

## DECLARATION OF VICE-PRESIDENT GEVORGIAN

*Disagreement with the Court's finding that Colombia has infringed upon Nicaragua's EEZ rights by issuing fishing permits — Conclusion that related incidents at sea imply an authorization to fish in Nicaragua's EEZ is not fully convincing — Doubts over whether there is sufficient evidence that resolutions by DIMAR and the Archipelago's Governor constitute fishing permits.*

1. I am not fully convinced by the finding of the Court that, “by authorizing fishing activities in the Republic of Nicaragua’s exclusive economic zone, the Republic of Colombia has violated the Republic of Nicaragua’s sovereign rights and jurisdiction in this maritime zone” (Judgment, subpara. 3 of the *dispositif*). The following paragraphs address why I believe Nicaragua has failed to substantiate this claim.

2. In my view, Nicaragua did not provide sufficient evidence to prove that Colombia issued permits to Colombian and foreign-flagged vessels authorizing them to fish in areas appertaining to Nicaragua’s exclusive economic zone (hereinafter “EEZ”). In particular, I am not convinced by the majority’s assessment of the available evidence relating to the alleged incidents at sea, which were relied upon to justify the conclusion in subparagraph 3 of the *dispositif*. The Court has consistently emphasized in its jurisprudence that it

“will treat with caution evidentiary materials specially prepared for this case and also materials emanating from a single source. It will prefer contemporaneous evidence from persons with direct knowledge. It will give particular attention to reliable evidence acknowledging facts or conduct unfavourable to the State represented by the person making them”<sup>1</sup>.

In addition, the Court has consistently held that the value of government reports

“depends, among other things, on (1) the source of the item of evidence (for instance partisan, or neutral), (2) the process by which it

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<sup>1</sup> See e.g. *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, *Reparations, Judgment*, I.C.J. Reports 2022 (I), p. 55, para. 121, quoting *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, *Judgment*, I.C.J. Reports 2005, p. 201, para. 61; see also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits, Judgment*, I.C.J. Reports 1986, p. 41, paras. 64-65.

has been generated (for instance an anonymous press report or the product of a careful court or court-like process), and (3) the quality or character of the item (such as statements against interest, and agreed or uncontested facts)”<sup>2</sup>.

3. The main evidentiary source for the incidents alleged by Nicaragua are the “Daily Navy Reports”, as well as a letter from the Nicaraguan Naval Force, all of which seem to have been prepared specifically for the purpose of the current proceedings and emanate from a single, partisan source. Accordingly, they can only be awarded limited probative value. Admittedly, some incidents are also supported by additional audio recordings. However, for a number of such recordings, there is no way to assess the date and location of their creation, nor are the recordings always clear about the precise circumstances of the exchange.

4. Moreover, even if conclusively proven, I remain unconvinced that said incidents at sea necessarily lead to the conclusion that Colombia has authorized unlawful fishing activities in Nicaragua’s EEZ. While Colombian ships did indeed in some instances accompany Colombian and foreign-flagged vessels engaged in unauthorized fishing in the Luna Verde area, this cannot be equated with the authorization of such fishing. There can be no requirement for Colombia’s naval frigates to dissociate themselves from private fishing activities in Nicaragua’s EEZ<sup>3</sup>. These incidents cannot be relied on to remedy, by way of inference, the additional evidentiary defects in relation to the resolutions issued by the General Maritime Directorate of the Ministry of National Defence of Colombia (hereinafter “DIMAR”) and the Governor of the Department of the Archipelago of San Andrés, Providencia and Santa Catalina (hereinafter “Governor of the Archipelago”).

5. In this regard, I am not certain the relevant resolutions adopted by DIMAR and the Governor of the Archipelago constitute fishing permits in the first place. In particular, it remains unclear whether DIMAR is an authority that is competent to issue such permits, as opposed to a body in charge of merely prescribing technical arrangements. It is the responsibility of Nicaragua, as the Party alleging the fact, to discharge the burden of proof in line with the principle of *onus probandi incumbit actori*, and demonstrate that these authorities are in fact competent to issue fishing permits<sup>4</sup>. However, Nicaragua has not responded to Colombia’s argument

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<sup>2</sup> See e.g. *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, *Reparations, Judgment*, I.C.J. Reports 2022 (I), p. 56, para. 122; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, *Judgment*, I.C.J. Reports 2015 (I), p. 76, para. 190.

<sup>3</sup> Judgment, para. 117.

<sup>4</sup> See *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, *Judgment*, I.C.J. Reports 2010 (I), p. 71, para. 162.

that DIMAR has no such powers and provided no convincing evidence to the contrary<sup>5</sup>.

6. In addition, even when assuming that DIMAR and the Governor of the Archipelago are competent authorities, and that said resolution actually constitutes fishing permits, I remain unconvinced that there is sufficient evidence to conclude that any authorization granted by these permits extends to areas appertaining to Nicaragua's EEZ. The only reference to the areas of Luna Verde or La Esquina appears in the preambular section of two "permits", and not in their operative parts. These operative parts define the authorized fishing grounds as "the area of the Department of San Andrés, Providencia and Santa Catalina" and include no reference to Luna Verde or La Esquina<sup>6</sup>. In its response to Nicaragua's allegations, Colombia specifically highlighted these facts. However, Nicaragua again chose not to address this issue in the oral hearings.

7. In light of these considerations, I have difficulties supporting the conclusion expressed in subparagraph 3 of the *dispositif* that Colombia has violated Nicaragua's sovereign rights and jurisdiction in its exclusive economic zone by authorizing fishing in this maritime zone. For this reason, I also voted against subparagraph 4 of the *dispositif*, which orders Colombia to cease conduct that was found to be unlawful in the two preceding paragraphs. However, I disagree with subparagraph 4 only in so far as it relates to subparagraph 3. In contrast, I support the finding that Colombia must cease to interfere with fishing and marine scientific research activities of Nicaraguan-flagged or Nicaraguan-licensed vessels as expressed in subparagraph 4 of the *dispositif*.

(Signed) Kirill GEVORGIAN.

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<sup>5</sup> CR 2021/15, p. 22 (Bundy).

<sup>6</sup> Memorial of Nicaragua, Ann. 11, p. 175; Reply of Nicaragua, Ann. 14, p. 313.