine of "constructive presence"[172] a coastal State could act against a foreign ship that stayed on the high seas while it used small boats to communicate with the shore, for example in order to smuggle narcotics into or out of the State.

12. There was no fixed distance from shore within which the ship on the high seas had to be located; nor was there a fixed list of coastal laws or interests whose violation justified reliance on the

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[170] RC, para. 1.23.

[171] CMC, para. 5.34.

[172] See e.g. UNCLOS, Art. 111 (4); *The Arctic Sunrise Arbitration (Netherlands* v. *Russia)*, PCA Case No. 2014-02, Award on the Merits, 14 August 2015, para. 253; US Navy, *The Commander's Handbook on the Law of Naval Operations*, (Aug. 2017 ed.), para. 3.11.2.2.5, available at https://www.hsdl.org/?view&did=806860; C. J. Colombos, *International Law of the Sea* (6th ed., 1967), pp. 173-175; (former ITLOS Judge) H. Caminos, "Contiguous Zone", in *Max Planck Encyclopedia of Public International Law* (2012), para. 4.

constructive presence doctrine. One could say that, within a reasonable distance beyond its territorial sea, a coastal State could enforce its laws protecting its important interests. But this was a matter of its rights on what remained the high seas. It was not the assertion of control over a defined area of the sea.

13. Similarly, in the case of hot pursuit, a coastal State may pursue a foreign ship that has violated its laws out of its territorial sea (or, in the case of violations of customs, fiscal, sanitary and immigration laws, out of its contiguous zone) and arrest it on the high seas or in the EEZ of third States[173]. There is no fixed geographical limit, as long as the ship pursued has not entered the territorial sea of its own or a third State[174].

14. Constructive presence and hot pursuit are examples of limited functional rights of a coastal State beyond its territorial sea for the protection of its vital interests. Within reason, and subject to the duty to have due regard to the interests of other users of the sea and to respect the sovereignty of other States in their territorial seas and their rights in other maritime zones, States could exercise these rights anywhere. There is no defined zone in which they exercise those rights. But that is *not* what we are dealing with here.

15. Colombia's ICZ is quite different. It is a defined zone in which Colombia says, these are *our* waters, subject to *our* control, within which you must look to *our* laws, because as long as you are in this defined zone, we have the right to prevent and punish infringements of our laws. Whatever Colombia may say here, according to the Constitution[175] and the laws[176] of Colombia, the ICZ is fully a part of Colombia.

16. Colombia says that the fact that its domestic law describes the ICZ as a Colombian "zone" is not decisive[177]. A State might indeed claim a contiguous zone that is consistent with UNCLOS Article 33 but call it, say, a "security zone". Using a name that is inappropriate is, in itself, no offence. But that is not the point.

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[173] See e.g. UNCLOS, Art. 111.

[174] UNCLOS, Art. 111 (3).

[175] Art. 101, available at https://www.constituteproject.org/constitution/Colombia_2015.pdf?lang=en.

[176] See MN, paras. 3.23-3.25; Presidential Decree No. 1119 of 17 June 2013, MN, Ann. 13; Presidential Decree No. 1946 of 9 September 2013, (Art. 2), MN, Ann. 9.

[177] RC, para. 4.102.

17. Colombia has indicated that it intends to delimit the zone — to define its boundary — when technical work on the relevant baselines is complete[178]. It asserts that the boundary "enables the Colombian Navy to efficiently protect vital interests" and will "enable the other users of the Southwestern Caribbean Sea to foresee when they enter the contiguous zone"[179]. Like the old signs at the checkpoints in occupied Berlin, the ICZ boundary will in effect announce "[y]ou are now entering the Colombian sector".

18. The designation of the area as the Colombian Integral Contiguous *Zone* matters precisely because Colombia says that foreign ships need to know when they are entering the Colombian ICZ. It is a defined Colombian maritime zone, in which Colombia asserts its "full jurisdiction and control"[180].

19. Article 24 of the 1958 Territorial Sea Convention provided for the delimitation of the contiguous zone, with the median line as the default rule. The suggestion that the absence of any such provision in UNCLOS Article 33 shows that there is no need to delimit contiguous zones and that they may overlap[181] is misconceived and, as one of the authorities cited by Colombia puts it, "a very academic approach"[182].

20. One obvious explanation for the omission of a delimitation provision from Article 33, as those authorities note[183], is that such a provision is superfluous because the contiguous zone is part of the EEZ, for whose delimitation provision *is* made, in UNCLOS Article 74.

21. And the very nature of the contiguous zone points to its status as a distinct, defined maritime zone. UNCLOS Article 303 makes provision in relation to archaeological and historical objects in the contiguous zone. It says that a coastal State may "presume that their removal from the sea-bed in the [contiguous] zone . . . without its approval" is an offence under its laws.

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[178] RC, para. 4.14.

[179] RC, para. 4.114.

[180] "Declaration of President Juan Manuel Santos on the integral strategy of Colombia on the Judgment of the International Court of Justice", 9 September 2013, MN, Ann. 4, p. 135.

[181] RC, paras. 4.37 and 4.34.

[182] *The United Nations Convention on the Law of the Sea: A Commentary*, Alexander Proelβ, editor (hereinafter *"Proelss Commentary"*), p. 263.

[183] See H. Caminos, "Contiguous Zone", in *Max Planck Encyclopedia of Public International Law* (2012), para. 16; *Proelss Commentary*, pp. 262–263; D. R. Rothwell and T. Stephens, *The International Law of the Sea* (2nd ed., 2016), pp. 81-82.

22. That provision makes no practical sense if the area of sea-bed in question falls within the overlapping contiguous zones of two States. Which of them is to give approval? As the *Virginia Commentary* recognized[184], delimitation is necessary in order to define the area within which each State is competent. That is why Article 8 of the 2001 Convention for the Protection of the Underwater Cultural Heritage asserts that "States Parties may regulate and authorize activities directed at underwater cultural heritage *within their contiguous zone*"[185].

23. Colombia, of course, itself asserts the right to safeguard its cultural heritage laws in its Integral Contiguous Zone; and that would plainly interfere with the rights of Nicaragua[186].

24. My final point on this first issue is that Colombia cannot point to a single State that has asserted contiguous zone rights without declaring a contiguous zone within defined limits. When States claim a contiguous zone, they claim a defined *zone*. Colombia, of course, has defined its Integral Contiguous Zone precisely, in Decree 1946.

25. Similarly, there is no evidence of States carving out or reserving their position in relation to contiguous zone rights when they delimit maritime boundaries — for example by establishing a contiguous zone straddling the delimited boundary. There is, for example, no such provision in Colombia's 1977 maritime boundary treaty with Costa Rica[187].

(b) ***A contiguous zone is confined to the protection of customs, fiscal, immigration and sanitary laws***

26. On the second issue, concerning the list of laws and regulations that may be protected in the contiguous zone, it is again what Colombia cannot show you that is more pertinent than what it can.

27. In its Rejoinder, Colombia argued that the terms "'customs', 'fiscal', 'immigration' and 'sanitary'" laws are "generic terms providing for the protection of the vital interests of the coastal

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[184] *Virginia Commentary*, Vol. V (1989), para. 303.6

[185] Http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/2001-convention/official-text/; emphasis added.

[186] Decree 1946 of 2013, Art. 5 (3) *(a)*.

[187] Https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/COL-CRI1977MC.PDF, Arts. 1 and 2.

State" in general in the contiguous zone[188], and that "all States retain within the EEZ high seas rights and freedoms not specifically assigned to the EEZ coastal State"[189].

28. To take the latter point, the EEZ does *not* have the "residual high seas character" that Colombia claims[190]: as UNCLOS, Article 55, makes clear, it is a zone "subject to the specific legal régime established in this Part" of the Convention.

29. The same is true in customary international law: the basic UNCLOS EEZ principles are a prime example of treaty provisions "reflecting, or . . . crystallizing, received or at least emergent rules of customary international law"[191], to borrow the Court's words from the *North Sea Continental Shelf* cases.

30. The United States' State Department geographer showed in his 1986 study of the exclusive economic zone that State practice developed alongside the successive drafts of UNCLOS, with national legislation based on those drafts. The graphic — your tab 34 — shows the number of claims made each year during the United Nations Conference, and the great leap in claims in the late 1970s. It was the concept of the EEZ *as developed by the United Nations Conference on the Law of the Sea* that was adopted in State practice[192].

31. As for the interests protected by the contiguous zone, exactly the same formula — "customs, fiscal, immigration or sanitary laws and regulations" — was adopted in Article 24 of the 1958 Territorial Sea Convention and then in Article 33 of UNCLOS.

32. There was no suggestion during the drafting that the contiguous zone should allow open-ended controls in relation to any matter that the coastal State considered to engage its "vital interests"[193].

33. That remains the case. As Captain Roach's 2020 study shows, "there are relatively few instances of claims to a contiguous zone that exceed the rights permitted coastal States under

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[188] RC, para. 4.82 and cf. paras. 4.19 and 4.72.

[189] RC, para. 4.103.

[190] CMC, para. 5.23.

[191] *North Sea Continental Shelf (Federal Republic of Germany/Denmark), Judgment, I.C.J. Reports 1969*, p. 34. para. 50.

[192] See Table 7 in R. W. Smith, *Exclusive Economic Zone Claims: An Analysis and Primary Documents* (1986), pp. 35–37, and cf. pp. 29–40.

[193] RC, para. 4.82.

international law. Excessive contiguous zone claims relate to security and to underwater cultural heritage."[194]

34. Roach identifies 103 States claiming contiguous zones as of 2019[195], and only 16 of them as claimants to control security as a contiguous zone interest[196]. That is hardly a "general practice". He also lists the equally numerous protests made against those claims[197], which undermines any suggestion that the practice of these 16 States is "a general practice *accepted as law*".

35. All 168 Parties to UNCLOS may, of course, assert jurisdiction over archaeological and historical objects found at sea, in accordance with the terms of UNCLOS Article 303, paragraph 2 of which treats them as falling within Article 33.

36. But there is no evidence whatsoever to support Colombia's argument that "UNCLOS Article 303 confirms that 'customs', 'fiscal', 'immigration' and 'sanitary' are generic terms providing for the protection of the vital interests of the coastal State, and that such generic terms are to be interpreted accordingly"[198]. How does that work? States may exercise controls for purposes x, y, and z; x, y and z are important interests; therefore, States may protect all important interests? I do not think so.

37. Customs, fiscal, immigration and sanitary laws and regulations: State practice provides no basis for the assertion of any wider rights of control, let alone for a general, "generic" right to protect whatever Colombia may consider to be its "vital interests".

(c) ***The contiguous zone may not extend beyond 24 nautical miles from the baseline***

38. On the third issue, the breadth of the contiguous zone, UNCLOS Article 33 (2) says "[t]he contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured".

39. As can be seen from the chart now on your screen (your tab 35), Colombia's ICZ extends beyond 24 nautical miles. Its south-eastern margin is, at its furthest, over 50 nautical miles from the

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[194] J. A. Roach, *Excessive Maritime Claims* (4th ed., 2020), p. 146.

[195] J. A. Roach, *Excessive Maritime Claims* (4th ed., 2020), p. 145, Table 6.

[196] J. A. Roach, *Excessive Maritime Claims* (4th ed., 2020), p. 149, Table 8.

[197] J. A. Roach, *Excessive Maritime Claims* (4th ed., 2020), pp. 146–149.

[198] RC, para. 482.

nearest baselines, on Roncador and East Southeast Cays. In the north, the "pan-handle" corridor inserted to connect the ICZ around Serranilla with that around Quitasueño and Serrana is in places 45 nautical miles from the nearest baselines.

40. This chart — your tab 36 — shows the ICZ, and all the parts of it that are shaded red lie more than 24 nautical miles from the nearest Colombian baselines. That is about one third of the ICZ. But Colombia has no right to establish a contiguous zone extending so far. It interferes not only with Nicaragua's rights, but with the rights of *all* foreign vessels in those waters.

41. The position is the same under customary international law. As of July 2021, the United Nations Division for Ocean Affairs and the Law of the Sea ("DOALOS") identifies only one State, the Democratic People's Republic of Korea, that claims a greater breadth for its contiguous zone — a 50-nautical mile zone established by an army command in 1977[199]. Another State in the DOALOS table, Lithuania, specifies co-ordinates containing its contiguous zone[200]: but the line so drawn lies entirely within 24 nautical miles of the baselines and conforms to Article 33[201].

42. There is no basis in State practice for a right to extend a contiguous zone beyond 24 nautical miles from the baseline. On the rare occasions when wider claims have been made, they have been actively opposed by States and subsequently withdrawn, as Roach's 2020 study shows[202].

43. Colombia has no right to establish a maritime zone — whether the ICZ or a special zone such as the Seaflower Marine Biosphere Reserve[203], in what the Court has determined to be Nicaragua's EEZ, including the waters around the enclaves around Quitasueño and Serrana[204]. And Colombia has no right to establish a contiguous zone of more than 24 nautical miles in any waters.

44. Columbia's suggestion that the ICZ is no more than a "simplification" of the complicated zone that would result from using the territorial sea baseline, analogous to the straight baseline in the *Anglo-Norwegian Fisheries* case, is not credible.

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[199] Available at https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/table_summary_of_claims.pdf (accessed 15 July 2021).

[200] Available at https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/LTU.htm

[201] Cf. J. A. Roach, *Excessive Maritime Claims* (4th ed., 2020), p. 145, table 6.

[202] J. A. Roach, *Excessive Maritime Claims* (4th ed., 2020), pp. 151–153.

[203] See MN, paras. 2.16, 2.57; Anns 5, 11, 12, 23B, 33 and 46.

[204] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II),* p. 713, para. 238.

45. There is no legal basis for claiming that such circumstances are ever relevant to the outer limit of the contiguous zone. The contiguous zone is always drawn from the territorial sea baseline. But in any event, the configuration of Colombia's islands is *not* an "exceptional geographical or socio-economic circumstance"[205]. The 24-nautical-mile contiguous zone contours are depicted in this figure — your tabs 37 and 38 — by purple shading — the inner blue shading represents the 12-nautical-mile territorial sea. Colombia calls this "a tangle of interconnected arcs, imposing significant difficulties in implementation"[206].

46. There are roughly half a dozen roughly circular areas, five of which overlap with one another. That is nothing like the complexities resulting from the 120,000 or so islands in the "skærgaard" that justified the use of simplifying straight baselines in the *Anglo-Norwegian Fisheries* case[207], which Colombia cites in support of its position[208]. Nor is it remotely comparable with the many States that do have complex coastlines and offshore islands.

(d) ***Colombia's contiguous zone rights and Nicaragua's EEZ rights conflict and cannot overlap***

47. I turn to Colombia's fourth point: the argument that its contiguous zone rights and Nicaragua's EEZ rights can coexist, overlapping in the same space.

48. The first response to this is that the premise underlying it is incorrect. To take one example, Decree 1946 asserts Colombia's "*sovereign authority* and the powers for the implementation and the necessary control regarding . . . violations of laws and by-laws regarding environmental protection . . . and the exercise of historic rights to fishing held by the State of Colombia"[209].

49. Colombia asserts that authority and those powers in areas in which, under UNCLOS and customary international law, *Nicaragua* has "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters", and in addition "jurisdiction . . . with regard to . . . the protection and preservation of the marine environment"[210]. Colombia asserts those very same rights in its own EEZ under its 1978 EEZ

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[205] CMC, para. 5.29

[206] RC, para. 4.109.

[207] *Fisheries (United Kingdom* v. *Norway), Judgment, I.C.J. Reports 1951*, p. 127.

[208] CMC, para. 5.29.

[209] Decree 1946 of 2013, Art. 5 (3) *(a)*.

[210] UNCLOS, Art. 56 (1) *(a)* and *(b)*.

law, including what it calls "*exclusive* jurisdiction for . . . the preservation of the marine environment"[211]. The jurisdictional clash is obvious. As was apparent to the ITLOS in the *Saiga* and the *Virginia G* cases[212].

50. Whose law does a vessel look to? If, for example, a United States vessel in the Nicaraguan EEZ is authorized by Nicaragua to fish there, and is approached by a Colombian law enforcement vessel and told that those waters are part of Colombia's ICZ, must it submit to Colombia's control? EEZ rights and Colombia's ICZ rights do not address entirely different matters as Colombia claims, especially given the breadth of the rights asserted by Colombia.

51. The second response is that regardless of the jurisdictional conflict, Colombia has no right to arrogate to itself such rights in such locations. It has the right to establish a contiguous zone around its islands, out to a maximum distance of 24 miles but in no case beyond the maritime boundary delimited by the Court, and to do so for the purposes listed in Articles 33 and 303 of UNCLOS. And that is all.

52. Colombia says that the inability to establish the ICZ would be "devastating to the coastal State's ability to protect its vital interests"[213]. But why? Despite establishing an EEZ in 1978[214], Colombia managed without establishing a contiguous zone until 2013, when it says that "as a result of the 2012 Judgment" it found itself in a position where it was accorded only a territorial sea[215].

53. That, of course, is inaccurate. As can be seen from Figure 3.2 of Nicaragua's Reply, tab 39 in your folder, only the uninhabited banks of Quitasueño, which has only one minute feature above water at high tide[216], and Serrana, which is so small that neither the Court nor Colombia placed a

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[211] Act No. 10 of 1978, Art. 8, available at https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/COL_1978_Act.pdf.

[212] *The M/V "SAIGA" Case (Saint Vincent and the Grenadines* v. *Guinea), Prompt Release, Judgment, ITLOS Reports 1997*, paras. 63–65; *The M/V "SAIGA" Case (Saint Vincent and the Grenadines* v. *Guinea), Prompt Release, ITLOS Reports 1997*, paras. 70–72; *The M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines* v. *Guinea), ITLOS Reports 1999*, paras. 131, 136; *The M/V "Virginia G" Case (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014*, paras. 208–217.

[213] RC, para. 4.39.

[214] Act No. 10 of 4 August 1978 establishing rules concerning the territorial sea, the exclusive economic zone and the continental shelf and regulating other matters, available at https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/COL_1978_Act.pdf.

[215] RC, para. 4.39.

[216] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 644, para. 36, and cf. p. 692, para. 181.

base point on it[217], were accorded no maritime zone beyond 12 nautical miles in 2012. What "vital interests" of Colombia are jeopardized by having only a 12-mile territorial sea around each of them?

54. It is true that the 24-mile contiguous zone around Providencia, Roncador, San Andrés and the Albuquerque Cays is curtailed — but it has to be. That is the direct result of the Court's 2012 delimitation. And Colombia has no right to establish a Colombian maritime zone within Nicaragua's EEZ.

55. Despite all that it says in its written pleadings in this case, the website of the *Cancilleria* of Colombia sets out a definition of the contiguous zone that is much more faithful to the UNCLOS definition:

> "The contiguous zone is a maritime area recognized by international law, immediately following the territorial sea and extending 12 nautical miles for a total of 24 miles. It applies to both the mainland and the islands and cays. In the Contiguous Zone, monitoring is mainly carried out to prevent violations of customs, fiscal, immigration or health regulations; States may also punish in this space those infractions on these matters committed in the territory or in the Territorial Sea."[218]

Colombia knows full well what the law is; and it should comply with it.

(e) ***Nicaragua's claim does not require material harm; but Nicaragua is suffering material harm***

56. Finally, I turn to the suggestion that no breach of international law arises from the establishment of the ICZ unless and until it causes Nicaragua material injury.

57. To be clear, Nicaragua maintains that there *has* been material injury, and has asked the Court to declare Colombia liable to compensate Nicaragua for such injury. The amount of compensation due for that material injury is a question reserved for a subsequent phase of this case. Here, the Court is asked to address the basic principles of Colombia's legal rights and duties.

58. Nicaragua explained in its Reply that the mere enactment of legislation may constitute an internationally wrongful act[219]. Colombia says that its ICZ Decree "can and will be implemented in accordance with international law"[220] — presumably, those parts of international law that Colombia

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[217] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports (II)*, p. 699, para. 202.

[218] ¿Qué es la zona contigua?, available at https://www.cancilleria.gov.co/que-la-zona-contigua (accessed 31 Aug. 2021).

[219] RN, para. 3.57.

[220] RC, para. 4.148.

chooses to accept. It says that the ICZ Decree "should only be evaluated based on whether or not its implementation violates Nicaragua's EEZ rights"[221].

59. That is not so. Your 2012 Judgment was not concerned with instances of the implementation of States' powers: it was concerned with the delimitation of maritime zones. The ICZ is a plain and direct repudiation of that Judgment, and of Nicaragua's rights. Colombia cannot say to the world: "Foresee when you enter our ICZ that we control shipping there", and then say to the Court: "Don't worry, despite what we have declared and enacted, we will only act within our rights under international law."

60. The ICZ is a declaration by Colombia of what it considers to be its rights to control foreign shipping. The rights it claims are plainly in excess of those to which it is entitled under customary international law and under the Court's 2012 Judgment; and Nicaragua asks the Court to say so.

61. But again I emphasize that, as Nicaragua has demonstrated in its written pleadings — and as Mr. Reichler has shown you today — Colombia has gone far beyond making declarations that violate Nicaragua's rights under customary international law. It has repeatedly sent its Navy to prevent Nicaragua from exercising its exclusive sovereign rights and jurisdiction in its own EEZ, as delimited by the Court in 2012. And Colombia has attempted to exercise for itself those same rights — over fishing, marine scientific research and environmental protection — in waters that the Court has determined fall within Nicaragua's EEZ.

Relief requested

62. The remedies that Nicaragua requests from the Court are set out in the submissions on page 191 of its Reply. In summary, Nicaragua seeks an order, first, that Colombia must respect the maritime boundary delimited by the Court in 2012, and Nicaragua's sovereign rights and jurisdiction therein, and must revoke Colombian laws and instruments to the contrary; second, that Colombia must compensate Nicaragua for all damages caused by its violations of its international legal obligations, in an amount to be determined subsequently; and third, that Colombia must give appropriate guarantees of non-repetition. Our Agent will read out the request for relief in full at the end of these proceedings.

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[221] RC, para. 4.149.

63. That brings my submissions, Madam President, Members of the Court, to a close. I thank you for your kind attention and unless I can be of any further assistance to you, this is the conclusion of Nicaragua's submissions on its claims, in this first round of oral proceedings. Thank you.

The PRESIDENT: I thank Professor Lowe, whose statement brings this sitting to a close. The oral proceedings in the case will resume at 11 a.m. on Wednesday 22 September, when Colombia will present its first round of argument, both on the claims of Nicaragua and on its own counter-claims.

The sitting is adjourned.

The Court rose at 6.10 p.m.

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