DISSENTING OPINION OF JUDGE *AD HOC* McRAE

Disagreement with the finding of the Court that it has jurisdiction ratione temporis *— No justification for the assimilation of a dispute involving events subsequent to the application to a dispute involving events subsequent to the lapse of the jurisdictional title — Responsibility may not be based on events subsequent to the lapse of the jurisdictional title — Policy considerations.*

Disagreement with the finding that Colombia exercised control in Nicaragua's EEZ — Definition of enforcement — Distinction between monitoring and enforcement — Failure by Colombia to exercise its rights with due regard to Nicaragua's rights and duties as coastal State.

Disagreement with the finding that Colombia authorized fishing activities in Nicaragua's EEZ.

Agreement with the finding that Colombia's ICZ may overlap with Nicaragua's EEZ and that it may not extend beyond 24 nautical miles — Disagreement with the finding that the powers claimed by Colombia in its ICZ are not in conformity with international law — The powers listed in Article 33 of UNCLOS addressed security concerns of the 1950s — Evolutive interpretation of Article 33 of UNCLOS — The jurisdiction claimed by Colombia pertains to offences committed on its territory or in its territorial sea, not in the ICZ or Nicaragua's EEZ.

Disagreement with the Court's rejection of the traditional fishing rights of the Raizales — The rights claimed by the Raizales are akin to indigenous rights — Recognition by Nicaragua of the fishing rights of the Raizales as akin to indigenous rights.

Disagreement with the Court's acceptance of the fourth counter-claim — Imprecision of the criteria for the drawing of straight baselines — Relevance of State practice in the examination of the permissibility of straight baselines.

I.

1. I regret that I have had to vote against the Court's Judgment on all of the findings in this case and will elaborate on my reasons in this dissent.

2. As a preliminary matter, I would note that I voted against the Court on the finding "that the Republic of Colombia must, by means of its own choosing, bring into conformity with customary international law the provisions of Presidential Decree 1946 of 9 September 2013", because the finding focused on the provisions of Presidential Decree 1946 which dealt with the powers to be exercised within the Integral Contiguous Zone (hereinafter "ICZ"). As I will point out in this dissent, I consider that the powers asserted by Colombia are among those that a State may exercise

in its contiguous zone consistently with customary international law. However, I agree with the Court that the configuration of Colombia's ICZ put before the Court is not in conformity with customary international law in so far as it exceeds 24 nautical miles. Thus, when it formally establishes the outer limits of its ICZ, Colombia must ensure that those limits do not exceed 24 nautical miles.

II.

3. I start with the issue of jurisdiction *ratione temporis* raised by Colombia in the course of these proceedings.

4. I disagree with the Court's conclusion that it has jurisdiction in respect of events that allegedly took place after the lapse of the jurisdictional title (Article XXXI of the Pact of Bogotá) on 27 November 2013. The point is critical because the conclusion of the Court that by interfering with the fishing and marine scientific activities of Nicaraguan-flagged or -licensed vessels and purporting to enforce conservation measures Colombia has violated Nicaragua's rights within its exclusive economic zone (hereinafter "EEZ") is based essentially on events that took place after the lapse of jurisdictional title. In other words, were it not for the events that occurred after the lapse of title, the Court would have had no basis for its conclusion in the second subparagraph of its operative clause that Colombia had violated Nicaragua's sovereign rights and jurisdiction within its EEZ. In short, Colombia is found internationally responsible on the basis of alleged violations of Nicaragua's rights and jurisdiction that took place after the Court's jurisdictional title had lapsed.

5. On 27 November 2013, Colombia's denunciation of the Pact of Bogotá came into effect, and from that point on the Court ceased to have jurisdiction in respect of claims brought against Colombia under the Pact. This is made evident in Article XXXI of the Pact of Bogotá which provides for the jurisdiction of the Court "as compulsory *ipso facto*, without the necessity of any special agreement so long as the present Treaty is in force". Indeed, the Court recognized this jurisdictional limit in its Judgment of 17 March 2016 on preliminary objections, where it accepted that it had jurisdiction over Nicaragua's claim because it was filed on 26 November 2013, the day before the lapse of jurisdictional title in accordance with Colombia's denunciation of the Pact of Bogotá[1]. In

[1] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 26, para. 48.

doing so, the Court applied the well-established principle that its jurisdiction is to be determined as of the date of application[2].

6. The Court justifies its assumption of jurisdiction in respect of events that took place after jurisdiction had lapsed, on the basis of the principle, also well established in the Court's jurisprudence, that jurisdiction extends to "facts subsequent to the filing of the Application, but arising directly out of the question which is the subject-matter of that Application"[3]. But, until this case, the principle had never been applied to cases where the events subsequent to the filing of the application are events over which the Court otherwise had no jurisdiction. In none of the cases referred to in the Judgment (para. 44) did the question of lapse of title of jurisdiction arise.

7. The Court treats the limitation in Article XXXI as applicable only to "the subject-matter of a dispute over which the Court may exercise jurisdiction" (Judgment, para. 40). Since in its 2016 Judgment the Court had already determined that it did have jurisdiction, the question before it now "is whether its jurisdiction over that dispute extends to facts or events that allegedly occurred after the lapse of the title of jurisdiction" *(ibid.)*.

8. In the critical part of its Judgment, the Court says that considerations relevant to the adjudication of claims or submissions subsequent to the date of application can be instructive in deciding this case, which deals with events that were certainly subsequent to the date of application but also, critically, subsequent to the lapse of title of jurisdiction. The Court immediately goes on (*ibid.*, para. 43) to say that the same criteria should apply to the question of jurisdiction *ratione temporis* in this case, that is where the events in question are subsequent to the date of lapse of title. The Court notes that, in the case of claims or submissions that have occurred subsequent to the date of application, it has "considered whether such a claim or submission arose directly out of the question which is the subject-matter of the application or whether entertaining such a claim or submission would transform the subject of the dispute originally submitted to the Court" (*ibid.*, para. 44). This, then, becomes the test for deciding whether jurisdiction can be taken over events occurring after the lapse of title. However, the Court does not explain how a dispute dealing with events over which it otherwise has no jurisdiction should be equated with a dispute dealing with events over which the Court has jurisdiction. It affirms that the rule for events subsequent to the date of application

[2] See note 1 *supra*, p. 18, para. 33, citing *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, pp. 437-438, paras. 79-80, and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 613, para. 26.

[3] *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 203, para. 72; see also *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, pp. 211-212, para. 87.

should be applied to events subsequent to the lapse of jurisdictional title but provides no explanation or rationale to show why this affirmation is justified.

9. The rule allowing the Court to treat events subsequent to the date that jurisdiction is established makes sense because it encourages efficiency; that is, it would be inefficient to require an applicant to bring a new application in respect of events that are part of the same dispute when they can be dealt with in the application already brought. But in the case of events subsequent to the loss of title of jurisdiction, no such efficiency considerations can be shown. A new application could not be brought in respect of events subsequent to the title of jurisdiction lapsing, because there would be no such title to do so. So, instead of applying a rule that encourages efficiency in cases where jurisdiction is established, what the Court is doing in this case is creating jurisdiction over events when no such jurisdiction would otherwise exist.

10. The Court points out that there is "nothing in the Court's jurisprudence to suggest that the lapse of jurisdictional title after the institution of proceedings has the effect of limiting the Court's jurisdiction *ratione temporis* to facts which allegedly occurred before that lapse" (Judgment, para. 42). But equally, there is nothing in the Court's jurisprudence to say that the Court can take jurisdiction over events that have occurred after the lapse of jurisdictional title.

11. The Court says, too, that the 2016 Judgment "implie[d] that the Court has jurisdiction to examine every aspect of the dispute" (*ibid.*, para. 45). But the Court was careful in 2016 to identify the dispute on the basis of events that allegedly occurred before the date of the Application. It would be strange in light of this to conclude, now, that the Court at that time was asserting that it could assume jurisdiction over events allegedly occurring after the title of jurisdiction had lapsed. At best the matter is simply not dealt with in the 2016 Judgment, and no inference can be drawn from it.

12. The Court's conclusion that "consideration" of alleged incidents that occurred after the lapse of jurisdiction "does not transform the nature of the dispute between the Parties" (*ibid.*, para. 47) and, thus, it has jurisdiction over those incidents, masks the reality of what is being decided. The question before the Court is not whether it can "entertain" or "consider" incidents subsequent to the date of filing of the Application (*ibid.*, para. 41) or date of lapse of title (*ibid.*, para. 47). Of course, the Court can "consider" or "entertain" events that took place after the lapse of title as part of the broader context of the case. But that is different from determining responsibility based on such events.

13. What is at issue in this case is whether the Court can find responsibility on the basis of events that occurred at the time when the Court had no jurisdiction. To say that consideration of subsequent events after the title has lapsed does not transform the nature of the dispute (Judgment, para. 47), ignores the fact that responsibility based on events before title lapses is responsibility in respect of a matter over which the Court has jurisdiction. Responsibility on the basis of events that were subsequent to the lapse of title is responsibility in respect of events over which the Court has no jurisdiction.

14. The Court was right in 2016 when it took jurisdiction over the dispute between the Parties on the basis of allegations of conduct by Colombia that occurred before the filing of the Application. And it is right today in asserting that it can consider facts and events subsequent to the Application provided those events do not transform the nature of the dispute. But what the Court has been unable to do is articulate a justification for finding responsibility on the basis of events that occurred after title of jurisdiction has lapsed.

15. There are no doubt policy implications of not taking jurisdiction over events subsequent to the lapse of title. Could a State by withdrawing acceptance of jurisdiction after a case has been filed against it undermine the ability of the Court to deal with the case? While that is certainly an undesirable consequence, it is not the case here. This is not the case of a respondent withdrawing jurisdiction on finding a case has been filed against it. Rather, it is a case of an applicant waiting to the last minute before jurisdiction expired to bring the claim.

16. Equally, there are contrary policy considerations. The principle that international jurisdiction is based on consent is fundamental and the Court should not facilitate bypassing that principle. But that is the consequence here. A State that has been unable to substantiate a case on the basis of events that existed at the time of the application when the Court had jurisdiction is being permitted to bypass a jurisdictional impediment and responsibility is found on the basis of events which could not be the subject of a new application.

17. In my view, the Court has provided no justification for finding responsibility on the basis of events that have occurred after the title of jurisdiction has lapsed. As a result, I would have found that the Court lacks jurisdiction *ratione temporis* over the events in this case that occurred after 27 November 2013.

III.

18. I turn now to Colombia's contested actions in Nicaragua's EEZ. With one exception (Judgment, paras. 71-72) the actions on which the Court relies to establish Colombia's responsibility occurred after the lapse of the jurisdictional title on 27 November 2013. Moreover, given that the approach of the Court has not been to reach a conclusion on the basis of each specific incident, but rather to base responsibility on an accumulation of incidents, it is unlikely that the Court would have been able to conclude that Colombia's international responsibility for the alleged incidents in Nicaragua's EEZ was engaged if that incident had stood alone. The facts are contested by the Parties and there is no basis on the evidence before the Court for choosing whose allegations are correct. Indeed, as Judge Nolte points out in his dissenting opinion, the Court does not even include this incident among those purporting to show that Colombian naval vessels were seeking to exercise enforcement jurisdiction in Nicaragua's EEZ (*ibid.*, para. 92).

19. In other words, the Court was able to conclude that Nicaragua had substantiated its claim in respect of the alleged incidents in Nicaragua's EEZ only because it relied on post-27 November 2013 incidents, over which the Court lacked jurisdiction.

20. However, even if the Court's decision to rely on events that occurred after the lapse of jurisdiction were correct, in my view the incidents on which the Court does base its conclusion on responsibility do not warrant the decision of the Court that Colombia was

> "interfering with fishing activities and marine scientific research of Nicaraguan-flagged or Nicaraguan-licensed vessels and with the operations of Nicaragua's naval vessels in Nicaragua's exclusive economic zone and . . . purporting to enforce conservation measures in that zone" (*ibid.*, para. 101).

21. As pointed out, this conclusion of the Court was not based on an assessment of each incident individually, but rather the Court reached a global conclusion in the light of all incidents. There are two important components to the Court's conclusion. First, the Court said that the incidents all took place in the area of Luna Verde, east of the 82nd meridian, within Nicaragua's EEZ (*ibid.*, para. 91). Second, the Court stated that in a number of instances Colombian naval officers read statements to vessels which they approached in the Nicaraguan EEZ, calling on them to discontinue fishing activities because they were environmentally harmful and illegal or unauthorized (*ibid.*, para. 92). The statements of these naval officers, it is said, also described the area as "Colombian jurisdictional waters" and said that the 2012 Judgment was "not applicable". In light of this, and of statements of Colombian government authorities, the Court

concludes that the evidence "sufficiently proves that the conduct of Colombian naval vessels was carried out to give effect to a policy whereby Colombia sought to continue to control fishing activities and the conservation of resources in the area that lies within Nicaragua's exclusive economic zone" (Judgment, para. 92).

22. The nature of the activities that the Court concludes violate the rights of Nicaragua in its EEZ are described by the Court as "exercising control over fishing activities in Nicaragua's exclusive economic zone, implementing conservation measures on Nicaraguan-flagged or Nicaraguan-licensed ships, and hindering the operations of Nicaragua's naval vessels" (*ibid.*, para. 100).

23. This might be compared with what actually happened in the incidents that the Court relies on. The Court refers to incidents in which there was an interaction between the Nicaraguan coast guard and a Colombian naval vessel and an incident involving a marine scientific research vessel. In each of those cases the facts are disputed, and the Court does not draw any conclusion about which Party's factual allegations are to be accepted. Although the Court says that the presence of Colombian vessels in the area is established (*ibid.*, para. 91), the key question was not presence of the vessels; rather, it was the conduct alleged to have occurred.

24. The predominant factual circumstances in the incidents identified by the Court involve Colombian naval vessels confronting Nicaraguan fishing vessels. While the incidents show that Colombian naval vessels did approach Nicaraguan or other non-Colombian-flagged vessels and made the statements attributed to them, in no case was there any evidence that the Colombian authorities attempted to arrest fishing vessels or prosecute individuals for violation of Colombian laws. The only evidence that might be regarded as attempted enforcement are the instances where it is alleged that a Colombian vessel chased a fishing vessel away and the intervention of a Colombian naval vessel when a Nicaraguan coast guard vessel had arrested a vessel for allegedly illegal fishing (*ibid.*, paras. 71, 77 and 89). But the facts of these incidents, too, are contested both as to whether the arrested vessels had been fishing in Nicaragua's EEZ and the events that were alleged to have taken place (*ibid.*, paras. 72, 78 and 90). Indeed, in most instances the warning statements of the Colombian naval officers, on which the Court relies, were simply ignored. The Nicaraguan fishing vessels continued their fishing.

25. Colombia's argument in support of the actions of its naval vessels is that they were simply "monitoring" and "informing", which they claimed

to be a right incidental to freedom of navigation[4]. Colombia argued further that there were responsibilities resulting from the particular environmental circumstances in the south-western Caribbean reflected in the Cartagena Convention and the SPAW Protocol (Judgment, para. 54). The Court rightly points out that neither of these instruments grants authority to a State to enforce its own environmental measures in the EEZ of another State (*ibid.*, paras. 98-99). However, that does not mean that the particular environmental circumstances in the south-western Caribbean or the regional arrangements encouraging the protection of the environment should be ignored in assessing the actions of States in the area. A claim to monitoring activities that might harm the environment has added legitimacy in areas where there is a regional concern about the environment.

26. Ultimately, the Court rests its conclusion of violation by Colombia on a perception of an intent by Colombia to control fishing and enforce its own national environmental laws in Nicaragua's EEZ. The Court never defines what it means by control or enforcement. Definitions of enforcement generally refer to the exercise of State authority to apply criminal law through arrest, detention, trial and punishment[5]. Yet, there were no actions of control or enforcement such as arrests, detention or prosecution. The perception of an intent to control and enforce is based less on what was done in fact by Colombian vessels but rather on inferences drawn from statements read by Colombian naval officers and statements of Colombian officials who argued that the 2012 Judgment was inapplicable and had been rejected by Colombia. From this the Court concludes, there was "a policy whereby Colombia sought to continue to control fishing activities and the conservation of resources in the area that lies within Nicaragua's exclusive economic zone" (Judgment, para. 92). In

[4] See, for example, Counter-Memorial of Colombia, Vol. I, p. 126, para. 3.59:

> "Colombia must be able to exercise in conformity with international law its rights of freedom of navigation, overflight, monitoring, humanitarian assistance and other related rights, which include the proper 'monitoring of activities undertaken' by public or private operators without being accused of impeding Nicaragua's sovereign rights";

CR 2021/14, p. 46, para. 46 (Boisson de Chazournes): "Colombia's environmentally focused observing and informing activities fall within the scope of what is permitted by the international law applicable to this dispute, in particular when fragile ecosystems and vulnerable habitats like that of the Raizales are concerned" *[translation by the Registry]*; see also *ibid.*, p. 29, para. 22 (Wood); *ibid.*, p. 41, para. 25 (Boisson de Chazournes), *ibid.*, p. 45, para. 40 (Boisson de Chazournes); CR 2021/18, p. 23, paras. 11-13 (Boisson de Chazournes)

[5] P. Daillier, M. Forteau and A. Pellet, *Droit international public (Nguyen Quoc Dinh)*, eighth ed., Paris: LGDJ, 2009, p. 565, para. 336; American Law Institute, *Restatement of the Law Fourth: The Foreign Relations Law of the United States*, American Law Institute, 2018, p. 291, Comment to § 431; R. O'Keefe, "Universal Jurisdiction: Clarifying the Basic Concept", 2004, *Journal of International Criminal Justice*, Vol. 2, pp. 736-737.

my view, this is a thin reed on which to base international responsibility and I do not find the reasoning of the Court compelling.

27. Nonetheless, the fact remains that Colombian naval vessels did approach Nicaraguan-licensed fishing vessels in the Nicaraguan EEZ and did notify them that they were fishing illegally and that they were in waters subject to Colombian jurisdiction (e.g. Judgment, paras. 75-76 and 81-84). And this was done without advising Nicaragua, either before or after the event, that its flag vessels, or vessels authorized by it, were being approached and information was being provided to them. Colombia claims that its vessels were doing this in exercise of their right of navigation in those waters, pursuant to their customary international law right reflected in Article 58 of United Nations Convention on the Law of the Sea (hereinafter "UNCLOS") and in the broader interests of promoting the protection of the marine environment (*ibid.*, para. 93). But, even accepting that this was a proper exercise of that customary international law right, such a right has to be exercised, having due regard to the rights and duties of the coastal State.

28. This, in my view, is the approach that the Court should have taken in this case. Instead of elevating what occurred into some kind of policy by Colombia to control fishing and enforce its own environmental laws in Nicaragua's EEZ, the Court should have focused on what was actually done, that is, monitoring the activities of Nicaraguan-licensed fishing vessels and informing them when it believed that they were fishing by environmentally harmful or illegal methods. Since Colombia had done this without informing Nicaragua either before or after the event, this is, in my view, evidence of a failure to have due regard for the rights and duties of Nicaragua as the coastal State in exercising its own jurisdiction over the marine environment. It is also in disregard of Nicaragua's rights in its EEZ for Colombia naval vessels to advise fishing vessels, erroneously, that these are waters subject to Colombia's jurisdiction, or to make gratuitous statements about Colombia rejecting the Court's 2012 Judgment. These are the matters on which the Court should have focused, instead of drawing a sweeping conclusion about a Colombian policy to control fishing and enforce its own environmental laws in Nicaragua's EEZ.

29. A statement by the Court that Colombia was acting without due regard for Nicaragua's EEZ rights and that it should cease from doing so would have been a much more appropriate solution to this aspect of the case than what the Court has in fact done in its decision on the alleged incidents in Nicaragua's EEZ.

IV.

30. I turn now to the allegation of Nicaragua that Colombia has granted permits for fishing in Nicaragua's EEZ. I have voted against the Court's conclusion that Colombia has authorized its nationals and foreign nationals to fish in Nicaragua's EEZ.

31. There are three bases on which Nicaragua's claim rests. First, Nicaragua asserts that resolutions issued by the General Maritime Directorate of the Ministry of National Defence of Colombia (hereinafter "DIMAR") included waters within Nicaragua's EEZ as areas where Nicaraguan-licensed vessels were permitted to operate. Second, Nicaragua claims that the Governor of the Department of the Archipelago of San Andrés, Providencia and San Catalina also issued resolutions permitting vessels to operate in the Luna Verde areas within Nicaragua's EEZ. Third, Nicaragua identifies certain incidents at sea involving Colombian naval vessels which, it argues, reinforce that Colombia was licensing vessels to fish in Nicaragua's EEZ (Judgment, paras. 103-105).

32. The Court does not appear to draw any conclusions from these resolutions, saying only that the reference to Luna Verde, in what was in fact the preamble to the Governor's resolutions, "suggests that Colombia continues to assert the right to authorize fishing activities in parts of Nicaragua's exclusive economic zone" (*ibid.*, para. 119). But the Court does not address the argument of Colombia that neither DIMAR nor the Governor had authority to issue fishing permits, a matter that was not contradicted on the evidence by Nicaragua.

33. The result is that the only real grounds the Court has for its conclusion that Colombia had issued permits to vessels to fish in Nicaragua's EEZ are the alleged incidents at sea (*ibid.*, paras. 121-130). In this regard, it should be noted that none of these incidents occurred before 27 November 2013, the date the Pact of Bogotá ceased to be in force for Colombia. Thus, to the extent that the Court relies on these incidents to establish responsibility, it is again finding responsibility on the basis of events that occurred after the Court's title of jurisdiction lapsed.

34. Even so, as proof that Colombia issued permits to license fishing vessels within Nicaragua's jurisdiction, this evidence is at best problematic. There is no direct evidence of actual licences, and the Court can only draw inferences from what was reported as having been said. What the evidence does show is that Colombian naval vessels were in the area where at least some of the alleged incidents took place and engaged in communications with fishing vessels and the Nicaraguan coast guard. But as evidence that the vessels concerned had licences issued by Colombian authorities, it really lacks any probative value.

35. The engagement between the Colombian naval vessels and Nicaragua's coast guard in these incidents was not cited by the Court in its consideration of incidents at sea in support of the Nicaraguan claim that Colombia had violated its rights in its EEZ, although that would seem to have been a more appropriate place to consider those incidents. In that context, rather than showing a violation of Nicaragua's rights within its EEZ, these incidents would have justified the Court cautioning Colombia to exercise its rights within Nicaragua's EEZ with due regard to the rights and duties of the coastal State as required by Article 58 of the Convention. That, in my view, would have been a more appropriate disposition of these incidents than using them as an indirect way of concluding that Colombia had been issuing licences to fish in Nicaragua's EEZ.

V.

36. With respect to Colombia's creation of its ICZ, I agree with the Court that Colombia has the right to establish a contiguous zone off the coasts of the islands of the San Andrés Archipelago notwithstanding any overlap with the EEZ of Nicaragua (Judgment, para. 163). As I pointed out earlier, I also agree with the Court that Colombia was not entitled to "simplify" the outer limits of its contiguous zone so that it extended more than 24 nautical miles from the Colombian coast (*ibid.*, para. 175).

37. However, I disagree with the Court's conclusion that the ICZ as established in Presidential Decree 1946 is not in conformity with customary international law (*ibid.*, para. 187). I also disagree with the Court's conclusion that the "expanded powers" asserted in Colombia's ICZ directly infringe on the sovereign rights and jurisdiction of Nicaragua with regard to the conservation, protection and preservation of the marine environment in Nicaragua's EEZ (*ibid.*, para. 178).

38. The objection the Court has is to Article 5 (3) of the Decree, which deals with the material scope of the zone. In the view of the Court, it confers powers on Colombia to exercise control over the infringement of its laws and regulations that extend to matters which are not permitted under customary international law. The Court's conclusion is based on its position that the content of customary international law relating to the contiguous zone is found in Article 33 of UNCLOS, and that Colombia's so-called "expanded powers" are not included in Article 33 (*ibid.*, para. 155). The so-called "expanded powers" of Colombia expressed in Article 5 of Decree 1946, as modified by Article 2 of Decree 1119 of 2014, that the Court found to be outside the scope of the rule reflected in Article 33 of UNCLOS, are laws and regulations related to the integral security of the State, including piracy and trafficking of drugs and psychotropic substances, conduct contrary to the security of the sea and

the national maritime interests, and laws and regulations related to the preservation of the marine environment (Judgment, paras. 177-181)[6].

39. The categories specified in Article 33 of UNCLOS are "customs, fiscal, immigration or sanitary laws and regulations". The question facing the Court was whether the laws and regulations covered in the Colombian Decree fall within the ambit of those Article 33 categories or whether State practice has evolved since the inclusion of those terms of Article 33 of UNCLOS so that today they can be said to cover the categories of laws identified by Colombia. Essentially, the question is whether the security claims of Colombia and the claim relating to the preservation of the marine environment fall within contiguous zone jurisdiction under Article 33 of UNCLOS.

40. As the Court points out, the provisions of Article 33 of UNCLOS were adopted in the 1958 Convention on the Territorial Sea and Contiguous Zone, on the basis of the 1956 work of the International Law Commission (hereinafter the "ILC" or the "Commission"), and have remained unchanged since then (*ibid.*, para. 153). They were then endorsed without change in UNCLOS. A proposal in 1958 to add security to the categories in Article 33 ultimately did not get support[7]. The question, then, is whether, notwithstanding what happened in 1958 and in the UNCLOS negotiations, there is a case today for seeing security and the preservation of the marine environment as matters that fall within the scope of Article 33 of UNCLOS.

41. An alternative to seeing the terms of Article 33 of UNCLOS as static that must be interpreted in the light of the world of 1956 might have led the Court to a different conclusion. The specific claim to including dealing with the trade in drugs would seem to be no more than an enlarged perception of both customs and fiscal laws. Drug trafficking is as much an issue of customs laws as was the smuggling of alcohol whose prosecution was one of the matters covered by the United States' "hovering acts" which laid the basis for the contiguous zone[8]. Equally, sanitary laws in 1958, and still today, concern health. Not seeing the preservation of the environment as an issue that is fundamentally linked to health is also to ignore the reality of today.

42. The justification for seeing contiguous zone jurisdiction in contemporary terms is in fact found in the ILC Commentary to what became

[6] I agree with the Court's conclusion that the inclusion of the exercise of control with respect to archeological and cultural objects found within the EEZ does not violate customary international law (Judgment, para. 186).

[7] *Official Records of the First United Nations Conference on the Law of the Sea* (1958), Vol. II, UN doc. A/CONF.13/38, p. 40, para. 63.

[8] D. P. O'Connell, *The International Law of the Sea: Volume II*, Oxford University Press, 1988, p. 1038. Indeed, the content of the hovering acts themselves evolved over time.

Article 24 of the 1958 Convention and Article 33 of UNCLOS. The Court quotes the relevant part of the Commentary (Judgment, para. 152) but does not draw the necessary inference from it. In the relevant extract from its Commentary, the ILC stated that it had not included special security rights in the draft provisions relating to the contiguous zone, indicating the term was vague and could lead to abuses and thus was not necessary. It then goes on to make the critical statement: "The enforcement of customs and sanitary regulations will be sufficient in most cases to safeguard the security of the State." (Commentary to the articles concerning the law of the sea, *Yearbook of the International Law Commission*, 1956, Vol. II, p. 295, draft Article 66, Comment (4), quoted in Judgment, para. 152.)

43. What the ILC statement shows is that the Commission thought that it was adequately dealing with contemporary issues of security. And this reinforces the view that the purpose of the contiguous zone was precisely to allow States to protect their security. But no one could now consider that what was adequate to safeguard the security concerns of States at the time of the Commentary in 1956 would necessarily parallel contemporary security needs. An assessment of the security needs of States today might well include the suppression of the drug trade and the protection of the marine environment. Indeed, at a time of heightened concern about the impact of climate change, the protection of the marine environment might be seen for some States as their primary security concern. Moreover, the last 20 years have shown that piracy, which might have been dealt with adequately under international law in 1956, has been posing an increasing problem for States in certain regions, including in their territorial seas. It is not surprising then that a State might wish to act in its contiguous zone to prevent piracy within its territorial sea or to punish when piracy has occurred within its territorial sea. Indeed, the fact that a significant number of States have inserted a right to include certain security needs among the matters over which they will exercise contiguous zone jurisdiction is testament to a change in contemporary security needs of States[9].

44. It must be recalled that contiguous zone jurisdiction only enables States to act to prevent and punish in respect of offences committed within the territory of a State or in its territorial sea, namely, offences that are committed within its jurisdiction. It does not grant authority to coastal States to prevent or punish in respect of offences committed within the contiguous zone or beyond.

45. It is the failure to recognize this that has led the Court to its conclusion that the powers asserted under Colombia's ICZ directly infringe

[9] Counter-Memorial of Colombia, Vol. II, Appendix B; Reply of Nicaragua, para. 3.38.

on the sovereign rights and jurisdiction of Nicaragua with respect to the conservation, protection and preservation of the marine environment in Nicaragua's EEZ (Judgment, para. 187). But, as the Court points out earlier in its Judgment, the contiguous zone and the EEZ deal with different things (*ibid.*, paras. 160-161). Nicaragua certainly has jurisdiction over the preservation of the marine environment in its EEZ. And it has no jurisdiction over the protection of the marine environment in the territory of Colombia or in Colombia's territorial sea. By the same token, Colombia, while having jurisdiction within its contiguous zone to prevent and punish in respect of offences in certain categories of matters within its territory and its territorial sea, has no jurisdiction on the basis of its contiguous zone to prevent or punish in respect of offences committed in Nicaragua's EEZ. And since Nicaragua's EEZ does not overlap Colombia's territorial sea, there is no potential for overlapping jurisdiction.

46. Nor does Colombia claim jurisdiction over offences within Nicaragua's territorial sea. Decree 1946, as amended by Decree 1119, makes this clear. It says that Colombia has authority in its contiguous zone to prevent infractions of its laws relating to the integral security of the State "which take place in its insular territories or in their territorial sea" (Art. 5 (3) *(a)* of Decree 1946, as amended by Decree 1119, quoted in Judgment, para. 170). And it goes on to say that "[i]n the same manner" violations of the laws relating to the preservation of the environment will be prevented and controlled *(ibid.)*. "In the same manner" can only mean that the authority asserted in respect of the environment is no different than the authority asserted in respect of security. And in respect of the other element of contiguous zone jurisdiction, the power to punish, the Decree states that it relates to the above-mentioned matters "committed in its island territories or in their territorial sea" (Art. 5 (3) *(b)* of Decree 1946, as amended by Decree 1119, quoted in Judgment, para. 170).

47. None of this involves a claim to exercise jurisdiction in respect of offences committed in the contiguous zone itself or in the EEZ of Nicaragua. Thus, the regulation adopted by Colombia makes no claim to "ensure their implementation in part of Nicaragua's exclusive economic zone" as asserted by the Court (*ibid.*, para. 178). Colombia's claim in respect of the prevention of the environment is no different than its claim in respect of customs, fiscal, immigration and sanitary rights — that is, to prevent and punish in respect of offences committed on Colombia's territory or in its territorial sea.

48. In my view, this was an appropriate case for the Court to interpret Article 33 of UNCLOS in an evolutionary manner. Evolutionary (or evo-

lutive) interpretation has been accepted in the jurisprudence of the Court[10]. A provision which, in 1956, the ILC saw as its purpose to protect the security needs of States must be interpreted today in a way that reflects contemporary security needs. On this basis, all of the matters identified in Colombia's Presidential Decree 1946 reflect contemporary security needs of some if not all States — piracy, suppression of the drug trade, maritime security and the protection of the (marine) environment — and thus should be seen as legitimate matters to be covered under the contiguous zone jurisdiction of States.

VI.

49. I turn now to Colombia's two counter-claims, (A) Traditional and artisanal fishing rights and (B) Straight baselines. I disagree with the Court's findings in respect of each counter-claim.

A.

50. I have voted against the Court's rejection of all remaining issues in the eighth subparagraph of the operative clause because I do not agree with the Court that

> "Colombia has failed to establish that the inhabitants of the San Andrés Archipelago, in particular the Raizales, enjoy artisanal fishing rights in waters now located in Nicaragua's exclusive economic zone, or that Nicaragua has, through the unilateral statements of its Head of State, accepted or recognized their traditional fishing rights, or legally undertaken to respect them" (Judgment, para. 231).

51. In my view, the Court has failed to address what is a critical, and to some extent unique, aspect of Colombia's counter-claim and this has had an impact on the way the Court has both assessed the evidence of traditional fishing rights and viewed the statements of Nicaragua's President.

52. Colombia's third counter-claim relating to traditional or artisanal fishing rights was articulated by Colombia in a number of different ways. It was referred to as a claim in respect of the inhabitants of the San Andrés

[10] See, for example, *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, pp. 242-243, paras. 64-66; see also *Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 247, para. 45.

Archipelago "in particular the Raizales"[11] or "including the Raizales"[12] or the "traditional, historic fishing rights of the Raizales and the other fishermen of the Archipelago"[13]. What is common about all of these formulations is that they identify two groups: the Raizales, and the other inhabitants of the San Andrés Archipelago. The Raizales are included within the inhabitants of the San Andrés Archipelago but are also seen as distinct from the other inhabitants of the Archipelago.

53. In its Counter-Memorial, Colombia identified the Raizales as "descendants of the enslaved Africans and the original Dutch, British and Spanish settlers" which "have acquired through the centuries their own specific culture"[14]. The Counter-Memorial also claims that "[s]ince time immemorial, they [the Raizales] have navigated all of the Southwestern Caribbean in search of resources, such as fish and turtles"[15].

54. While Nicaragua's pleadings refer to the fishing practices of the inhabitants of the San Andrés Archipelago "including the indigenous Raizal people"[16] and on another occasion simply "the Raizal people"[17], their pleadings tend to treat the inhabitants of the San Andrés Archipelago as a single group. The main argument of Nicaragua is that traditional or artisanal rights did not survive the creation of the EEZ[18] and, thus, regardless of any claim to traditional or artisanal fishing, no such right exists within the EEZ. In Nicaragua's pleadings no independent right exists for the Raizales, but rather the rights that are claimed by Colombia are rights in respect of all of the inhabitants of the San Andrés Archipelago.

55. Having described the origins of the Raizales and the fact that they had fished in the south-western Caribbean for centuries, Colombia characterizes the Raizales as "indigenous fishermen"[19]. They are, Colombia says, a "distinct ethnic and cultural community" who "navigated, traded and fished in this area of the Southwestern Caribbean Sea before and after the coming into existence of Nicaragua and Colombia as independent States"[20].

56. In describing the Raizales in this way, Colombia is clearly creating a category that is separate from other claimants to traditional or artisanal fishing rights. The way that Colombia articulates this claim for the Raizales as a separate and distinct group and in particular the reference to the Raizales as "indigenous fishermen" suggests an analogy with indigenous

[11] Rejoinder of Colombia, Vol. I, paras. 5.1 and 5.74, and submission II.3; CR 2021/18, p. 75, submission II.3 (Arrieta Padilla).
[12] Rejoinder of Colombia, Vol. I, para. 5.76.
[13] Counter-Memorial of Colombia, Vol. I, para. 9.25.
[14] *Ibid.*, para. 2.64.
[15] *Ibid.*
[16] Reply of Nicaragua, para. 6.1.
[17] *Ibid.*, para. 6.3.
[18] *Ibid.*, para. 6.5; Judgment, para. 208.
[19] Counter-Memorial of Colombia, Vol. I, para. 2.68.
[20] Rejoinder of Colombia, Vol. I, para. 5.10.

rights, rights that have most recently found expression in the United Nations Declaration on the Rights of Indigenous Peoples[21].

57. There is no accepted definition of who constitute indigenous peoples, but indicia of indigeneity include:

> "(i) communal attachments to 'place'; (ii) historical precedence over dominant societies; (iii) experience of severe disruption, dislocation and exploitation; (iv) 'historical continuity'; (v) ongoing oppression/exclusion by dominant societal groups; (vi) distinct ethnic/cultural groups; and (vii) self-identification as an indigenous community"[22].

It has been argued that not all of the indicia are necessary in order to establish entitlement to indigenous rights[23]. In any event, it is clear that the attribution of the terms "indigenous" to a people is a potentially complex task. Thus, it is not possible to reach any conclusion on whether the Raizales are properly termed "indigenous" but, as described by Colombia in its pleadings, the Raizales clearly meet many of the above indicia suggesting that at the very least an analogy with indigenous rights is appropriate.

58. Treating the situation of the Raizales as akin to that of indigenous peoples finds indirect support in the position of Nicaragua in the pleadings in this case and direct support in the statements of President Ortega. Although Nicaragua's pleadings assimilate the Raizales to the other inhabitants of the San Andrés Archipelago, they refer to the Raizales as "Raizal people" reinforcing a separateness from those other inhabitants of the Archipelago (see paragraph 54 above).

59. President Ortega has consistently used language that emphasizes the analogy of the Raizales with indigenous peoples. Shortly after the 2012 Judgment of the Court was delivered, President Ortega spoke of the "Raizal brethren" and of being respectful of "the Principle of Native Peoples" and of respect for their right to fish and navigate where they have historically navigated[24]. He later spoke of the "historical rights" of the

[21] United Nations General Assembly resolution 61/295 "United Nations Declaration on the Rights of Indigenous Peoples" (adopted on 13 September 2007), UN doc. A/RES/61/295 (2 October 2007).

[22] S. Allen, N. Bankes, E. L. Enyew and O. Ravna, "Introduction", in S. Allen, N. Bankes and O. Ravna (eds.), *The Rights of Indigenous Peoples in Marine Areas*, Oxford, Hart Publishing, 2019, p. 10; a similar approach is found in "Standard-setting activities: Evolution of standards concerning the rights of indigenous people: Working Paper by the Chairperson-Rapporteur, Mrs. E.-I. A. Daes, on the concept of 'indigenous people'", UN doc. E/CN.4/Sub.2/AC.4/1996/2, 10 June 1996, para. 69.

[23] S. Allen, N. Bankes, E. L. Enyew and O. Ravna, "Introduction", in S. Allen, N. Bankes and O. Ravna (eds.), *The Rights of Indigenous Peoples in Marine Areas*, Oxford, Hart Publishing, 2019, p. 10.

[24] Memorial of Nicaragua, Ann. 27.

Raizal people[25]. He also spoke of the rights of the Raizal people as rights of "Original People"[26]. All of this is the language of indigenous rights, not just the language of traditional or artisanal fishing rights.

60. Furthermore, President Ortega spoke of allowing the rights of the Raizales to "continue", and of "ensur[ing]" those rights[27]. The context clearly shows that what was being assured was the continuation of existing rights, not the creation of new rights where none had existed before. President Ortega's proposal for a "commission" was for a body to ensure the orderly continuation of existing Raizal fishing. It was to help locate "where the [R]aizal people can fish in exercise of their historic rights"[28]. It was not a commission that would create a new right to fish.

61. In short, when viewed from the perspective of Raizal rights as the rights of a specific group with a strong analogy to indigenous rights, then President Ortega's statements have much more meaning. They are not just an expression about claims of the inhabitants of the San Andrés Archipelago to traditional or artisanal fishing. Nor can they be explained away as President Ortega wanting to be diplomatic or avoiding controversy and appeasing Colombia[29]. They are a recognition and validation of the claims of a particular community of "original peoples" to continue fishing as they had in the past.

62. Viewing the rights of the Raizales through an analogy with indigenous rights has certain consequences for the conclusions reached by the Court. The Court assesses the statements of President Ortega in terms of whether they could constitute recognition of traditional or artisanal fishing rights or of a right to fish without prior authorization (Judgment, para. 227). The Court also considers whether President Ortega's statements constituted a unilateral declaration undertaking legal obligations (*ibid.*, paras. 228-230). But a more appropriate focus would have been to consider what President Ortega was saying about the Raizales. He called them "original people", "native people", and spoke of their "ancestral rights". The traditional fishing rights of the Raizales that he spoke of,

[25] Counter-Memorial of Colombia, Vol. II, Ann. 74.

[26] Rejoinder of Colombia, Vol. II, Ann. 6.

[27] See, for example, Memorial of Nicaragua, Ann. 27: "we [Nicaragua] fully respect their right to fish and to navigate those waters, which they have historically navigated, and have also survived from the marine resources"; Counter-Memorial of Colombia, Vol. II, Ann. 73: "we [Nicaragua] will respect the historical rights that they (the Raizals) have had over those territories. We will find the mechanisms to ensure the right of the Raizal people to fish, in San Andrés".

[28] Counter-Memorial of Colombia, Vol. II, Ann. 76.

[29] Reply of Nicaragua, para. 6.65; Additional pleading of Nicaragua, para. 2.29; CR 2021/16, pp. 24-25, paras. 29-32 (Martin).

were rights that flowed from their status as Raizal people. This is evidenced clearly when President Ortega argues for a commission to delimit where the Raizales are to exercise their fishing rights. He said: "they already have a permanent permit there, they do not have to be going for a permit every day, why? Because they are in their lands, they are in their waters, they are in their natural habitat."[30] In short, for President Ortega, the right to a fishery was an inherent consequence of who the Raizal people were. Their fishing in what were now Nicaragua's waters was their right because it was in "their lands", in "their waters". It was, President Ortega said, the Raizales "natural habitat"[31].

63. The language and imagery President Ortega used is consistent with indigenous rights. And his statements should also be considered against the background of the jurisprudence of the Inter-American Court of Human Rights which has consistently held that "tribal and indigenous peoples" have rights to the natural resources that they have traditionally used[32]. In light of such developments in the Inter-American Court, it is not surprising that a president of a Latin American country would refer to the Raizales in the language that President Ortega used.

64. The fishing rights of indigenous peoples are recognized in the United Nations Declaration on the Rights of Indigenous Peoples. Article 26, paragraph 1, provides: "Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired."[33] This clearly covers indigenous fishing rights.

65. However, the Court concludes that Colombia has not established that the Raizales enjoyed traditional rights to fishing in Nicaragua's EEZ. This conclusion is based on a rejection of affidavit evidence of fishers provided by Colombia. But this is problematic in two ways. First, the standard the Court set for establishing traditional fishing rights is essentially one that could never be reached. Second, the Court failed to see the link between what was claimed in respect of the Raizales and what was said about them, and about their right to fish in Nicaragua's EEZ.

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[30] Rejoinder of Colombia, Vol. II, Ann. 6.

[31] *Ibid.*

[32] Inter-American Court of Human Rights (IACtHR), *Saramaka People* v. *Suriname*, Judgment of 28 November 2007, Series C, No. 172, p. 36, para. 121: "members of tribal and indigenous communities have the right to own the natural resources they have traditionally used within their territory for the same reasons that they have a right to own the land they have traditionally used and occupied for centuries"; IACtHR, *Kichwa Indigenous People of Sarayaku* v. *Ecuador*, Judgment of 27 June 2012, Series C, No. 245, para. 146: "the protection of the territories of indigenous and tribal peoples also stems from the need to guarantee the security and continuity of their control and use of natural resources, which in turn allows them to maintain their way of living".

[33] United Nations General Assembly resolution 61/295 "United Nations Declaration on the Rights of Indigenous Peoples" (adopted on 13 September 2007), UN doc. A/RES/61/295 (2 October 2007).

66. With regard to the assessment of affidavit evidence, as the Court itself notes, it is unrealistic to expect that evidence of what happened centuries ago can be gleaned from the affidavits of contemporary fishers, particularly when their culture is not a written one. It is not surprising, therefore that the Court concluded that the affidavit evidence had nothing to say about the location of fishing of the Raizales some two hundred years ago (Judgment, para. 221).

67. But if the claims in respect of the Raizales were seen as analogous to claims to indigenous rights then a different approach must be taken. In this regard, the Court failed to appreciate the import of what President Ortega said. All of President Ortega's statements were about the right of the Raizales to engage in fishing in Nicaragua's EEZ. For President Ortega it went without saying that the original peoples, the Raizales, fished within the waters that were now subject to Nicaraguan jurisdiction. It did not require affidavit evidence of such practices.

68. Viewing the claims of the Raizales as akin to indigenous rights also makes irrelevant another part of the Court's reasoning, that relating to the position taken by the Ministry of Labour of the Colombian Government in a complaint brought before the International Labour Organization relating to the impact of the 2012 Judgment on the Raizales and other fishers of the San Andrés Archipelago (*ibid.*, paras. 222-223). The rights of the Raizales that President Ortega was referring to are not rights that can be abandoned by a department of a government seeking to protect the reputation of its government in another international forum.

69. In my view, the Court has failed to appreciate the real nature of the claim relating to the Raizales in respect of the third counter-claim. It has reached a conclusion that does not accord with the entitlement of the Raizales as reflected in the words of President Ortega — that the Raizales had fished in waters that were now within the Nicaraguan EEZ and that, by virtue of their particular status as "original peoples", they were entitled to continue that fishing. All that was needed was an arrangement between Nicaragua and Colombia to ensure the effective implementation of that right to continue fishing.

70. In paragraph 232, the Court supports the negotiation of an agreement between Nicaragua and Colombia regarding access by the Raizales community to fisheries within Nicaragua's EEZ. The fact that the Court singles out the Raizales specifically and does not speak of an agreement for all the inhabitants of the San Andrés Archipelago is a clear indication that the Court was at least implicitly treating the Raizales as a distinct group. The negotiation of an agreement is an important step, but it is unfortunate that the Court did not couple this recommendation with an affirmation of the rights that the Raizales have. The purpose of such an agreement should not be to grant rights to the Raizales. Rather, an agreement would, as President Ortega anticipated, provide the modalities to ensure that the Raizales could continue

to exercise their right to a resource that they had traditionally fished but which as a result of the 2012 Judgment was now in Nicaragua's EEZ.

B.

71. I have voted against the Court's conclusion that Nicaragua's straight baselines do not conform with customary international law. I did so because, in my view, the Court has based its decision on a decontextualized application of the law relating to drawing straight baselines and ignored State practice which should have been taken into account in interpreting the relevant provisions of customary international law.

72. The Court notes that the Parties accept that Article 7 of UNCLOS reflects customary international law on drawing straight baselines and concludes itself that this is so (Judgment, paras. 241-242). As result, the issue before the Court is whether Nicaragua's straight baselines meet the requirements of Article 7.

73. In interpreting Article 7, the Court focuses on the criteria in paragraph 1 of that Article that straight baselines can apply in localities where the coastline "is deeply indented and cut into" or whether there is a "fringe of islands along the coast in its immediate vicinity". In respect of Nicaragua's baseline between points 8 and 9 the Court asks whether the coast in the area meets the requirement of being "deeply indented and cut into" (*ibid.*, para. 245). The baselines between points 1 and 8 are tested by reference to whether there is a "fringe of islands" along the coast (*ibid.*, para. 247).

74. The terms of Article 7 are essentially a direct reflection of what was said in the 1951 Judgment in the *Fisheries (United Kingdom* v. *Norway)* case[34]. Thus, the terms constitute a description of the coasts of Norway as perceived in that Judgment. The difficulty is how to apply these terms to coasts that are not identical to those of Norway[35]. Thus, the challenge for the Court was to give meaning to the terms "deeply indented and cut into" or "fringe of islands" along the coast that can be readily applied to the coastal configurations in this case and can be used as guidance for States in applying Article 7 to their own coastlines.

75. Unfortunately, I do not consider that the Court has done this. It has taken the idea expressed in the language of "deeply indented and cut into" and applied it by saying that the coastal indentations of the Nicaragua coast "do not penetrate sufficiently inland or present characteristics

[34] *Fisheries (United Kingdom* v. *Norway), Judgment, I.C.J. Reports 1951*, p. 116; see M. H. Nordquist, S. N. Nandan and S. Rosenne (eds.), *United Nations Convention on the Law of the Sea, 1982: A Commentary*, Vol. II, Dordrecht: Martinus Nijhoff, 1985, para. 7.1.

[35] See T. Scovazzi, "Baselines", *Max Planck Encyclopedia of Public International Law*, article last updated in June 2007, para. 20.

sufficient for the Court to consider the said portion as 'deeply indented and cut into'" (Judgment, para. 245). Resorting to the language of the 1951 Judgment, the Court refers to requirements of the coast being of a "very distinctive configuration" or not "broken along its length", or indentations "often penetrating great distances inland" *(ibid.)*. None of this is any more precise than the phrase "deeply indented or cut into" of Article 7. The impression left is that the conclusion is based not on clear criteria but on a subjective impression of what "deeply indented and cut into" means.

76. The same applies to the Court's treatment of the term "fringe of islands". The Court notes that in its 2012 Judgment it had referred to islands off Nicaragua's coast as "fringing islands", but states that it did not do so as an interpretation of Article 7 (*ibid.*, para. 249). The fact that it had used the term "fringe of islands" apparently to mean something different from the term "fringe of islands" in Article 7, should itself have alerted the Court to the perils of trying to apply the term. The closest the Court comes to elucidating the meaning of a "fringe of islands" is when it says that "the phrase 'fringe of islands' implies that there should not be too small a number of such islands relative to the length of coast" (*ibid.*, para. 252) and when it says, "a 'fringe' must enclose a set, or cluster of islands which present an interconnected system with some consistency or continuity" (*ibid.*, para. 254). But while such statements can provide an image of what the Court is seeking to establish, the link between them and the Court's conclusion that it "is not satisfied . . . that the number of Nicaragua's islands . . . is sufficient to constitute a 'fringe of islands' along Nicaragua's coast" (*ibid.*, para. 252) or that they "are not sufficiently close to each other to form a coherent 'cluster' or a 'chapelet' along the coast and are not sufficiently linked to the land domain" (*ibid.*, para. 256) is simply not evident. In elaborating on the requirements for a fringe of islands the Court also refers to islands having "a masking effect" (*ibid.*, para. 254), but this is as imprecise as the terms to which it is supposed to give content.

77. What is missing from the Court's analysis is a treatment of State practice in drawing straight baselines. The imprecision of the terms in Article 7 might well be lessened by considering how States in practice have interpreted and applied those provisions. There are many examples of State practice in drawing straight baselines, including the practice of Colombia itself[36]. And when viewed against that practice, the straight baselines of Nicaragua do not seem to be out of line with the way States are interpreting Article 7. It is true that straight baselines are sometimes

[36] See International Law Association, "Baselines under the International Law of the Sea: Final Report", *ILA Reports of Conferences*, Vol. 78 (2018), especially p. 124, para. 20, p. 126, para. 25, and p. 160, para. 105, with further references therein.

objected to by neighbouring States, but even those instances are relatively rare. There is simply no widespread objection by States to the way straight baselines have been drawn[37]. Only one State has consistently objected to straight baselines, reflecting its own view of what is appropriate. In light of this, it might have been prudent for the Court to have been guided by what States have been doing when establishing straight baselines.

78. In short, what the Court has done is measure Nicaragua's baselines against an impression created by the words in Article 7, rather than giving concrete content to the words that would reduce subjectivity and provide guidance not only on how the conclusion was reached in this case but on how States should in the future be guided in the interpretation of Article 7. And this has been done without reference to State practice. Yet there is significant State practice which can throw light on how Article 7 has been interpreted and, if taken into account, would lead to a contrary conclusion.

79. Ultimately, in my view, this was not the case for the Court to provide a definitive interpretation of Article 7. It came by way of counter-claim, not as a principal claim, from a State that itself had drawn straight baselines that do not appear dissimilar from the baselines it is challenging. The case raised questions about how to assess the relevance of scale on the maps used to depict the baselines. It involved challenges to the status of features that were claimed to be islands and to the legitimacy of using them as base points. Yet the Parties did not ask the Court to appoint a technical expert who could provide guidance on aspects of the pleadings of the Parties that would have enabled the Court to reach definitive conclusions on some of these questions.

80. There is no doubt that the law relating to straight baselines is in need of clarification and perhaps the day will come when an appropriate case comes before the Court, where the matter can be considered fully with a complete articulation by the parties of all the issues, and technical support provided for the Court. Unfortunately, that is not this case. I am concerned therefore that what the Court has done will increase uncertainty in this area, rather than providing clarification, and will leave States in considerable doubt about how to assess whether their straight baselines meet the requirements of Article 7.

(Signed) Donald M. McRae.

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[37] See International Law Association, "Baselines under the International Law of the Sea: Final Report", *ILA Reports of Conferences*, Vol. 78 (2018), p. 127, para. 27: "Not entirely surprisingly, the number of States which have protested relevant state practice in this regard [i.e. in relation to the drawing of straight baselines], in proportion to the number of potentially interested States, is very small."