



# INTERNATIONAL COURT OF JUSTICE

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## Summary

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

#### I. GENERAL BACKGROUND (PARAS. 25-32)

The Court begins by recalling the geographical and legal background of the case. It notes in particular that the maritime spaces with which the present proceedings are concerned are located in the Caribbean Sea, and that, in the Judgment rendered by the Court on 19 November 2012 in the case concerning *Territorial and Maritime Dispute (Nicaragua v. Colombia)* (hereinafter the “2012 Judgment”), it decided that Colombia had sovereignty over certain islands and established a single maritime boundary delimiting the continental shelf and the exclusive economic zones of Nicaragua and Colombia up to the 200-nautical-mile limit from the baselines from which the territorial sea of Nicaragua is measured. However, the precise location of the eastern endpoints of the maritime boundary could not be determined because Nicaragua had not yet notified the Secretary-General of the United Nations of the location of those baselines.

The Court notes that, in the present case, Nicaragua alleges that Colombia has violated Nicaragua’s sovereign rights and jurisdiction in Nicaragua’s exclusive economic zone in various ways. First, it contends that Colombia has interfered with Nicaraguan-flagged or Nicaraguan-licensed fishing and marine scientific research vessels in this maritime zone in a series of incidents involving Colombian naval vessels and aircraft. Nicaragua also claims that Colombia repeatedly directed its naval frigates and military aircraft to obstruct the Nicaraguan Navy in the exercise of its mission in Nicaraguan waters. Secondly, Nicaragua states that Colombia has granted permits for fishing and authorizations for marine scientific research in Nicaragua’s exclusive economic zone to Colombians and nationals of third States. Thirdly, Nicaragua alleges that Colombia has violated its exclusive sovereign right to explore and exploit the natural resources in its exclusive economic zone by offering and awarding hydrocarbon blocks encompassing parts of that zone.

Nicaragua further objects to Presidential Decree No. 1946 of 9 September 2013, as amended by Decree No. 1119 of 17 June 2014 (hereinafter “Presidential Decree 1946”), whereby Colombia established an “integral contiguous zone”, which “ostensibly unified the maritime ‘contiguous zones’ of all of Colombia’s islands, keys and other maritime features in the area”. Nicaragua claims that the “integral contiguous zone” overlaps with waters attributed by the Court to Nicaragua as its exclusive economic zone and therefore “substantially transgresses areas subject to Nicaragua’s exclusive sovereign rights and jurisdiction”. Nicaragua further claims that the Decree violates customary international law and that its mere enactment engages Colombia’s international responsibility.

In its counter-claims, Colombia first asserts that the inhabitants of the San Andrés Archipelago, in particular the Raizales, enjoy artisanal fishing rights in the traditional fishing banks located beyond the territorial sea of the islands of the San Andrés Archipelago. It contends that Nicaragua has infringed the traditional fishing rights of the inhabitants of the San Andrés Archipelago to access their traditional fishing banks located in the maritime areas beyond the territorial sea of the islands of the San Andrés Archipelago and those banks located in the Colombian maritime areas, access to which requires navigating outside the territorial sea of the islands of the San Andrés Archipelago.

Secondly, Colombia challenges the lawfulness of Nicaragua's straight baselines established by Decree No. 33-2013 of 19 August 2013 (hereinafter "Decree 33"), which was enacted by Nicaragua on 27 August 2013 and then amended in 2018. More specifically, Colombia contends that the straight baselines, which connect a series of maritime features appertaining to Nicaragua east of its continental coast in the Caribbean Sea, have the effect of pushing the external limit of its territorial sea far east of the 12-mile limit permitted by international law, expanding Nicaragua's internal waters, territorial sea, contiguous zone, exclusive economic zone and continental shelf. According to Colombia, Nicaragua's straight baselines thus directly impede the rights and jurisdiction to which Colombia is entitled in the Caribbean Sea.

Before examining Nicaragua's claims and Colombia's counter-claims, the Court first addresses the scope of its jurisdiction *ratione temporis*, an issue raised by Colombia in its Counter-Memorial.

## **II. SCOPE OF THE JURISDICTION *RATIONE TEMPORIS* OF THE COURT (PARAS. 33-47)**

In its 2016 Judgment, the Court concluded that it had jurisdiction, on the basis of Article XXXI of the Pact of Bogotá, to entertain 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. The question now before the Court is whether its jurisdiction over that dispute extends to facts or events that allegedly occurred after 27 November 2013, the date on which the Pact ceased to be in force for Colombia.

The Court considers that there is nothing in its jurisprudence to suggest that the lapse of the 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. In the view of the Court, the criteria that it has considered relevant in its jurisprudence to determine the limits *ratione temporis* of its jurisdiction with respect to a claim or submission made after the filing of the application, or the admissibility thereof, should apply to the Court's examination of the scope of its jurisdiction *ratione temporis* in the present case.

The Court notes that, in cases involving the adjudication of a claim or submission made after the filing of the application, it has in such instances 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. With regard to facts or events subsequent to the filing of the application, the Court has affirmed the relevance of criteria relating to "continuity" and "connexity" for determining limits *ratione temporis* to its jurisdiction.

In the 2016 Judgment, the Court did not address the question of jurisdiction *ratione temporis* with regard to those alleged incidents that occurred after the denunciation of the Pact of Bogotá came into effect. However, its Judgment implies that the Court has jurisdiction to examine every aspect of the dispute that the Court found to have existed at the time of the filing of the Application. It follows that the task of the Court is to decide whether the incidents alleged to have occurred after the lapse of the jurisdictional title meet the aforementioned criteria drawn from the Court's jurisprudence.

The Court observes that the incidents said to have occurred after 27 November 2013 generally concern Colombian naval vessels and aircraft allegedly interfering with Nicaraguan fishing activities and marine scientific research in Nicaragua's maritime zones, Colombia's alleged policing operations and interference with Nicaragua's naval vessels in Nicaragua's maritime waters and Colombia's alleged authorization of fishing activities and marine scientific research in Nicaragua's exclusive economic zone. These alleged incidents are of the same nature as those that allegedly occurred before 26 November 2013. They all give rise to the question whether Colombia has breached its international obligations under customary international law to respect Nicaragua's rights in the latter's exclusive economic zone, a question which concerns precisely the dispute over which the Court found it had jurisdiction in the 2016 Judgment.

In light of the foregoing considerations, the Court concludes that the claims and submissions made by Nicaragua in relation to incidents that allegedly occurred after 27 November 2013 arose directly out of the question which is the subject-matter of the Application, that those alleged incidents are connected to the alleged incidents that have already been found to fall within the Court's jurisdiction, and that consideration of those alleged incidents does not transform the nature of the dispute between the Parties in the present case. The Court therefore has jurisdiction *ratione temporis* over Nicaragua's claims relating to those alleged incidents.

### **III. ALLEGED VIOLATIONS BY COLOMBIA OF NICARAGUA'S RIGHTS IN ITS MARITIME ZONES (PARAS. 48-199)**

The dispute between the Parties in the present case raises questions concerning the rights and duties of the coastal State and the rights and duties of other States in the exclusive economic zone. The Applicant and the Respondent agree that the applicable law between them is customary international law.

#### **A. Colombia's contested activities in Nicaragua's maritime zones (paras. 49-144)**

##### **1. Incidents alleged by Nicaragua in the south-western Caribbean Sea (paras. 49-101)**

The Court notes that customary rules on the rights and duties in the exclusive economic zone of coastal States and other States are reflected in several articles of the United Nations Convention on the Law of the Sea (hereinafter "UNCLOS"), including Articles 56, 58, 61, 62 and 73.

The Court further notes that, in considering whether the evidence establishes the violations of customary international law alleged by Nicaragua, it will be guided by its jurisprudence on questions of proof. The Court recalls that, as a general rule, it is for the party which alleges a particular fact in support of its claims to prove the existence of that fact. The Court will treat with caution evidentiary materials prepared for the purposes of a case, as well as evidence from secondary sources. It will consider evidence that comes from contemporaneous and direct sources to be more probative and credible. The Court will also give particular attention to reliable evidence acknowledging facts or conduct unfavourable to the State represented by the person making them. Finally, while press articles and documentary evidence of a similar secondary nature are not capable of proving facts, they can corroborate, in some circumstances, the existence of facts established by other evidence.

Upon examination of the evidence submitted by Nicaragua, the Court finds that for many alleged incidents, Nicaragua seeks to establish that Colombian naval vessels violated Nicaragua's rights in its maritime zones; yet its evidence does not prove, to the satisfaction of the Court, that Colombia's conduct in Nicaragua's exclusive economic zone went beyond what is permitted under customary international law as reflected in Article 58 of UNCLOS. In relation to a number of other alleged incidents, Nicaragua's evidence is primarily based on what fishermen reported to the owners of their vessels, on materials that were apparently prepared for the purposes of the present case

without other corroborating evidence, on audio recordings that are not sufficiently clear, or on media reports that either do not indicate the source of their information or are otherwise uncorroborated. The Court does not consider that such evidence suffices to establish Nicaragua's allegations against Colombia. It is of the view that, with regard to the alleged incidents referred to above, Nicaragua has failed to discharge its burden of proof to establish a breach by Colombia of its international obligations. The Court therefore dismisses those allegations for lack of proof.

With regard to the rest of the alleged incidents, the Court considers that a number of facts on which Nicaragua's claim rests are established. First of all, as to many of the alleged incidents, the evidence supports Nicaragua's allegations regarding the location of Colombian frigates (see the alleged incidents of 17 November 2013; 27 January 2014; 12 and 13 March 2014; 3 April 2014; 28 July 2014; 21 August 2016; 6 and 8 October 2018). Further, Colombia's own naval reports and navigation logs, as contemporaneous documents, also corroborate the specific geographic co-ordinates presented by Nicaragua, which lie within the area east of the 82° meridian, often in the fishing ground at or around Luna Verde, located within the maritime area that was declared by the Court to appertain to Nicaragua.

Moreover, the Colombian naval vessels purported to exercise enforcement jurisdiction in Nicaragua's exclusive economic zone (see the alleged incidents of 27 January 2014; 13 March 2014; 3 April 2014; 28 July 2014; 26 March 2015; 21 August 2016). In communications with Nicaraguan naval vessels and fishing vessels operating in Nicaragua's exclusive economic zone, Colombian naval officers, at times reading from a government proclamation, requested Nicaraguan fishing vessels to discontinue their fishing activities, alleging that those activities were environmentally harmful and were illegal or not authorized. These officials also stated to the Nicaraguan vessels that the maritime spaces concerned were Colombian jurisdictional waters over which Colombia would continue to exercise sovereignty on the basis of the determination by the Colombian Government that the 2012 Judgment was not applicable. 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.

The Court notes that Colombia relies on two legal grounds to justify its conduct at sea. First, Colombia claims that its actions, even if proved, are permitted as an exercise of its freedoms of navigation and overflight. Secondly, Colombia asserts that it has an international obligation to protect and preserve the marine environment of the south-western Caribbean Sea and the habitat of the Raizales and other inhabitants of the Archipelago.

According to customary international law on the exclusive economic zone, Nicaragua, as the coastal State, enjoys sovereign rights to manage fishing activities and jurisdiction to take measures to protect and preserve the maritime environment in its exclusive economic zone. The evidence before the Court shows that the conduct of Colombian naval frigates in Nicaraguan maritime zones was not limited to "observing" predatory or illegal fishing activities or "informing" fishing vessels of such activities, as claimed by Colombia. This conduct often amounted to 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. The Court considers that Colombia's legal arguments do not justify its conduct within Nicaragua's exclusive economic zone. Colombia's conduct is in contravention of customary rules of international law as reflected in Articles 56, 58 and 73 of UNCLOS.

In light of the foregoing considerations, the Court finds that Colombia has violated its international obligation to respect Nicaragua's sovereign rights and jurisdiction in the latter's exclusive economic zone by interfering with fishing activities and marine scientific research by Nicaraguan-flagged or Nicaraguan-licensed vessels and with the operations of Nicaragua's naval vessels, and by purporting to enforce conservation measures in that zone.

## **2. Colombia's alleged authorization of fishing activities and marine scientific research in Nicaragua's exclusive economic zone (paras. 102-134)**

Before turning to the evidence relating to the incidents at sea alleged by Nicaragua, the Court first considers the resolutions under which Nicaragua claims Colombia authorized fishing by Colombian-flagged and foreign vessels in Nicaragua's exclusive economic zone.

The resolutions in question were issued by two Colombian governmental authorities: the General Maritime Directorate of the Ministry of National Defence of Colombia (hereinafter "DIMAR") and the Governor of the San Andrés Archipelago. With regard to the DIMAR resolutions, the Court observes that they do not specify the extent of the jurisdiction of the San Andrés and Providencia Harbour Master's Offices, a crucial issue for the purposes of the present case. Thus, on the basis of the resolutions themselves, the Court cannot determine whether the geographical scope of the area in which the listed fishing vessels were authorized to operate extends into Nicaragua's maritime spaces. As regards the resolutions of the Governor of the San Andrés Archipelago, the Court notes that the express inclusion of the fishing ground "*La Esquina or Luna Verde*" in the fishing zone described in resolutions issued after the 2012 Judgment suggests that Colombia continues to assert the right to authorize fishing activities in parts of Nicaragua's exclusive economic zone. The Court then examines the alleged incidents at sea to determine whether Colombia authorized fishing activities and marine scientific research in Nicaragua's exclusive economic zone.

The Court considers that the evidence presented by the Parties reveals at least three facts. First, the fishing vessels allegedly authorized by Colombia did engage in fishing activities in Nicaragua's exclusive economic zone during the relevant time. Secondly, such fishing activities were often conducted under the protection of Colombian frigates. Thirdly, Colombia recognizes that the Luna Verde area is in Nicaragua's exclusive economic zone.

As regards Colombia's alleged authorization of marine scientific research in Nicaragua's exclusive economic zone, the Court cannot find in the resolutions before it any express reference to authorization of marine scientific research operations. Without other credible evidence to corroborate Nicaragua's claim in this regard, the Court cannot draw a conclusion from the available evidence that Colombia also authorized marine scientific research in Nicaragua's exclusive economic zone.

On the basis of the above considerations, the Court concludes that Colombia has violated Nicaragua's sovereign rights and jurisdiction in its exclusive economic zone by authorizing vessels to conduct fishing activities in Nicaragua's exclusive economic zone.

## **3. Colombia's alleged oil exploration licensing (paras. 135-143)**

The Court first addresses the admissibility of Nicaragua's claim concerning Colombia's alleged oil exploration licensing.

The Court notes that Nicaragua's allegation regarding Colombia's oil exploration licensing concerns the question whether Colombia has violated Nicaragua's sovereign rights in the exclusive economic zone. Although a different kind of activity is involved, Nicaragua's claim does not transform the subject-matter of the dispute as stated in the Application, since the dispute between the Parties involves the rights of the Parties in all maritime zones as delimited by the 2012 Judgment. The Court is of the view that Nicaragua's claim arises directly out of the question which is the subject-matter of the Application, and that it is therefore admissible.

Regarding the merits of the claim, the Court is of the opinion that the evidence shows, including by Nicaragua's own account, that Colombia offered 11 oil concession blocks for licensing and awarded two blocks in 2011, at a time when the maritime boundary between the Parties had not yet been delimited. The documents before the Court also demonstrate that signature of the contracts

for the said petroleum blocks was first suspended by the parties concerned in 2011 and later by a decision of the administrative tribunal of San Andrés, Providencia and Santa Catalina in 2012. Nicaragua also concedes that, to date, the contracts in question have not been signed. As regards the facts since then, there is no credible evidence that the National Hydrocarbon Agency still intends to offer and award those blocks. The Court notes in this regard that Nicaragua did not pursue its claim during the oral proceedings and that it acknowledged Colombia's statement that no concessions had been awarded in the areas concerned. Colombia, for its part, reiterated that the blocks in question had not been implemented and would not be pursued or offered.

In light of the foregoing, the Court finds that Nicaragua has failed to prove that Colombia continues to offer petroleum blocks situated in Nicaragua's exclusive economic zone. It therefore rejects the allegation that Colombia violated Nicaragua's sovereign rights by issuing oil exploration licences.

#### **4. Conclusions (para. 144)**

In light of the foregoing considerations, the Court finds that Colombia has breached its international obligation to respect Nicaragua's sovereign rights and jurisdiction in its exclusive economic zone (i) by interfering with fishing and marine scientific research activities of Nicaraguan-flagged or Nicaraguan-licensed vessels and with the operations of Nicaraguan naval vessels in Nicaragua's exclusive economic zone; (ii) by purporting to enforce conservation measures in Nicaragua's exclusive economic zone; and (iii) by authorizing fishing activities in Nicaragua's exclusive economic zone. Colombia's wrongful conduct engages its responsibility under international law.

### **B. Colombia's "integral contiguous zone" (paras. 145-194)**

The Court notes that among its allegations of Colombia's violations of Nicaragua's rights in its maritime zones, Nicaragua refers to Colombia's Presidential Decree 1946, which establishes an "integral contiguous zone" around Colombian islands in the western Caribbean Sea. Nicaragua does not deny Colombia's entitlement to a contiguous zone, but it maintains that both the geographical extent of the "integral contiguous zone" and the material scope of the powers which Colombia claims it may exercise therein exceed the limits permitted under customary international rules on the contiguous zone. In Nicaragua's view, by establishing the "integral contiguous zone", Colombia violated Nicaragua's rights in the latter's exclusive economic zone.

#### **1. The applicable rules on the contiguous zone (paras. 147-155)**

The Court first notes that, under the law of the sea, the contiguous zone is distinct from other maritime zones in the sense that the establishment of a contiguous zone does not confer upon the coastal State sovereignty or sovereign rights over this zone or its resources. The drafting history of Article 24 of the 1958 Convention and that of Article 33 of UNCLOS demonstrate that States have generally accepted that the powers in the contiguous zone are confined to customs, fiscal, immigration and sanitary matters as stated in Article 33, paragraph 1. With regard to the breadth of the contiguous zone, most States that have established such zones have set the breadth thereof within a 24-nautical-mile limit consistent with Article 33, paragraph 2, of UNCLOS. Some States have even reduced the breadth of previously established contiguous zones to conform to that limit.

In conclusion, the Court considers that Article 33 of UNCLOS reflects contemporary customary international law on the contiguous zone, both in respect of the powers that a coastal State may exercise there and the limitation of the breadth of the contiguous zone to 24 nautical miles.

## **2. Effect of the 2012 Judgment and Colombia's right to establish a contiguous zone (paras. 156-163)**

The Court notes that in the proceedings leading to the 2012 Judgment, the Parties discussed the contiguous zone but did not request the Court to delimit it in drawing a single maritime boundary, nor did the Court address the contiguous zone, as the issue did not arise during the delimitation. The Court considers that the 2012 Judgment does not delimit, expressly or otherwise, the contiguous zone of either Party.

The Court then notes that the contiguous zone and the exclusive economic zone are governed by two distinct régimes. It considers that the establishment by one State of a contiguous zone in a specific area is not, as a general matter, incompatible with the existence of the exclusive economic zone of another State in the same area. In principle, the maritime delimitation between Nicaragua and Colombia does not abrogate Colombia's right to establish a contiguous zone around the San Andrés Archipelago. The Court adds that, under the law of the sea, the powers that a State may exercise in the contiguous zone are different from the rights and duties that a coastal State has in the exclusive economic zone. The two zones may overlap, but the powers that may be exercised therein and the geographical extent are not the same. The contiguous zone is based on an extension of control by the coastal State for the purposes of prevention and punishment of certain conduct that is illegal under its national laws and regulations, while the exclusive economic zone, on the other hand, is established to safeguard the coastal State's sovereign rights over natural resources and jurisdiction with regard to the protection of the marine environment. In exercising the rights and duties under either régime, each State must have due regard to the rights and duties of the other State.

The Court is of the view that, in the parts of the "integral contiguous zone" which overlap with Nicaragua's exclusive economic zone, Colombia may exercise its powers of control in accordance with customary rules on the contiguous zone as reflected in Article 33, paragraph 1, of UNCLOS and it has the rights and duties under customary law as reflected in Article 58 of UNCLOS. In exercising the rights and duties under the contiguous zone régime, Colombia is under an obligation to have due regard to the sovereign rights and jurisdiction which Nicaragua enjoys in its exclusive economic zone under customary law as reflected in Articles 56 and 73 of UNCLOS.

Given the above considerations, the Court concludes that Colombia has the right to establish a contiguous zone around the San Andrés Archipelago in accordance with customary international law.

## **3. The compatibility of Colombia's "integral contiguous zone" with customary international law (paras. 164-186)**

The Parties are divided over the conformity with customary international law of the provisions of Article 5 of Presidential Decree 1946, which set out the geographical extent of the "integral contiguous zone" and the material scope of the powers that may be exercised therein.

The Court begins by recalling that the 24-nautical-mile rule provided for in Article 33, paragraph 2, of UNCLOS is an established customary rule. The simplified configuration of Colombia's "integral contiguous zone" has the effect of extending its breadth beyond 24 nautical miles. The Court is of the view that Colombia may choose to reduce the breadth of the "integral contiguous zone" if it wishes to simplify the configuration of the zone, but it has no right to expand it beyond the 24-nautical-mile limit to the detriment of the exercise by Nicaragua of its sovereign rights and jurisdiction in its exclusive economic zone. It follows that the geographical extent of Colombia's "integral contiguous zone" is not in conformity with customary international law.

With regard to the material scope of Colombia's powers within the "integral contiguous zone", Article 5 (3) (a) of Presidential Decree 1946 provides that Colombia shall exercise powers in the

“integral contiguous zone” to prevent and control infringements of laws and regulations regarding “the integral security of the State, including piracy, trafficking of drugs and psychotropic substances, as well as conduct contrary to the security in the sea and the national maritime interests, the customs, fiscal, migration and sanitary matters” and that “[i]n the same manner, violations against the laws and regulations related with the preservation of the maritime environment and the cultural heritage will be prevented and controlled”. Under this provision, the scope of the powers under which the Colombian authorities may exercise control in the contiguous zone is therefore much broader than the material scope of the powers enumerated in Article 33, paragraph 1, of UNCLOS.

The Court notes that security was not a matter that States agreed to include in the list of matters over which a coastal State may exercise control in the contiguous zone; nor has there been any evolution of customary international law in this regard since the adoption of UNCLOS. The inclusion of security in the material scope of Colombia’s powers within the “integral contiguous zone” is therefore not in conformity with the relevant customary rule.

In respect of the power to protect “national maritime interests”, Article 5 (3) of Presidential Decree 1946, through its broad wording alone, appears to encroach on the sovereign rights and jurisdiction of Nicaragua as set forth in Article 56, paragraph 1, of UNCLOS. This is also true with regard to violations of “laws and regulations related with the preservation of the environment”, since the coastal State, Nicaragua in the present case, has jurisdiction in its exclusive economic zone over the “protection and preservation of the marine environment”. Yet, if exercised in the area overlapping with Nicaragua’s exclusive economic zone, the powers conferred on the Colombian authorities under Article 5 (3) of Presidential Decree 1946 would encroach on the sovereign rights and jurisdiction of Nicaragua.

Article 5 (3) (a) of Presidential Decree 1946 also refers to cultural heritage. In support of its position, Colombia invokes Article 303, paragraph 2, of UNCLOS, which gives the coastal State the power to exercise control over objects of an archaeological and historical nature found in its contiguous zone and provides that the removal of such objects can be regarded as an infringement of its laws and regulations on customs, fiscal, immigration or sanitary matters.

Taking into account State practice and other legal developments in this field, the Court is of the view that Article 303, paragraph 2, of UNCLOS reflects customary international law. It follows that Article 5 (3) of Presidential Decree 1946, in so far as it includes the power of control with respect to archaeological and historical objects found within the contiguous zone, does not violate customary international law.

#### **4. Conclusion (paras. 187-194)**

In light of the foregoing, the Court finds that the “integral contiguous zone” established by Colombia’s Presidential Decree 1946 is not in conformity with customary international law in two respects. First, the geographical extent of the “integral contiguous zone” contravenes the 24-nautical-mile rule for the establishment of the contiguous zone. Secondly, Article 5 (3) of Presidential Decree 1946 confers certain powers on Colombia to exercise control over infringements of its laws and regulations in the “integral contiguous zone” that extend to matters that are not permitted by customary rules as reflected in Article 33, paragraph 1, of UNCLOS.

Having reached this conclusion, the Court will consider the question whether the establishment of the “integral contiguous zone” by enactment of Presidential Decree 1946 constitutes, in and of itself, a breach by Colombia of its international obligations owed to Nicaragua, which engages its international responsibility.

In the absence of a general rule applicable to the question whether a State engages its international responsibility by the enactment of national legislation, the Court examines this question

in light of the obligations of which Colombia is allegedly in breach and the specific context of the case. It notes that Colombia's Presidential Decree 1946 was initially issued not long after the delivery of the 2012 Judgment and that the enactment of Presidential Decree 1946, among other things, contributed to the dispute between the Parties, which eventually led to the institution of the present proceedings by Nicaragua. The Court is mindful that Colombia amended Presidential Decree 1946 in 2014 to provide that the Decree will be applied in compliance with international law. However, it does not consider that this additional provision is sufficient to address the concern raised by Nicaragua in this regard. The Court is of the view that Colombia is under an international obligation to remedy the situation.

On the basis of these considerations, the Court concludes that, in respect of the maritime areas in which Colombia's "integral contiguous zone" overlaps with Nicaragua's exclusive economic zone, Colombia's "integral contiguous zone", which the Court has found to be incompatible with customary international law as reflected in Article 33 of UNCLOS, infringes upon Nicaragua's sovereign rights and jurisdiction in the exclusive economic zone. Colombia's responsibility is thereby engaged. Colombia has the obligation, by means of its own choosing, to bring the provisions of Presidential Decree 1946 into conformity with customary international law in so far as they relate to maritime areas declared by the Court in its 2012 Judgment to appertain to Nicaragua.

### C. Conclusions and remedies (paras. 195-199)

The Court has concluded that Colombia breached its international obligation to respect Nicaragua's sovereign rights and jurisdiction in its exclusive economic zone thereby engaging its responsibility under international law. Colombia must therefore immediately cease its wrongful conduct. The Court has also found that the "integral contiguous zone" established by Colombia's Presidential Decree 1946 is not in conformity with customary international law and that in the maritime areas where the "integral contiguous zone" overlaps with Nicaragua's exclusive economic zone, the "integral contiguous zone" infringes upon Nicaragua's sovereign rights and jurisdiction in the exclusive economic zone thereby engaging Colombia's responsibility. Colombia therefore has the obligation, by means of its own choosing, to bring the provisions of Presidential Decree 1946 into conformity with customary international law in so far as they relate to maritime areas declared by the Court in its 2012 Judgment to appertain to Nicaragua.

The Court notes that, in its final submissions, Nicaragua made a number of requests for additional remedies. Considering the nature of Colombia's internationally wrongful acts, the Court considers that the remedies stated above suffice to redress the injury that Colombia's internationally wrongful acts have inflicted on Nicaragua.

As regards the request by Nicaragua to order Colombia to pay compensation, the Court considers that in the course of the proceedings Nicaragua did not offer evidence demonstrating that Nicaraguan-flagged or Nicaraguan-licensed vessels or their fishermen suffered material damage or were effectively prevented from fishing as a result of Colombia's acts of interference by its naval frigates in Nicaragua's exclusive economic zone. Therefore, Nicaragua's request for compensation must be rejected.

Finally, the Court considers that Nicaragua's request that the Court remain seised of the case until Colombia recognizes and respects Nicaragua's rights in the Caribbean Sea as attributed by the 2012 Judgment has no legal basis and must therefore be rejected.

#### **IV. COUNTER-CLAIMS MADE BY COLOMBIA (PARAS. 200-260)**

##### **A. Nicaragua's alleged infringement of the artisanal fishing rights of the inhabitants of the San Andrés Archipelago to access and exploit the traditional banks (paras. 201-233)**

The Court observes that Colombia's counter-claim relating to the artisanal fishing rights said to be enjoyed by the inhabitants of the San Andrés Archipelago, including the Raizales, in the traditional fishing banks located beyond the territorial sea of the islands of the San Andrés Archipelago is premised on two main contentions. First, Colombia asserts that the inhabitants of the San Andrés Archipelago, in particular the Raizales, have for centuries practised traditional or artisanal fishing in locations now falling in Nicaragua's exclusive economic zone. The alleged long-standing practices amongst those communities are said to have given rise to an uncontested "local customary norm" between the Parties or to customary rights of access and exploitation that survived the establishment of Nicaragua's exclusive economic zone. Additionally, Colombia points to statements of President Ortega, the Head of State of Nicaragua, which it characterizes both as accepting or recognizing the existence of those rights and as unilateral statements that are capable of producing legal effects in the sense that they amounted to granting rights to the artisanal fishermen.

The Court begins by recalling that the Parties' relations in respect of the exclusive economic zone are governed by customary international law.

The Court then turns to the question of whether Colombia has proved that the inhabitants of the San Andrés Archipelago, in particular the Raizales, have historically enjoyed "artisanal fishing rights" in areas that now fall within Nicaragua's exclusive economic zone and that those "rights" survived the establishment of Nicaragua's exclusive economic zone. Colombia relies on 11 affidavits to prove the existence of a long-standing practice of artisanal fishing by the inhabitants of the San Andrés Archipelago, in particular the Raizales. The Court observes that those affidavits appear to have been sworn specifically for the purposes of this case and are signed by fishermen who may be considered as particularly interested in the outcome of these proceedings, factors that have a bearing on the weight and probative value of that evidence. The Court must nonetheless analyse the affidavits "for the utility of what is said" and to determine whether they support Colombia's contention.

Having reviewed those affidavits, the Court observes that they contain indications that some fishing activities have in the past taken place in certain areas that had once been part of the high seas but now fall within Nicaragua's exclusive economic zone. However, the Court also notes that the affidavits do not establish with certainty the periods during which such activities took place, or whether there was in fact a constant practice of artisanal fishing spanning many decades or centuries, as claimed by Colombia. The Court also notes that most of the affiants speak of having conducted their activities in "waters surrounding the Colombian features" or in fishing grounds located "within Colombia's territorial sea", rather than Nicaraguan maritime areas. The Court is of the view that the 11 affidavits submitted by Colombia do not sufficiently establish that the inhabitants of the San Andrés Archipelago, in particular the Raizales, have been engaged in a long-standing practice of artisanal fishing in "traditional fishing banks" located in waters now falling within Nicaragua's exclusive economic zone.

The Court also considers that the positions adopted by Colombia on other occasions are inconsistent with its assertion concerning the existence of such a traditional practice of artisanal fishing in Nicaragua's exclusive economic zone.

The Court then turns to several statements of Nicaragua's Head of State, which, according to Colombia, either illustrate Nicaragua's acceptance or recognition that the artisanal fishermen of the Archipelago have the right to fish in Nicaragua's maritime zones without having to request prior

authorization or alternatively create a legal obligation on the part of Nicaragua to respect those fishing rights.

The Court observes that, in several of President Ortega's statements, reference is made to the need for the Raizal community or the inhabitants of the Archipelago to obtain fishing permits or authorizations from Nicaragua to carry on artisanal or industrial fishing. In addition, President Ortega made references to mechanisms that needed to be established between Nicaragua and Colombia before the artisanal fishermen could operate in waters falling in Nicaragua's exclusive economic zone by virtue of the 2012 Judgment. In the Court's view, the statements by President Ortega do not establish that Nicaragua has recognized that the inhabitants of the San Andrés Archipelago, in particular the Raizales, have the right to fish in Nicaragua's maritime zones without having to request prior authorization. It follows that the Court cannot uphold Colombia's contention that Nicaragua, through the statements of its Head of State, accepted or recognized the rights of the Raizales to fish in Nicaragua's exclusive economic zone without requiring authorization from Nicaragua.

The Court then considers whether the statements of President Ortega constitute a legal undertaking granting rights to the artisanal fishermen.

In the Court's view, the statements of Nicaragua's Head of State indicate that the Nicaraguan authorities were aware of the issues that arose in respect of the fishing activities of the inhabitants of the Archipelago and the challenges that Colombia faced in implementing the 2012 Judgment. In that regard, it appears that Nicaragua expressed an openness to concluding an agreement with Colombia regarding appropriate mechanisms and solutions to overcome those challenges. Bearing in mind the above context and adopting a restrictive interpretation, the Court cannot accept Colombia's alternative argument that the statements of President Ortega, referred to above, constitute a legal undertaking on the part of Nicaragua to respect the rights of the artisanal fishermen of the San Andrés Archipelago to fish in Nicaragua's maritime zones without requiring prior authorization from Nicaragua.

For these reasons, the Court concludes 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. In light of all the above considerations, the Court dismisses Colombia's third counter-claim.

Notwithstanding the above conclusion, the Court takes note of Nicaragua's willingness, as expressed through statements of its Head of State, to negotiate with Colombia an agreement regarding access by members of the Raizales community to fisheries located within Nicaragua's exclusive economic zone. The Court considers that the most appropriate solution to address the concerns expressed by Colombia and its nationals in respect of access to fisheries located within Nicaragua's exclusive economic zone would be the negotiation of a bilateral agreement between the Parties.

## **B. Alleged violation of Colombia's sovereign rights and maritime spaces by Nicaragua's use of straight baselines (paras. 234-260)**

The Court turns to Colombia's counter-claim relating to Decree 33, through which Nicaragua established a system of straight baselines along its Caribbean coast, from which the breadth of its territorial sea is measured.

Customary international law as reflected in Article 7, paragraph 1, of UNCLOS provides for two geographical preconditions for the establishment of straight baselines. The preconditions are alternative and not cumulative. With respect to the straight baselines drawn from Cabo Gracias a

Dios on the mainland to Great Corn Island along the coast (points 1-8), Nicaragua asserts that there is “a fringe of islands along the coast in its immediate vicinity” that entitles it to use straight rather than normal baselines. As to the southernmost part of its mainland coast, Nicaragua claims instead that the indentation of the coast from Monkey Point to the land boundary terminus with Costa Rica justifies Nicaragua’s straight baselines drawn from point 8 (Great Corn Island) to point 9 (Barra Indio Maíz).

The Court notes that there appears to be no single test for identifying a coastline that is “deeply indented and cut into”. Since Nicaragua concedes that it is only the southernmost portion of its Caribbean coast that falls to be considered under the second geographic option, the Court must determine whether the straight baseline segment between base points 8 and 9 defined by Decree 33, as amended, is justified on the basis that the corresponding coast is “deeply indented and cut into”. The Court is of the view that the indentations along the relevant portion of Nicaragua’s coast do not penetrate sufficiently inland or present characteristics sufficient for it to consider the said portion as “deeply indented and cut into”. Thus, recalling that the straight baselines method “must be applied restrictively”, the Court finds that the straight baseline segment between base points 8 and 9 defined by Decree 33, as amended, does not conform with customary international law on the drawing of straight baselines as reflected in Article 7, paragraph 1, of UNCLOS.

The Court then turns to the remainder of Nicaragua’s straight baselines running from point 1 to point 8. It notes that the Parties are divided on the question whether Nicaragua’s offshore islands constitute a “fringe of islands along the coast in its immediate vicinity” within the meaning of Article 7, paragraph 1, of UNCLOS.

The Court begins by ascertaining whether Nicaragua has demonstrated the presence of “islands” and, if so, whether those islands amount to “a fringe . . . along the coast in its immediate vicinity” as required by customary international law.

The Court is satisfied in general terms, and noting its findings in its 2012 Judgment according to which “[t]here are a number of Nicaraguan islands located off the mainland coast of Nicaragua”, that some of the 95 features listed by Nicaragua are islands. The Court must emphasize, nonetheless, that it does not automatically follow that all the features listed by Nicaragua are “islands” or that they constitute “a fringe” within the meaning of Article 7, paragraph 1, of UNCLOS.

The Parties are divided concerning the insular nature of “Edinburgh Cay” and about whether this feature may be considered an island for the purpose of drawing straight baselines under Article 7 of UNCLOS. In light of the case file, the Court considers that there are serious reasons to question whether such is the case. Thus, significant questions arise as to its appropriateness as the location for a base point for the drawing of straight baselines under the same provision. The Court adopts the view that Nicaragua has not demonstrated the insular nature of this feature.

In respect of the existence of a fringe of islands, the Court notes that there are no specific rules regarding the minimum number of islands, although the phrase “fringe of islands” implies that there should not be too small a number of such islands relative to the length of the coast. Given the uncertainty about which of the 95 features are islands, the Court is not satisfied, on the basis of the maps and figures submitted by the Parties, that the number of Nicaragua’s islands relative to the length of the coast is sufficient to constitute “a fringe of islands” along Nicaragua’s coast.

In determining whether the features identified by the Applicant can be considered a “fringe of islands”, the Court observes that customary international law, as reflected in Article 7, paragraph 1, of UNCLOS, requires this fringe to be located “along the coast” and in its “immediate vicinity”. Read together with the additional requirements of Article 7, paragraph 3, according to which the drawing of straight baselines “must not depart to any appreciable extent from the general direction of the coast” and “the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters”, the specific requirements of Article 7,

paragraph 1, indicate that a “fringe of islands” must be sufficiently close to the mainland so as to warrant its consideration as the outer edge or extremity of that coast. It is not sufficient that the concerned maritime features be part, in general terms, of the overall geographical configuration of the State. They need to be an integral part of its coastal configuration.

Bearing in mind these considerations, the Court is of the opinion that the Nicaraguan “islands” 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 to be considered as the outer edge of the coast. Nicaragua asserts that “there are numerous small cays between the mainland and the Corn Islands and that as a consequence the territorial seas of the two merge and overlap” in order to illustrate the relationship between the “islands” and the mainland. However, the Court notes that Nicaragua’s straight baselines enclose large maritime areas where no maritime feature entitled to a territorial sea has been shown to exist. The Court further notes that the features and islands located towards the south of Nicaragua’s mainland coast appear to be significantly detached from the islands grouped in the north. Furthermore, a notable break in continuity of over 75 nautical miles can be observed between Ned Thomas Cay, on which Nicaragua has plotted base point 4, and Man of War Cays where base point 5 is located. Nicaragua concedes that the groups of islands along its coast are “separate”.

Furthermore, the Court is not convinced that Nicaragua’s islands “guard . . . part of the coast” in such a way that they have a masking effect on a large portion of the mainland coast. The Court notes that the Parties disagree about the approach to be adopted to assess the extent of the masking effect of the islands and propose different methods by way of different projections. Without adopting a view concerning the relevance of the projections suggested by the Parties in assessing the masking effect of islands for the purpose of Article 7, paragraph 1, of UNCLOS, the Court considers that, even if it were to accept Nicaragua’s approach, the masking effect of the maritime features that the Applicant identifies as “islands” is not significant enough for them to be considered as masking a large proportion of the coast from the sea.

In light of the above findings, the Court cannot accept Nicaragua’s contention that there exists a continuous fringe or an “intricate system of islands, islets and reefs which guard this part of the coast” of Nicaragua. It follows that Nicaragua’s straight baselines do not meet the requirements of customary international law reflected in Article 7, paragraph 1, of UNCLOS.

Nicaragua’s own evidence establishes that the straight baselines convert into internal waters certain areas which otherwise would have been part of Nicaragua’s territorial sea or exclusive economic zone and convert into territorial sea certain areas which would have been part of Nicaragua’s exclusive economic zone. Nicaragua’s straight baselines thus deny to Colombia the rights to which it is entitled in the exclusive economic zone, including the freedoms of navigation and overflight and of the laying of submarine cables and pipelines, as provided under customary international law as reflected in Article 58, paragraph 1, of UNCLOS.

For the reasons set out above, the Court concludes that the straight baselines established by Decree 33, as amended, do not conform with customary international law. The Court considers that a declaratory judgment to that effect is an appropriate remedy.

## **V. OPERATIVE CLAUSE (PARA. 261)**

For these reasons,

THE COURT,

(1) By ten votes to five,

*Finds* that its jurisdiction, based on Article XXXI of the Pact of Bogotá, to adjudicate upon the dispute regarding the alleged violations by the Republic of Colombia of the Republic of Nicaragua's rights in the maritime zones which the Court declared in its 2012 Judgment to appertain to the Republic of Nicaragua, covers the claims based on those events referred to by the Republic of Nicaragua that occurred after 27 November 2013, the date on which the Pact of Bogotá ceased to be in force for the Republic of Colombia;

IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Tomka, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa; *Judge ad hoc* Daudet;

AGAINST: *Judges* Abraham, Bennouna, Yusuf, Nolte; *Judge ad hoc* McRae;

(2) By ten votes to five,

*Finds* that, by interfering with fishing and marine scientific research activities of Nicaraguan-flagged or Nicaraguan-licensed vessels and with the operations of Nicaraguan naval vessels in the Republic of Nicaragua's exclusive economic zone and by purporting to enforce conservation measures in that zone, the Republic of Colombia has violated the Republic of Nicaragua's sovereign rights and jurisdiction in this maritime zone;

IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Tomka, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa; *Judge ad hoc* Daudet;

AGAINST: *Judges* Abraham, Bennouna, Yusuf, Nolte; *Judge ad hoc* McRae;

(3) By nine votes to six,

*Finds* 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;

IN FAVOUR: *President* Donoghue; *Judges* Tomka, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa; *Judge ad hoc* Daudet;

AGAINST: *Vice-President* Gevorgian; *Judges* Abraham, Bennouna, Yusuf, Nolte; *Judge ad hoc* McRae;

(4) By nine votes to six,

*Finds* that the Republic of Colombia must immediately cease the conduct referred to in points (2) and (3) above;

IN FAVOUR: *President* Donoghue; *Judges* Tomka, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa; *Judge ad hoc* Daudet;

AGAINST: *Vice-President* Gevorgian; *Judges* Abraham, Bennouna, Yusuf, Nolte; *Judge ad hoc* McRae;

(5) By thirteen votes to two,

*Finds* that the "integral contiguous zone" established by the Republic of Colombia by Presidential Decree 1946 of 9 September 2013, as amended by Decree 1119 of 17 June 2014, is not in conformity with customary international law, as set out in paragraphs 170 to 187 above;

IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Tomka, Bennouna, Yusuf, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte; *Judge ad hoc* Daudet;

AGAINST: *Judge* Abraham; *Judge ad hoc* McRae;

(6) By twelve votes to three,

*Finds* 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, as amended by Decree 1119 of 17 June 2014, in so far as they relate to maritime areas declared by the Court in its 2012 Judgment to appertain to the Republic of Nicaragua;

IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Tomka, Bennouna, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte; *Judge ad hoc* Daudet;

AGAINST: *Judges* Abraham, Yusuf; *Judge ad hoc* McRae;

(7) By twelve votes to three,

*Finds* that the Republic of Nicaragua's straight baselines established by Decree No. 33-2013 of 19 August 2013, as amended by Decree No. 17-2018 of 10 October 2018, are not in conformity with customary international law;

IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Tomka, Abraham, Yusuf, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte; *Judge ad hoc* Daudet;

AGAINST: *Judges* Bennouna, Xue; *Judge ad hoc* McRae;

(8) By fourteen votes to one,

*Rejects* all other submissions made by the Parties.

IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Tomka, Abraham, Bennouna, Yusuf, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte; *Judge ad hoc* Daudet;

AGAINST: *Judge ad hoc* McRae.

\*

Vice-President GEVORGIAN appends a declaration to the Judgment of the Court; Judge TOMKA appends a separate opinion to the Judgment of the Court; Judge ABRAHAM appends a dissenting opinion to the Judgment of the Court; Judge BENNOUNA appends a declaration to the Judgment of the Court; Judge YUSUF appends a separate opinion to the Judgment of the Court; Judge XUE appends a declaration to the Judgment of the Court; Judge ROBINSON appends a separate opinion to the Judgment of the Court; Judge IWASAWA appends a declaration to the Judgment of the Court; Judge NOLTE appends a dissenting opinion to the Judgment of the Court; Judge *ad hoc* MCRAE appends a dissenting opinion to the Judgment of the Court.

### **Declaration of Vice-President Gevorgian**

Vice-President Gevorgian voted against the majority's finding that Colombia has violated Nicaragua's sovereign rights in its EEZ by authorizing fishing in this maritime zone.

In his view, Nicaragua did not substantiate its claim that Colombia issued permits to Colombian and foreign-flagged vessels authorizing them to fish in areas appertaining to Nicaragua's EEZ. In particular, the Vice-President questions whether the alleged acts of Colombian vessels are supported by sufficient evidence. Moreover, even if conclusively proven, he expresses doubts that these acts can be relied on to support the conclusion that fishing in the relevant areas had been authorized by the Colombian authorities. Finally, the Vice-President remains unconvinced that the resolutions issued by the General Maritime Directorate of the Ministry of National Defence of Colombia (DIMAR) constitute fishing permits and even if so, that they extend to maritime areas appertaining to Nicaragua.

For these reasons, the Vice-President was also unable to vote in favour of the Court's call upon Colombia to cease the relevant actions.

### **Separate opinion of Judge Tomka**

Although Judge Tomka voted in favour of all the conclusions reached by the Court, he offers some observations on two issues in his separate opinion.

The first issue concerns the Court's jurisdiction under Article XXXI of the Pact of Bogotá. Colombia argued that the Court lacked jurisdiction *ratione temporis* to consider any claims made by Nicaragua based on facts that were alleged to have occurred after the Pact ceased to be in force for Colombia. Colombia interpreted Article XXXI of the Pact as containing a temporal limitation on the Court's jurisdiction. Under this interpretation, the Court would have had no jurisdiction to deal with various incidents referred to by Nicaragua that occurred after the Pact ceased to be in force for Colombia. Judge Tomka explains why, in his view, Colombia's argument cannot be accepted.

He considers that Article XXXI, interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of the Pact's object and purpose, does not contain any temporal condition or limitation.

He also notes that it is common practice for States to present additional facts after having filed an application before the Court. The limit of States' freedom to present such new facts is that the dispute brought before the Court by the application is not transformed into another dispute which is different in character. Judge Tomka considers that Nicaragua has not, in the present case, transformed the dispute into another dispute which is different in character by relying on incidents that were not mentioned in its Application.

Judge Tomka recalls the well-established principle that once the Court has established jurisdiction to entertain a case, the subsequent lapse of the title of jurisdiction cannot deprive the Court of its jurisdiction. Since the incidents which occurred after the date on which the Pact of Bogotá ceased to be in force for Colombia do not transform the dispute brought before the Court into another dispute which is different in character, they may be considered by the Court when adjudicating on Nicaragua's claim.

Judge Tomka, however, does not share the Court's view that the phrase "so long as the present Treaty is in force" in Article XXXI of the Pact of Bogotá limits the period within which such a dispute must have arisen. In his view, that phrase does not suggest any temporal condition or limitation as to the disputes over which the Court has jurisdiction. Rather, in his view, this phrase

concerns the validity in time of the title of jurisdiction provided for in Article XXXI of the Pact. An applicant may initiate proceedings against another State party to the Pact only during the period in which the title of jurisdiction is in force.

Judge Tomka then turns to a second issue, namely the Court's finding on Nicaragua's straight baselines and the legal consequences of this finding. He notes that the Court draws no legal consequences from its finding that Nicaragua's straight baselines are not in conformity with customary international law, but that, by contrast, the Court draws such consequences with respect to its finding that Colombia's "integral contiguous zone" is not in conformity with customary international law. He notes that this discrepancy can only be explained by the fact that Colombia, in contrast with Nicaragua, did not formally request the Court to draw any legal consequences from its finding on Nicaragua's straight baselines.

In his view, there is no doubt that Nicaragua must bring its straight baselines in the Caribbean Sea into conformity with the provisions of the United Nations Convention on the Law of the Sea. These baselines, after all, also affect the interests and rights of other States.

### Dissenting opinion of Judge Abraham

Judge Abraham disagrees with the parts of the Judgment relating to jurisdiction *ratione temporis* and the "integral contiguous zone". It is as a result of that disagreement that he voted against most of the paragraphs of the operative clause.

Regarding the Court's jurisdiction over facts that occurred after 27 November 2013, Judge Abraham first observes that the matter was resolved neither explicitly nor implicitly by the 2016 Judgment. He then notes that the precedents invoked by the Parties are irrelevant given the novel character of the question that arises in the present case. In Judge Abraham's view, it is hard to reconcile Article XXXI of the Pact of Bogotá with the idea that the Court can exercise its jurisdiction over facts that occurred after the denunciation of the Pact took effect. That those facts were invoked in the context of a case which was already pending before the Court does not alter that finding. Judge Abraham observes that the precedents referred to by the Court concern the admissibility of new claims introduced in the course of proceedings, rather than its jurisdiction. In his view, the relative flexibility shown in the jurisprudence on the admissibility of such new claims is not justified when the Court has to examine a question of jurisdiction, an area in which a certain rigour is called for. Although the Court examined this issue from the standpoint of jurisdiction in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, in that instance it was a matter of interpreting the material scope of France's consent to the jurisdiction of the Court, and not a question of jurisdiction *ratione temporis*. Judge Abraham acknowledges that the Court may be required to examine facts occurring after the lapse of the jurisdictional title in a situation where the facts form an indivisible whole. In the present case, the facts subsequent and prior to the critical date are entirely separable, even though they are more or less of a similar nature.

With respect to the question of the "integral contiguous zone", Judge Abraham is of the view that the approach adopted by the majority is too abstract. He emphasizes that Nicaragua's claim was limited to alleged violations of its own rights in its exclusive economic zone, a fact of which the Judgment tends to lose sight. In this instance, the question of the conformity of the "integral contiguous zone" with international law does not fully coincide with the question of respect for the rights invoked by Nicaragua as a coastal State. For Judge Abraham, it is the "sovereign rights" and "jurisdiction" of the coastal State as they derive from the customary rule reflected in Article 56, paragraph 1 (a) and (b), of UNCLOS that should have served as reference points for the examination of Decree 1946 establishing the contiguous zone. The question of the breadth of the "integral contiguous zone" was of little relevance in this regard. With respect to the provisions of Decree 1946 relating to security, Judge Abraham considers that the Judgment does not demonstrate that there has been a violation of the "sovereign rights" and "jurisdiction" of Nicaragua, but merely examines

*in abstracto* whether those provisions are in conformity with customary international law. Finally, Judge Abraham is of the view that the mere promulgation by Colombia of the Decree in question, without any concrete measures to implement the provisions at issue, cannot in itself be regarded as constituting an internationally wrongful act, since the Decree could be interpreted, at the implementation stage, in a manner which reconciles it with Nicaragua's rights.

### **Declaration of Judge Bennouna**

Judge Bennouna voted against the decision of the Court, which found that it had jurisdiction *ratione temporis* to entertain facts and events alleged by Nicaragua to have occurred after 27 November 2013 (paragraph 261, subparagraph 1). He considers the Court should have interpreted the Pact of Bogotá, and in particular the compromissory clause contained in its Article XXXI, using the means of interpretation provided for in the 1969 Vienna Convention on the Law of Treaties. In order to comply with Article XXXI of the Pact of Bogotá, the Court should thus have declared that it lacked jurisdiction to rule on all incidents alleged by the Applicant to have occurred after the critical date of 27 November 2013.

Judge Bennouna points out that none of the cases to which the Court refers (paragraph 44) concerns facts or events that occurred after the jurisdictional title was no longer in force between the parties. It is clear, therefore, that the present case cannot be treated in the same way as the precedents mentioned by the Court, since the situation concerned is not comparable to them.

In view of the foregoing, Judge Bennouna also voted against subparagraph 2 of the operative clause relating to Colombia's violations of Nicaragua's sovereign rights and jurisdiction (paragraph 250, subparagraph 2) and subparagraph 3, relating to the granting of fishing permits by Colombia (paragraph 250, subparagraph 3).

Finally, Judge Bennouna voted against subparagraph 7 of the operative clause, which states that Nicaragua's straight baselines are not in conformity with customary international law (paragraph 250, subparagraph 7). He underlines that this is a counter-claim relating to alleged violations of Colombia's sovereign rights and maritime spaces resulting from the use of straight baselines by Nicaragua. In his view, the Court would only be able to assess whether Nicaragua's straight baselines were consistent with international law if Colombia could prove that the drawing of such baselines by Nicaragua specially affected its own rights in its exclusive economic zone.

### **Separate opinion of Judge Yusuf**

In his separate opinion, Judge Yusuf explains his disagreement with the conclusion in subparagraph (1) of the *dispositif* of the Judgment concerning the jurisdiction of the Court *ratione temporis*. According to Judge Yusuf, the Judgment should have undertaken a detailed analysis of the interpretation of Article XXXI of the Pact of Bogotá, which sets out the limits and conditions of the Court's jurisdiction. In his view, an interpretation of the text of Article XXXI would have led to the conclusion that the Court's jurisdiction *ratione temporis* does not extend to claims by Nicaragua based on incidents that occurred after 27 November 2013, the date on which the Pact of Bogotá ceased to be in force for Colombia. According to Judge Yusuf, the text of Article XXXI makes it abundantly clear that the Court's jurisdiction *ratione temporis* is limited to claims based on facts which occurred before the treaty ceased to be in force between the parties.

Judge Yusuf also notes that the Court has never been confronted with a similar situation. It is therefore his view that, contrary to what is stated in paragraph 45 of the Judgment, there is nothing in the 2016 Judgment to suggest that the Court's jurisdiction extends to facts subsequent to the termination of the Pact of Bogotá with respect to Colombia. The "dispute" found by the Court to exist in its 2016 Judgment was limited to the facts "at the date on which the Application was filed",

i.e. before the lapse of the jurisdictional title. Additionally, Judge Yusuf is of the view that the Court's jurisprudence on the admissibility of new facts or claims that occurred after the filing of the Application, but while the title of jurisdiction still existed, is inapposite to the question of whether the lapse of the jurisdictional title had an effect on the Court's jurisdiction to examine incidents that allegedly occurred after the Pact of Bogotá ceased to be in force between the Parties. In his view, this jurisprudence presupposes the continued existence of a valid jurisdictional title, which is not the case here. Finally, Judge Yusuf points out that the incidents that allegedly occurred before and after 27 November 2013 cannot be considered as being in all instances of "the same nature", since some of them are neither uniform in character nor do they always relate to identical facts or possess common legal bases.

Judge Yusuf also disagrees with the Court's conclusion in subparagraph (6) of the *dispositif* concerning the conformity with customary international law of the provisions of the Colombian Presidential Decree 1946 of 9 September 2013 as amended by Decree No. 1119 of 17 June 2014. It is not solely by enacting the provisions of the Decree as such, but through their implementation in establishing the "integral contiguous zone" and enforcing its powers therein that Colombia has breached the rights of Nicaragua in the latter's EEZ. The Judgment itself does not say anywhere that Colombia has breached its obligations under customary international law by merely enacting the Decree or that it is the Decree, in and of itself, which is not in conformity with international law. It rather finds that it is the "integral contiguous zone" established by Colombia that is not in conformity with customary international law. This finding is afterwards reflected in subparagraph (5) of the *dispositif*, with which subparagraph (6) is not consistent. Therefore, according to Judge Yusuf, the obligation to bring the situation into conformity with customary international law should, by logical necessity, relate to the "integral contiguous zone" itself, rather than the provisions of the Presidential Decree as such, as formulated in subparagraph (6) of the *dispositif*.

### **Declaration of Judge Xue**

Judge Xue agrees with the Court's conclusion on Colombia's third counter-claim relating to the artisanal fishing rights of the inhabitants of the San Andrés Archipelago. In regard to traditional or historic fishing rights, however, she makes a few observations.

Judge Xue considers that traditional fishing rights, which primarily concern artisanal fishing that may have existed for centuries, are recognized and protected under customary international law. She notes that, at the Second and Third United Nations Conferences on the Law of the Sea, States held divergent views as to whether a coastal State should enjoy exclusive rights to exploit living resources in the exclusive economic zone and to what extent traditional fishing may be maintained. In this regard, both traditional artisanal fishing and distant-water industrial fishing were mentioned.

Contrary to Nicaragua's assertion that developing countries "strenuously objected" to the protection of traditional fishing rights, Judge Xue observes that those countries were actually very critical of foreign industrial and commercial fishing practices, particularly of those "prescriptive rights" acquired under colonialism. At the same time, they were sympathetic to the fishing interests of the developing countries whose economy depended on fisheries.

Judge Xue notes that the establishment of the exclusive economic zone régime is one of the major achievements of the Third United Nations Conference on the Law of the Sea, largely responding to concerns of the coastal States over the exploitation of living resources by industrial and commercial fishing of foreign fleets in their coastal waters and the need to ensure optimum utilization of natural resources of the sea. This new régime has fundamentally changed the fishery limits in the sea and put an end to the freedom of fishing in the areas that fall within the exclusive economic zone of the coastal States.

With regard to Article 51, paragraph 1, of UNCLOS, she considers that the drafting history does not support Nicaragua's interpretation that this provision is the only exception that preserves traditional fishing rights under UNCLOS. She points out that the *travaux préparatoires* show that Article 51, paragraph 1, was intended to maintain a balance of rights and interests between the archipelagic States and their regional neighbours, whose fishing interests would be substantially jeopardized by the enclosure of the archipelagic waters. Confined to a special régime, Article 51, paragraph 1, concerns solely traditional fishing rights in the archipelagic waters. There is no legal basis in international law to preclude the existence of traditional fishing rights under other circumstances.

Commenting on Nicaragua's contention that, by virtue of Article 62, paragraph 3, on habitual fishing, the Convention has settled the relationship between the exclusive economic zone and traditional fishing rights, Judge Xue considers that such conclusion is over-sweeping. Habitual fishing may include certain types of traditional fishing activities carried out by individual fishermen of other States, but in the context of the Article, that factor alone cannot be taken to presume that all situations relating to traditional fishing rights are encompassed by that Article.

In Judge Xue's view, the advent of the régime of the exclusive economic zone as set forth in UNCLOS does not, in and of itself, extinguish traditional fishing rights that may be found to exist under customary international law. On the relationship between UNCLOS and customary international law, Judge Xue refers to the settled jurisprudence of the Court and states that, unless and until traditional fishing rights are explicitly negated by treaty law or new customary rules, they will continue to exist under customary international law. As the Preamble of UNCLOS affirms, "matters not regulated by this Convention continue to be governed by the rules and principles of general international law".

Judge Xue observes that traditional fishing rights are recognized and protected by State practice, judicial jurisprudence and arbitral awards. In order to establish traditional fishing rights, two conditions are often applied: first, traditional fishing rights have to be borne out by "artisanal fishing" and, secondly, such fishing activities must have continued consistently for a lengthy period of time. The first element is applied primarily to distinguish traditional fishing from industrial fishing, while the second element has to be assessed under the circumstances of each case. In the present case, Judge Xue considers that, although the evidence adduced by Colombia is not considered sufficient to prove its claim, the statements of the Nicaraguan President do not deny the existence of traditional fishing of the inhabitants of the San Andrés Archipelago, particularly of the Raizales. In order to preserve the local tradition and custom of the San Andrés Archipelago, she takes the view that an agreement on fisheries for the benefit of the Raizales community between the Parties would contribute to a stable and co-operative relationship in the region.

### **Separate opinion of Judge Robinson**

1. Having voted in favour of the Court's finding that Colombia has breached Nicaragua's sovereign rights in its exclusive economic zone ("EEZ"), in his opinion, Judge Robinson makes observations on the Court's treatment of a coastal State's sovereign rights in its EEZ.

2. First, Judge Robinson notes that the United Nations Convention on the Law of the Sea (hereinafter "UNCLOS" or the "Convention") provides a set of interlocking rights and duties to govern the relationship between the coastal State and other States in relation to the EEZ. In his view, by the due regard obligations provided for in Articles 56 (2) and 58 (3) of UNCLOS, the Convention attempts to strike a balance between the rights and duties of the coastal State in its EEZ and the rights and duties of other States in that zone. Judge Robinson expresses disagreement with commentators who maintain that Article 56 is a "relevant provision" for the purposes of Article 58 (1) of the Convention. In his view, the effect of such a reading of the Convention would subordinate the

freedoms enjoyed by other States in the EEZ to the coastal State's sovereign rights in that zone. This result, he concludes, was not intended in the negotiations of the Convention.

3. Judge Robinson considers that the issues raised by Nicaragua's claim and Colombia's response call for an examination of the rights, duties and jurisdiction of the coastal State in its EEZ, as well as the nature of the rights and freedoms of other States in the zone, particularly the freedom of navigation. In this regard, he is of the view that the Judgment of the Court would have been significantly strengthened by a discussion of the nature of the coastal State's sovereign rights in its EEZ to show that those rights are exclusive to the coastal State, and a discussion of the nature and scope of the freedom of navigation on which Colombia relied.

4. Concerning the nature and scope of the freedom of navigation, Judge Robinson opines that, in the context of Part V of the Convention, that freedom encompasses the free passage or movement of ships of third States in the EEZ of a coastal State without any entitlement on the part of the coastal State to restrict that passage or movement in any way, unless there is carried out on the ship an activity that is not directly related with that passage or movement and interferes with the enjoyment by the coastal State of its sovereign rights. In this regard, he notes, the freedom of navigation under Article 58 (1) is more limited than freedom of navigation on the high seas under Article 87 since the sovereign rights — of the coastal State in its EEZ — to explore, exploit, conserve and manage its living and non-living resources will impact on a third State's freedom of navigation in that zone. As such, the activities carried out by Colombian naval vessels of harassing Nicaraguan fishermen and stopping Nicaraguan fishing vessels or other Nicaraguan-licensed vessels in order to apply what Colombia considers to be proper conservation methods, are not directly related to the passage of the ship and do not fall within the scope of the freedom of navigation under Article 58. Those activities, therefore, constitute a breach of Nicaragua's sovereign rights to explore, exploit, conserve and manage its natural resources, including fishing. In any event, by carrying out those activities in Nicaragua's EEZ, Colombia would have failed to satisfy the substantive due regard requirement of Article 58 (3).

5. Judge Robinson next considers the nature and scope of Nicaragua's sovereign rights in its EEZ. In his view, it is not merely, as the Court holds, that rights relating to the exploration, exploitation, conservation and management of the natural resources of the EEZ, as well as the power to design conservation policies for the zone, are "specifically reserved for the coastal State"; rather, it is that they are exclusively reserved for the coastal State. This conclusion follows from the history of the development of the concept of an EEZ, the negotiations preceding the adoption of UNCLOS, and the text of the Convention itself. Judge Robinson further notes that the design of the Convention does not admit of States other than the coastal State exercising any of the sovereign rights attributed to that State in its EEZ for the purpose of conserving and managing the fisheries resources. The only exception to this exclusivity, Judge Robinson opines, is the obligation under Article 62 (2) to give other States access to the surplus of the allowable catch through agreements or other arrangements, and in doing so to have particular regard to the provisions of Articles 69 and 70.

6. Judge Robinson further notes that the obligations of the coastal State relating to the conservation and management of the resources of its EEZ are as exclusive to that State as are its sovereign rights to exploit, explore, conserve and manage those resources. As such, a State's perception that a coastal State is not discharging its obligation to conserve and manage its living resources, even if it is well founded, does not give the former State the right to assume the responsibility of discharging those obligations.

7. An important indicator of the exclusivity of the coastal State's sovereign rights to conserve and manage the living resources of its EEZ, in Judge Robinson's estimation, is the extensive and far-reaching power given to the coastal State pursuant to Article 73 (1) of the Convention. If the coastal State has exclusive sovereign rights for the purpose of exploring, exploiting, conserving and managing its living and non-living resources, it is to be expected that it would also have the power to adopt measures within the zone that would enable it to enjoy those rights. This conclusion, Judge Robinson states, is supported by the decision of the International Tribunal for the Law of the Sea in *M/V Virginia G.*

8. Finally, Judge Robinson considers whether the jurisdiction of a State over vessels flying its flag is an exception to the exclusive sovereign rights of the coastal State in its EEZ. Judge Robinson concludes that while the power of the flag State over its vessels under Articles 92 and 94 of UNCLOS is exclusive, the exercise of that power within the EEZ of a coastal State is governed by Article 58 (2) of the Convention, which provides that "Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part". Thus, while a flag State has exclusive jurisdiction over its ships on the high seas, and may therefore set conservation standards for those ships while they are on the high seas, in the EEZ it is the coastal State that has the exclusive right and duty to set the applicable conservation standards for the zone.

### **Declaration of Judge Iwasawa**

Judge Iwasawa offers his views on Colombia's integral contiguous zone and the Court's reasoning in that regard.

The Court finds that Article 33, paragraph 1, of UNCLOS reflects customary international law on the contiguous zone in respect of the powers that a coastal State may exercise in that zone, and that, in its contiguous zone, a coastal State may not exercise control with respect to security matters. Judge Iwasawa considers it significant that, at the Third United Nations Conference on the Law of the Sea, there were no proposals to add other matters to the list in Article 33, paragraph 1.

Article 56, paragraph 1, of UNCLOS provides that, in the exclusive economic zone, the coastal State has (a) sovereign rights over natural resources and (b) jurisdiction with regard to the protection of the marine environment. Paragraph 1 (c) further indicates that the coastal State also has "other rights" provided for in the Convention. Judge Iwasawa explains that the coastal State has freedom of navigation in its exclusive economic zone.

Judge Iwasawa considers that the power to prevent and control infringements relating to the "integral security of the State", including drug trafficking and "conduct contrary to security in the sea" in Article 5 (3) of Colombia's Presidential Decree 1946 does not, in itself, affect Nicaragua's sovereign rights and jurisdiction, but it unquestionably encroaches on Nicaragua's freedom of navigation in its exclusive economic zone.

The Court concludes that Colombia's integral contiguous zone is not in conformity with customary international law and infringes upon Nicaragua's "sovereign rights and jurisdiction" in its exclusive economic zone. Judge Iwasawa is of the view that Colombia's integral contiguous zone also infringes on Nicaragua's freedom of navigation in its exclusive economic zone.

As regards appropriate remedies, the Court finds that Colombia must, by means of its own choosing, bring into conformity with customary international law the provisions of Presidential Decree 1946, "in so far as they relate to maritime areas declared by the Court in its 2012 Judgment to appertain to Nicaragua". Judge Iwasawa points out that the Court indicates a remedy in this form in response to Nicaragua's request in its final submissions.

### Dissenting opinion of Judge Nolte

In his dissenting opinion, Judge Nolte explains the reasons for his disagreement with the Court's decision to recognize and exercise jurisdiction with regard to facts or events which took place after 27 November 2013, the date on which the Pact of Bogotá ceased to be in force with respect to Colombia.

Judge Nolte believes that the reasoning underlying this decision is not convincing. According to Judge Nolte, all but one of the cases cited in support of the Court's exercise of jurisdiction *ratione temporis* concern the admissibility of late claims, not the jurisdiction of the Court *ratione temporis*. In his view, the one remaining decision, *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, offers an *obiter dictum* which only nominally addresses jurisdiction *ratione temporis*.

Judge Nolte is of the view that the question is whether the parties to the Pact of Bogotá intended to limit the temporal scope of the jurisdiction conferred on the Court. According to Judge Nolte, this question should be answered by way of an interpretation of Articles XXXI and LVI of the Pact of Bogotá in accordance with the customary rules on the interpretation of treaties, and not by applying certain elements of the Court's jurisprudence which concern other legal questions. In his view, the parties cannot be presumed to have intended to extend the jurisdiction of the Court to what are severable factual elements which could not have been submitted independently after the expiration of the Court's jurisdictional basis. While acknowledging that this may be different for acts, or a series of acts, which together constitute a "composite act" in the sense of Article 15 of the ILC Articles on State Responsibility, he is of the view that the legal significance of the incidents alleged by Nicaragua to have taken place before 27 November 2013 is not affected by alleged subsequent incidents. These considerations, according to Judge Nolte, indicate that a termination under Article XXXI has the effect of precluding the Court's consideration of facts or events which occur after the treaty has expired for a party.

Finally, Judge Nolte notes that by drawing only a very limited conclusion from the evidence presented by the Parties with respect to the alleged *Miss Sofia* incident, the Court in effect acknowledges that Nicaragua has not proven any of the incidents which allegedly took place before 27 November 2013.

### Dissenting opinion of Judge *ad hoc* McRae

Judge *ad hoc* McRae dissents in respect of all of the Court's findings in the case although, as a preliminary matter, he notes that he does agree with the Court's conclusion that Colombia's Integral Contiguous Zone should not exceed 24 nautical miles.

Judge *ad hoc* McRae considers that the Court's conclusion that it has jurisdiction *ratione temporis* in respect of events that allegedly took place after the lapse of the jurisdictional title is crucial, because Colombia's responsibility in respect of alleged incidents in Nicaragua's EEZ is almost exclusively founded on post-jurisdiction events. Judge *ad hoc* McRae argues that the Court provides no explanation why the rule for the admissibility of events subsequent to the date of application should be applied to events subsequent to the lapse of jurisdictional title. For Judge *ad hoc* McRae, considerations of efficiency, which warrant the assumption of jurisdiction over events subsequent to the date of the application, are not present where the jurisdictional title has lapsed. Judge *ad hoc* McRae explains that, while the Court may take account of events after the lapse of the jurisdictional title, it may not establish responsibility on their basis. In Judge *ad hoc* McRae's view, both the Court's jurisprudence and its 2016 Judgment are silent on the point now decided by the Court, and policy considerations in favour of the position taken by the Court are outweighed by the principle that jurisdiction must be based on consent.

Judge *ad hoc* McRae then turns to Colombia's contested actions in Nicaragua's EEZ, noting from the outset that Colombia's responsibility could not have been established if it were not for events outside the Court's jurisdiction *ratione temporis*. With respect to the incidents involving interaction between the Nicaraguan coast guard and Colombian naval vessels, and a marine scientific research vessel, Judge *ad hoc* McRae points out that the Court should have focused on the conduct alleged to have occurred, rather than on the mere presence of vessels in Nicaragua's EEZ. Judge *ad hoc* McRae then turns to the incidents involving Colombian naval vessels confronting Nicaraguan-flagged or -authorized fishing vessels, observing that these incidents did not involve enforcement action on the part of Colombia. In those few incidents where specific action is alleged, the facts are disputed. In Judge *ad hoc* McRae's view, the Court concluded that Colombia asserted control based on Colombia's statements, whereas it should have instead examined Colombia's conduct. Judge *ad hoc* McRae argues that the Court should have focused on the fact that Colombia's activities in Nicaragua's EEZ were simply those of monitoring and informing. However, Judge *ad hoc* McRae considers that by failing to inform Nicaragua of those activities, Colombia had not exercised its rights in Nicaragua's EEZ with due regard to Nicaragua's rights as a coastal State.

Judge *ad hoc* McRae further considers that the evidence on which the Court relies for its finding that Colombia authorized fishing in Nicaragua's EEZ is at best problematic. According to Judge *ad hoc* McRae, the incidents invoked by the Court do not constitute proof of licences being issued by Colombia and, even if the facts were established, they would show at most that when exercising its rights, Colombia failed to have due regard to Nicaragua's rights as a coastal State.

Turning to the question of Colombia's ICZ, Judge *ad hoc* McRae notes his agreement with the Court's conclusion that Colombia's ICZ may overlap with Nicaragua's EEZ and that it may not exceed 24 nautical miles. However, Judge *ad hoc* McRae considers that the powers claimed by Colombia are in conformity with international law. Judge *ad hoc* McRae argues that the rule reflected in Article 33 of UNCLOS should be interpreted in an evolutionary manner, so that it meets contemporary concerns with respect to security and health, including the protection of the environment. Judge *ad hoc* McRae further emphasizes that, in its ICZ, Colombia claims the power to prevent and punish acts committed on its territory or in its territorial sea, but not in the ICZ itself. Therefore, there is no basis for the Court's conclusion that Colombia was asserting a power to conserve, protect and preserve the marine environment in Nicaragua's EEZ.

Judge *ad hoc* McRae then addresses Colombia's counter-claims. With respect to the counter-claim about traditional fishing rights, Judge *ad hoc* McRae notes that Colombia identifies the Raizales as a group that is distinct from other inhabitants of the San Andrés Archipelago and describes them in a way that suggests that they are akin to indigenous peoples. According to Judge *ad hoc* McRae, the Nicaraguan President has consistently used language indicating that the claim of the Raizales to fishing is analogous to an indigenous right, namely, a right that is an inherent consequence of the status of the Raizales as a particular group often described as original or indigenous peoples. Judge *ad hoc* McRae stresses that the Court failed to appreciate the real nature of the claim relating to the Raizales. Thus, the agreement proposed by the Court between the Parties should be to ensure the implementation of existing rights, rather than the establishment of new fishing rights for the Raizales.

Lastly, Judge *ad hoc* McRae argues that the Court's approach to the counter-claim concerning Nicaragua's use of straight baselines constituted a decontextualized application of the law relating to drawing straight baselines in disregard of relevant State practice. Judge *ad hoc* McRae explains that the terms of Article 7 of UNCLOS reflect the Court's findings in the 1951 *Fisheries* case, which however cannot easily be applied to coasts different from those of Norway. In Judge *ad hoc* McRae's view, the Court failed to clarify the imprecise terms of Article 7. Judge *ad hoc* McRae argues that the Court should have instead considered how States have interpreted and applied those terms in practice. According to Judge *ad hoc* McRae, Nicaragua's straight baselines do not seem to be out of line with the practice of States, which, as Judge *ad hoc* McRae observes, is rarely objected to by other States. Judge *ad hoc* McRae concludes by noting that this was not the case for the Court to

provide a definitive interpretation of Article 7 of UNCLOS and that, in doing so, the Court has increased uncertainty in this area.

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