

**Gobierno de Reconciliación y Unidad Nacional  
Unida Nicaragua Triunfa**



**ALLEGED VIOLATIONS OF SOVEREIGN RIGHTS AND  
MARITIME SPACES IN THE CARIBBEAN SEA  
(NICARAGUA V. COLOMBIA)**

**MERITS**

**AGENT'S SPEECH ON COUNTER-CLAIMS**

**24 SEPTEMBER 2021**

**(ESTIMATED TIME 15')**

1. Madame President, Members of the Court, today we will address the two counterclaims filed by Colombia that were admitted by the Court.
2. The first counter-claim requests the Court to declare that Nicaragua has infringed the customary artisanal fishing rights of the local inhabitants of the San Andrés Archipelago, including the indigenous Raizal people, to access and exploit their traditional fishing grounds.<sup>1</sup>
3. Colombia has presented to the Court the three classic types of argument identified by Aristotle: the logical

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<sup>1</sup> See CCM, Chapter 9 and CR, Chapter 5.

appeal (*logos*), the ethical appeal (*ethos*) and the emotional appeal (*pathos*).

4. As a starting point it must be clear that the only valid argument before this Court is the logical appeal, that is the legal argument, and on that count there are absolutely no legal rights, residual or otherwise, of the Raizal population of the small islands of San Andrés, Providencia and Santa Catalina to any purported fishing in the Nicaraguan EEZ. With respect to the purported infringement of these rights of the local inhabitants, it must be said at the outset that Colombia has failed to offer any credible evidence that Nicaragua has interfered with any fishing by these people, whether or not they have any rights in Nicaragua's EEZ, which Nicaragua denies. This argument or pleading by Colombia will be addressed by Mr. Lawrence Martin. I will say a few words on the other two arguments, or rather appeals.
  
5. Mr. Valencia explained that his pleading was also addressed to "the inhabitants of the San Andrés Archipelago and, in particular, the Raizales, who are listening

very closely in their native Caribbean islands.”<sup>2</sup> So in a certain sense, my words must take that into consideration.

6. Hence, to begin let me make it clear that I am not underestimating the arguments basically developed by Mr. James and Mr. Valencia but as I will briefly indicate below, if the Raizal population is suffering any problems it is *not* due to Nicaragua or to the Court’s Judgment of 2012, but to the Colombian governments.

### **The 2012 Court’s Judgment**

7. I will begin with the 2012 Judgment.
8. In this Judgment the court attributed sovereignty over all the islands and keys in dispute to Colombia as well as very substantial maritime areas around those small features.<sup>3</sup> The total land area of the islands and keys is approximately 45 square kilometers with a population today of approximately 80.000, including a

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<sup>2</sup> CR 2021/15, pp. 36-37, para.1 (Valencia-Ospina).

<sup>3</sup> *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, *I.C.J. Reports 2012*, pp.718-720.

minority of Raizales<sup>4</sup>. The land area of the Caribbean Coast of Nicaragua which is about one third of the total land area of the country, is around 45.000 square kilometers and has a population of approximately 1 million.<sup>5</sup>

9. Thus the relevant Nicaraguan continental land area was more than a thousand times larger than all the islands put together, and the population was more than twenty times more extensive. As you can appreciate in the image on the screen notwithstanding this, Colombia (that is the islands) was awarded approximately 24% of the maritime area that was to be divided. When Nicaragua was presenting its pleadings on delimitation in the 2012 case, it couldn't present arguments based on this disparity because the jurisprudence of the Court is constant that the land mass or the population is not taken into consideration in a delimitation.<sup>6</sup>

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<sup>4</sup> Ficha Técnica de Indicadores Económicos y de Desarrollo, Secretaría de Planeación Departamental, Gobernación del Archipiélago, Agosto 2020, p. 9 available at <https://www.sanandres.gov.co/index.php/gestion/planeacion/publicaciones/13057-ficha-tecnica-de-indicadores-san-andres-providencia-y-santa-catalina/file> (accessed 24 Sept. 2021).

<sup>5</sup> Demographic Data, Pro Nicaragua, available at <https://pronicaragua.gob.ni/es/descubre-caribe/> (accessed 24 Sept. 2021).

<sup>6</sup> See for example *Continental Shelf (Libyan Arab Jarnahiriya/Malta), Judgment, I. C.J. Reports 1985*, p. 41, para.50; *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, p. 74, para.80.

10. So, on the basis of the Judgment the islands and their population came out extremely well. Much better than the Caribbean people of Nicaragua. If the decision had been based on strict equity, *lato sensu*, the Colombian islands would have been attributed at most a territorial sea, and the small rocks or keys a very small token area.
  
11. Mr. James made a very emotional appeal based on the situation of his people, the Raizales, that according to a census is presently less than half of the population of the islands. The Government of the Archipelago published a census in August 2020 and the Raizal population is a total of 26.076 with 23.396 living in the islands.<sup>7</sup>
  
12. But, as indicated before, it must be pointed out that the problems of the Raizales did not begin with the Court or with Nicaragua. These problems began

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<sup>7</sup> Ficha Técnica de Indicadores Económicos y de Desarrollo, Secretaría de Planeación Departamental, Gobernación del Archipiélago, Agosto 2020, p. 9 available at <https://www.sanandres.gov.co/index.php/gestion/planeacion/publicaciones/13057-ficha-tecnica-de-indicadores-san-andres-providencia-y-santa-catalina/file> (accessed 24 Sept. 2021).

in the 1950's when the Government of Colombia declared San Andrés a free port and started promoting tourism. There was a massive influx of people from the mainland that sidelined the Raizales. They have a name for what happened, they call it the "colombianization" of the islands. The newcomers took over the most lucrative businesses and the Raizales were marginalized.<sup>8</sup>

13. The Judgment of the Court did not make matters worse. It simply served as an excuse to point the finger away from the Colombian Government for the problems of the Raizal population. The main detrimental impact of the Judgment is supposedly the loss of fishing areas. Let us look briefly on this issue.

### **Alleged Artisanal Fishing Rights**

14. Firstly, the claim is that these fishing areas that have been presumably curtailed by the Judgment are identified as ancestral fishing grounds. Let's go back in history.

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<sup>8</sup> See for example San Andrés Isla, Memorias de la colombianización y Reparaciones, Natalia Guevara, available at <https://repositorio.unal.edu.co/bitstream/handle/unal/2862/09CAPI08.pdf?sequence=23&isAllowed=y#:~:text=En%20los%20a%C3%B1os%20veinte%20se,hablo%20espa%C3%B1ol%2C%20yo%20soy%20colombiano%E2%80%A6> (accessed 24 Sept. 2021).

15. According to the historical data the population of San Andres in 1843 was 1285 inhabitants out of which 56.8% were farmers, 31.8% did domestic work and the rest were fishermen or other related activities<sup>9</sup>.
  
16. This means that circa 1850, about eleven percent of the population of 1285 persons were fisherman; that is, about 130 persons if we include women, children and the elderly. Is it conceivable that these people needed to fish outside the territorial waters of the islands? And by territorial waters I refer to the 3 mile limit usually accepted in the 19<sup>th</sup> century. Is it conceivable that this small group of people had needed and established fishing rights in an area the size of the Adriatic Sea?
  
17. In 1925 the population had increased to approximately 5000 inhabitants.<sup>10</sup> Even with this increase in population, most of them were farmers dedicated to the copra industry and not fisherman.

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<sup>9</sup> La estructura económica de San Andrés y Providencia en 1846, Adolfo Meisel, 2009, p.5. available at <https://repositorio.banrep.gov.co/bitstream/handle/20.500.12134/454/?sequence=1> (accessed 24 Sept. 2021).

<sup>10</sup> See for example Los Raizales del Archipiélago de San Andrés, Providencia y Santa Catalina, available at <https://thearchipelagopress.co/los-raizales-del-archipelago-de-san-andres-providencia-y-santa-catalina/> (accessed 24 Sept. 2021)

But even if they had all been fishermen, did they need and use the equivalent extent of the Adriatic Sea to fish?

## **Present day fishing**

18. The artisanal fishermen of the islands, even today don't go much beyond the area of the main islands. According to a publication of the Colombian Institute of Marine and Coastal Investigations in 2011, most of the artisanal fisheries

“were concentrated in the areas contiguous to the islands of Providencia and San Andres and the Cays of Albuquerque and Bolivar. The Cays of Roncador, the Serrana Banks and Quitasueño presented a low frequency of fishing by unit of area, which indicates that artisanal fishing is not frequent in those areas due to their distance from Providencia and San Andres.”<sup>11</sup>

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<sup>11</sup> INVEMAR-ANH. 2011. Estudio Línea base ambiental y pesquera en la Reserva de Biosfera Seaflower (Archipiélago de San Andrés, Providencia y Santa Catalina) como aporte al conocimiento y aprovechamiento sostenible de los recursos para la región – FASE I. Informe técnico final. Santa Marta, p.4 available at [http://cinto.invemar.org.co/alfresco/d/d/workspace/SpacesStore/06068ed3-6a62-4939-8119-86364328efa6/Estudio%20linea%20base%20ambiental%20y%20pesquera%20en%20la%20reserva%20de%20biosfera%20seaflower%20\(Archipiélago%20de%20San%20Andres,%20Providencia%20y%20Santa%20Catalina\)%20como%20aporte%20al%20conocimiento%20y%20aprovechamiento%20sostenible%20de%20los%20recursos%20para%20la%20region%20-%20FASE%20I?ticket=TIKTET\\_00ba8ac51399410cd995d2e5731889fb33f6721c](http://cinto.invemar.org.co/alfresco/d/d/workspace/SpacesStore/06068ed3-6a62-4939-8119-86364328efa6/Estudio%20linea%20base%20ambiental%20y%20pesquera%20en%20la%20reserva%20de%20biosfera%20seaflower%20(Archipiélago%20de%20San%20Andres,%20Providencia%20y%20Santa%20Catalina)%20como%20aporte%20al%20conocimiento%20y%20aprovechamiento%20sostenible%20de%20los%20recursos%20para%20la%20region%20-%20FASE%20I?ticket=TIKTET_00ba8ac51399410cd995d2e5731889fb33f6721c) (accessed 24 Sept. 2021).

19. In Colombia a government program was set up to support the artisanal fishermen of the islands supposedly to help them out after the Judgment of the Court. According to the published report of 8 April 2013, a total of 275 people were registered and paid.<sup>12</sup>
20. In the Caribbean coast of Nicaragua there are hundreds of thousands of people, afro descendants like the Raizales, quite a few of them Creoles and even with close family ties with the Creoles or Raizales living in the islands; there are also the numerous descendants of the different aborigines in the mosquito coast that lived there centuries before the afro descendants arrived in the area. All of these Nicaraguan people have depended on fishing for their subsistence: the afro descendants including the Creoles or Afro-Europeans, the Miskitos (which is the largest component of the population) Sumu (Amerindian), Garifuna (Afro-Indians), and Rama (Amerindian) and some Chinese.

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<sup>12</sup> See Comité de apoyo, acompañamiento y seguimiento al componente pesquero artesanal del plan archipiélago de San Andrés, Providencia y Santa Catalina, Beneficiarios Aprobados-Listado Definitivo para avalar el segundo pago del subsidio, 8 de Abril de 2013, available at <https://www.sanandres.gov.co/index.php/170-agricultura/pescadores-artesanales/1183-listado-pescadores-artesanales-subsidio-tercer-pago> (accessed 15 Sept. 2021).

## **Nicaraguan artisanal fishing**

21. The Nicaraguan government is very aware of the ancestral rights of its indigenous and ethnic communities. There is a Nicaraguan law on the Communal Property of the Indigenous People and Ethnical Communities of the Atlantic Coast dating from 2003, that mandates in art. 33 the following:

“The indigenous and ethnic communities of the coast, islands and cays of the Atlantic, have exclusive rights to use the maritime resources for communal and artisanal fishing, within the 3 miles adjacent to the coast and 25 miles around the adjacent cays and islands.”<sup>13</sup>

22. As a parenthesis, it could be pointed out that one of the reasons Nicaragua declared straight base lines - the legality of which is also the basis of a counterclaim of Colombia - is because it considered it appropriate in view of the rights

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<sup>13</sup> Communal Property Regime Law Of Indigenous Peoples And Ethnic Communities Of The Autonomous Regions Of The Atlantic Coast Of Nicaragua And The Rivers Bocay, Coco, Indio And Maiz, Law 445, 2003 available at [https://www.poderjudicial.gob.ni/pjupload/costaribe/pdf/Ley\\_445.pdf](https://www.poderjudicial.gob.ni/pjupload/costaribe/pdf/Ley_445.pdf) (accessed 24 sept. 2021).

of the population to fish and exploit those areas within 25 miles of the adjacent islands and keys.

23. In order to regulate the exercise of these rights of artisanal fishing, the Institute of Fisheries of Nicaragua keeps a registry of the artisanal fishermen in the country. On the Caribbean side of Nicaragua according to the publication of 2018, there are 8.907 artisanal fishermen registered.<sup>14</sup> It is well to recall that the number of registered Colombian artisanal fishermen in the islands was 275 in the year 2013.

### **President Ortega's statements**

24. President Ortega made several statements shortly after the 2012 Judgment about the possibility and even desirability of negotiating a fishing agreement for the benefit of the Raizal community. This offer to negotiate was never accepted by

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<sup>14</sup> Fishery and Aquaculture Yearbook of Nicaragua, Nicaraguan Institute of Fisheries, 2018, p. 83. Available at <http://www.inpesca.gob.ni/images/Anuarios%20Pesqueros/Anuario%20Pesquero%20y%20Acuicola%202018.pdf> (accessed 24 Sept. 2021).

Colombia. From the quote of President Ortega cited by Mr. Valencia, it should be clear that his emphasis is on an Agreement.

"I told President Santos, and I have said publicly, that the Raizales can continue fishing. That Nicaragua will not affect them in their Rights as Original people, that they can continue fishing. And that we work an Agreement, an Agreement between the Government of Colombia and Nicaragua, so that we can regulate this well. Because how do we know that all the boats that are fishing there are from the Raizal Community, and which ones are fisheries not related to the Raizal Community, or even has to do with industrial fishing?"<sup>15</sup>

25. Finally, it should be noted that if there are any people that could point to ancestral fishing rights in all this area including the islands and the mainland coast, it is the Miskitos, whose presence in the area goes back much further in time than that of the Raizales in the islands.

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<sup>15</sup> CR 2021/15, p.40, para.11 (Valencia-Ospina).

**Colombia's second counterclaim:  
Straight base lines**

26. Madam President, the second counter-claim requests the Court to declare that Nicaragua, by adopting Decree No. 33-2013 of 19 August 2013, which established straight baselines and, according to Colombia, had the effect of extending its internal waters and maritime zones beyond what international law permits, has violated Colombia's sovereign rights and jurisdiction<sup>16</sup>. Prof. Alex Oude-Elferink will address this issue fully. At this point some short comments.
27. To begin, there is some apparent misconception that the question of Nicaragua's straight base lines is in some way related to the issue of Colombia's creation of a so called "Integral Contiguous Zone. (ICZ)" There is no connection. Nicaragua's straight base lines are located inside indisputable Nicaraguan waters. Colombia's ICZ is located in Nicaragua's EEZ. The only comparison of Nicaragua's straight base lines could be with the straight base line system that Colombia has along its coasts and

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<sup>16</sup> See CCM, Chapter 10; CR, Chapter 6.

which will be discussed later, in spite of Prof. Thouvenin's averment that we shouldn't do so.<sup>17</sup>

28. Colombia's rights of innocent passage through the waters enclosed by the straight base lines has not been and cannot be affected. The right of innocent passage is guaranteed in art. 8 of the UNCLOS that states:

"Where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage as provided in this Convention shall exist in those waters."

29. Indeed customary law cannot be less accommodating for third countries rights. Indeed this right is accorded to vessels of states, including non-parties to the Convention.

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<sup>17</sup> CR 2021/15, p.51, para.5 (Thouvenin).

30. There have been no incidents in that area with Colombia or any other state. It has in no way affected Colombia's rights or is the issue really connected in any way with the present case. If there was a connection we would also be discussing Colombia's straight base lines and the impact that has had or could have for Nicaragua.
31. Professor Thouvenin has pointed out that the area enclosed by these straight lines is comparable to the size of Belgium and of some other countries<sup>18</sup>. As a legal argument that is not relevant *per se* because that depends on the size and configuration of the coast line. UNCLOS, as well as customary law, permits the drawing of straight base lines in the same way it permits archipelagic lines that frequently enclose enormous spaces around a group of small islands.
32. But if we want to discuss these kind of figures, what could be of interest is that the straight baselines used by Colombia, just those, on its Caribbean

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<sup>18</sup> CR 2021/15, p.62, para.57 (Thouvenin).

Coast enclose areas as large as 21,670 km<sup>2</sup>, bigger than El Salvador and more than half the size of the Netherlands<sup>19</sup> as you can appreciate on the screen.

33. Perhaps the most insidious claim of Colombia is that the straight base line system extended the Nicaraguan EEZ. Any expert on the law of the sea would immediately see through this. It is not a theoretical question but a physical geometrical issue. Straight base lines, almost invariably, do not affect the extent of the EEZ. This could only be affected by the base points used to draw those lines. The base points used by Nicaragua are unimpeachable.
  
34. Professor Thouvenin attempted to dispute one of the base points, Edinburgh Key. Prof. Oude Elferink will address this, but let me point out that a base point on this key was used in the *Nicaragua/Honduran* delimitation and for the drawing of the provisional equidistance line in *Nicaragua v. Colombia* by the Court. Even more to the point, it was used by Colombia itself

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<sup>19</sup> Areas taken from worldometers.info (accessed on 24 sept. 2021).

as a basepoint in its Counter Memorial in the Maritime Dispute with Nicaragua.<sup>20</sup>

35. Professor Thouvenin also stated that these lines project Nicaragua's exclusive economic zone and continental shelf further east, and that this is what Colombia disputes."<sup>21</sup> But he volunteered no argument on this question besides that statement.
36. On the screen are some graphics that show the effect of the baselines on the outerlimit of the EEZ.
37. The image on screen shows the 200 mile limit drawn from the Nicaraguan straight baselines. The next image compares the limits measured from the straight and from the normal baselines, and we can see that the normal baseline limit actually extends further east than the limit drawn from the straight baselines.
38. Now, the graphic on screen is taken from the Colombian Counter Memorial in the *Territorial and Maritime Dispute*

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<sup>20</sup> *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Counter-Memorial, p.393, Figure 9.2

<sup>21</sup> CR 2021/15, p.50, para.2 (Thouvenin).

and shows the basepoints used by Colombia to draw its median line between the San Andres Archipelago and Nicaragua.

39. In this last map, Colombia's basepoints have been used to draw the 200 mile limit which is the red line on screen. The blue line now on screen is the 200 mile limit drawn from the straight baseline. The two lines are very close; if anything the line resulting from Colombia's basepoints lies further to the east.
40. In conclusion, Madam President, the straight baselines of Nicaragua have no practical effect on the outer limit of its EEZ as Colombia claims.
41. Madame President, Members of the Court, thank you for your attention may I ask you to call Mr. Lawrence Martin.